055

SCSL-2003-05-PT-055
(1113-1148)

1113

IN THE SPECIAL COURT FOR SIERRA LEONE

Before: Judge Bankole Thompson, Presiding Judge
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Mr. Robin Vincent

Date filed: 23 June 2003

THE PROSECUTOR

Against

ISSA HASSAN SESAY
(Case No. SCSL 2003-05-PT)

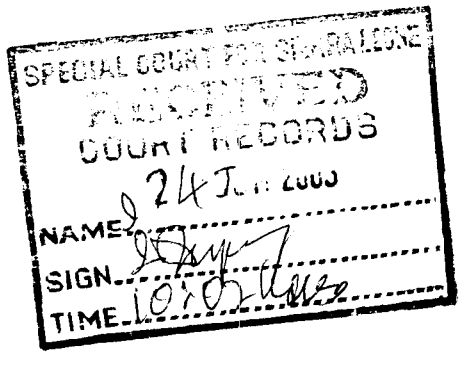
PRELIMINARY MOTION FOR DEFECTS IN THE FORM OF THE INDICTMENT
(Rule 72(B)ii) of the Rules of Procedure and Evidence)

Office of the Prosecutor:

Luc Cote, Chief of the Prosecution
Robert Petit, Senior Trial Counsel

Defence Counsel:

William Hartzog, Lead Counsel
Alexandra Marcil, Co-Counsel



INTRODUCTION

1114

1. The Defence respectfully submits that the Indictment of Issa Hassan Sesay is so defective that it should be dismissed. Alternatively, if the extension of time requested in his separate motion is granted, the Defence for Mr. Sesay intends to file a complete and substantial Preliminary Motion on the Form of the Indictment. In the alternative, the Indictment should be clarified.

DEFECTS IN THE FORM OF THE INDICTMENT

2. Under Rule 72 (B) ii) of the Rule of Procedure and Evidence, the Defence raises a number of defects in the form of the indictment, and submits the following.

3. In *The prosecutor v. Karemera,* ICTR-98-44-T, Decision on the Defence Motion, pursuant to Rule 72 of Rule of Procedure and Evidence, pertaining to, *inter alia,* lack of jurisdiction and defects in the form of the Indictment, April 25, 2001 (para 16), the ICTR Trial Chamber noted:

> "... that allegations within an indictment are defective in their form if they are not sufficiently clear and precise, in the way they are spelt out and with respect to their factual and legal constituent elements, so as to enable the Accused to fully understand the nature and the cause of the charges brought against him. (*See notably,* on this issue, *Prosecutor v. Anatole Nsengiyumba,* ICTR-96-12-I, "Decision on the Defence Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment", 12 May 2000, para.1: "for an indictment to be sustainable, facts alleging an offence must demonstrate the specific conduct of the accused constituting the offence", and *Prosecutor v. Kanyabashi,* ICTR-96-15-I, "Decision on Defence Preliminary Motion for Defects in the Form of the Indictment", 31 May 2000, para 5.1: "an Indictment must be

sufficiently clear to enable the Accused to fully understand the nature and cause of the charges brought against him")." 115

Regarding the fact that the accused incurs responsibility, by the reason of the same facts, pursuant to article 6(1) and 6(3) of the Statute:

4. Pursuant to *The Prosecutor v. Kanyabashi,* ICTR, Trial Chamber, ICTR-96-15-I, Decision on Defence Preliminary Motion for Defects in the Form of the Indictment, May 31, 2000, when the accused incurs responsibility under Article 6(1) and Article 6(3) as hierarchical superior, such practice makes it impossible to understand the nature and the cause of the charges, since the same facts cannot give rise to the two types of responsibility. This situation calls for a clarification of the Indictment. Accordingly in *Kanyabashi,* the Trial Chamber ordered the Prosecutor to clarify the Indictment and stated:

> "... the Prosecutor must clearly distinguish the acts for which the Accused incurs criminal responsibility under Article 6(1) of the Statute from those for which he incurs criminal responsibility under Article 6(3)"

5. The Defence for Mr. Sesay submits that the same clarification should be ordered in the present case in relation to each and every count.

Regarding the vague and imprecise nature of the counts:

6. Pursuant to *Kanyabashi* (paragraph 5.21), it is necessary to specify the identity of the subordinates. In *Karemera* (paragraph 20 (viii)), the Trial Chamber stated:

> "Para. 6.46 refers to the accused's responsibility under Article 6(3) of the Statute, and that of other co-Accused, with respect to crimes committed by certain categories of subordinates in several prefectures of Rwanda. The Trial Chamber orders the Prosecutor to specify, to the extent possible, these allegations against the Accused, notably with

regard to the actual crimes allegedly committed that entail his command responsibility, in which capacity, and with regard to which of the accused's subordinates are concerned."

7. Accordingly, in relation to each and every count (see the general formulation "*Members of the AFRC/RUF subordinate to or acting in concert with Issa Hassan Sesay...*), the Prosecutor should be ordered to specify the identity of the subordinates of Mr. Sesay which are concerned by each crime alleged.

8. As well, for every count charging superior responsibility under Article 6(3), the Indictment of Mr. Sesay should include:

> "the relationship between the accused and the perpetrators as well as "the conduct of the accused by which he may be found (a) to have know or had reason to know that the acts were about to be done, or had been done, by those others, and (b) to have failed to take necessary and reasonable measures to prevent such acts or to punish the persons who did them" (see *Prosecutor v. Krnojelac,* Decision on Defence Preliminary Motion on the Form of the Indictment, February 11, 2000, para. 18 and *Prosecutor v. Krajisnik,* Decision Concerning Preliminary Motion on the Form of the Indictment, August 1, 2000, para. 9)" (Archibold International Criminal Courts: Practice, Procedure & Evidence, Sweet & Maxwell, London, 2003, 6-58)

9. A general formulation that "*members of AFRC/RUF*" have committed unlawful acts does not enable the Accused to understand the nature and the cause of the charges brought against him (see *Kanyabashi)*, since the Defence has no precision on the relationship between the accused and the perpetrators, nor the nature of the participation by the accused in that enterprise.

10. In *Krnojelac,* IT-97-25, Decision on Form of Second Amended Indictment, May 11, 2000, (paragraph 16), the Trial Chamber stated that:

1117

"In order to know the nature of the case he must meet, the accused must be informed by the indictment of:

(a) the nature of purpose of the joint criminal enterprise (or its "essence", as the accused here has suggested),

(b) the time at which or the period over which the enterprise is said to have existed,

(c) the identity of those engaged in the enterprise – so far as their identity is known, but at least by reference to their category as a group, and

(d) the nature of the participation by the accused in that enterprise.

Where any of these matters is to be established by inference, the prosecution must identify in the indictment the facts and circumstances from which the inference is sought to be drawn."

11. In the present case, the Defence submits that the formulation *"Members of the AFRC/RUF"* is a much too broad category. It is not precise enough for the accused to know the nature of the case and does not meet the criteria above.

12. In relation to each and every count (see the general formulation "*Members of the AFRC/RUF subordinate to or acting in concert with Issa Hassan Sesay...*), the Prosecutor should be ordered to specify, to the extend possible, any further information that the Prosecutor may be in a position to disclose at this stage concerning the identity of the co-accused or co-perpetrators and the implication of the accused with them.

13. In particular, paragraph 21 of the Indictment should be more precise as to "*other superiors in the RUF*".

14. The Defence submits that the Indictment should also include the identity of the victims (if not protected) and the precise location of the crimes (see *Krnojelac,* paragraph 3; Archibold, 6-54)

15. The Defence submits that the paragraph 51 of the Indictment should be more precise and include the approximate date of its commission. Indeed, the whole paragraph 51 in too vague and should be set aside.

