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**TRIAL CHAMBER II**

**Before Judges:** **Joseph Asoka Nihal de Silva, Presiding**
**Taghrid Hikmet**
**Seon Ki Park**

ICTR-00-56-T
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**The Prosecutor**

**Vs**

**Augustin Ndindiliyimana**
**Augustin Bizimungu**
**Francois Xavier Nzuwonemeye**
**Innocent Sagahutu**

# NZUWONEMEYE DEFENCE MOTION ON DEFECTS IN THE FORM OF THE INDICTMENT IN LIGHT OF THE CHAMBER'S DECISIONS IN RESPECT TO THE DEFENCE 98BIS MOTIONS AND PURSUANT TO RULE 72(F)

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**NZUWONEMEYE DEFENCE MOTION ON DEFECTS IN THE FORM OF THE INDICTMENT, IN LIGHT OF THE CHAMBER'S DECISIONS IN RESPECT TO THE DEFENCE 98BIS MOTIONS, AND PURSUANT TO RULE 72 (F)**

## I. Introduction

1. Throughout the proceedings against the Accused, the Defence has consistently objected to the defects in pleading in the indictment.[1]

2. "Whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence." Krupeskic (AC), 23 October 2001, para. 88.

3. The Defence submits that these defects, in respect to both the forms of participation alleged, and to the substantive charges alleged, render it impossible for the Accused to prepare his defence.

4. For example, in its Urgent Motion to Exclude Parts of AOG's Testimony, 21 February 2006, the Defence objected that joint criminal enterprise was not pleaded in the indictment, and therefore could not be used in this case against the Accused. In its Decision, the Trial Chamber specifically reserved its decision on this objection. It stated:

   > ". . . the Chamber sees no need, at this stage of the proceedings, to determine the question whether joint criminal enterprise has been adequately pleaded in the Indictment." (Decision, 30 March 2006, para. 27).

   The Chamber, however, did not indicate at which stage of the proceedings it would rule on the absence of the pleading of joint criminal enterprise.

5. The Defence must know all the allegations retained against the Accused, in order to present a defence. Hence, in the exercise of due diligence, we are again asking this Chamber for a ruling on the deferred objection.

6. The Defence notes, further, that the defects in pleading raised in our 98bis motions were never addressed by the Chamber. In fact, the Chamber stated:

   > "The Chamber will also not consider whether the Defence has had sufficient notice of charges to sustain a conviction, or whether there

[1] See footnote 5, and Procedural History section, III.

> are other legal defects in the Indictment which could lead to acquittal. [footnote omitted] The examination of whether there was clear and consistent notice adequate to cure any such defect is not appropriate at this stage of the proceedings, nor is the Chamber legally authorized by Rule 98bis to consider these matters. [footnote 13, Semanza 98bis Decision, 27 September 2001, para. 18, Corrigendum]. Decision, 20 March 2007, para. 8; also in Corrigendum, 18 June 2007, para. 8

7. The Defence respectfully submits that the reliance on the Trial Chamber decision in Semanza as legal precedent is misleading. It is true that the Semanza Trial Chamber decision, in paragraph18, states that defects in the indictment cannot be raised in 98bis motions.[2]

8. However, the Ntagerura Appeals Judgment, affirming the Trial Chamber's Judgment in that case, holds that the issue of defects in the indictment in respect to an Accused's right to a fair trial is a post-trial issue. Ntagerura Appeal Judgment, 7 July 2006. In Ntagerura, the Trial Chamber re-considered some of the findings it had made in certain pre-trial decisions on the forms of the indictments, and the Prosecution appealed this as error. The Appeals Chamber rejected the Prosecution argument, holding that it was not an error for the Trial Chamber to reconsider its pre-trial decisions relating to the specificity of the Indictments at the judgment stage of the proceedings; but, it was error not to interrupt deliberations and re-open the hearings once the case was closed, to give the Prosecution an opportunity to be heard (para. 55, Appeals Judgment).

9. In Ntagerura, consideration of defects in the form of the indictment were not circumscribed by the time limits in Rule 72, and the Appeals Chamber upheld the consideration of defects even at the judgment phase of the proceedings.
   Thus, in the case at bar, consideration of defects in the indictment, at the current stage of the Accused's proceedings, is supported by appellate jurisprudence.

10. Lastly, the Trial Chamber denied the Defence 98bis motions in their entirety, thus having consequences in terms of all of the counts where the Accused is named:

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[2] Semanza 98bis Decision, para 18. Notwithstanding the clear language of Rule 98*bis*, the Defence raised a number of issues that fall outside its scope. Firstly, pleas for quashing the indictment cannot be raised under Rule 98*bis*. Whatever defects the Defence perceived in the form of the indictment, such as its claim that the charges in the indictment are vague or in contradiction to the indictment and the supporting materials, were to be raised under Rule 72 within the time limits prescribed therein. It is wholly unacceptable to raise such matters half-way through the trial. In fact, this and similar issues have been raised in this case in previous pre-trial motions.

counts 1,4, 6, 7, 8.[3]
For each count, the Trial Chamber held that the Prosecution had adduced sufficient evidence for a prima facie showing.

11. The Trial Chamber, in its Decision on Defence Request for Certification to Appeal the Chamber's Decision Pursuant to Rule 98bis, 24 April 2007, clearly stated that the amended indictment, without any changes, still stands as the instrument against which we must defend.

    The Chamber stated:

    "the Chamber is not convinced that the first criterion under Rule 73(B) is met. *The consequence of that Decision is simply to require the Accused to answer the case he was confronted with from the start of his trial.* That in itself does not affect the fair or expeditious conduct of the proceedings. . ." Decision, para. 8 [italics added]

12. Thus, the defects in the form of pleading in the indictment still remain, rendering it defective. Generally, they include the absence of any pleading of the legal requirements of joint criminal enterprise and the failure of the Prosecution's Pre-Trial Brief to provide notice of same; the failure to differentiate between allegations in support of 6(1) and 6(3); vagueness and lack of specificity of the substantive counts, and failure to allege material elements of each crime.

13. As a result of the Tribunal's rejection of the Defence 98bis motions, meticulous scrutiny of the indictment, as it now stands, leads to the conclusion that the Accused must defend against a defective indictment. This is a legal and factual impossibility.

14. The Defence, therefore, has the obligation, under the Article 20 rights of the Accused, to raise this issue yet again now, as the first co-defendant's case has started. The impossibility of defending against a defective indictment is clearly an issue which affects whether or not there is a fair trial.

15. For this reason, the Defence requests that the Trial Chamber consider the arguments in this motion, and grant the requested remedy of acquittal for all counts.

## II. Legal Grounds for Motion

[3]In the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98bis, the Accused is named in paras. 16 - 18 referring to the conspiracy count; paras. 29, 35, 36, 38, referring to murder as crime against humanity and events at CHK, killings of Agathe and UNAMIR under count 4; paras. 48, 50 referring to rape allegations at CHK, count 6, and para. 59, referring to count 8.

**A. Defects in the form of the indictment violate the Accused's right to fair trial.**

16. An Accused's right to a fair trial and to the presumption of innocence are principles embodied in Article 20, ICTR Statute, as well as in international instruments including, among others, the Universal Declaration of Human Rights (Article 11), the International Covenant on Civil and Political Rights (Article 14), the African Charter on Human and Peoples' Rights (Article 7), the European Convention on Human Rights (Articles 6 and 7), and the Rome Statute of the International Criminal Court (Articles 66 and 67)

17. Under Article 20(4)(a), ICTR Statute, an Accused is entitled, "to be informed promptly and in detail. . .of the charge against him or her." The Statute categorizes this right as one of the "minimum guarantees" under the Rights of the Accused.

