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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

TRIAL CHAMBER I

Case No. ICTR-2001-65-I

ENGLISH
Original: FRENCH

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date Filed: 5 April 2005

THE PROSECUTOR

v.

JEAN MPAMBARA

JUDICIAL DEPARTMENT ARCHIVES
ICTR
2005 JUN -7 A 11: 29
Seidman

DEFENCE PRELIMINARY MOTION OBJECTING TO DEFECTS IN FORM OF
AMENDED INDICTMENT

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D105-0048 (E)

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Introduction

On 7 March 2005, the Prosecutor served the Defence with the amended Indictment, pursuant to the Trial Chamber's decision of 4 March 2005.¹

This preliminary motion objecting to defects in the form of the amended Indictment is filed pursuant to Rules 50(C) and 72(A)(ii) of the Rules of Procedure and Evidence.

Indeed, the amended Indictment contains many defects such as ambiguity and vagueness. Moreover and unless there is information to the contrary, this amended Indictment was disclosed only in English, a language that the Accused can neither speak nor read.

As a result of the said defects, the Accused is not in a position to understand the exact nature of the charges against him, contrary to the provisions of Article 20(4)(a) of the Statute and Rule 47 (C) of the Rules of Procedure and Evidence.

For the same reasons, the amended Indictment does not guarantee the Accused a fair and equitable trial, as provided for by Article 20 (2) of the Statute of the Tribunal.

Scope of the Motion

This motion concerns only the defects relating to the new charges in the new Indictment, pursuant to Article 50(C) [sic] of the Statute.

Consequently, the paragraph relating to the count of genocide will not be discussed.

In the instant case, two new counts, namely, the alternate count of complicity in genocide and the count of extermination as a crime against humanity, have been added.

However, the Trial Chamber will note that the facts alleged by the Prosecutor in support of the two counts of the Indictment are exactly the same as those alleged in support of the count of genocide which was already included in the original Indictment.

Outline of the present motion

To start with, the Defence will only identify the ambiguities resulting from the way the Indictment itself is framed.

Secondly, the Defence will highlight several vague and ambiguous allegations of fact cited by the Prosecutor to characterize the offences charged.

¹ Mpambara, Decision on the Prosecution Request for Leave to File an Amended Indictment, 4 March 2005, TC, ICTR.

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Lastly, the Defence will briefly examine a vague allegation arising from an omission by the Prosecutor, which had already been highlighted by the Chamber in its decision of 4 March 2005.

I - Ambiguities arising from the framing of the Indictment

A - Genocide and complicity in genocide

On page 2 of the amended Indictment under counts 1 and 2, the Prosecutor presents the alternate counts of genocide and complicity in genocide as separate counts.

However, under the “Concise statement of facts for count 1 and 2”, the Prosecutor refers to all the forms of participation under Article 6(1), without specifying which ones relate specifically to the count of genocide or to the alternate count of complicity in genocide.

In the circumstances, the Accused cannot determine which form(s) of participation he is charged with under each of the two counts.

Yet, the Appeals Chamber recently recalled:

“Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial.”²

The Defence therefore requests that the Accused’s liability under Article 6(1) of the Statute be specified with respect to each count of the Indictment.

B - Count of extermination as a crime against humanity

Regarding this count, the amended Indictment in the concise statement of the facts of the case (p. 7, paras. 21 and 22) merely refers to the facts cited earlier in support of the alternate charges of genocide and complicity in genocide.

In the circumstances, the Defence cannot determine the exact charges against the Accused with respect to the count of extermination.

C - Link between the facts and the alleged forms of participation

Lastly, the link between the facts and the forms of participation alleged under Article 6(1) of the Statute with respect to each count is not clearly indicated.

² Ntakirutimana Judgment, AC, ICTR, 13 December 2004, para. 475, citing Krnojelac Judgment, AC, ICTY, 17 September 2003.

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The Accused cannot therefore know the exact nature of the charges against him.