Regarding the general formulation of the counts:

> "Phrases such as "including but not limited to" as well as other ambiguous phrases such as "among others" are to be avoided in order to ensure that the indictment is specific and not too vague for the purposes of identifying the crimes against which the accused must defend himself or herself (see *Prosecutor v. Blaskic,* Decision on the Defence Motion to Dismiss the Indictment based Upon Defects in the Form thereof, April 4, 1997, paras 22-24). The Trial Chamber stated that such phrases were "vague and subject to interpretation and they do not belong in the indictment when it is issued against the accused" (para. 22)."
> (Archibold, 6-55).

16. The Defence submits that the general formulations like *"including, but not limited to"* or *"such as"* or *"various locations"* or *"various areas... including"* does not specify nor does it limit the reading of the counts, but expands the Indictment without concretely identifying precise allegations against the accused. Those words are imprecise and not at all restrictive. Therefore, the charges must be set aside or, alternatively, the formulation should be deleted.

17. In particular, in paragraphs 28, 32, 37, 38, 40, 41 (e.g. the location of the sexual violence as well as the location of the camps), 42 (e.g. the Freetown area should be precise), 43, 44, 45, 46, 47, 49 (e.g. the location of the abductions as well as the location of the camps), 51, 52, 53, 55, 56, etc., the Prosecutor should be ordered to specify, in each count, whether the accused is charged with having committed acts solely in specific locations, or to delete the general formulation.

18. The description of the offence (or crimes alleged) should be precise and not expressed in a vague formulation (e.g. in paragraph 45 related to counts 9 and

1119

10 physical violence: "The mutilations included...". e.g. in paragraph 47 related to count 12 : " Forced labour included...").

19. In relation to the description of a common plan, the Prosecutor should be ordered to be more specific regarding the nature or purpose of the common plan and the nature of the participation by the accused in that common plan (e.g. the facts that are showing his share of a common plan).

20. In particular, in paragraphs 23 and 24 of the Indictment, the formulation "*in particular*" and "*included*" should be deleted.

21. In paragraph 24, the formulation should be more precise. The formulation should avoid using the word "included" in describing the joint criminal enterprise since this word does not allow the defence to know with precision what is the joint criminal enterprise and the participation of the accused.

22. When charging joint criminal enterprise, the Indictment should include precisely the nature of the accused's participation in the criminal enterprise (*Krnojelac,* paragraph 16). The Defence for Mr. Sesay submits that the Indictment in the case of Mr. Sesay does not fulfill the criteria of an indictment charging joint criminal enterprise set out in Archibold, 6-57. For this reason, the Indictment should be dismissed.

23. In relation to each and every count in the Indictment of Mr. Sesay (in particular in paragraphs 31, 37, 42, 45, 46, 52, 57, 58), the Defence keenly submits that the Prosecutor should be ordered to delete the general formulation "*By his acts of omissions in relation, but not limited to those events...Issa Hassan Sesay.... is individually criminally responsible...*". The general formulation chosen by the Prosecutor expands the Indictment without concretely identifying precise allegations against the accused. The Defence respectfully submits that for the reason above, the Indictment should be dismissed. Alternatively, each count must mention the specific allegation against the accused. The facts alleging an offence must demonstrate the

1120

specific conduct of the accused constituting the offence (see *Kanyabashi*, at paragraph 5.1).

ORDER SOUGHT:

It is hereby requested that the Trial Chamber:

Dismiss the Indictment;

Alternatively, if the extension of time requested in his separate motion is granted, permit the Defence for Mr. Sesay to file a complete and substantial Preliminary Motion on the Form of the Indictment pursuant to Rule 72;

Alternatively, orders the Prosecutor to clarify the Indictment, and directs the Prosecutor to file the amended Indictment within 30 days from the date of this Decision.

Respectfully submitted

Dated 23rd June 2003, at Montréal

for William Hartzog
Lead Counsel for Issa Hasssan Sesay

Alexandra Marcil
Co-Counsel for Issa Hassan Sesay

1121

ANNEXES

The Prosecutor v. Joseph Kanyabashi, ICTR-96-15-I, Decision on Defence Preliminary Motion for Defects in the Form of the Indictment, 31 May 2000.

The prosecutor v. Édouard Karemera, ICTR-98-44-T, Decision on the Defence Motion, pursuant to Rule 72 of Rules of Procedure and Evidence, pertaining to, *inter alia,* lack of jurisdiction and defects in the form of the Indictment, 25 April 2001.

1122

ANNEX 1

1123

TRIAL CHAMBER II

Before Judges:
Laïty Kama, presiding
William H. Sekule
Mehmet Güney

Registry:
Ms Aminatta N'Gum

Decision of: 31 May 2000

THE PROSECUTOR
vs.
JOSEPH KANYABASHI

Case No ICTR-96-15-I

DECISION ON DEFENCE PRELIMINARY MOTION FOR DEFECTS IN THE FORM OF THE INDICTMENT

(Rule 72 (B)(ii) of the Rules of Procedure and Evidence)

Office of the Prosecutor:

Mr. Japhet Mono
Ms Andra Mobberley
Mr. Ibukundu A. Babajide

Defence Counsel:

Mr. Michel Marchand
Mr. Michel Boyer

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("The Tribunal")

SITTING as Trial Chamber II, composed of Judges Laïty Kama, presiding, William H. Sekule and Mehmet Güney;

CONSIDERING the initial indictment confirmed by Judge Yakov Ostrovsky on 15 June 1996 ;

CONSIDERING the indictment amended on 17 August 1999 ("the Indictment"), upon leave granted by this Chamber on 12 August 1999;

HAVING BEEN SEIZED of Defence preliminary motion for defects in the form of the indictment dated 9 October 1999;

CONSIDERING the Prosecutor's response to the said motion dated 14 February 2000;

HAVING HEARD the parties during the hearing held for this purpose on 29 February 2000.

Submissions by the parties:

The Defence

1. Under Rule 72 (B)(ii) of the Rules of Procedure and Evidence (the "Rules"), the Defence raises a number of defects in the form of the indictment, and submits essentially as follows:

1.1. In addition to the relevant provisions, specifically, Articles 17 (4) and 20 (4)(a) of the Statute of the Tribunal (the "Statute"), and Rule 47 (C) of the Rules, an indictment must include some degree of specificity concerning temporal references, the charges, the distinction between the types of the Accused's individual responsibility, his conduct or the extent of his participation in the acts with which he is charged. In support of this submission, the Defence refers, particularly, to the decisions of 24 November 1997 and 17 November 1998 in the *Nahimana* case, and to the decision of 30 June 1998 in the *Ntakirutimana* case as well as the relevant case-law of the International Criminal Tribunal for the Former Yugoslavia.

1.2. All nine counts of the Indictment begin with the following words:

By the acts or omissions described in paragraphs 5.1 to 6.65 and more specifically in the paragraphs referred to below [...]

Now, the words *"and more specifically"* are imprecise and not at all restrictive. Therefore the charges must be set aside or, alternatively this formulation deleted.

1.3. With the exception of Count 4, all the counts refer to the same paragraphs concerning the alleged facts. This identical formulation reads as follows:

"- *pursuant to Article 6 (1), according to paragraphs: 5.1, 5.8, 5.12, 5.13, 6.22, 6.26, 6.28 to 6.35,6.37, 6.38, 6.41 to 6.46, 6.57 to 6.65*

- *pursuant to 6(3), according to paragraphs: 5.1, 5.8, 5.12, 5.13, 6.22, 6.26, 6.28 to 6.35, 6.37, 6.38, 6.41 to 6.46, 6.57 to 6.65".*

According to the Defence, the effect of such practice certainly is to "*facilitate the work of the Prosecutor*[...]",but at the same time it prevents the Accused from knowing precisely what he is accused of individually or on account of the conduct of his subordinates. Consequently, these eight counts must be set aside.

1.4. Count 4 must also be set aside because it is vague and imprecise. The Defence submits that the Prosecutor failed to specify the time or to provide specific factual references as to the deeds or conduct of the Accused or his subordinates and as to Accused's exact role in the acts charged.

