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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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TRIAL CHAMBER I

Before: **Judge Erik Møse (President)**
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: **Adam Dieng**

Filed on: **14 April 2005**

THE PROSECUTOR
V.
Jean MPAMBARA
(CASE No. ICTR-2001-65-I)

THE PROSECUTOR'S REPONSE TO THE DEFENCE MOTION ALLEGING DEFECTS IN THE FORM OF THE AMENDED INDICTMENT PURSUANT TO RULES 50 (C) & 72 (A) (ii)

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For the Accused:
Arthur Vercken
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May it Please the Chamber

1. On 5 April 2005, the Defence filed a Preliminary Motion pursuant to Rule 72 (A) (ii) challenging defects in the form of the Amended Indictment.

Relevant Procedural Background

2. On 20th July 2001, the Prosecution filed the initial indictment against the Accused charging him with a single count of Genocide and on 8th August 2001 the Accused made his initial appearance before Trial Chamber I and pleaded not guilty.

3. On 29th November 2004 the Prosecutor applied for an amendment of the initial Indictment against the Accused charging him with one count of Genocide and introducing the alternative count of Complicity in Genocide, and one count of Crimes Against Humanity (Extermination).

4. On 4 March 2005 the Trial Chamber confirmed the Amended Indictment, hence the extant motion alleging defects in the Amended Indictment.

The Defense Motion

5. The Preliminary Motion alleges defects in the form of the indictment on account of, *inter alia,* vagueness and imprecision in the statement of facts and their characterization, and seeks an order that the Prosecutor furnish the accused with:

- the exact forms of participation alleged pursuant to article 6(1);
- facts that support the charge of extermination;
- clarify paragraphs 6 and 21 (using the term 'command responsibility') in the Amended Indictment;
- dates and locations of the various attacks referred to in paragraph 10 and 15 of the Amended Indictment, as well as various modes of participation by the Accused;
- location of the killing referred to in paragraph 14 of the Amended Indictment;
- names of Tutsis the Accused transported in his vehicle;
- name of the victim and identity of attackers referred to in paragraph 20(i) of the Amended Indictment;
- name of victim and identity of group leader referred to in paragraph 20(ii) of the Amended Indictment, and
- specificity as to the form of JCE relied upon by the prosecutor.

The Prosecutor's Submissions

6. The Prosecutor submits that according to Article 17(4) of the ICTR Statute, an indictment should contain *"a concise statement of the facts and the crime or crimes with which the accused are charged"*. Similarly, Rule 47(C) of the ICTR Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth *"a concise statement of the facts of the case and the crime or crimes with which the suspect is charged."*

7. The issue raised by the extant motion is whether the indictment sets out the material facts of the Prosecution case with enough detail to inform the accused clearly of the charges against him so that he may prepare his defence.[1]

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[1] *Kupreskic,* (AC) Judgment, 23 October 2001, para. 88.

8. The Prosecutor submits that, to the extent possible, the indictment sufficiently particularizes the material facts underpinning the crimes with which the accused is charged together with a sufficient description of the mode of participation in the alleged crimes. Further, Prosecutor submits that the indictment has to be read together with the pre trial disclosure of prosecution evidence and as such the accused would suffer no prejudice in preparing his defence. [2]

Forms of Participation

9. The Prosecutor submits that the exact forms of participation incurring Individual Criminal Responsibility are set out paragraphs 6 and 10 of the Amended Indictment and include planning, instigating, ordering, committing and otherwise aiding and abetting. The facts relating to the various forms of participation are set forth with sufficient clarity in paragraphs 7, 9, 11-16 and 18 of the Amended Indictment, stating to the extent reasonably possible, the date, location and manner in which the accused participated in the alleged crimes.

10. The Prosecutor further submits that the principal crimes of Genocide and Extermination comprise multiple criminal acts over several days, each involving one or more of the prescribed modes of Art 6(1) liability, which are adequately pleaded as to put the Accused on sufficient notice to plead.

Facts for Charge of Extermination

11. The Prosecutor submits that the facts in support of the charge of extermination are the same facts that will be used to support genocide.[3] It needs no restatement that in the jurisprudence of the International Tribunals cumulative charging is recognized and permissible. [4]

Use of term 'Command Responsibility'

12. The Prosecutor submits that the usage of the term *"Command Responsibility"* in paragraphs 6 and 21 of the Amended Indictment does not in any way embarrass the Defence in so far as the Prosecutor does not rely on Art 6(3) criminal responsibility. The term is used solely for the purpose of underscoring his authority and the relationship between the Accused and those to whom he gave "orders" for purposes of establishing Art 6(1) liability for *"ordering"*.

