



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 13 December 2010

THE PROSECUTOR

v.

Ildephonse NIZEYIMANA

CASE NO. ICTR-2000-55C-PT

**DECISION ON DEFENCE MOTION TO STRIKE OR HAVE DECLARED
IRRELEVANT PARTS OF THE PRE-TRIAL BRIEF**

Rules 50(C) and 72 of the Rules of Procedure and Evidence

Office of the Prosecution:

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INTRODUCTION

1. The trial in this case is scheduled to commence on 17 January 2011.¹
2. On 29 September 2010, the Prosecution filed its Second Amended Indictment.² Following this and pursuant to the Trial Chamber's decisions on 22 and 29 September 2010, the Prosecution filed its Pre-Trial Brief on 29 September 2010.³
3. On 26 October 2010, the Defence filed a motion to strike, or have declared irrelevant, parts of the Pre-Trial Brief.⁴ The Defence submits that the Prosecutor has added new charges and material facts to its case, and the Defence requests that a number of parts of the Pre-Trial Brief be struck or declared irrelevant by the Chamber.⁵
4. On 1 November 2010, the Prosecution filed a response to the Defence motion, in which it submits that the Defence is unwarranted, frivolous and vexatious.⁶

DELIBERATIONS

5. The Chamber recalls that an accused can only be convicted of charges of which he or she is given sufficient notice. Article 20(4)(a) of the Statute guarantees an accused the fundamental right "[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her". The Appeals Chamber has interpreted this provision, in conjunction with Articles 17(4), 20(2), and 20(4)(b) of the Statute and Rule 47(C) of the Rules of Procedure and Evidence ("the Rules"), as requiring the Prosecution to state all material facts underpinning the charges in the indictment but not the evidence by which such facts are to be proven.⁷
6. Rule 73 *bis* (B)(i) of the Rules allows the Chamber to order the Prosecutor to file "[a] pre-trial brief addressing the factual and legal issues" in the case. The Rules in no way

¹ Scheduling Order (TC), 3 November 2010, Order II.

² Second Amended Indictment, filed on 29 September 2010.

³ Prosecutor's Pre-Trial Brief, filed 29 September 2010.

⁴ Defence Motion to Strike or Have Declared Irrelevant Parts of the Pre-Trial Brief, filed 26 October 2010 ("Defence Motion").

⁵ Defence Motion, paras. 2-5, 15-42.

⁶ Prosecutor's Response to Defence Motion to Strike or Have Declared Irrelevant Parts of the Pre-Trial Brief, filed 1 November 2010 ("Prosecutor's Response").

⁷ *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 21. See also *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004, para. 470 (this case refers to Articles 20(2), 20(4)(a) and 20(4)(b) of the Statute); *Prosecutor v. Simić*, Case No. IT-95-9-A, Judgement (AC), 28 November 2006, para. 20; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgement (AC), 3 May 2006, para. 23; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement (AC), 23 October 2001, para. 88.

indicate that a pre-trial brief is an accusatory instrument. That function remains with the indictment.⁸ Rather, the function of the pre-trial brief is to develop the strategy of the Prosecutor and to elaborate on the charges and material facts outlined in the indictment.

7. The Chamber recalls that a Trial Chamber can convict an accused only of crimes that are charged in the indictment.⁹ The Chamber therefore finds that the remedy sought by the Defence in its motion is unnecessary – if there are charges in the Pre-Trial Brief that are not plead in the Second Amended Indictment,¹⁰ then these charges cannot be relied upon for a conviction.

8. Notwithstanding that the Chamber finds that the remedy requested by the Defence Motion is unnecessary, it will consider the particular aspects of the Defence Motion with regard to specific paragraphs of the Pre-Trial Brief in the interests of expeditiousness of proceedings by clarifying these matters early in the proceedings.

Defence Request by Paragraph of the Pre-Trial Brief

(i) *Paragraphs 1 to 5*

9. The Defence submits that the material facts that are pled in paragraphs one to five of the Pre-Trial Brief are not contained in the Indictment. The Defence assumes that the Prosecution intends to prove the facts outlined in these paragraphs. However, the Prosecution, in its response, submits that “[p]aragraphs 1-5 are not material facts and are not charges; they are introductory paragraphs that describe a contextual background of this case”.¹¹

10. The Chamber relies on the submissions of the Prosecution and finds that paragraphs one to five are background facts and notes that the Prosecution will not rely on these as material facts. The Chamber denies the Defence request.