1.5. The paragraphs included in the formulation "5.1 to 6.65" , but which are not specifically mentioned in the various counts namely 5.2 to 5.7, 5.9 to 5.11, 5.14 to 5.18, 6.1 to 6.21, 6.23 to 6.25, 6.27, 6.36, 6.39. 6.40, 6.47 to 6.56, must be deleted, firstly, on account of their vagueness and imprecision and, secondly, because they in no way cover the accused or his subordinates. Since joinder of Accused was granted in the absence of a joint indictment, all allegations unrelated to the Accused must be deleted from his Indictment;

1.6. Those paragraphs specifically referred to in the various counts namely 5.1, 5.8, 5.12, 5.13, 6.22, 6.26, 6.28 to 6.35, 6.37, 6.38, 6.41 to 6.46, 6.57 to 6.65, should all be set aside, again, on account of their vagueness and imprecision and, more specifically, on account of one or more of the following reason:

(1) Absence of or imprecision in time references;

(2) Lack of specific factual reference as to the Accused's individual conduct with respect to the acts with which he is charged and as to role in the alleged crimes in relation to his hierarchical superiors, his co-conspirators, or his subordinates;

(3) Failure to disclose the identity of his co-conspirators.

2. Consequently, in light of the foregoing the Defence prays:

2.1. That the indictment be set aside because it is vitiated by serious defects;

2.2. Alternatively, that should the Chamber decline to quash the indictment, the Prosecutor be ordered to effect the corrections requested by the Defence within 30 days.

2.3. That the Defence be allowed to reserve its right to raise objections to the indictment as amended following the decision of this present Chamber.

The Prosecutor

3. In response to the Defence, the Prosecutor mainly submits the following:

3.1. The style of the Indictment is within the sole prerogative of the Prosecutor, who has the power to adopt, under the guidance of the Trial Chamber, styles drawn from different jurisdictions throughout the world.

3.2. Regarding the nature and the scope of the facts indicated in the Indictment, it is necessary to make a distinction, between the minimum guarantees which the Accused is entitled to in the yes"> outline of the Indictment on the one hand, and, on the other hand, the right of the Accused to be provided subsequently with more detailed information so as to enable him prepare his defence. At this stage of the proceedings, the object of the Indictment is not to enable the Accused to prepare his defence, but rather to ensure that the Accused can read and fully understand the charges brought against him.

3.3. Regarding the wording "*and more specifically*", used in each of the counts, the Prosecutor submits that this formulation far from misleading the Defence, yes"> enables it to differentiate between the paragraphs which are purely of a narrative nature and those which describe specifically the acts alleged.

3.4. In response to the allegation by the Defence that counts 1 to 3 and 5 to 9 are cumulative since they all refer to the same factual paragraphs, the Prosecutor submits that the acts and omissions charged against the Accused all result from the same criminal transaction, in the instance, the genocide of 1994. The paragraphs cited all relate to each of the counts, but not necessarily in similar fashion to each of the factual ingredients of each count. In addition, the Prosecutor refers to the Decision of 24 November 1997 in the matter of *Nahimana* in which the Trial Chamber dismissed the allegation of cumulative charges made by the Defence, holding that the matter would only be relevant when determining the penalty.

3.5. Regarding temporal references, the Prosecutor submits that she focused on the sequence of events in which the Accused was allegedly involved, and that consequently, it is necessary to use *inclusive* rather than *exclusive* time frames.

3.6. Regarding the identity of the co-conspirators, Article 3 of the Statute does not require that the Prosecutor should name all the co-conspirators and the Prosecutor contends that with respect to the facts referred to in the first count of the Indictment on conspiracy to commit genocide, she followed the case–law established by the Decision of 24 November 1997 in *Nahimana* case, requesting the Prosecutor *"to identify some or all of the persons with whom the Accused, in the first count allegedly conspired to commit genocide"*.

3.7 The submission by the Defence that the Indictment is vague as to the individual acts or the role of the Accused in the crimes alleged, or as to his acts or role as a subordinate, co-conspirator or hierarchical superior, is without merit. The specific factual information sought by the Defence is contained in the paragraphs referred to in each of the counts.

3.8 Moreover, the provisions of the Statute and the Rules provide that the clarifications sought by the Accused shall be specified during the disclosure process after his initial appearance.

3.9 Regarding the paragraphs which have not specifically been referred to in the counts, it appears from the structure of the Indictment that these mention the context within which the paragraphs which relate directly to the Accused should be situated, thus forming an integral part of the Prosecutor's argument.

3.10 Furthermore, in case of defects in the form of the indictment, the Rules do not provide that the Indictment be set aside. The practice is rather to direct, if necessary, the Prosecutor to cure if necessary, the defects in the form of the Indictment.

4. 1 For all the foregoing reasons, the Prosecutor prays the Chamber to dismiss the Defence motion.

AFTER HAVING DELIBERATED,

Regarding the defects in the form of the Indictment:

5.1. WHEREAS an Indictment must be sufficiently clear to enable the Accused to fully understand the nature and cause of yes"> the charges brought against him;

5.2. WHEREAS the Trial Chamber reminds the Prosecutor that, pursuant to Article 20 (4) (a) of the Statute, an Indictment should present in a precise and detailed manner, the charges brought against the Accused;

5.3. WHEREAS the Accused may, pursuant to Rule 72 of the Rules, raise objections based on defects in the form of the indictment, which procedure enables him to obtain further information in order to fully understand the nature and cause of the charges brought against him;

5.4. WHEREAS, in the opinion of the Trial Chamber, contrary to the Prosecutor's submission, the clarification required in the Indictment therefore does not relate to style;

Regarding the fact that, with the exception of count 4, all counts refer to exactly the same paragraphs of the Indictment:

5.5 WHEREAS counts 1 to 3 and 5 to 9 refer without distinction to the same paragraphs of the Indictment, that is, paragraphs 5.1, 5.8.5.12,5.13, 6.22, 6.26, 6.28 to 6.35, 6.37, 6.38, 6.41 to 6.46, 6.576 to 6.65;

5.6 WHEREAS the Trial Chamber notes that it is the usual practice before the Tribunal, which does not in anyway prejudice the Accused;

5.7 WHEREAS, furthermore, the Trial Chamber recalls that the issue of multiple charges can only be considered at trial and ruled on when judgement is passed, and not at this stage of the proceedings;

Regarding the fact that, according to the Indictment, the Accused incurs individual criminal responsibility, by reason of the same facts, pursuant to Article 6 (1) and Article 6 (3) of the Statute:

5.8 Whereas the Trial Chamber notes that with the exception of count 4, the wording of the charges states that the Accused incurs individual criminal responsibility based on the same facts, both under Article 6 (1) of the Statute and that of Article 6 (3) as hierarchical superior;

5.9 Whereas the Trial Chamber holds that such a practice makes it impossible for the Accused to understand the nature and the cause of the specific charges brought against him, since the same facts cannot simultaneously give rise to the two types of responsibility provided for under the Statute;

5.10 Whereas the Trial Chamber notes the case-law established by Trial Chamber I in its Decision rendered on 17 November 1998, in the *Nahimana* case, which directed the Prosecutor to amend the Indictment "*specifying [...] the alleged acts for which the Accused is held individually criminally responsible pursuant to Article 6 (1) of the Statute and the acts allegedly committed by the Accused's subordinates for which he is held individually criminally responsible pursuant to Article 6 (3) of the Statute*".