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[2] See ***Ntakirutimana*** (TC) Decision on a Preliminary Motion Filed by Defence Counsel for an Order to Quash Counts 1, 2, 3 and 6 of the Indictment, 30 June 1998, para. 10. "...the purpose of the indictment is not to put the accused in a position to prepare his defence, since the Prosecutor's investigation against the accused may not be complete, but rather to ensure that the accused has full knowledge and understanding of the charges against him and is able to plead to these charges at his initial appearance, in accordance with Rule 62 of the Rules. **The accused will have ample opportunity and adequate means to prepare his defence once he has received supporting documentation in accordance with Rule 66(A)(i) and disclosure of witness statements in terms of Rule 66(A)(ii) of the Rules." (emphasis added)**

[3] See *Mpambara*, (TC) Decision on the Prosecution's Request for Leave to File an Amended Indictment, 4 March 2005 paras 13, 19 & 20. As the Trial Chamber rightly noted the two additional counts (complicity in genocide and extermination) *"are based on the same factual allegations underlying the already existing count of genocide. Therefore, the addition of the two new counts does not alter the fundamental factual case against the Accused."* However, extermination has two different elements: widespread and systematic attacks against a civilian population on discriminatory grounds, and knowledge of the intent even if the Accused did not share the same intent. The Trial Chamber again correctly noted, *"the material facts enumerated in the existing indictment are highly probative of the mental elements for extermination. Indeed the Prosecution relies on no additional facts to support the extermination count, simply incorporating by reference the paragraphs relevant to the genocide charge."*

[4] ***Musema***, (AC) Judgment, para 369, *quoting* ***Celebici***, (AC) Judgment, para 400 ("Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven."). *See also* ***Bagilishema***, (TC) Judgment, paras 108-109.

Vagueness as to Dates, Locations and Names

13. The Prosecutor submits that paragraph 10 is a general allegation of criminal conduct, intent and mode of participation, the specifics of which are adequately set out in paragraphs 11 to 14 of the Amended Indictment.

14. Similarly, paragraph 15 is a general allegation of criminal conduct, intent and mode of participation, the details of which are specifically pleaded in paragraphs 18 and 20 of the Amended Indictment. The specific allegations detailed in the paragraphs indicated above adequately reflect the material facts of his alleged criminal conduct on given dates at given locations and put the Accused on sufficient notice of the charges against him.[5]

17. The alleged killing pleaded in paragraph 14 of the Amended Indictment is as specific to the extent possible insofar as it gives the date, the name of the victim and the description of the killers who allegedly killed the victim in the presence of the accused in Rukara Commune. Further details can be found in the witness statement of LEM, disclosed to the Defence in French on 19 July 2001 as part of the supporting materials.

18. With regard to Defence submissions on paragraph 16 of the Amended Indictment, that the indictment does not name the Tutsi the Accused transported to Rukara Parish, the Prosecutor submits that the omission does not render the indictment defective nor indeed does it prevent the accused from understanding the charges against him[6]. Prosecutor further submits that while naming of the victim is useful for preparation of the Defence, it is not a mandatory requirement as long as the indictment sufficiently describes them as belonging to the targeted group, in this case Tutsi civil servants some of whom are protected witnesses, whose identities will be disclosed to the Defence before trial.

19. In reference to paragraph 20(i) of the Amended Indictment the Prosecutor adopts the above arguments and would add that disclosing the details of the victim would compromise the identity and security of a potential witness and that adequate disclosure will be made before trial in accordance with the protective measures in force. However, the attackers were Hutu men by the names Sebishwi and Gasaza.

20. Similarly, the attackers referred to in paragraph 20(ii) are Murwanashyaka and several other Hutu men. The name of the alleged victim will be disclosed ahead of trial in accordance with the protective measures in force.

21. The Prosecutor submits that the Amended Indictment meets the charging threshold with regard to specificity and that any further particulars are a matter of pre- trial disclosures and evidence to be adduced at trial.

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[5] *Mpambara*, ibid paras 11 and 14.

[6] See *Akayesu*, (TC) *Judgment* 2, September 1998 para 656 where the accused was found guilty of the murder of *"8 detained men"* in front of Taba *bureau communale*, who were not named in paragraph 19 and Count 8 of the indictment, nor in evidence at trial. See also *Vasiljevic* (TC) Judgment, 29 November 2002 para 229-231 where the accused was convicted for the extermination of a large number of un-named victims only described as *"Bosnian Muslim civilians including women, children and the elderly"* in paragraph 5 of Count I in the indictment.