Yet, according to well-settled case-law:

“The amended Indictment should leave no doubt which facts are linked to which type of responsibility. (...) In order to give the Accused sufficient notice of the charges against him, the Prosecutor has to establish the link between his factual allegations and the alleged specific type of responsibility pursuant to Article 6(1) of the Statute in a more precise way.”³

Consequently, the Defence requests the Chamber to order the Prosecutor to specify with respect to each count, the forms of participation attributed to the Accused under Article 6(1) and to show the link between them and the alleged facts.

II - Defects in the form of the Indictment arising from ambiguous allegations

The Prosecutor must present clearly and precisely, the main facts underpinning the charges in the Indictment. In *Ntakirutimana*, the Appeals Chamber recalled the principles requiring that the indictment be specific, as set out in the case of *Kupreškić* before ICTY:

“The *Kupreškić* Appeal Judgement stated that Article 18(4) of the ICTY Statute, read in conjunction with Articles 21(2), 4(a) and 4(b), “translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven.”⁴

The question of whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him or her so that he or she may prepare his or her defence.”⁵

Thus, according to case-law, the indictment must specify, *inter alia*, the date, the place and the name of the victims where possible.

In the instant case, the Prosecutor failed to present in sufficient detail, the main facts underpinning the charges in the amended indictment.

Indeed, the Defence noted several vague allegations and contradictions which prevent the Accused from knowing and understanding the exact nature of the charges against him and, consequently, impede the preparation of his defence.

³ *Zigiranyirazo*, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, TC, ICTR, 15 July 2004, para. 37.

⁴ *Ntakirutimana* Judgment, AC, ICTR, 13 December 2004, para. 25.

⁵ *Ntakirutimana*, Judgment, AC, ICTR, 13 December 2004, para. 470.

The Defence will first highlight the vagueness in the choice of terminology, before going on to examine the vague factual allegations noted.

A - Vague terminology

The Defence notes that the terms “command responsibility” used in paragraphs 6 and 21 of the Indictment are ambiguous.

Indeed, these terms refer to the responsibility of the superior (Article 6(3) of the Statute) whereas in the instant case, only individual responsibility is expressly referred to under Article 6(1).

The Defence therefore requests that paragraphs 6 and 21 be reworded to remove any ambiguities.

B - Vague factual allegations

The Defence has noted the following vague allegations:

- Paragraph 10 of the Indictment reads:

“Between 7 and 16 April 1994, Jean MPAMBARA planned, ordered, instigated, facilitated or otherwise aided and abetted the attacks on the Tutsi civilian population and other Hutu civilians married to Tutsis or in the opposition with the intent to destroy in whole or in part the Tutsi population.”

These allegations are much too general. In fact, the Prosecutor does not specify the dates of the different attacks or the place where they occurred, or the Accused’s alleged mode of participation.

- Paragraph 14 of the Indictment states:

“On or about 9 April 1994, while Jean MPAMBARA was driving in Rukara *commune*, a Tutsi man named Philippe SAHAHA ran out of his hiding place to seek Jean MPAMBARA’s help. Interahamwe followed the man and killed him next to Jean MPAMBARA’s vehicle and in his presence. Although accompanied by armed policemen, Jean MPAMBARA did nothing to stop the killing.”

Since this event has been described in such detail, the place should also have been identified in detail.

The reference to “Rukara *commune*” alone is not sufficient since Rukara *commune* comprised six *secteurs* at the time.

The Prosecutor should have indicated the exact location where the said events took place, by specifying at least the name of the *secteur* in question.

- Paragraph 15 of the Indictment states:

“Between 7 and 16 April 1994, Jean MPAMBARA ordered, planned, instigated, facilitated or otherwise aided and abetted attacks against civilian Tutsi men, women and children, and other persons gathered in Rukara Parish. The attacks were progressively executed and incorporated a strategy to gather Tutsi civilians in large groups in order to harm or kill them with efficient use of human and material resources . ”

This allegation is much too general, just like the one in paragraph 10.

Indeed, there are no details regarding the date, the exact geographic location of the various attacks or the alleged mode of participation of the Accused.