18. "The basic rule embodied in Articles 18(4) and 17(4) of the ICTY and ICTR Statutes, respectively, and Rule 47( C), is that the indictment must contain a concise statement of the facts and the crime or crimes with which the accused is charged [citations omitted]. The indictment must be 'sufficiently clear to enable the accused to understand the nature and cause of the charges against him' (see, Prosecutor v. Kanyabashi, Decision on the Preliminary Motion for Defects in the Form of the Indictment, May 31, 2000, para. 5.1). In other words, the accused is entitled to particulars 'necessary in order for the accused to prepare his defence and to avoid prejudicial surprise' (see, Prosecutor v. Delalic, Decision on the Accused Mucic's Motion for Particulars, June 26, 1996, para. 9)." Archbold, Chapter 6, Section III, p.119 (2003 Edition).

19. If an indictment fails to provide an accused with a specific statement of the facts and the crimes which the accused is alleged to have committed it will be held to be defective (see Prosecutor v. Tadic, Decision on Defence Motion on the Form of the Indictment, November 14, 1995, para. 12).

20. In sum, the issue of defects in the form of the indictment is a fair trial issue. See, Ntagerura, Judgment (TC), 25 February 2005, paras. 28-39 (judgment affirmed by Appeals Chamber, 7 July 2006). Where the allegations are "grossly deficient" and violate a defendant's right to fair trial, defects in the indictment are post-trial issues Ntagerura (TC) Judgment, 5 February 2004; judgment affirmed, Appeals Chamber, 7 July 2006.

21. As Judge Pavel Dolenc stated in his Separate and Dissenting Opinion in Ntagerura,

> ". .. [t]he legitimacy and legacy of this Tribunal rests as much on the fairness of the proceedings as on the substance of the

> Judgments that we deliver. It is only through fair and equitable proceedings that international justice is achieved. Moreover, we cannot lose sight of the effect of the Tribunal's jurisprudence on international and national guarantees to a fair trial. If the international tribunals fail to provide a model of fairness, we send the wrong message to other courts." Dolenc Opinion, 25 February 2004, para. 5.

**B. This motion satisfies the good cause standard, under Rule 72(F).**

22. Rule 72(F) permits a Trial Chamber to grant relief from the waiver of time limits for preliminary motions upon a showing of good cause.[4]

23. Whether "good cause" exists is determined on a case-by-case basis. However, the determinant criterion is whether the fundamental rights of an Accused are at issue. See, Prosecutor v. Zigiranyirazo, Decision on the Defence Request for Extension of Time to File Preliminary Motions under Rule 72(G) of the Rules of Procedure and Evidence, 17 December 2003 (Defence Motion granted based on need to translate Prosecution's disclosure into language of the Accused); Prosecutor v. Nahimana, Decision on the Preliminary Motion Filed by the Defence on Defects in the Form of the Indictment, 30 August 1999.

    In Nahimana, the Defence filed a motion on defects in the form of the indictment outside the Rule 72 time limit, and did not request a waiver under 72(F). The Trial Chamber, however, on its own, waived the time limit:

    > "In this case the prescribed time limit for filing preliminary motions have expired, and the Defence have not sought relief for the waiver of this time limit, as envisaged in Rule 72(F). However, the Trial Chamber, after having examined the indictment against the accused, finds that that it is in the interest of justice to consider the matter at hand and therefore ex mero motu waives the prescribed time limit as envisaged in Rule 72(A)." Nahimana Decision, para. 6.

24. Since the nature of the defects in the indictment is fundamental to the rights of the Accused to a fair trial, enumerated under Article 20 of the Statute, the Defence is respectfully requesting that the Trial Chamber accept this Motion "out of time." and in the interests of justice.

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[4] Rule 72(F) was formerly Rule 72(G).

25. This Defence motion incorporates, by reference, previous arguments which have been raised in respect to defects in the form of the indictment, and also supplements the same.[5]

26. The Defence further points out that Lead Counsel Charles Taku, who was appointed in July 2005 during the Prosecution's case, in good faith, did not want to interrupt or delay the proceedings in order to file a preliminary motion on defects in the indictment at that time. Therefore, Chief Taku did not request an adjournment. However, he filed a Notice
on 26 August 2005, in order to reserve the right of the Accused to contest the jurisdiction and competence of the Tribunal in respect to the allegations in the indictment.[6]

27. If the Defence motion is granted, the remedy requested, at this stage of the proceedings, is dismissal of the defective allegations. The Prosecution has closed its case, and the Defence is preparing to present its case. The Defence cannot present a legal defence against facially deficient allegations, and, to ensure a fair trial, needs to know from the Trial Chamber against what allegations it is expected to defend.

28. Further, in the interests of judicial economy, the Defence does not want to waste the Trial Chamber's time defending against allegations which would be dismissed for facial deficiency or not ruled on in the judgment (see, Ntagerura Trial Chamber Judgment). A decision at this stage of the proceedings on the defects in the indictment could potentially give the Defence an opportunity to reduce its witness list.

29. For these reasons, the Defence prays that the Trial Chamber will consider its Motion on Defects in the Indictment, and grant the remedy requested.

## III. Procedural History[7]

30. The first indictment was filed on 20 January 2000. The Defence received a

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[5] Defence pleadings which identify defects in the amended indictment include Urgent Motion to Exclude Parts of Witness AOG's Testimony, 21 February 2006; Defence Reply to Prosecutor's Response to the Urgent Motion to Exclude Parts of Witness AOG's Testimony, 1 March 2006; Motion for Acquittal Pursuant to Rule 98bis, 15 January 2007; Corrigendum to Nzuwonemeye's Reply to the Prosecutor's Response to Motion for Acquittal Pursuant to Rule 98bis, 12 February 2007.

[6] Notice by the Defence of Major Francois Xavier Nzuwonemeye Regarding the Trial Schedule and About the Intention to Contest the Jurisdiction of the Tribunal with Regard to Certain Paragraphs of the Indictment at a Later Stage in the Proceedings, 26 August 2005.

[7] This list is not exhaustive, but highlights pleadings relevant to the points argued in this motion.

redacted copy of same. The full unredacted Indictment was disclosed to the Defence by the Prosecution on 6 August 2002.

31. On 23 April 2001, Lead Counsel for Nzuwonemeye, Me. Francois-Xavier Charvet filed a Preliminary Motion on defects in the indictment. The following violations and grounds were cited:

a. First Motion: Chapters II to IV of the Indictment ("Concise Statement of Facts") violated provisions of Article 17 (ICTR Statute) and Rule 47 (RPE) because there were no supporting materials to support the alleged acts.

b. Second Motion: Chapter VI ("Charges") violated Article 20.4(a) (ICTR Statute) because it failed to cite dates and places.

c. Third Motion: Count I ("Conspiracy") violated Article 1 (ICTR Statute) because it referred to acts committed prior to 1 January 1994.

d. Fourth Motion: Count I ("Conspiracy") violated Article 20.4 (a) (Statute) because members of the alleged conspiracy were not named.

e. Fifth Motion: Counts 2 (Genocide) and 3 (Complicity in Genocide) as alternative charges are not provided for in the ICTR statute, and violated the right of the Accused to be precisely informed of the charges against him.

f. Sixth Motion: Creation of an autonomous count, "Complicity in genocide" had no legal basis provided in the Statute.

g. Seventh Motion: Charges of genocide and crimes against humanity are cumulative; the former subsumes the latter.

h. Eighth Motion: Charges of Count 5 (crimes against humanity) and Count 11 (violations of the Geneva Conventions) are identical offenses, with same victims (Belgian blue helmets).

i. Ninth Motion: Counts 8 and 9: the form and nature of the criminal acts of persecution and other inhumane acts are not specified.

