



UNITED NATIONS

NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER III

Original: English

Before Judges: Lloyd G. Williams, QC, Presiding
Yakov Ostrovsky
Pavel Dolenc

Registrar: Adama Dieng

Judgement of: 25 February 2004

THE PROSECUTOR
v.
ANDRÉ NTAGERURA
EMMANUEL BAGAMBIKI
SAMUEL IMANISHIMWE
Case No. ICTR-99-46-T

JUDGEMENT AND SENTENCE

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1. Applicable Principles

29. In accordance with Article 20(4)(a) of the Statute, an accused has a fundamental right “to 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.”³² This provision is based on Article 14(3)(a) of the International Covenant on Civil and Political Rights and is substantially similar to the guarantee in Article 6(3)(a) of the European Convention on Human Rights. While neither this Tribunal nor the International Criminal Tribunal for the Former Yugoslavia has previously defined or made a distinction between the nature and the cause of the charges, the Chamber understands that the *nature of the charge* refers to the precise legal qualification of the offence, and the *cause of the charge* refers to the facts underlying it.³³ Although Article 20(4)(a) of the Statute does not require that the nature and the cause of the charge be communicated to the accused in any particular format, it is clear from the Statute and the Rules that this information should be included in the indictment, which is the only accusatory instrument provided for therein.³⁴

30. Accordingly, the Prosecutor has an obligation to plead all material facts underpinning the charges against an accused in the indictment with sufficient detail so that the accused can prepare his defence.³⁵ In assessing an indictment, the Chamber is mindful that each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment.³⁶ Moreover, when assessing an indictment at the post-trial phase, the Chamber is primarily concerned with defects in the indictment that prejudice the rights of the accused.³⁷

31. The mode and extent of an accused’s participation in an alleged crime are always material facts that must be clearly set forth in the indictment.³⁸ The materiality of

³² See also Article 19(2); *Semanza*, Judgement (TC), para. 42; *Kupreskic*, Judgement (AC), para. 114.

³³ KAREN REID, A PRACTITIONER’S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 95 (1998); MANFRED NOVAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 255 (1993).

³⁴ Articles 17(4), 19(2), 20(4); Rule 47. See also *Semanza*, Judgement (TC), para. 42; *Kupreskic*, Judgement (AC), para. 88; *Hadzihasanovic et al*, Case No. IT-01-47-PT, Decision on the Form of the Indictment (TC), 7 December 2001, para. 8.

³⁵ *Semanza*, Judgement (TC), para. 44; *Krnojelac*, Judgement (AC), paras. 130, 131; *Kupreskic*, Judgement (AC), paras. 88, 92.

³⁶ *Rutaganda*, Judgement (AC), para. 304.

³⁷ See *Semanza*, Judgement (TC), para. 43; *Rutaganda*, Judgement (AC), para. 303 (“Before holding that an event charged is immaterial or that there are minor discrepancies between the indictment and the evidence presented at trial, a Chamber must normally satisfy itself that no prejudice shall, as a result, be caused to the accused. An example of such prejudice is the existence of inaccuracies likely to mislead the accused as to the nature of the charges against him.”); *Kupreskic*, Judgement (AC), paras. 115-125 (undertaking prejudice analysis for vagueness allegation raised in post-trial stage).

³⁸ The Chamber recognises that the Prosecutor may allege more than one form of participation for each crime, but emphasises that it is vague for the Prosecutor to simply refer broadly to Article 6(1) without further particularising the alleged acts of the accused that give rise to each form of participation charged. *Semanza*, Judgement (TC), para. 59. See also *Krnojelac*, Judgement (AC), para. 138 (“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.”); *Celebici*, Judgement (AC) para. 350.

other facts and the specificity with which the Prosecutor must plead these facts depend on the form of participation alleged in the indictment and the proximity of the accused to the underlying crime.³⁹

32. In cases where the Prosecutor alleges that an accused personally “committed” criminal acts within the meaning of Article 6(1), an indictment generally must plead with particularity the identity of the victims, the time and place of the events, and the means by which the acts were committed.⁴⁰ The Chamber, however, does not expect the Prosecutor to perform an impossible task and recognises that the nature or scale of the crimes, the fallibility of witnesses’ recollections, or witness protection concerns may prevent the Prosecution from fulfilling its legal obligations to provide prompt and detailed notice to the accused.⁴¹ If a precise date cannot be specified, a reasonable range of dates should be provided.⁴² If victims cannot be individually identified, then the indictment should refer to their category or position as a group.⁴³ Where the Prosecution cannot provide greater detail, then the indictment must clearly indicate that it provides the best information available to the Prosecutor.⁴⁴

33. Where an accused is charged with a form of accomplice liability, the Prosecutor must plead with specificity the acts by which the accused allegedly planned, instigated, ordered, or aided and abetted in the crime.⁴⁵ Where superior responsibility

³⁹ *Kupreskic*, Judgement (AC), para. 89; *Prosecutor v. Galic*, Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal (AC), 30 November 2002, para 15.

⁴⁰ *Semanza*, Judgement (TC), para. 45; *Kupreskic*, Judgement (AC), para. 89.