- Paragraph 16 of the Indictment reads:

“Between 7 and 9 April 1994, Jean MPAMBARA circulated in Rukara commune aboard his vehicle, advised the Tutsi population to take shelter at Rukara Parish, assured them that they would be safe, and transported persons seeking refuge to Rukara Parish in his vehicle. He also listed the names of certain Tutsi civil servants and gathered those persons, along with their families, at Rukara Parish.”

Here, the Prosecutor has not provided any evidence to support the allegations that the Accused reportedly transported people in his vehicle, since there is no information regarding the identity of the people in question. Yet, such allegations must necessarily be supported by more specific facts.

- Paragraph 20(i) states:

“On or about 8 April 1994, a Tutsi woman in Gahini secteur, Rukara *commune*, was beaten and raped by two attackers. The two attackers each raped her, beat her with a hoe until her teeth fell out, and then attacked her with machetes.”

The Defence requests that the Indictment specify the name of the victim and identify at least the group (soldiers, *gendarmes*, *Interahamwe*) to which the attackers belonged.

- Paragraph 20(ii) states:

“On or about 11 April 1994, a Hutu pregnant woman married to a Tutsi man was raped, in Nyawera secteur, Rukara Commune, by multiple attackers and, as a result, lost her Tutsi baby. One of the rapists was the leader of the attackers who attacked and destroyed her house two days earlier.”

The Defence requests that the Indictment specify the name of the victim and of the leader of the group which attacked the victim’s house.

III - Defect in the form of the Indictment arising from the vagueness of the allegation concerning the Accused’s alleged participation in a joint criminal enterprise

As pointed out by the Chamber,⁶ the allegation of joint criminal enterprise was not specifically pleaded in Mpambara's original Indictment.

It was introduced in the amended Indictment under the three counts of genocide, complicity in genocide and extermination as a crime against humanity.

However, if the Prosecutor intends to rely on the doctrine of joint criminal enterprise, he must not only clearly state this intention in the Indictment, but also expressly specify which of the three recognized forms of joint criminal enterprise he intends to plead (basic, systematic or extended).⁷

Indeed, the ICTR Appeals Chamber recently held:

"that it is preferable for an indictment alleging the accused's responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise envisaged."⁸

Although the Defence is aware of the Trial Chamber's opinion as expressed in its decision of 4 March 2004, (page 4, paragraph 12), the Defence wishes to seize this opportunity to request that the Prosecutor specify clearly in the Indictment, which of the three forms of joint criminal enterprise he intends to plead.

FOR THESE REASONS

The Defence firstly requests service of the French version of the amended Indictment.

The Defence further requests the Chamber to grant its motion and consequently order the Prosecutor:

- To specify the exact forms of participation alleged under Article 6(1) with respect to each count and in relation to the facts;
- To clearly set out separately from the other counts, the factual allegations relating to the count of extermination as a crime against humanity;
- To reword paragraphs 6 and 21 in order to remove any ambiguities;
- To specify the following details, which are indispensable for the defence of the Accused:

⁶ *Mpambara*, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 4 March 2005, TC, ICTR, para. 12.

⁷ *Simba*, Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment, TC, ICTR, 14 July 2004, para. 5; *Ntakirutimana*, Judgment, 13 December 2004, AC, ICTR, para. 475.

⁸ *Ntakirutimana*, Judgment, 13 December 2004, AC, para. 475.

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- In paragraph 10 of the Indictment, specify the dates of the various attacks, the locations where they occurred and the Accused's exact mode of participation;
- In paragraph 14 of the Indictment, specify the location where the alleged act was committed or at least the *secteur* in Rukara *commune*;
- In paragraph 15 of the Indictment, specify the date and location of the alleged attacks and the exact mode of the Accused's participation;
 - In paragraph 16 of the Indictment, give the names of the people whom the Accused allegedly transported in his vehicle;
 - In paragraph 20(i) of the Indictment, specify the name of the victim and identify at least the group (soldiers, *gendarmes*, *Interahamwe*) to which the attackers belonged;
 - In paragraph 20(ii) specify the name of the victim and of the leader of the group which attacked the victim's house.
- To specify expressly the forms of joint criminal enterprise which he intends to plead (basic, systematic or extended).

[Signed]

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