32. On 12 December 2002, the Trial Chamber issued a decision on Nzuwonemeye's Preliminary Motions, rejecting all its grounds and denying the Defence request to quash the indictment.
33. In its Motion for Leave to Amend the Indictment Issued on 20 January 2000 and Confirmed on 28 January 2000, dated 28 October 2003, the Prosecution stated:

7. In fact, the Indictment under amendment - and the Defence will agree with us, seeing their numerous Motions - has in places overly vague charges that are inconsistent with the precision required under criminal law (see paragraphs 5.19, 5.43 to 5.45, to cite only a few).

8. This partial imprecision and the fact that certain crimes initially charged were, indeed, only the preparatory acts to the commission of other more serious crimes, charged elsewhere, oblige the Prosecution to drop certain counts.

9. Hence, the crimes of genocide and extermination (crime against humanity) are dropped in respect of the Accused Francois-Xavier Nzuwonemeye and Innocent Sagahutu, while the crimes against humanity, persecution and other inhumane acts, are dropped against all the Accused.

10. It is also proposed, in the new Indictment, to combine the former Counts 4 and 5, and 10 and 11, for the simple reason that both refer to murder for which the Prosecution intends to adduce evidence as crimes against humanity. The different types of murder will be considered separately but under a single count to avoid preferring a multiplicity of counts against the Accused.

34. On 26 March 2004, in its Decision on Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment Issued on 20 January 2000 and Confirmed on 28 January 2000, the Trial Chamber granted the Prosecution's request to withdraw Count 2, Genocide and Count 3, Complicity in Genocide, against the Accused.

35. Lead Counsel Charles Taku was appointed on 12 July 2005. In order not to delay the proceedings, he did not request an adjournment. In a Notice filed on 26 August 2005, Chief Taku, reserved the right of the Accused to contest the jurisdiction and competence of the Tribunal in respect to the allegations concerning the alleged attack on Belgian elements of MINUAR (Paragraphs 22, 38, 59, 78, 105, 118) in the Indictment.

36. In its Urgent Motion to Exclude Part of Witness AOG's Testimony, 21 February 2006, the Defence argued, inter alia, the insufficiency of the pleading of joint criminal enterprise, pointing out that joint criminal enterprise could not be alleged in the case since it was not pleaded in the indictment (Motion, paras. 17-22), and the lack of specificity in the pleading of conspiracy. The Defence re-iterated the defects in the pleading of joint criminal enterprise and conspiracy in its Defence

Reply to the Prosecution, 1 March 2006, para. 11.

37. In its Decision on Nzuwonemeye's Motion to Exclude Parts of Witness AOG's Testimony, in respect to the issue of defects in the indictment, the Trial Chamber made no ruling on the lack of specificity in the pleading of conspiracy. On the defect in the pleading of joint criminal enterprise, it stated, ". . .the Chamber sees no need, at this stage of the proceedings, to determine the question whether joint criminal enterprise has been adequately pleaded in the Indictment." (Decision, para. 27).

38. In its 98bis motions, dated 15 January 2007 and 12 February 2007, the Defence moved for acquittal of the Accused in respect to Counts 1, 4, 6 and 8.[8] The Defence argued, inter alia, that a) the pleading of conspiracy was defective since there was no allegation that Accused entered into an agreement with those named in paragraph 22; and 2) the pleading of command responsibility was defective, citing as examples paras. 78, 110. 112 and 119 for, inter alia, failure to identify the subordinates alleged to be under the Accused's command.

39. In its Decision on Defence Motions Pursuant to Rule 98bis, 20 March 2007, the Trial Chamber denied the Nzuwonemeye's Defence Motion in its entirety. The Chamber stated:

"The Chamber will also not consider whether the Defence has had sufficient notice of charges to sustain a conviction, or whether there are other legal defects in the Indictment which could lead to acquittal. [footnote omitted] The examination of whether there was clear and consistent notice adequate to cure any such defect is not appropriate at this stage of the proceedings, nor is the Chamber legally authorized by Rule 98bis to consider these matters." [footnote 13, Semanza 98bis Decision, 27 September 2001, para. 18, Corrigendum]. Decision, 20 March 2007, para. 8; also in Corrigendum, 18 June 2007, para. 8

40. In its Motion for Certification of the Decision on Defence Motions Pursuant to Rule 98bis, 23 March 2007, the Nzuwonemeye Defence reiterated, inter alia, that joint criminal enterprise was not pleaded in the indictment and the Prosecution had led no evidence from which a court could sustain a conviction, beyond a reasonable doubt, in respect to Counts 1, 4, 6 and 8.

The Defence also pointed out that "being asked to answer a case that does not exist is a huge waste of judicial time and would significantly affect the fair and expeditious conduct of the proceedings." Motion, para. 34.

[8] Acquittal of Count 7 is argued in both Defence 98bis Motions, and should have been included in the remedy requested.

41. In its Decision on Defence Request for Certification to Appeal the Chamber's Decision Pursuant to Rule 98bis, 24 April 2007, the Chamber denied the motion and stated: "the Chamber is not convinced that the first criterion under Rule 73(B) is met. The consequence of that Decision is simply to require the Accused to answer the case he was confronted with from the start of his trial. That in itself does not affect the fair or expeditious conduct of the proceedings." Decision, para. 8.

42. On 18 June 2007, the Trial Chamber issued a Corrigendum to its Decision on Defence Motions Pursuant to Rule 98bis, 20 March 2007.

43. The Defence filed a Motion for Clarification of the Corrigendum, on 25 June 2007.

44. On 11 September 2007, the Trial Chamber issued its Decision on Nzuwonemeye's Motion for Clarification, which granted, in part, the Defence Motion.

## IV. DEFECTS IN THE INDICTMENT IN THE PLEADING OF FORMS OF PARTICIPATION

### A. The allegations in the indictment

45. The Accused is charged under Counts 1, 4, 6, 7 and 8 in the Amended Indictment, filed 23 August 2004. Counts 4, 6 and 7 charge 6(1) and 6(3) as forms of participation; and Count 8 charges 6(3) and "acting in concert." Counts 1, 4, 6, 7 and 8 make no reference to joint criminal enterprise as a form of liability in the indictment.

### B. The pleading of joint criminal enterprise (JCE).

#### i. An indictment must plead the material facts of joint criminal enterprise in sufficient detail to provide notice to the Accused

46. It is a fundamental rule of the Tribunals that the indictment must contain "a concise statement of the facts of the case and of the crime with which the suspect is charged." (ICTR, RPE, Rule 47(C); ICTY Statute, Article 18(4).

47. ". . .[A]n indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect." Krupeskic (AC) 23 October 2001, paras. 114,124, 246 (failure to plead material facts in

indictment one of the grounds for reversal of convictions of appellants Zoran and Mirjan Krupeskic for persecution; appellants denied right to prepare their defence and right to a fair trial).

48. "Whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence." Kupreskic (AC), 23 October 2001, para. 88.

49. Specificity is a requirement in the pleading of joint criminal enterprise. Prosecutor v. Brdnanin and Talic. Decision, 26 June 2001 (Trial Chamber ordered that the prosecution plead a) whether the crimes alleged fell within or outside the object of the joint criminal enterprise; and b) that the Accused had the mens rea required for those crimes within the object of the enterprise, para. 81(4a) and (4b)). See, Krnojelac, Decision on Form of the Second Amended Indictment, 11 May 2000, para. 16.

50. " . . . If the Defence is not properly notified of the material facts of the accused's alleged criminal activity until the Prosecution files its pre-trial brief or until trial itself, it will be difficult for the Defence to conduct a meaningful investigation prior to the commencement of trial. Thus, an indictment is defective if it fails to plead required material facts. . ." Kvocka (AC), 28 February 2005, para. 28; Krupeskic (AC) 23 October 2001, para. 114.

51. An indictment is vague, and therefore, defective, where the Prosecution pleads modes of responsibility for which there are no corresponding material facts pleaded. Kvocka (AC), 28 February 2005, para. 41.