5.11 Whereas the Trial Chamber consequently holds that the Prosecutor must clearly distinguish between facts as a result of which the Accused incurs criminal responsibility under Article 6 (1) of the Statute from those giving rise to his responsibility under Article 6 (3);

Regarding the alternative nature of the charges of genocide and complicity in genocide :

5.12 Whereas the Trial Chamber notes that in its oral decision of 12 August 1999 granting leave to amend the indictment, it stated :

"that it follows from the Prosecutor's clarification during the hearing of the motion, that count 2 of the amended indictment of genocide and count 3 of the amended indictment of complicity in genocide are meant to be charged alternatively";

5.13 Whereas it is clear that the counts of genocide and complicity in genocide are alternative counts and that in the opinion of the Chamber the Indictment must clearly indicate that the said two counts are charged alternatively;

The paragraphs referred to in the counts which the Defence claims do not concern the Accused

5.14 WHEREAS the Trial Chamber notes that while certain paragraphs in the Indictment do not refer directly to the Accused, they nevertheless make for an understanding of the background to the acts with which the Accused is charged;

5.15 Whereas, the Trial Chamber holds that the Indictment must be read as a whole and that the paragraphs which do not refer specifically to acts with which the Accused is charged must be read in conjunction with those that concern him directly, and that consequently, it is not appropriate to delete them;

5.16 Whereas, in any case, the Trial Chamber reminds the Defence that yes"> the paragraphs which do not directly refer to the Accused are only of general import and, therefore, must not be construed as supporting the counts;

The general introductory formulation of each count:

5.17 WHEREAS, contrary to the Prosecutor's assertion, the Chamber finds that the general introductory formulation to each count, "*By the acts or omissions described in paragraphs 5.1 to 6.65 and more specifically in the paragraphs referred to below*", does not specify nor does it limit the reading of the counts, but rather expands the Indictment without concretely identifying precise allegations against the Accused;

5.18 Therefore, the Trial Chamber holds that the said introductory formulation must be deleted from each count and that each count must consequently only mention the specific paragraphs of the Indictment which directly concern the allegations against the Accused;

The vague and imprecise nature of the counts and the paragraphs to which they refer:

5.19 WHEREAS the Trial Chamber finds that the vague and imprecise nature of the counts, as alleged by the Defence, indeed stems from the lack of specificity of the paragraphs to which the said counts refer;

5.20 Whereas, with respect to the paragraphs which are not specifically referred to in the counts, the Chamber finds that it is not necessary to consider whether they are vague and imprecise, since as a result of the general introductory formulation to each count being deleted, such formulation will no longer be reflected in the charges against the Accused;

5.21 Whereas, therefore, after having carefully reviewed the paragraphs specifically referred to in the Indictment, the Chamber is of the opinion that the following paragraphs of the Indictment must be clarified:

(a) Paragraph 5.8:

The Prosecutor must align the wording of this paragraph of the Indictment with that of paragraphs 7, 13 and 14 of the initial Indictment dated 15 June 1996, which is more precise;

(b) Paragraph 5.12:

The Prosecutor must specify whether the Accused is charged with having committed acts solely in Ngoma *commune* or also in Nyakizu *commune*, as indicated in paragraph 6.31;

(c) Paragraph 6.29:

It is necessary to specify the identity of the subordinates referred to in this paragraph;

(d) Paragraph 6.37:

There appears to be a discrepancy between the English version and the French version with regard to the word "*éventuellement*", which appears in the last sentence of the paragraph. The Prosecutor should therefore harmonize the two versions;

(e) Paragraph 6.63:

The phrase "*During the events referred to in this indictment*" is not sufficiently precise; the Prosecutor must make reference to more specific dates;

(f) Paragraph 6.64:

This paragraph gives no indication as to the period during which the events referred to occurred; the Prosecutor must specify dates, and moreover, identify who the subordinates referred to in the paragraph are.

5.22 WHEREAS the Chamber finds that it is not necessary to respond to the Defence's objections relating to the other paragraphs, either because the paragraphs in the Indictment are sufficiently clear or because the factual precisions sought by the Defence bear on issues to be addressed during the trial on the merits, or also because the requested precisions sought can be inferred from the context of the paragraphs in question, bearing in mind the Chamber's opinion that the Indictment must be read as a whole.

Paragraph 6.66

5.23 WHEREAS, on this point, the Trial Chamber simply notes that said paragraph 6.66 is not referred to in any of the counts and does not rule on this matter.

FOR THE FOREGOING REASONS,

THE TRIBUNAL,

DISMISSES the Defence request to set aside the Indictment;

RULES that the Prosecutor must clearly distinguish the acts for which the Accused incurs criminal responsibility under Article 6 (1) of the Statute from those for which he incurs criminal responsibility under Article 6 (3);

ORDERS that the Indictment must clearly indicate that the counts of genocide and conspiracy to commit genocide be clearly indicated in the Indictment;

RULES that the general introductory formulation to each count, "*By the acts or omissions described in paragraphs 5.1 to 6.65 and more specifically in the paragraphs referred to below*", must be deleted from each count and that each count must consequently only mention the specific paragraphs of the Indictment which directly concern the allegations against the Accused;

DIRECTS the Prosecutor to clarify paragraphs 5.8, 5.12,6.29, 6.37, 6.63 and 6.64 of the Indictment as follows:

Paragraph 5.8:

The Prosecutor must align the wording of this paragraph in the Indictment with that of paragraphs 7, 13 and 14 of the initial Indictment dated 15 June 1996;

Paragraph 5.12:

The Prosecutor must specify whether the Accused is charged with acts committed only in Ngoma *commune* or also in Nyakizu *commune,* as indicated in paragraph 6.31;

Paragraph 6.29:

The Prosecutor must specify the identity of the subordinates referred to;

(g) Paragraph 6.37:

The Prosecutor must harmonize the meaning of the word "*eventuellement*" which appears in the last sentence of the paragraph in the English and French versions of the indictment;

(h) Paragraph 6.63:

The Prosecutor must make reference to more specific dates;

(i) Paragraph 6.64:

The Prosecutor must provide specific dates and identify who the subordinates referred to in this paragraph;

1132

FURTHER DIRECTS the Prosecutor to file with the Registry within 30 days from the date of this Decision, the English and French versions of the Indictment amended pursuant to this Decision.

Done in Arusha on 31 May 2000

Laïty Kama: Presiding
William H. Sekule: Judge
Mehmet Güney: Judge

(Seal of the Tribunal)

1133

ANNEX 2

1134

Original: English

TRIAL CHAMBER II

Before:
Judge Laïty Kama, Presiding
Judge Pavel Dolenc
Judge Mehmet Güney

Registrar: Adama Dieng

Decision of: 25 April 2001

THE PROSECUTOR
v.
ÉDOUARD KAREMERA

Case No. ICTR-98-44-T

Decision on the Defence Motion, pursuant to Rule 72 of Rules of Procedure and Evidence, pertaining to, *inter alia*, lack of jurisdiction and defects in the form of the Indictment

---

The Office of the Prosecutor:
Kenneth C. Fleming

Counsel for the Defence:
Didier Skornicki

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

SITTING as Trial Chamber II ("the Chamber"), composed of Judge Laïty Kama, Presiding, Judge William H. Sekule, and Judge Pavel Dolenc;

BEING SEIZED OF:

A "Requête, Article 72 du Règlement de Procédure et de Preuve", filed by the Defence on 16 January 2001 ;

A "Response of the Prosecutor to the Preliminary Motion filed by the Accused on 16 January 2001", filed on 21 February 2001;

CONSIDERING the Interoffice Memorandum Ref. po-iom/19-3-01/t.c II of 19 March 2001, whereby Judge Navanethem Pillay, President of the Tribunal, assigned Judge Pavel Dolenc to sit in the place of Judge Sekule for the purposes of the instant motion, pursuant to Rules 15(E) and 27(C) of the Rules of Procedure and Evidence of the Tribunal (the "Rules");

CONSIDERING the provisions of the Statute of the Tribunal ("the Statute"), specifically Article 20 of the Statute, and the Rules, in particular Rules 7, 40, 40 *bis,* 47(C), 53 *bis*, 55, 66(A)(i), 72, 73 of the Rules;

HAVING HEARD the Parties on 19 March 2001;

NOW REVIEWS THE MOTION.