(ii) *Paragraphs 30 to 34*

11. The Defence submits that these paragraphs of the Pre-Trial Brief introduce the concept of the third form of joint criminal enterprise (“JCE”), which is entirely foreign to the

⁸ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 220.

⁹ *Muvunyi v. Prosecutor*, Case No. ICTR-2000-55A-A, Judgement (AC), 29 August 2008, para. 18; *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 28; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement (AC), 28 February 2005, para. 33. See also *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 326.

¹⁰ Second Amended Indictment, filed 29 September 2010.

¹¹ Prosecutor’s Response, para. 27(a)(2).

Indictment.¹² However, the Prosecution submits that it has expressly pled the third form of JCE in the Second Amended Indictment, and this form of JCE is pled in the matter dictated by the Tribunal jurisprudence.¹³

12. The Chamber recalls the Pre-Trial Chamber's decision on the Prosecutor's request for leave to file an amended indictment of 25 February 2010 in this case, where it found that JCE was sufficiently pled in the indictment it was then considering.¹⁴ The manner by which the Second Amended Indictment pleads JCE has not changed since that decision.

13. When the accused is charged with "committing" pursuant to Article 6(1) of the Statute, the indictment must specify whether the term is to be understood as physical commission, participation in a joint criminal enterprise or both.¹⁵ If the Prosecution relies on a theory of JCE, the purpose of the enterprise, the identity of the participants, the nature of the accused's participation in the enterprise and the period of the enterprise must be pleaded in the indictment.¹⁶ The indictment should also clearly indicate which form of JCE is being alleged.¹⁷ Failure to plead these elements will result in a defective indictment.

14. Vagueness in an indictment may be cured in exceptional circumstances.¹⁸ The Appeals Chamber has noted that any "curing" of an indictment may be achieved through the provision of timely, clear and consistent information detailing the factual basis underpinning the charges in question.¹⁹ Such information may be provided through means such as a pre-

¹² Defence Motion, paras. 22-23

¹³ Prosecutor's Response, para. 27(b)(1)-(2).

¹⁴ Decision on Prosecutor's Request to File an Amended Indictment (TC), 25 February 2010, paras. 7, 14, 15.

¹⁵ *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement (AC), 17 September 2003, para. 138; *Ntakirutimana and Ntakirutimana*, Judgement (AC), para. 475.

¹⁶ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement (AC), 28 February 2005, para. 28; *Ntagerura et al.*, Judgement (AC), para. 24; *Simba v. Prosecutor*, Case No. ICTR-01-76-A, Judgement (AC), 27 November 2007, para. 63; *Prosecutor v. Simić*, Case No. IT-95-9-A, Judgement (AC), 28 November 2006, para. 22. See also *Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006, para. 162.

¹⁷ *Simba* Judgement (AC), para. 63; *Simić*, Judgement (AC), para. 22; *Ntagerura et al.*, Judgement (AC), para. 24.

¹⁸ *Muvunyi*, Judgement (AC), para. 20; *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Judgement (AC), 12 March 2008, para. 100; *Simba*, Judgement (AC), para. 64; *Muhimana v. Prosecutor*, Case No. ICTR-95-1B-A, Judgement (AC), 21 May 2007, paras. 76, 195, 217; *Gacumbitsi*, Judgement (AC), para. 49. See also *Ntagerura et al.*, Judgement (AC), paras. 28, 65.

¹⁹ *Karera v. Prosecutor*, Case No. ICTR-01-74-A, Judgement (AC), 2 February 2009, para. 293; *Muvunyi*, Judgement (AC), 29 August 2009, para. 20. See also *Ntagerura et al.*, Judgement (AC), 7 July 2006, para. 28, 65; *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, para. 114, cited in *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on Defence Motion for a Stay of Proceedings or Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 January 2010.

trial brief and annexed witness summaries, the opening statement and motions to vary witness lists.²⁰

15. In this case, the Chamber notes that paragraphs 5, 37, 43, 47, 51 and 55 of the Second Amended Indictment refer to the third form of JCE by the use of the words “foreseeable outcome”. The language used in the Indictment indicates that the Prosecutor is intending to plead the third form of JCE. The Pre-Trial Brief then makes it clear that the Prosecutor intends to pursue the third form of JCE (in addition to the first form).²¹ Accordingly, the Pre-Trial Brief cures any vagueness in the Second Amended Indictment with regard to the forms of JCE upon which the Prosecutor intends to rely.