52. ". . .Whether or not a fact is considered material depends on the nature of the Prosecution's case...If the Prosecution relies on a theory of joint criminal enterprise, then the Prosecutor must plead the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise [footnotes omitted]. Kvocka (AC), 28 February 2005, para. 28; see also, Krupeskic (AC) 23 October 2001, para. 88; Prosecutor v. Krnoljelac, Decision on the Form of Second Amended Indictment, 11 May 2000; Prosecutor v. Ntagerura Judgment, 25 February 2004, para. 34, judgment affirmed by Appeals Chamber, 7 July 2006.

53. Where the theory of joint criminal enterprise is alleged by the

Prosecution, it must be pleaded "in an unambiguous manner" and specify the form of joint criminal enterprise on which the Prosecution is relying. Ntagerura Judgment, 5 February 2004, para. 34 (Chamber emphasized that the defendant must "must be informed. . .also of the acts and crimes of his alleged subordinates or accomplices," para. 35), judgment affirmed by Appeals Chamber, 7 July 2006.

**ii. The curing of a defective indictment is governed by the principle of fairness to the Accused**

54. The Appeals Chamber has held that the "alleged mode of liability [of joint criminal enterprise] of the accused is a crime pursuant to Article 7(1) of the Statute [and] should be clearly laid out in an indictment." Kordic and Cerkez Appeals Judgment, para. 129.

55. The Appeals Chamber cautioned that the Prosecution's practice of merely quoting the statutory provisions is "likely to cause ambiguity, and *it is preferable* that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged." Kordic and Cerkez Appeals Judgment, para. 129, quoting Blaskic Appeal Judgment, para. 215 [italics added].

56. The Appeals Chamber did not exclude the possibility that, "in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category. For the reasons that follow, the Appeals Chamber finds that this case is not one of them." Krupeskic, para. 114. (Prosecution Pre-Trial Brief "extremely general in nature" and difficult to see how it could have assisted the accused in preparation of their defence). [underlining added]

57. Thus, the Appeals Chamber has held that the curing of a defective indictment by a pre-trial brief was not the general situation, and a remedy in only a limited number of cases.

58. Further, the "option" of the Prosecution to plead the material elements of joint criminal enterprise, and the forms alleged, elsewhere than in the indictment, for example, in a pre-trial brief, is "limited by the need to guarantee the accused a fair trial." See, Krnojelac Appeal Judgment, para. 138.

### *iii.* The indictment fails to meet the specific legal requirements for the pleading of joint criminal enterprise under Tadic.

**59.** The Tadic Appeals Judgment identifies the objective and subjective elements of the theory of joint criminal enterprise liability. Tadic (AC), 15 July 1999, paras. 220, 227-228. These elements must be pleaded in an "unambiguous manner," and the Prosecution must specify the form of joint criminal enterprise upon which it is relying. Ntagerura (TC). para. 34; judgment affirmed on appeal, 7 July 2006.

60. The *actus reus* includes three elements: i) a plurality of person; ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; and iii) participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.[9]

61. The legal concept of common design refers to a plan. In Krnojelac, the Trial Chamber held that:

> "A joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of

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[9] The Appeals Chamber in Tadic, 15 July 1999, para. 227 defines joint criminal enterprise:

"In sum, the objective elements (*actus reus)* of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:

*i. A plurality of persons.* They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching and the Kurt Goebell* cases.

*ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute:* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

*iii. Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."

a particular crime themselves establish an unspoken understanding or arrangement formed between them then and there to commit that crime." Krnojelac, Judgment (TC), 15 March 2002, para. 80.

62. Joint criminal enterprise has been applied to "three distinct categories of cases."[10] The objective elements remain the same for each category. However, each of these three categories has its own separate requirement for mens rea.

The Appeals Chamber explained:

"By contrast, the mens rea element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was, *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly *took that risk."* Tadic, para. 228. [italics in original]

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[10] ". . . First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further - individually and jointly - the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus specialis* is required (also called "advertent recklessness" in some national legal systems). Tadic, para. 220.

63. Thus, the material facts to be pleaded in support of joint criminal enterprise include the form of joint criminal enterprise and those facts alleging the actus reus, and those facts alleging the mens rea required for the specific form (s) alleged.
64. The Defence submits that joint criminal enterprise has not been pleaded against the Accused in the indictment. The term, "joint criminal enterprise" appears nowhere in the indictment, nor are there any material facts to support this allegation. There is no identification of the form(s) charged and the requisite pleading of the legal elements for the actus reus and for the specific mens rea required. Therefore, the indictment is legally deficient in respect to the pleading of joint criminal enterprise, and this form of liability against the Accused should be dismissed.

**iv. The Prosecution's Pre-Trial Brief does not cure the defect in *the indictment in respect to the pleading of joint criminal* enterprise.**

65. The Defence rejects the notion that the Prosecution's pre-trial brief (PTB) can cure the defect in the pleading of joint criminal enterprise as a form of participation. This "less preferred practice" (see Kordic and Cerkez Appeal Judgment, para. 129) is unfair to the Accused.

66. However, even accepting, arguendo, that a pre-trial brief can cure defects in the form of the indictment in some limited cases, the Defence maintains that the Prosecution's PTB in the case of Major Nzwuwonemeye unequivocally is not one of those limited cases.

67. The words "joint criminal enterprise" appear twice in the PTB: in para. 105 and paras. 316-321. In neither place are the material elements required under Tadic alleged, nor is the specific form and corresponding mens rea alleged. There are no legally sufficient factual allegations for the object, the time duration, identity of its members, participation of the Accused to support the allegation of JCE. Thus, the PTB does not "cure" the defective pleading of JCE.

**Paragraph 105**

68. Paragraph 105, under the Conspiracy to Commit Genocide count, the PTB alleges: "Francois-Xavier Nzuwonemeye is criminally responsible, under this count [count 1] for his decisive role as part of a joint criminal enterprise in the planning and execution of the genocide." This is the only count under which joint criminal enterprise liability is discussed in

the PTB.

69. Let us assume, arguendo, that the object of the alleged JCE is to plan and execute the genocide, and that the Accused is alleged to have a "decisive" role.

70. This allegation is egregiously deficient, in respect to the requirements of the object of a JCE and the role of an Accused in same.

71. First, the Prosecution withdrew the allegation of genocide against the Accused. The Prosecution cannot subsequently allege his participation in a form of liability connected with this objective. The Prosecution has, therefore, created the impossibility of a JCE, with an object of planning and executing genocide, involving the Accused. Thus, the object of the JCE is legally deficient, and cannot satisfy a material element of the actus reus.[11]

72. Second, in respect to the description of the alleged role of the Accused, the term "decisive" has no legal significance as characterizing participation and does not appear in the Statute. Terms such as "principal," "accomplice," "co-perpetrator," "aider," or "abettor" are used in the Statute and in judgments to describe roles of participants. Each of these terms has specific legal requirements.

**Paragraphs 316- 321**

Paragraph 316

73. The Defence submits that the apparent significance that the Prosecution attaches to the definition of transaction or operation is unclear in respect to its relevance. For the purposes of notice for joint criminal enterprise, it is simply irrelevant and does not nullify the legal requirements articulated in Tadic and its progeny.

Paragraph 320

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[11] *In its Motion for Leave to Amend the Indictment* Issued on 20 January 2000 and Confirmed on 28 January 2000, dated 28 October 2003, the Prosecution stated:

> 8. This partial imprecision and the fact that certain crimes initially charged were, indeed, only the preparatory acts to the commission of other more serious crimes, charged elsewhere, oblige the Prosecution to drop certain counts.
>
> 9. Hence, the crimes of genocide and extermination (crime against humanity) are dropped in respect of the Accused Francois-Xavier Nzuwonemeye and Innocent Sagahutu, while the crimes against humanity, persecution and other inhumane acts, are dropped against all the Accused.