SUBMISSIONS OF THE PARTIES:

1. The Defence objects to the lack of jurisdiction of the Tribunal on, *inter alia*, the following grounds:

(a) Illegality of Security Council Resolution 955 of 8 November 1994 ("Security Council Resolution 955"):

(i) Establishment of an international tribunal is not part of the measures the Security Council is entitled to take under Chapter VII of the UN Charter;

(ii) In any event, no "threat to international peace and security", within the meaning of Article 39 of the Charter of the United Nations, existed in Rwanda at the time the Security Council decided, pursuant to the said disposition, to set up the Tribunal. This constitutes an obvious error of judgment (une "erreur manifeste d'appréciation") the Trial Chamber has the authority to raise;

(b) As a consequence of its temporal and personal jurisdiction, as defined in the Statute, the Tribunal is not an independent body, in contradiction with Article 14(1) of the Covenant on civil and Political Rights, in so far as the Tribunal has no jurisdiction over members of the current Rwandan Government and all other persons having committed crimes envisioned in the Statute against members of the Hutu community;

(c) The Judges of the Tribunal, and, in particular, those of the present Trial Chamber, should be disqualified as they sit in cases pertaining to identical facts;

(d) The Tribunal has lost personal jurisdiction over the Accused on the following grounds:

(i) Illegal detention since 31 August 1998, as notification of the Decision confirming the Accused's Indictment took place with delay;

(ii) Violation of the Accused's right to a Counsel of his choice;

(iii) Lack of legal representation at the Accused's Initial Appearance of 7 and 8 April 1999.

2. The Defence further objects to defects in the form of several paragraphs of the Accused's Indictment on the grounds of, *inter alia*, error of fact, lack of objectivity, lack of precision and clarity and lack of evidence.

3. The Prosecutor replies that the Motion should be dismissed on, *inter alia*, the following grounds:

(a) Non-admissibility: The Motion is a repeat of the Motion filed in November 1999. The latter Motion was time-barred under Rule 72(A) as in force at the time, the Accused having had a period of 60 days from the date of disclosure of the materials envisaged under Rule 66(A)(i) to file any preliminary motions, whereas the Prosecutor had disclosed the said materials on 5 May 1999. No good cause was shown warranting the waiver of the debarment of the instant motion, which is an abuse of process;

(b) On the merits:

(i) The objection based on lack of jurisdiction does not fall under Rule 72(B) as currently in force and, in any case, is defeated by the "Decision on Defence Motion on jurisdiction" of 10 August 1995 rendered in the Case *Prosecutor v. Tadic* by the International Criminal Tribunal for the former Yugoslavia (the "ICTY") (the "Tadic Decision on Jurisdiction");

(ii) Preliminary motions cannot challenge alleged errors of fact in an indictment;

(iii) The sufficiency of *prima facie* evidence supporting the Accused's Indictment was decided upon confirmation of the Indictment, by the confirming Judge. This Decision is not subject to review.

HAVING DELIBERATED,

1. Whether the Motion is time-barred in globo

4. The Defence Motion is brought, as a preliminary motion, under Rule 72 of the Rules. The Defence does not contest that, as submitted by the Prosecutor, the materials envisaged under Rule 66(A)(i) of the Rules were disclosed more than a year ago, in May 1999, and that the Motion is time-barred pursuant to Rule 72(A) of the Rules.

5. The Defence however moved, during the hearing of 19 March 2001, for a waiver of this deadline, pursuant to Rule 72(F), in the light of, essentially, the following factors:

(i) No Counsel was effectively assisting the Accused during most of the period of time when the preliminary motion was to be filed pursuant to Rule 72(A), that is, from 5 May 1999 to 5 July 1999;

(ii) Once Mr Skornicki was assigned, in February 2000, the Chamber authorized him to review the contents of the original Motion as drafted by the Accused himself and as initially filed by the latter on 16 November 1999;

(iii) From the date of his assignment until several months afterwards, the Counsel and the Accused have had to focus all their efforts on opposing the Prosecutor's Request for joinder, which accounts for the delay in filing the instant Motion.

6. The Chamber considers that the reasons above do account for the delay in the filing of these Preliminary objections, albeit only until the 28 June 2000, when the Defence was heard by this Chamber on their opposition to the joinder in the present case. Indeed, the Motion was sent to the Tribunal, via *facsimile*, on 12 January 2001 only, and officially filed by Court Management Section on 16 January 2001, that is, five months and a half after the said hearing. The Chamber accordingly notes that the Defence could have proved more diligent in filing their Motion sooner. This is especially true in regard to a *facsimile* transmission of 25 April 2000 from Mr Mindua, on behalf of the Court Management Section of the Tribunal ("CMS") to Counsel for the Accused, ref: ICTR/JUD-11-6-382. This document indicates that, in a previous letter to CMS, the Defence mentioned having taken good note of a deadline, set by the Chamber on 30 April 2000, to file their Motion. The Defence has thus failed to justify, to the above extent, their delay in filing the instant Motion.

7. At this point, the Chamber would like to note a variation between Rule 72(F) of the Rules in its French and English versions. Rule 72(F) of the Rules indeed reads thus, in the English version, "[t]he Trial Chamber may, however, grant relief from the waiver upon showing good cause", and in the French version, "[l]a Chambre de première instance peut néanmoins déroger à ces délais pour des raisons jugées valables". One may derive from the English version of the said Rule that the Defence must show good cause for the waiver to be granted, whereas the French version may be construed as, *either* giving such an opportunity to the Defense, *or* giving the Chamber authority to grant waiver *proprio motu*, should it find, good cause not referred to by the Party.

8. The Chamber recalls in this regard that, pursuant to Rule 7 of the Rules, "The English and French texts of the Rules shall be equally authentic". Pursuant to the same provision however, "[i]n case of discrepancy, the version which is more consonant with the spirit of the Statute and the Rules shall prevail. The Chamber recalls in this respect the Akayesu Judgement, where former Trial Chamber I stated twice that, in case of discrepancy between the French and English versions of a text, with regard, either to a disposition of the Statute, or to specific paragraphs of the Accused's Indictment, the version most favorable to the Accused should be upheld, in accordance with a cardinal principle of criminal law. (*See*, The Prosecutor v. Jean-Paul Akayesu, case No. ICTR-96-4-T, "Judgement", 2 September 1998, at para. 319 and 501). This Trial Chamber concurs with the above reasoning and decides to apply Rule 72(F) of the Rules in its French version, as it appears more favorable to the Accused and, therefore, more consonant with the spirit of the Statute and the Rules.

9. While taking partly into account the above reasons submitted by the Defence for filing their Motion with delay, the Chamber therefore *proprio motu* considers that, in the instant case, the seriousness of the Defence's allegations, in so far as they relate to fundamental defects in the form of the Indictment which might affect the trial proceedings, violation of the Accused's individual rights and the establishment of this Tribunal, its jurisdiction and its independence, commend, in the interests of justice, that the Motion, although time-barred, be reviewed pursuant to Rule 72(F) of the Rules.

2. The Defence Objections

10. Having decided on the admissibility as a whole of the Defence Motion with respect to the timeframes under Rule 72(A) and 72(F) of the Rules, the Chamber will now review each of the Defence objections in turn.

