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Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding Judge**
Judge Mohamed Shahabuddeen
Judge Florence Ndepele Mwachande Mumba
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Adama Dieng**

Judgement of: **9 July 2004**

ELIÉZER NIYITEGEKA
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-96-14-A

JUDGEMENT

Counsel for the Appellant:

Ms. Sylvia Geraghty
Mr. Feargal Kavanagh SC

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Ms. Melanie Werrett
Mr. James Stewart
Mr. Kenneth C. Fleming
Ms. Linda Bianchi
Mr. Alex Obote Odora

VIII. NOTICE (GROUNDS OF APPEAL 32, 35, 39, 52)

191. The Appellant contends that the Trial Chamber erred in law in finding that he committed acts that were not pleaded in the indictment and by relying on those findings to convict him. The Appellant cites nine witnesses who, he asserts, testified to unpleaded material facts.[378]

192. The Prosecution responds to these arguments in a cursory manner. Other than suggesting that the Appellant's argument with respect to three of the nine witnesses should be rejected for failure to "indicate a decision made by the Trial Chamber with respect to notice,"[379] the Prosecution merely invokes general statements of law and baldly asserts that the Appellant failed to meet his burden on appeal.[380] This style of argumentation does not provide the Appeals Chamber with meaningful assistance. Nor is the suggestion in the Prosecutor's response that defects in the indictment were corrected by "provision to the Defence of timely, clear and consistent information"[381] useful, given that the response does not specify when such information was provided to the Defence and does not identify any such communication in the record.

193. The law governing challenges to the failure of an indictment to provide notice of material facts is set out in detail in the ICTY Appeals Chamber's Judgement in *Kupreškić*. The *Kupreškić* 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."[382] *Kupreškić* discussed several factors that may bear on the determination of materiality, although whether certain facts are "material" ultimately depends on the nature of the case. If the Prosecution charges personal physical commission of criminal acts, the indictment should set forth "the identity of the victim, the time and place of the events and the means by which the acts were committed."[383] On the other hand, such detail need not be pleaded if the "sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes.'"[384] Even in cases in which a high degree of specificity is "impracticable," however, "since the identity of the victim is

[378] Appellant's Brief, paras. 178-187.
[379] Prosecution Response Brief, para. 195.
[380] Prosecution Response Brief, paras. 194-197.
[381] Prosecution Response Brief, para. 196 (quoting *Ntakirutimana* Trial Judgement, para. 59).
[382] *Kupreškić et al.* Appeal Judgement, para. 88.
[383] *Kupreškić et al.* Appeal Judgement, para. 89.
[384] *Kupreškić et al.* Appeal Judgement, para. 89 (quoting *Prosecutor v. Kvočka, et al.*, Case No. IT-98-30/1-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 17).

information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so."[385]

194. *Kupreškić* also addressed the possibility that the Prosecution might be unable to plead a material fact with specificity because it was not in the Prosecution's possession prior to trial. As a general matter, "the Prosecution is expected to know its case before it goes to trial" and cannot expect to "mouldFğ the case against the accused in the course of the trial depending on how the evidence unfolds."[386] If the Defence is denied the material facts of the accused's alleged criminal activity until the Prosecution files its pre-trial brief or until the trial itself, it will be difficult for the Defence to conduct a meaningful investigation prior to the commencement of the trial. The Trial Chamber must consider whether proceeding to trial in such circumstances is fair to the accused. *Kupreškić* indicated that there are "instances in criminal trials where the evidence turns out differently than expected," and such situations may call for measures such as an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.[387]

195. Failure to set forth the specific material facts of a crime constitutes a "material defect" in the indictment.[388] Such a defect does not mean, however, that trial on that indictment or a conviction on the unpleaded material fact necessarily warrants the intervention of the Appeals Chamber. Although *Kupreškić* stated that a defective indictment "*may*, in certain circumstances" cause the Appeals Chamber to reverse a conviction, it was equally clear that reversal is not automatic.[389] *Kupreškić* left open the possibility that the Appeals Chamber could deem a defective indictment to have been cured "if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her."[390]

196. A Trial Chamber faced with a situation in which "the evidence turns out differently than expected" may not simply find that the error has been cured, but rather should take one or more of the steps envisioned by *Kupreškić*, including excluding the evidence or ordering the Prosecution to move to amend the indictment.[391] In considering a motion to amend the indictment, a Trial Chamber should naturally consider whether the Prosecution has previously provided clear and timely notice of the allegation such that the Defence has had a fair opportunity to conduct investigations and prepare its response. On appeal, however, amendment of the indictment is no

[385] *Kupreškić et al.* Appeal Judgement, para. 90.
[386] *Kupreškić et al.* Appeal Judgement, para. 92.
[387] *Ibid.*
[388] *Kupreškić et al.* Appeal Judgement, para. 114.
[389] *Ibid.* (emphasis added).
[390] *Ibid.*
[391] *Kupreškić et al.* Appeal Judgement, para. 92.