74. The PTB misstates the required elements which must be alleged under Tadic for the actus reus. Para. 320 states that "the actus reus of the crimes in the joint enterprise is any of the constitutive acts of offenses provided in the Statute." [underlining added]

This is incorrect for two reasons:

i) The Prosecution reduces the actus reus to a single element, while Tadic identifies three elements for the actus reus,[12] and

ii) The Prosecution equates the actus reus of JCE with crimes under the Statute, while Tadic makes it clear that the gravaman of the element is "common purpose" in respect to a crime in the Statute. We note that it is this confusion that leads the Prosecution to erroneously equate the elements of joint criminal enterprise with those of conspiracy, and to use the mode of liability interchangeably with the substantive crime.

Paragraph 321

75. Para. 321 states the Prosecution's application of the law to the facts of the case:

> The Prosecutor submits that the crimes with which the accused are charged in the instant case are part of a joint criminal enterprise (transaction or operation, first, because some ingredients of this mode of participation go to conspiracy to commit genocide. . . .and next, because the case-law of this Tribunal does acknowledge, the Prosecutor posits, there was a genocidal plan in Rwanda in 1994 executed by government authorities at the regional and national level [footnote 95] The material indicia taken into account by case-law in support of the view that there was a genocidal plan in Rwanda in 1994, such as the drawing up of lists, the distribution of weapons to civilians and the selection and separation at roadblocks of Tutsis to be killed, are the same those used by the Prosecutor in the

[12] Mettraux explains in International Crimes and the Ad Hoc Tribunals at pp. 289-290:

> All three forms of joint criminal enterprise require the existence of a criminal enterprise and the participation of the accused therein [footnotes omitted]. The required actus reus is therefore identical in all three cases and consists of three sub-requirements (i) a 'plurality of individuals,' (ii) common purpose 'which amount to or involves the commission of a crime provided for in the Statute, and (iii) the participation of the accused therein. [footnotes omitted]

Indictment (drawing up lists of Tutsis, para. 85; distribution of weapons to civilian, para. 23. 57; selection and separation at roadblocks, para. 66, 98, 104, etc.). Lastly the mens rea for all the categories of participation in a JCE is to be found in the present case. Proof of these will be established at trial.

76. On this point, the Defence unequivocally opposes the view that there was a genocidal plan. However, for the purposes of the Prosecution providing notice of its position to the Accused,[13] we want to point out that this paragraph is useless. It is a mystery as to where the paragraphs referred to in para. 321 can be found. The Prosecution references to lists, roadblocks, and other "indicia" which cannot be found in the indictment or in the PTB, and have no relation to the Accused. For

[13] The Defence is mindful that the Accused is not charged with genocide. However, for the purposes of pleading the charge of conspiracy to commit genocide, the issue of whether the elements of genocide are legally pleaded is relevant. It is our view that the existence of a plan is an element of the crime of genocide, and that the case law supports a plan as a significant index of specific intent required for genocide..

The existence of a plan has been considered extremely important in the Tribunal's jurisprudence. While a plan is not an element of genocide, it is strong evidence of the specific intent required for genocide. Kayishema and Ruzindana, para. 276. See also, Krstic (AC), para. 94 (Appeals Chamber considered link to genocidal plan as one of the indicia of genocidal intent).

Although the *Travaux Preparatoire* [for Genocide Convention] make no reference to a plan or policy as a element of the crime of genocide, there is a strong interpretation that for genocide to take place, there must be a plan. See Schabas, William A., Genocide in International Law, Cambridge University Press (2000), p. 207. Schabas argues that the case-law of the Tribunals supports the requirement of a plan as an evidentiary matter. He points out that "Thus, the Jelisic judgment confirms the requirement of a plan as an evidentiary matter even if this is not explicitly part of the definition of the Convention." Schabas at p. 208, fn. 10.

In Jeslisic (AC), 5 July 2001, this Tribunal held ". . .the existence of a plan or policy is not a a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crimes." para. 48

The requirement of a plan is also mandated by the Trial Chamber's Judgment in Brdjanin, 1 September 2004. In para. 341, the Chamber holds: "For both the first and third categories of JCE the Prosecution must, *inter alia*, prove the existence of a common plan that amounts to, or involves an understanding or an agreement to commit a crime proved for in the Statute

example, in the amended indictment, para. 85 concerns soldiers surrounding a house in Kigali, para. 66 refers to roadblocks, but the Accused is not named; para. 43 names none of the co-defendants in Military II, but refers to Jean Kambanda.

77. Based on paragraph 321, the Prosecution indicates that it wants to proceed with all three categories. But, according to Tadic and its progeny, the mens rea for each category is different and must be alleged. However, no where in the indictment or the PTB is the mens rea for each category alleged.

78. Lastly, "[T]he Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds" (internal footnotes omitted). Krupeskic Judgment (AC), para. 92.

79. In sum, the Prosecution fails to satisfy the legal requirements for the pleading of JCE. The allegations in support of JCE are no where to be found in the PTB. Based on its inclusion of the three words, "joint criminal enterprise," it is impossible for an Accused to defend himself against the allegations. The Defence submits that the PTB gives no notice to the Accused, is grossly unfair to the Accused, and violates his rights under Article 20.

**v. The material elements for JCE must be pleaded separately from the material elements of the crime of conspiracy.**

80. The failure to plead the material elements of JCE is further exacerbated by the Prosecution's efforts to erroneously equate the crime of conspiracy with joint criminal enterprise as a form of participation.

81. In para. 321, the Prosecution alleges that the Accused are charged as part of a JCE because ". . . some of the ingredients of this mode of participation go to conspiracy to commit genocide. . ."

82. The Defence submits that there is a distinction between JCE liability and the crime of conspiracy, and the elements of each must be pleaded separately. The distinction between JCE, as a form of criminal liability, and conspiracy as a substantive crime, is articulated by Judge Hunt in his Separate Opinion on Ojdanic's Motion Challenging Jurisdiction -- Joint Criminal Enterprise), Decision in Milutinvoic, et. al., 21 May

2003.

". . .Conspiracy is not a mode of individual criminal responsibility for the commission of a crime. Conspiracy is itself a crime (of an inchoate nature) which is complete once the agreement between the conspirators has been reached. No step needs to have been taken in furtherance of that agreement before the crime of conspiracy has been committed. On the other hand, joint criminal enterprise is available as one mode of individual criminal responsibility by which a crime may be committed, but only when the agreed (or contemplated ) crime has in fact been committed." J. Hunt Separate Opinion, para. 23[14] [underlining added]

83. The two legal concepts - crime of conspiracy and JCE as a form of participation - are distinct under the ICTR Statute. Conspiracy is an enumerated crime under Art. 2(3); JCE has been held to be a form of participation under 6 (1) and 7 (1) by the jurisprudence of the Tribunals.

84. A conspiracy is an "agreement between two or more persons to commit an unlawful act." Musema Judgment (TC), 187; Nahimana Judgment (TC), para. 1045. The crime of conspiracy may in turn be defined as an agreement between two or more individuals to commit the crime of genocide, with a concerted intent to commit genocide, that is, with the intent to destroy, in whole or in part, a national ethnic racial, or religious group, as such. Musema Judgment (TC), para. 191. See also Ntakirutimana Trial Judgment , paras. 798-799.

85. The actus reus of conspiracy to commit genocide is the agreement; the mens rea is the intent to commit genocide. Joint criminal enterprise (legal elements discussed above) requires the existence of an agreement, and an individual's intent which is shared among the participants.

[14] The Defence is aware that the other Justices of the AC, in the same decision (Decision in Milutinvoic, et. al., 21 May 2003 on Ojdanic's Motion Challenging Jurisdiction -- Joint Criminal Enterprise), referred to both conspiracy and JCE as forms of liability. The Defence points out that ICTY Statute, as distinguished from the ICTR Statute, has no crime of conspiracy, and raises the issue of what impact, if any, this had on the analysis.