2.1. Objection based on defects in the form of the Indictment

11. The Defence raises an objection to defects in the form of the Indictment, within the meaning of Rule 72(B)(ii) of the Rules, on, essentially, the following grounds, which the Chamber classifies below, for purposes of clarity and exhaustiveness:

(i) Errors of fact (notably, at para. 1.6, 1.8, 1.12, 1.16, 1.18, 1.20, 1.24-1.25, 1.27, 3.11, 4.8, 4.10, 6.11, 6.34 to 6.38, 6.40 and 6.41);

(ii) Controversial nature of allegations set out in the Indictment (notably, at para. 1.13 and 6.1 to 6.104);

(iii) Lack of objectivity of allegations set out in the Indictment (notably, at para. 1.13, 1.18, 1.20, 1.21, 1.24 to 1.25, 2.4, 4.8, 6.1 to 6.104, 6.42, 6.44, 6.46 and 6.47);

(iv) Lack of *prima facie* evidence or lack of evidence in general (notably, at para. 1.20, 1.21, 2.4, 5.1, 6.17, 6.22, 6.23, 6.26 to 6.32, 6.33, 6.40, 6.50, 6.51, 6.53, 6.54, 6.59, 6.61 to 6.63, 6.67, 6.68, 6.69, 6.72, 6.76 to 6.81, 6.84 to 6.86, 6.88, 6.89, 6.91, 6.94, 6.95, 6.96, 6.97);

(v) Contradiction between allegations (at para. 5.2);

(vi) Omissions of facts in general (notably, at para. 2.4, 4.7, 6.11 and 6.34 to 6.38);

(vii) Absence of mention of Karemera's name (notably, at para. 6.5, as referred to under each Count the Accused is charged with respect to Article 6(3) of the Statute, 6.23, 6.26 to 6.32);

(viii) Lack of precision or clarity amounting to excessive globalization, as to the circumstances of the acts alluded to, or as to the alleged involvement of the Accused (notably, at para. 1.28, 5.1, 6.5, 6.12, 6.23, 6.26 to 6.32, 6.42, 6.44, 6.46 and 6.47, 6.58, 6.59, 6.61 to 6.63);

The Chamber thus attempted to be as exhaustive as possible. The Defence however made further reference to several paragraphs, about which general comments were made, that the Chamber could not ascribe to any category of defects in the form of the Indictment (notably, at para. 1.22, 3.9, 4.9, 6.4 to 6.10). Besides, the Defence did not clearly specify, with respect to several paragraphs referred to in their motion, whether they contested their formulation on the basis of their lack of specificity, or on other grounds.

12. As a preliminary matter, the Chamber notes that the categories of alleged defects No. (i) to (iii) above, as well as that of lack of evidence in general to support allegations set out in the Indictment at No. (iv), pertain to the substance of the Indictment, rather than to its form. Such objections cannot be entertained under Rule 72(B)(ii) of the Rules, and can only be raised at trial. These objections are accordingly dismissed.

13. As a further preliminary matter, by contesting the lack of *prima facie* evidence supporting numerous allegations in the Accused's Indictment (para. 10(iv) above), the Chamber notes that the Defence is in fact appealing, before this Trial Chamber, against the Confirmation of the Indictment, a Decision rendered by Judge Navanethem Pillay on 29 August 1998, whereby the Tribunal found that "(...) a *prima facie* case has been established with respect to each and every count in the indictment (...)". Besides, the Defence specifically advocated it during the hearing (*See*, French Transcripts of 19

March 2001, at page 30: "*Et à ce point de vue, vous êtes votre propre Tribunal (...), la juridiction du recours*"). The Chamber reminds the Defence that it has no such authority, under the Statute and the Rules, to act as an appellate jurisdiction with respect to Decisions of the Tribunal and, accordingly, dismisses the Defence objection.

14. The Chamber notes that contradictions between allegations set out in an indictment constitute defects in the form of an indictment, if the Trial Chamber finds, without dwelling into their substance, that these allegations are mutually exclusive in view of the way they are spelt out and with respect to their factual and legal constituent elements.

15. The Defence specifically submits that para. 5.1 and 5.2 are contradictory. The Chamber notes that para. 5.1 relates to the alleged inception and execution, by the Accused and others, including his co-Accused, Ministers of the Interim Government or prominent Rwandan political figures, of a plan to massacre the Tutsi population and moderate Hutu, while para. 5.2 relates to such a plan conceived by members of the Military. The Chamber does not consider that these allegations exclude each other in the way they are spelt out. Indeed, as the Defence rightly notes, the existence of the former plan, if proved at trial, does not exclude the existence of another plan, while the relation between these two plans will have to be determined, if any, at trial.

16. The Chamber notes that allegations within an indictment are defective in their form if they are not sufficiently clear and precise, in the way they are spelt out and with respect to their factual and legal constituent elements, so as to enable the Accused to fully understand the nature and the cause of the charges brought against him. (*See notably*, on this issue, *Prosecutor v. Anatole Nsengiyumva*, ICTR-96-12-I, "Decision on the Defense Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment", 12 May 2000, para. 1: "for an indictment to be sustainable, facts alleging an offence must demonstrate the specific conduct of the accused constituting the offence"; and Prosecutor v. Kanyabashi, ICTR-96-15-I, "Decision on Defence Preliminary Motion for Defects in the Form of the Indictment", 31 May 2000, para. 5.1: "an Indictment must be sufficiently clear to enable the Accused to fully understand the nature and cause of the charges brought against him").

17. The Chamber further bears in mind that, pursuant to Rule 47(C) of the Rules, beside "the name and particulars of the suspect", "[t]he indictment shall set forth (...) a concise statement of the facts of the case and of the crime with which the suspect is charged". When assessing the specificity of allegations set out in an indictment, the Chamber must therefore strike a balance between the right of the Accused to fully understand the nature and the cause of the charges brought against him, and the necessary conciseness of the indictment.

18. As regards the omission of specific facts in the Indictment (para. 10(vi) above), the Trial Chamber similarly notes that this objection pertains to the substance of the Indictment rather than to its form. It may however constitute a defect in the form of an indictment if the Trial Chamber is satisfied that the omission does not enable the Accused to fully understand the nature and the cause of the charges brought against him. In this

case, the objection is to be reviewed with allegations pertaining to the lack of precision or clarity of the indictment (*See*, in the present case, para. 19, below).

19. As regards, more specifically, the absence of mention of Karemera's name in several paragraphs of the Indictment, The Chamber refers to the "Decision on the Defense Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment" rendered on 12 May 2000 in the Case Prosecutor v. Anatole Nsengiyumva, No. ICTR-96-12-I, where Trial Chamber III of the Tribunal held, at para. 2, that: "(...) it is not reasonable to expect the Prosecutor to mention the Accused in every paragraph of the amended indictment. Nor is it proper to consider the amended indictment in such a way as to disregard those paragraphs where not only is the Accused mentioned, but where acts and omissions for which the Prosecutor finds him individually responsible under the Statute of the Tribunal are described". Further, the same Trial Chamber stated, at para 3, that: "[t]he amended indictment must be considered in its totality and it would be incorrect to make a conclusion as to any defect in it upon a selective reading of only certain of its paragraphs" (*See also*, on this issue, the "Decision on Defence motion on Matters arising from Trial Chamber Decisions and Preliminary Motion based on Defects in the Form of the Indictment and Lack of Jurisdiction", rendered on 20 November 2000 in the Case Prosecutor v. Eliézer Niyitegeka, No. ICTR-96-14-T, at para. 34). In the view of the Chamber indeed, the absence of mention of an accused's name in specific paragraphs of his indictment does not constitute, *per se*, a defect in the form of the indictment. In any case, this issue pertains to the lack of precision or clarity of the indictment, and is to be assessed at this stage.

20. The Chamber now turns to each of the paragraphs specifically mentioned by the Defence as lacking precision and/or clarity and notes that:

> (i) Para. 1.28, which relates, *inter alia*, the espousal, by the Interim Government, of the plan of extermination of the Tutsi population and of Hutu political opponents, is not specific with respect to the plan as such as well as to the Accused and his alleged participation in the said plan. However, this paragraph does not lack specificity in that its purpose is mainly to describe the overall historical context surrounding the events alleged in the Indictment, rather than the individual criminal responsibility of the Accused. Further, this paragraph is to be read in conjunction with para. 5.1 *et seq.*, which address the existence and carrying out of the said plan with respect to the Accused's individual involvement;
>
> (ii) Para. 5.1, as mentioned above, refers to the devising and execution of a plan to exterminate the Tutsi population and Hutu political opponents. At this stage of the proceedings, the Chamber is of the view that this paragraph, which does mention the Accused's individual involvement in the said plan, is sufficiently specific for the Accused to understand the nature and the extent of the charges encompassed, since it is to be read in conjunction with the following paragraphs of the Indictment, which refer

to specific crimes alleged that may have taken place within the framework of this plan.