16. Further, the Chamber notes that this clarification by the Prosecution, in its Pre-Trial Brief dated 29 September 2010, is timely; being over four months prior to the beginning of the Prosecution case.²² Given this timely notice, the Chamber finds there is no prejudice suffered by the Accused. The Defence request is therefore denied.

(iii) *Paragraph 37*

17. The Defence submits that this paragraph introduces a new material fact: planning by members of the JCE prior to 6 April 1994.²³ The Prosecution submits that this paragraph is relevant only for contextual background and is neither a new charge nor new material fact.²⁴

18. The Chamber therefore relies on the submission of the Prosecution and finds that this paragraph will only be used by the Prosecution as background information. The Defence request to strike or have this paragraph declared irrelevant is denied.

(iv) *Paragraphs 82 and 83*

19. The Defence submits that the murder of those victims outlined in paragraphs 82 and 83 are new charges against the Accused, which are not included in the indictment.²⁵ The Prosecution submits that these two paragraphs relate to paragraph six of the Second Amended Indictment, which refers to the “killing of Tutsi civilians” at roadblocks in Butare.²⁶

²⁰ See, e.g., *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze’s Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, para. 35; *Niyitigeka v. Prosecutor*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 197. See also *Muhimana*, Judgement (AC), para. 82.

²¹ Pre-Trial Brief, filed 29 September 2010, para. 34.

²² See paragraph 14 above.

²³ Defence Motion, para. 28.

²⁴ Prosecutor’s Response, paras. 2-3.

²⁵ Defence Motion, paras. 34, 35.

²⁶ Prosecutor’s Response, paras. 27(d)(1)-(3), 27(e)(1)-(2).

20. The Chamber recalls that, in the Pre-Trial Chamber's decision of 9 June 2010 concerning the Accused's preliminary motion on defects in the Amended Indictment, it found that paragraph 6 of the Amended Indictment was sufficiently pled, especially given that the acts in this paragraph do not relate directly to the Accused but rather to the subordinates of the Accused.²⁷

21. The Chamber therefore finds, given that the Pre-Trial Brief paragraphs 82 and 83 fall within paragraph six of the Second Amended Indictment and add detail to an existing charge, paragraphs 82 and 83 do not constitute new charges. The inclusion of these paragraphs should, in fact, assist the Defence in investigating the charge in paragraph six of the Indictment. The Chamber denies the Defence request.

(v) *Paragraph 150*

22. The Defence submits that paragraph 150 contains a new murder charge against the Accused.²⁸ The Prosecution responds that the "Accused is not charged with that specific crime and can therefore not be convicted of it."²⁹ Further, the Prosecution states that it has insufficient evidence to support this charge.³⁰

23. The Chamber therefore relies on the Prosecution's submission and finds that the Prosecutor is not relying on this paragraph to support a new charge. The Defence request is denied.

²⁷ Decision on Nizeyimana's Preliminary Motion on Defects in the Amended Indictment (TC), 9 June 2010. Note "[t]he Appeals Chamber has previously stated that "the facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue"." *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgement (TC), 18 December 2008, citing *Ntagerura et al.*, Judgement (AC), para. 26 fn. 82, quoting *Blaškić* Judgement (AC), para. 218. See also *Muvunyi*, Judgement (AC), para. 58.

²⁸ Defence Motion, para. 38.

²⁹ Prosecutor's Response, para. 27(f)(2).

³⁰ Prosecutor's Response, para. 27(f)(2).

FOR THESE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 13 December 2010, done in English,

[Read and approved]

[Read and approved]

Lee Gacuiga Muthoga
Presiding Judge

Seon Ki Park
Judge

Robert Fremr
Judge

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[Absent at time of signature]

[Seal of the Tribunal]