86. Conspiracy does not require that the agreed upon crime be carried out. However, JCE or common purpose doctrine requires that, in addition to the agreement to commit the crime, the crime itself must be executed pursuant to the agreement. See, Akayesu Trial Judgment,para. 479; Musema, paras. 184-198); Ojdanic, Decision on Motion Challenging Jurisdiction - Joint Criminal Enterprise (AC), 21 May 2003, paras. 23 and 44 (the concept of joint criminal enterprise is a mode of committing one of the offences in Articles 2 to 5, ICTY Statute, and is not a separate offence in itself). See also, International Crimes and the Ad Hoc Tribunals, Mettraux, p. 253.

87. The element of a common plan, purpose or design for JCE and the element of agreement required for the crime of conspiracy, are each a part of the actus reus. However, the object and context of each is distinct and the elements, upon careful examination, are not fungible. For this reason, the Defence submits that although both conspiracy and JCE share a material element of agreement, they are distinguishable and have other elements respectively. Hence, the elements of each must be pleaded separately in the indictment.

88. The Prosecution, however, has merged conspiracy and JCE into one entity, and does not treat them as distinct legal concepts. This is illustrated by the Prosecution's attempt to "cure" the failure to plead JCE in the indictment, with its general assertion that "some ingredients of this mode of participation go to conspiracy to commit genocide."

89. Thus, the Prosecution, in its theory and in its pleading, erroneously conflates the legal concepts of conspiracy (to commit genocide) and JCE. In paragraph 22, the Prosecution merges the substantive crime of conspiracy to commit genocide with the form of participation of "common scheme." This is discussed below from the perspective of JCE deficiency in pleading, and later, in respect to the conspiracy charge.

**vi. The allegation of "common scheme" is legally insufficient to support JCE.**

90. The Defence submits that the term "common scheme" has no legal significance, and points out that the use of "common scheme" as a code word for JCE has been rejected for failing to comply with the pleading requirements of JCE.

91. In its judgment in Prosecutor v. Gacumbitsi, the Trial Chamber held that JCE must be clearly pleaded, and that use of the term, "common

scheme," was insufficient. The Chamber stated:

". . .the Prosecution seems to allege that the Accused participated in a joint criminal enterprise. However, the Chamber cannot make a finding on such allegation since it was not pleaded clearly enough to allow the Accused to defend himself adequately..."(para. 289).

92. The paragraph at issue in the Gacumbitsi indictment was para. 25:

" Sylvestre Gacumbitsi, in his position of authority and acting in concert with others, participated in the planning, preparation and execution of a common scheme, strategy or plan to exterminate the Tutsis by his own affirmative acts or through persons he assisted or by his subordinates with his knowledge and consent.

93. In the case at bar, para. 22 alleges that the Accused ". . .decided and executed a common scheme. . . .to destroy. . .the Tutsi ethnic group. . ." The Defence submits that language of para. 22 includes the identical allegations rejected by the Gacumbitsi Chamber, and maintains that the allegation of "common scheme" in para. 22 should also be found to be defective.

94. But even accepting, arguendo, the reference to "common scheme" as a reference to "joint criminal enterprise," the Prosecution has failed to allege the material elements of joint criminal enterprise, and to plead the required mens rea for the form(s) alleged. Count 1, paragraph 22 fails to allege the object, specific duration, nature and specific identity of the participants - the material elements - in the purported JCE.

95. On the issue of identity of members of the common scheme, paragraph 22 names some of alleged participants in the "common scheme," but also includes references to "numerous other administrators, soldiers and civilians" who are unnamed.

The references to the "numerous other[s]" do not provide adequate notice to the Accused of the charges against him. See, Nahimana, Decision on the Preliminary Motion filed by the Defence based on Defects in the Form of the Indictment, 24 November 1997, paragraphs 26-27 (an Accused charged with conspiracy to commit genocide must be informed of the names of his alleged co-conspirators); Ntagerura Decision on the Preliminary Motion filed by the Defence based on Defects in the Form of the Indictment, 28 November 1997, para. 19 (to fully understand the charge against him, an Accused needs to know who he is alleged to have conspired with and who are his alleged

accomplices).

96. In addition, the indictment alleges that the Accused was in a "common scheme" with "some or all of the following" [named individuals], but gives no specificity as to exactly who among the named persons is allegedly involved. In addition, the "numerous other administrators, soldiers and civilians" is an infinite, anonymous universe of membership in this alleged "common scheme."
97. The Defence submits that the broadness and lack of boundaries of this notion of JCE is contrary to the seminal case, Tadic (AC), which involved a small group of armed men acting jointly to commit a certain crime, and the narrow application of "joint criminal enterprise" in other ICTY cases. See, Brdjanin (TC), 1 September 2004, para. 355 and footnote 890.

98. There can be no allegation that an Accused entered into an agreement with an unknown other, nor can there be a pleading that an Accused shared the required form of mens rea with each unknown member of the JCE. The legal (and logical) absurdity of this notion is obvious. Thus, an Accused has no possibility of defending himself against an allegation alleging his involvement in a "common scheme" with an unnamed, infinite universe.

99. It follows that, in respect to notice, the unidentified and infinite membership in the "common scheme" does not provide an Accused with an opportunity to investigate the allegations and present a defence. To maintain the contrary, that a defence is possible, is to eviscerate and nullify the legal meaning of notice for material elements of joint criminal enterprise, as held by the Appeals Chamber in Kronjelac and other cases, as well as the legal requirements for the element of shared mens rea, as articulated in Tadic and its progeny.

100. In addition, paragraph 22 fails to identify the nature of the Accused's alleged participation in the "common scheme," the object, and the time frame. The dates of "before 6 April 1994 and between 6 April and July 1994" are not specific.

101. In para. 22, there are no allegations that the Accused shared any of the separate mens rea required for Category One, Two or Three of JCE with anyone named, or anonymous in the alleged "common scheme." The general reference to the "cause to destroy, in whole or in part, the Tutsi ethnic group" fails to satisfy the pleading requirements in respect to mens rea.

102. In sum, the material elements of the allegation of joint criminal enterprise as a form of liability are not alleged in the indictment by the Prosecution, thus violating the Accused's right to notice of the charges against him under Article 20.

**C. The pleading of individual criminal responsibility under 6(1) and command responsibility 6(3)**

103. The Accused is charged with individual criminal responsibility and command responsibility as follows: Count 1 (6(1)); Count 4 (6(1) and 6(3)); Count 6 (6(3)); Count 7 (6(1) and 6(3) and Count 8 (6(3)).

104. When an Accused is charged with individual criminal responsibility under Articles 7(1) and 6(1). . .as well as command responsibility under Articles 7(3) and 6(3), the indictment must clearly separate the acts relied upon for each of these charges (see, Prosecutor v. Delalic, Decision on Motion by the Accused Delic based on Defects in the Form of the Indictment, 15 November 1996, para. 18; Prosecutor v. Nahimana, 17 November 1998; Prosecutor v. Blaskic, Decision on the Defence Motion to Dismiss the Indictment based Upon Defects in the Form therefore, 4 April 1997; and Kronjelac, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000.[15]

105. The form of participation of "the accused in a crime is a material averment which should be clearly laid out in the indictment in order to clarify it and make plain the prosecution case." Prosecutor v. Dosen, Decision on Preliminary Motions, 10 February 2000, para. 12.