Joint Criminal Enterprise

23. First, the Prosecutor submits that the current pleading of joint criminal enterprise liability puts the accused on sufficient notice that the Prosecutor will be relying on this theory, and the alleged lack of specificity with regard to the particular mode applicable does not of itself render the Amended Indictment defective.[7]

24. It is submitted that the current Indictment provides the Accused with sufficient notice of the Prosecutor's intention to rely on JCE by clearly pleading the purpose of the enterprise, the identity of the participants and the nature of the Accused's participation in the enterprise.[8]

25. Recent Appeals Chamber jurisprudence on this issue suggests that while it is *"preferable"* that the Indictment specifies the particular form of JCE envisaged, failure to do so does not render the indictment incurably defective.[9] The Appeals Chamber has explained that failure to so plead *"does not in principle prevent the Prosecution from pleading elsewhere than in the indictment - for instance in the pre-trial brief – the legal theory which it believes best demonstrates the crime or crimes alleged are imputable to the accused in law in the light of the facts alleged..."*[10]

26. The Prosecutor submits that the principal counts of genocide and extermination alleged in the indictment comprise multiple criminal acts spanning a period of over a week, committed at various locations, each involving potentially one or more of the Art 6(1) forms of responsibility, which, individually or collectively, can be construed as proving co-perpetration in a JCE or, conversely, from which evidence of a JCE can be inferred to prove the intent with which the crimes were committed under the other modes of Art 6(1) responsibility.

27. The submission here is that the indictment, to the extent possible, sufficiently characterizes the alleged criminal conduct of the Accused. Any arguments or conclusions as to the most appropriate form of JCE are matters of evidence best left to be elaborated in the Pre-Trial and Closing Briefs for deliberation by the Chamber on the merits. Indeed in *Kvocka* the Trial Chamber held, *inter alia,* that,

> "[i]t was "within its discretion to characterize the form of participation of the accused, if any, according to the theory of

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[7] It is important here to note that in *Ntakirutimana* and *Kvocka* the indictments never alleged JCE. In *Ntakirutimana* JCE was never considered at trial by the TC and was raised for the first time on appeal. In *Kvocka* on the other hand JCE was considered at trial by the TC and on appeal it was found that the Prosecution had given timely, clear and consistent information to the appellants of the Prosecutor's intention to rely on JCE liability responsibility.

[8] *Simic*, Judgment (TC) para. 145-146. According to *Simic*, the following information must be included in the indictment: the nature or essence of the joint criminal enterprise; the period over which the enterprise is said to have existed; the identity of those engaged in the enterprise, at least by reference to a group; and the nature of the participation of the accused in the enterprise. Failure to plead this information results in "no injustice to the accused if he is given an adequate opportunity to prepare an effective defence." See also *See, e.g., Prosecutor v. Stani{i}*, Case No. IT-03-69-PT, Decision on Defence Preliminary Motions, 14 November 2003, p. 5; *Prosecutor v. Meaki} et al.*, Case No. IT-02-65-PT, Decision on Duško Kneževi}'s Preliminary Motion on the Form of the Indictment, 4 April 2003, p. 6; *Prosecutor v. Momčilo Krajišnik & Biljana Plavšić*, Case No. IT-00-39&40-PT, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para. 13.

[9] Ntakirutimana (AC) Judgment 13 December 2004 paras 471, 475 & 482. See also Krnojelac (AC) Judgment para 138-144, Kvocka (AC) Judgment paras 42 -43.

[10] Krnojelac (AC) Judgment, para. 138; Ntakirutimana (AC), para. 475. The rationale for the this approach is to ensure that the Accused is not *materially impaired* in the preparation of his defence

responsibility it deems most appropriate, within the limits of the Amended Indictment and insofar as the evidence permits."[11]

28. The Prosecutor undertakes, in the Pre-Trial Brief, to advance arguments and draw conclusions based on alleged facts as to the most appropriate form of JCE to attach to specific criminal conduct, it being understood that the ultimate discretion lies with the Chamber to determine, on the basis of evidence, what has been proved at trial.

29. The Prosecutor submits that by reason of the foregoing arguments, the defense motion is without merit and ought to be dismissed and any relief sought, denied.

DATED AT ARUSHA this 14 day of April 2005

Richard KAREGYESA
Senior Trial Attorney

[11] *Kvocka* (TC) Judgment 2 Nov. 2001 para. 248. In *Mpambara* (TC) Decision 4 March 2005 at para 12 the Chamber correctly understood the formulation of JCE in the Amended Indictment to be indicative of all three forms. It is worth noting in this regard that different forms of JCE may attach to different facts within the same indictment.

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