⁴¹ *Semanza*, Judgement (TC), paras. 55, 57-58; *Kupreskic*, Judgement (AC), para. 89. Of course, witness protection cannot be used as a pre-text to frustrate the proper preparation of a defence. See *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-I, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses (TC), 20 May 2003, para. 11 (“The protection of witnesses should not . . . serve to frustrate or hinder an effective defence.”); *Prosecutor v. Krnojelac*, Case No. 97-25-PT, Decision on the DEfence Preliminary Motion on the Form of the Indictment (TC), 24 February 1999, para. 40 (“It may be, of course, that the prosecution is simply unable to be more specific because the witness statement or statements in its possession do not provide the information in order for it to do so. It cannot be obliged to perform the impossible, but in some cases there will then arise the question as to whether it is fair to the accused to permit such an imprecise charge to proceed. The inability of the prosecution to provide proper particulars may itself demonstrate sufficient prejudice to an accused person as to make a trial upon the relevant charge necessarily unfair. The fact that the witnesses are unable to provide the needed information will inevitably reduce the value of their evidence. The absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance.”)

⁴² See, e.g., *Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, Decision on Objections by Momir Talic to the Form of Amended Indictment (TC), 20 February 2001, para. 22.

⁴³ See, e.g., *Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, Decision on Objections by Momir Talic to the Form of Amended Indictment (TC), 20 February 2001, para. 22; *Prosecutor v. Krnojelac*, Case No. 97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment (TC), 24 February 1999, para. 40 paras. 55, 58 (“The prosecution must provide some identification of who died (at least by reference to their category or position as a group), and it is directed to amend the indictment accordingly”).

⁴⁴ See, e.g., *Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, Decision on Objections by Momir Talic to the Form of Amended Indictment (TC), 20 February 2001, para. 22; *Prosecutor v. Krnojelac*, ICTY Case No. 97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 paras. 33-34, 43.

⁴⁵ *Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, Decision on Objections by Momir Talic to the Form of Amended Indictment (TC), 20 February 2001, para. 20.

is alleged, the relationship of the accused to his subordinates is most material, as are his knowledge of the crimes and the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates.⁴⁶

34. If the Prosecutor intends to rely on the theory of joint criminal enterprise to hold the accused criminally responsible as a principal perpetrator of the underlying crimes rather than as an accomplice, the indictment should plead this in an unambiguous manner and specify upon which form of joint criminal enterprise the Prosecutor will rely.⁴⁷ In addition to alleging that the accused participated in a joint criminal enterprise, the Prosecutor must also plead the purpose of the enterprise, the identity of the co-participants, and the nature of the accused's participation in the enterprise.⁴⁸ For these reasons, the Chamber will not consider the Prosecutor's arguments, which were advanced for the first time during the presentation of closing arguments, to hold the accused criminally responsible based on this theory.

35. The specificity required to plead the identity of the victims, the time and place of the events, and the means by which the acts were committed is not as high where criminal responsibility is predicated on accomplice liability or superior responsibility.⁴⁹ The Chamber emphasises, however, that the accused must be informed not only of his own alleged conduct giving rise to criminal responsibility but also of the acts and crimes of his alleged subordinates or accomplices.⁵⁰ Thus, pleading accomplice or superior responsibility does not obviate the Prosecution's obligation to particularise the underlying criminal events for which it seeks to hold the accused responsible, particularly where the accused was allegedly in close proximity to the events.⁵¹

36. Although no rule specifies the content of the "count", it is evident from the context of Rule 47 that this term refers to the legal characterisation or qualification of the crime alleged in the concise statement of facts of the crime.⁵² This legal

⁴⁶ *Prosecutor v. Mejakic*, ICTY Case No. IT-02-65-PT, Decision on Zeljko Mejakic Preliminary Motion on the Form of the Indictment (TC), 14 November 2003, p. 3; *Prosecutor v. Deronjic*, Case No. IT-02-61-PT, Decision on Form of the Indictment (TC), 25 October 2002, para. 7.

⁴⁷ *Krnjelac*, Judgement (AC), para. 138; *Prosecutor v. Mejakic*, ICTY Case No. IT-02-65-PT, Decision on Zeljko Mejakic Preliminary Motion on the Form of the Indictment, 14 November 2003, p. 3. See also *Tadic*, Judgement (AC), paras. 185-226 (discussing the forms of joint criminal enterprise).

⁴⁸ See, e.g., *Prosecutor v. Stansic*, Case No. IT-03-69-PT, Decision on Defence Preliminary Motions (TC), 14 November 2003, p. 5; *Prosecutor v. Mejakic*, Case No. IT-02-65-PT, Decision on Dusko Knezevic's Preliminary Motion on the Form of the Indictment (TC), 4 April 2003.

⁴⁹ *Semanza*, Judgement (TC), para. 45; *Prosecutor v. Galic*, Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal (AC), 30 November 2002, para 15 ("As the proximity of the accsed person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the prosecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him.").

⁵⁰ *Prosecutor v. Strugar*, Case No. IT-01-42-PT, Decision on Defence Preliminary Motion Concerning the Form of the Indictment (TC), 28 June 2002.

⁵¹ *Prosecutor v. Strugar*, Case No. IT-01-42-PT, Decision on Defence Preliminary Motion Concerning the Form of the Indictment (TC), 28 June 2002. See also *Brđjanin and Talic*, Case No. IT-99-36, Decision on Objections by Momir Talic to the Form of the Amended Indictment (TC), 20 February 2001, paras. 19-20.

⁵² This is particularly evident in Rule 47(I) ("... indictment based on the acts underlying the count . . .") (emphasis added).