> When an indictment is based on responsibility pursuant to Article 7(3) [6.3] of the Statute, as in the Indictment in the present case, it should plead the following:
>
> (a)(i) that the accused is the superior of (ii) subordinates sufficiently identified, (iii) over whom he had effective control--in the sense of a material ability to prevent or punish criminal conduct--and (iv) for whose acts he is alleged to be responsible;
>
> (b) the conduct of the accused by which he may be found to (i) have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates, and (ii) the related conduct of those others for whom he is

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[15]Archbold, International Criminal Courts, Practice, Procedure, Evidence, Sweet and Maxwell, 2003, p. 123. (citations omitted).

alleged to be responsible and

(c) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them. [footnote omitted]. Delic Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, 13 December 2005. See also, Zigiranyirazo Decision, 15 July 2004, para. 39;
Bagilishema, Judgment (TC), 7 June 2001, para. 38.

106. In Delalic et al., Judgment (TC), 16 November 1998, the Chamber concluded that

> ". .. a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his de facto position of authority, the fundamental considerations underlying the imposition of such responsibility must be borne in mind. The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. It follows there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and, accordingly, cannot properly be considered their "superiors" within the meaning of Article 7(3) of the Statute. While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote." (para. 377).

107. The "touchstone" of individual responsibility under 6(3) is whether the superior exercises effective control over subordinates. Effective control is the "material ability to control the actions of the subordinates," defined as the ability to prevent and punish the offenses of subordinates. See, Kayishema and Ruzindana, Judgment (TC), 21 May 1999, paras. 229-331; Prosecutor v. Mucic et al., Judgment (TC) 16 November 1998, paras. 377-378.

108. "A superior must be held responsibility for failing to take only such measures that were within his or his powers. Indeed, it is the commander's degree of effective control - his or her material ability to control subordinates - which will guide the Chamber in determining whether he or she took reasonable measures to

prevent, stop or punish the subordinates' crimes. Such a material ability must not be considered abstractly but must be evaluated on a case-by-case basis, considering all the circumstances." Bagilishema, Judgment (TC), para. 48.

**i. Defects in the pleading of 6(1) and 6(3) in the indictment**

109. The Defence submits that the specific factual allegations which support the Accused's responsibility under 6(1) and under 6(3) are not distinguished. In both counts 4 and 7, the indictment states the same set of allegations, within paragraphs 103 - 108, and 118 respectively; there is no differentiation as to what paragraphs support 6(1) and what paragraphs support 6(3).

110. The Defence further submits that in Counts 4, the pleading of both 6(1) and 6 (3) is defective because the forms of participation are pleaded cumulatively, which is legally defective. As the Trial Chamber has held in Zigiranyirazo, "[W]hen both forms of responsibility are charged, the Prosecutor should either omit the cumulative pleading of personal and command responsibility pursuant to Article 6(1) and (3) of the Statute or support both types of responsibility by specific factual allegations referring precisely to the respective type of responsibility." Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, Zigiranyirazo, 15 July 2004, para. 47.

111. The paragraphs103-107 [under Count 4] do not include any allegations to support the form of participation alleged, and, hence, do not distinguish 6(1) and 6(3).

112. Counts 4, 6, 7, 8 [which allege 6(3)] simply track the language of the ICTR Statute, 6 (3): "did not take the reasonable and necessary measures to prevent such crimes or to punish the perpetrators thereof." There are no specific allegations to support the material elements of knowledge and failure to prevent or punish.

This is contrary to the jurisprudence of Ntagerura which holds that

". . .when superior responsibility 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." Ntagerura Trial Chamber Judgment, para. 33; judgment affirmed, Appeals Chamber, 7 July 2006.

**ii.** Defects **in the pleading of allegations of acts and omissions**

113. In Count 1, para. 22, the Accused (and other named co-Accused) are charged with acts and omissions under 6 (1) (". . .acts or obstinate refusal to mobilize); in Counts 4, 7 and 8 the Accused is charged with acts of omission under 6(3) (". .

.did not take reasonable and necessary measures to prevent. . .or to punish. . .").

114. The jurisprudence of the Tribunal has held that acts of omission must be pleaded in the indictment.

> "It would therefore be contrary to the fundamental right of the Accused to a fair trial, including his right to defend himself and to know the charges against him, if the Chamber were to accede to a Prosecution request to find the Accused criminally responsible for omission which were neither set forth in the Indictment nor subsequently notified by timely, clear and consistent information from the Prosecution..." Rwamakuba Trial Judgment, 20 September 2006, para. 28.

115. Acts of omission, contrary to the Rwamakuba jurisprudence, are not set forth in the indictment, nor are there any factual allegations to support the material element of "[failure to] take reasonable and necessary measures to prevent. . .or to punish."

116. In terms of the Accused,[16] the Defence suspects that Prosecution will argue that it provides the basis for that allegation of duty to punish in paragraph 21. This position is erroneous.

First, paragraph 21 is conclusory [ ". . . .officers of the Rwandan Army had the duty to enforce general rules of discipline in respect of all soldiers under their authority, even those who were not members of their units"] and offers no specific allegations to support the general rule in the various branches of the Army, and at the various levels of the command structure.

Second, the Defence notes that reference to the Presidential Decree No. 413/02, 13 December 1978 is preceded by "see," a signal which means that there is general support for a proposition, but that there is no specific rule in support.[17] Since the Prosecution fails to identify any specific reference in the legislation, the Defence can only conclude that the legislation offers no reference as to the duties of the Accused, and hence, cannot be used to support the material element required for 6(3).

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[16] In the indictment, paragraphs 17 - 21, the Prosecution cites various laws related to the responsibilities and duties of the Army and Gendarmerie. Paragraph 17 refers to the Army's responsibility to defend the national territory and cooperate, if necessary with the Gendarmerie to maintain public order. Paragraphs 18 and 19 refer to the Gendarmerie. Paragraph 20 refers to the public service mandate, and Paragraph 21 to the disciplinary obligations.

[17] The signal "See" means that "cited authority directly supports the proposition. "*See*" is used instead of "[no signal]" when the proposition is not stated by the cited authority but follows from it. A Uniform System of Citation, Thirteenth Edition, p. 8, commonly referred to as "the blue book."

117. Paragraph 21, therefore, is defective and cannot support the pleading of a form of participation of the Accused.

118. The defect in paragraph 21 infects the other counts (4, 7 and 8) where there are allegations of omissions. For example, the Prosecution alleges failure to punish in Counts 7 and 8, but there are no factual allegations (such as a reference to specific sections of the law) in support of the existence of a duty to punish). Paragraphs 118 and 119 simply repeat the language of 6(3) in the Statute.

119. In sum, the Accused's right to notice under Article 20 is violated by the pleading of 6(1) and 6(3) liability, resulting in the denial of a fair trial.

## V. DEFECTS IN THE PLEADING OF SUBSTANTIVE COUNTS

### A. Count I: Conspiracy to Commit Genocide

#### i. Procedural history

120. In his Preliminary Motion (addressing defects in the original indictment, 23 April 2001), Me. Charvin argued that the conspiracy count violated Article 20(4)(1) (A) of the ICTR Statute because it did not contain names of the alleged co-conspirators, the number of people or their functions (Motion, para. 24, Fourth Preliminary Motion). In the conspiracy charge, the Defence also alleged that the reference to acts prior to 1994 violated the temporal jurisdiction of the Tribunal (Article I, ICTR Statute). (Third Preliminary Motion)

121. In the Defence Reply to the Prosecutor's Response, 2 August 2002, Me. Ferran re-iterated the insufficiency of the indictment (paras. 18-22) generally, but did not make a specific reference to the conspiracy count.

122. In the Chamber's Decision, 12 December 2002, para. 28, it pointed out that the Prosecution was "duty bound" in line with its previous ruling in Sagahutu decision, to provide names of alleged co-conspirators.

123. In the Urgent Motion to Exclude Parts of Witness AOG's Testimony, 21 February 2006, the Defence argued that paragraph 22 was vague, and insufficient; that the only material fact pleaded in relation to the Accused and Count I was paragraph 34 (allegations of hiding equipment) and that it was "very remote from any speech, arrest or rally." (Defence Motion, para. 15).