(iii) Para. 6.5, which relates to the assassinations, by Rwandan Army personnel, of Prime Minister Agathe Uwilingiyimana, of prominent political opponents and of ten Belgian para-commandos, all of which took place within the first hours of President Habyarimana's death, does not mention the Accused. This paragraph is however part of those specifically supporting all Counts pertaining to the Accused brought under Article 6(3) of the Statute. Para. 4.10 of the Indictment, on the other hand, pertains to the authority the Accused had over different civil servants, *préfets*, *bourgmestres*, and the *Interahamwe*, as Minister of the Interior or as Vice-President of the *MRND*. The Chamber notes that this paragraph does not mention that the Accused had any authority over Rwandan Army personnel. In light of these factors, the Chamber notes that para. 6.5 as it currently reads is not specific enough for the Accused to understand the nature and the extent of the charges encompassed. The Chamber therefore directs the Prosecutor to specify, at para. 4.10, the nature and extent of the Accused's command responsibility, if any, over members of the Rwandan Army personnel in general, and in what position the Accused had such authority, and, at para. 6.5 specifically, to specify, to the extent possible, the Accused's alleged involvement in the above crimes;

(iv) The Defence, however, cannot entertain a similar objection with respect to para. 6.58 *et seq.* wherein reference is made to crimes committed by members of the Military under the command of the Accused. Indeed, para. 6.58 clearly specifies that Tharcisse Renzaho, a Lt. Colonel of the Rwandan Army, whose direct responsibility is referred to with respect to crimes committed in Kigali, acted in his position of *préfet*, and was, therefore, under the alleged authority of the Accused, as clearly mentioned at para. 4.10 of the Indictment;

(v) Para. 6.12, which refers to several members of the Interim Government's adhesion to the above referred-to plan to exterminate the Tutsi population and moderate Hutus, does not lack specificity. Indeed, this paragraph is to be read in conjunction with paragraph 6.11, as well as with para. 5.1 *et seq.*, which address the existence, the adhesion to, and the carrying out of the said plan, or the Accused's involvement in specific crimes that may have taken place within the framework of such a pre-conceived plan;

(vi) Para. 6.22, 6.23 and 6.26 to 6.32, which refer to a wide range of crimes committed by, or with the complicity of, elements of the *FAR*, members of the *Interahamwe-MRND*, Félicien Kabuga, Colonel Théoneste Bagosora and Joseph Nzirorera, entail the alleged criminal responsibility of the Accused under Article 6(3) of the Statute, with

respect to all the Counts he is charged with. Considering that none of these paragraphs mention the Accused, and that, further, no clear indication is to be found of which specific crimes, among all those mentioned, the Accused is alleged to be responsible for under Article 6(3) of the Statute and in what capacity, the Chamber orders the Prosecutor to specify these allegations with respect to the Accused and the specific crimes, among all these, he is alleged to have committed, and to the extent indicated at para. 20(iii) above;

(vii) Para. 6.42 refers to the Accused's, and several of his co-Accused's, alleged acts of incitement to commit genocide during visits in several prefectures, while para. 6.44 refers to the Accused's act of incitement to commit genocide, during a meeting held in Gitarama. The Chamber considers that the latter paragraph should mention the date of the said meeting, and accordingly orders the Prosecutor to add this precision and, to the extent possible, any further information, in this respect, that the Prosecutor may be in a position to disclose at this stage of the proceedings;

(viii) Para. 6.46 refers to the Accused's responsibility under Article 6(3) of the Statute, and that of other co-Accused, with respect to crimes committed by certain categories of subordinates in several prefectures of Rwanda. The Trial Chamber orders the Prosecutor to specify, to the extent possible, these allegations against the Accused, notably with regard to the actual crimes allegedly committed that entail his command responsibility, in which capacity, and with regard to which of the Accused's subordinates are concerned.

(ix) The Defence further refers to several omissions of fact:

(a) Omission at para. 2.4, of crimes committed by RPF infiltrators in Kigali prior to, and during, 1994. The Chamber notes that the paragraph, being of a contextual nature, is sufficiently clear and specific, and that it is all the more so since it does not distinguish between crimes committed by one party, or the other. The Chamber therefore finds that this paragraph does not exclude the Defence's allegation, which, in any case, pertains to the merits of the present case. This objection is accordingly dismissed;

(b) Omission, at para. 4.7, 6.12 and 6.34 to 6.38, of the date of assignment of the Accused within the Interim Government. Although the said date is not specified in these paragraphs as well as in the Indictment in general, the Chamber notes that this omission does not impede the

Accused's proper understanding of the nature of the charges brought against him and, in any event, relates to the merits of the case. This objection is accordingly dismissed.

2.2. Objection based on denial of request for assignment of Counsel

21. The Defence raises an objection to Denial of Request for Assignment of Counsel under Rule 72(B)(iv) of the Rules.

22. A review of this particular submission indicates that the Defence in fact contends that a Counsel of his choice did not assist the Accused over an extended period of time, an objection which is not encompassed by Rule 72(B)(iv) of the Rules. The Chamber will therefore address it with respect to the Defence's general allegation of the violation of the Accused's individual rights resulting in the loss of personal jurisdiction of the Tribunal over the Accused.

2.3. Objection Based on Structural Lack of Jurisdiction:

23. The Defence objects to the structural lack of jurisdiction of the Tribunal over any accused, by way of (1) the illegality of Security Council Resolution 955, and (2) the lack of independence of the Tribunal.

24. The Chamber notes that objections to the structural lack of jurisdiction of the Tribunal cannot be entertained under Rule 72 of the Rules as amended on 21 February 2000, as they do not relate to the Accused's Indictment. The Chamber accordingly considers these objections inadmissible.

25. The Trial Chamber recalls in this regard that the Court of International Justice dismissed an objection raised by the United States against the Application made by the State of Nicaragua in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua, to the effect that the said Application was "in effect an appeal to the Court from an adverse decision of the Security Council", holding in this regard "[t]hat the Court is not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which the members of the Council employed their right to vote" (Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v. United States of America, Judgment, Jurisdiction of the Court and Admissibility of the Application, 26 November 1984, at para. 98, General List No. 70, ICJ Reports 1984, p. 392). In any event, the Chamber considers that it does not have the authority to review or assess the legality of Security Council decisions and, in particular, that of Security Council Resolution 955. The Chamber further emphasises in this regard that Article 39 of the Charter of the United Nations gives a discretionary power to the Security Council in assessing the existence of a threat to the peace (*See*, The Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, "Decision on the Defence Motion on Jurisdiction", 18 June 1997, at para. 20), and in taking the measures it deems appropriate to maintain or restore international peace and security.

1145

26. As to the Defence's contention that, by virtue of the statutory definition of its competence, the Tribunal has no jurisdiction over members of the current Rwandan Government and all other persons having committed crimes envisioned in the Statute against members of the Hutu community, the Chamber, as did the former Trial Chamber II in the above-mentioned Kanyabashi Decision, "simply reiterates that, pursuant to Article 1 of the Statue, all persons who are suspected of having committed crimes falling within the jurisdiction of the Tribunal are liable to prosecution" (The Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, "Decision on the Defence Motion on Jurisdiction", 18 June 1997, at para. 49).

27. The Chamber incidentally notes that, during the hearing of 19 March 2001, the Defence further made reference to the supposed lack of functional impartiality, a concept which stems from the case law of the European Court of Human Rights, of all the Judges of the Tribunal over the accused in general. The Defence indeed submits that the Judges sit in trials and render Judgments on facts that are similar, if not identical, for all the accused, as a result of the restricted temporal, material and personal competence of the Tribunal, as defined in the Statute. The Chamber does not consider that such a fact would warrant disqualification of any Judge of the Tribunal. Indeed, the Chamber emphasises that the Judges of the Tribunal are jurists and, as such, able to distinguish between the points of law and of fact that are specific to individual cases and mindful of the fundamental requirement to judge each case on its own merits in order to assess the guilt or innocence of each individual Accused. The Chamber further notes that, in any event, it is the responsibility of the Prosecutor to prove the guilt of each individual accused beyond reasonable doubt. By the same token therefore, in the present case, Judges of this Trial Chamber may not be perceived as lacking functional impartiality by virtue of their sole participation to such cases as The Prosecutor v. Akayesu and The Prosecutor v. Kayishema & Ruzindana.

28. The Chamber accordingly dismisses the Defence objection to the structural lack of jurisdiction of the Tribunal.

2.4. Objection based on lack of Personal Jurisdiction:

29. The Defence further contends that, as a result of the denial of the Accused's individual rights, the Tribunal has lost personal jurisdiction over him.

Subject matter of the Objection with respect to Rule 72 as Amended on 21 February 2000

30. As a preliminary matter, the Chamber notes that this objection, as well as that pertaining to the structural lack of jurisdiction of the Tribunal, is excluded by Rule 72(H) of the Rules, added on 21 February 2000, from the subject-matter of preliminary objections based on lack of jurisdiction under Rule 72(B)(i) of the Rules, as it does not relate to the Accused's Indictment.

31. The Chamber however recalls its holding in the "Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused" of 12 December 2000

(*See*, The Prosecutor v. Rwamakuba, Case No. ICTR-98-44-T), wherein the Defence of Accused Rwamakuba similarly contended that the Accused's individual rights had been violated, in a Motion filed pursuant to Rule 72(B)(i) of the Rules. The Chamber therein noted that the Motion did not fall within the scope of Rule 72 of the Rules, as amended on 21 February 2000. It however accepted to review the Motion, as alternately submitted by the Defence, under Rule 73 of the Rules, after emphasising that "the Defence Motion raise[d] serious allegations pertaining to the fundamental rights of individuals before the Tribunal as well as to the obligations of the different organs of the Tribunal in this respect". The Chamber concurs with the above and decides to review the Defence objection pertaining to the loss of personal jurisdiction over the Accused under Rule 73 of the Rules.

32. Turning to the merits of this particular submission, the Defence objects to the lack of personal jurisdiction of the Tribunal over the Accused on three grounds, which the Chamber will review in turn.

Arbitrary Detention

33. The Defence first contends that the Accused was arbitrarily detained from 31 August 1998 onwards, as the Decision confirming his Indictment was served upon him on 1 September 1998 only, more than 20 days after the second Order for remand in detention dated 10 August 1998, contrary to Rules 40 and 40 bis of the Rules.

34. The Chamber notes that the overall legality, under the Statute and the Rules, of the Accused's detention is not in question. The Chamber indeed recalls that the Order for Remand in detention of 10 August 1998 extended the Accused's detention for a period of 20 days. Subsequently, the Accused's Indictment, dated 22 August 1998, was confirmed in due time by Judge Navanethem Pillay on 29 August 1998, whereupon she issued a Warrant of Arrest and Order for Continued Detention of the Accused on the same date. As to the specific submission of the Defence, the Chamber notes that no disposition in the Statute or the Rules of the Tribunal, and specifically in Rules 40 and 40 *bis*, 47, 53 *bis* and 55 of the Rules in force at the time, suggests that the legality of one's detention depends on personal service to the Accused of a Decision confirming the Indictment 20 days, at the latest, after an Order for detention is issued. The Defence objection is therefore dismissed.

Right to Choose Counsel

35. Secondly, the Defence contends that the Accused's right to choose Counsel pursuant to Article 20(4)(d) was violated by the assignment by the Registry of Counsel Legros (Assigned 24 February 1999), Leclercq (Assigned 3 March 1999) and Mongo (Assigned 8 July 1999).

36. The Chamber agrees with the Prosecutor that the Accused seems to entertain a wrong interpretation of the dispositions, in the Statute and the Rules, pertaining to one's right to choose Counsel. The Trial Chamber recalls that Article 20(4)(d) of the Statute, notably,

states that, although accused persons have a right to "legal assistance of [their] own choosing", indigent accused who can not afford to bear the cost of their own legal assistance have a right "to have legal assistance assigned (...), in any case where the interest of justice so require, and without payment (...)".

37. The Chamber moreover recalls that this issue was decided upon in the "Decision on the Motions of the Accused for Replacement of Assigned Counsel" rendered on 11 June 1997 in the Case The Prosecutor v. Gérard Ntakirutimana (Case No. ICTR-96-10-T and ICTR-96-17-T, at p. 2 *et seq.*), and was further settled in the Kambanda Judgement of 19 October 2000 wherein the Appeals Chamber, making reference to the said Ntakirutimana Decision, concluded that, "in the light of a textual and systematic interpretation of the provisions of the Statute and the Rules, read in conjunction with relevant decisions from the Human Rights Committee and the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (...) the right to free legal assistance by counsel does not confer the right to choose one's counsel" (Jean Kambanda v. The Prosecutor, Case No. ICTR 97-23-A, Judgement, 19 October 2000, at para. 33 *in fine*).

Absence of Counsel during the Initial Appearance

38. Thirdly, the Defence submits that the Accused was not assisted by a Counsel at his Initial appearance. The Chamber notes that, according to the transcripts of the said Initial Appearance, the Accused reserved his plea several times on the ground, *inter alia*, of absence of his Counsel, the latter having further previously notified the Tribunal of his withdrawal (*See*, English Transcripts of 7 April 1999 and 8 April 1999). The former Trial Chamber II, considering the above circumstances in the overall context of the case, eventually took the decision to proceed with the Accused's Initial appearance on 8 April 1999 (*See*, English Transcripts, 8 April 1999, pages 104 to 107). The Chamber notes that, by raising such an objection, and asking relief for the Accused in this respect, the Defence is appealing against a Trial Chamber Decision. The Chamber reminds the Defence that it has no such authority, under the Statute and the Rules, to act as an appellate jurisdiction with respect to decisions taken by Trial Chambers of this Tribunal and, accordingly, dismisses the Defence objection.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER,

I. PARTIALLY GRANTS the Defence Objection relating to defects in the form of the Accused's Indictment;

II. ACCORDINGLY ORDERS that the Indictment be amended in respect of the Accused, in that the Prosecutor shall:

(A) Clarify, at para. 4.10, whether the Accused had any authority, in what capacity and to what extent, over members of the Military in general;

(B) Specify to the extent possible, at para. 6.5, the Accused's alleged involvement, and in what capacity, in the crimes referred to within the said paragraph;

(C) Specify to the extent possible, at para. 6.22, 6.23 and 6.26 to 6.32, the extent of the Accused's alleged involvement under Article 6(3) of the Statute, in what capacity, over which subordinates and with respect to which specific crimes, among all those mentioned;

(D) Specify to the extent possible, at para. 6.44, the date of the meeting held in Gitarama, and add any further information that may be disclosed in this regard, at this stage of the proceedings;

(E) Specify to the extent possible, at para. 6.46, the allegations against the Accused, notably with regard to the crimes that allegedly entail his command responsibility, in what capacity, and with regard to which of his subordinates.

III. DISMISSES the Defence Motion in all other respects.

Arusha, 25 April 2001

Laïty Kama	Pavel Dolenc	Mehmet Güney
Presiding Judge	Judge	Judge

(Seal of the Tribunal)