124. In the Defence Reply to the Prosecution Response to AOG Motion, paras. 6-10,

the Defence reiterated the lack of specificity in the pleading of conspiracy in indictment.

**ii. Argument**

125. In Count 1, the Accused is charged with conspiracy to commit genocide. The count is presented in paragraphs 22 - 60. The Accused is named in paragraphs 22, 34, 38, 39 and 48. The Defence submits that the pleading of the conspiracy allegation, is overly broad and vague, and devoid of material elements to support the charge of conspiracy. The defective pleading of the count violates Article 20 because the Accused is not informed of specific details necessary for notice, so that he can provide a defence.

126. A conspiracy is an "agreement between two or more persons to commit an unlawful act." Musema Judgment (TC), 187; Nahimana Judgment (TC), para. 1045. The crime of conspiracy may in turn be defined as an agreement between two or more individuals to commit the crime of genocide, with a concerted intent to commit genocide, that is, with the intent to destroy, in whole or in part, a national ethnic racial, or religious group, as such. Musema Judgment (TC), para. 191. See also Ntakirutimana Trial Judgment , paras. 798-799.

127. The actus reus of conspiracy to commit genocide is ". . . An agreement between two or more persons to commit the crime of genocide." Musema Trial Judgment, paras. 189-191. The mens rea is the special intent to commit genocide, the same as mens rea required for genocide.

128. The general rule is that the location, date, identity and means must be specified to satisfy notice requirements. The Prosecution is obligated to provide specific details, where it is in a position to do so. See, Archbold, 2005, pp. 200-201.

Paragraph 22

129. The element of agreement, the actus reus of conspiracy, is not alleged in paragraph 22, nor in any other paragraph in the indictment. There is also no allegation that that an agreement existed between the Accused Nzuwonmeye and any other person.

130. Paragraph 22 alleges that the all of the Accused ". . .decided and executed a common scheme with some or all of the following....".

131. The wording of paragraph 22 is strikingly similar to paragraph 3.14 in the Ntagerura indictment, which alleged that the Accused and others who were named "held a large number of meetings among themselves, or with others, to incite, prepare, organize and commit genocide."

132. In Ntagerura, the Trial Chamber found that "paragraph 3.14 [of indictment] fails to allege facts which would constitute material elements of crime of conspiracy, which, according to the Prosecutor, is the only charge that this paragraph supports." (para. 51).

133. The Ntagerura Chamber explained its finding in paragraph 71:

"Trial Chamber dismissed conspiracy counts in both indictments because they failed to allege the actus reus of conspiracy, namely that two or more persons agreed to commit the crime of genocide." (underlining added).

134. In respect to the element of time frame, paragraph 22 is vague ("before 6 April 1994 to July 1994"). The date of inception of the alleged conspiracy is not even included.[18]

135. Para. 22 alleges a "common scheme" and does not allege the existence of an agreement, which is the gravaman legal element of a charge of conspiracy.

136. Para. 22 names no locations where the non-alleged agreement transpired. It can not be argued that the locations are to be found in the subsequent paragraphs in the conspiracy section. None of these paragraphs names the site of the non-alleged agreement for the crime of conspiracy. Simply put, there are no allegations that the Accused Nzuwonemeye entered into an agreement, on a specific date and at a specific place, with one or more other persons to commit genocide.

137. Para. 22, as discussed in the section on joint criminal enterprise above, is replete with vague phrases as to identity of the co-conspirators: "common scheme with some or all. . .". , "numerous other administrators. . ." Co-Conspirators must be named as a matter of notice and fairness. Nahimana Decision on Defects in Indictment, 24 November 1997: 26-27; Ntagerura Decision on Defects in Indictment, 28 November, 1997, para. 19. There are infinite permutations of "some of all...." and especially the unnamed "numerous other administrators, soldiers and civilians....."

In sum, the allegation is so broad and vague as to render the pleading insufficient and defective for the purposes of notice, so that an Accused can defend himself.

[18] The Prosecution clearly has this information in its possession, since the 23 March 2001 indictment dated the conspiracy "from late 1990" (para. 4.1). However, the amended indictment - three years later - omitted this starting date. It is thus unclear why the Prosecution's withdrew its original date.

Paragraph 34

138. Para. 34 alleges that the Accused acted, "in keeping with the same dissimulation strategy as Ndindiliyimana. . . . had about 2 armoured vehicles and about ten jeeps. . .hidden. . . ."

Dissimulation strategy is not defined, and there is no reference to paragraphs which allege intent to commit genocide. Although agreement need not be express or formal, and may be inferred (Nahimana Trial Judgment, para. 1045), the indictment must allege a nexus between "dissumlation strategy" and an agreement with intent to commit genocide. The indictment fails to allege a nexus.

Moreover, there is no allegation in the paragraph that the Accused Nzuwonemeye agreed with Ndindiliyimana, or that the Accused entered into an agreement with the intent to commit genocide.

139. In the key paragraph in the PTB on "actus reus of the crime of conspiracy to commit genocide," para. 169 in the indictment., the Accused Nzuwonemeye is not named in any of the referenced paragraphs, and no nexus between the Accused and any of these acts is alleged in the indictment. The Defence notes, in addition, that para. 169 does not provide references which correspond with the indictment.[19] For all of the reasons argued above, the Defence submits that the PTB cannot provide notice to cure a defective indictment in which notice of material elements is non-existent.

140. The Defence re-iterates that it is legally inconsistent to include acts associated with genocide in the conspiracy count. Conspiracy is an inchoate, continuing offence:
It is the *process* of conspiring itself that is punishable and not the result. Musema Trial Judgment, para. 194) *(italics* added).

Paragraph 34

[19] The Defence notes that the sections on the actus reus of the crime of conspiracy to commit genocide are convoluted and impossible to follow in the PTB. For example, para. 166 states: The actus reus of conspiracy to commit genocide consists in the material acts that characterize the crime of conspiracy. Para. 169 identifies the acts, followed by references to indictment paragraphs. Using the amended indictment, the cited para. 28, allegedly on ENI, is, in fact about a Presidential declaration in 1993 re Interahamwe in Ruhengeri; paras. 29 and 30, cited for providing weapons and training to the Interahamwe, are allegations concerning Bizimungu in Ruhengheri; para. 49, cited for alleging failure to end the massacres, names only Ndindiliyimana; and paras. 57 and 58, cited for Tutsis massacres, allege a meeting attended by Bizimungu and his visit to Remera-Rukoma Hospital, respectively.

141. Paragraph 34 names the Accused Nzuwonemeye, but there is no specificity as to dates of the allegations. January and February 1994 are general, and do not provide the specificity required for the Accused to defend against the allegation. Moreover, the Defence notes that there is no criminal conduct alleged against the Accused for the morning of 7 April 1994: the indictment uses the passive voice in respect to ". . .vehicles were brought back" and fails to attribute responsibility to any actor..

Paragraph 38

142. Paragraph 38 alleges that the RECCE Battalion, in concert with elements of the Presidential guard, killed the Prime Minister and the ten Belgian UNAMIR soldiers. This paragraph is found under "Acts associated with Genocide." The Defence submits that this allegation cannot be a material element in support of the crime of conspiracy, because conspiracy is an inchoate offense.

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143. In the PTB, under the count of conspiracy, para. 105 states that the Accused "is criminally responsible, under this count, for his decisive role as part of a joint criminal enterprise in the planning and execution of the genocide." Paragraphs 36, 40 and 41 of the indictment are cited in support of this count. The legal impossibility of this formulation has been addressed above, but we point out here problems with the paragraphs cited.

144. Paragraph 36 of the indictment names Sagahutu, and contains allegations in reference to RTLM. The Accused Nzuwonemeye is not named, and no relation is alleged between Nzuwonemeye and Sagahutu.

145. Paragraph 40 names only Mpiranya. 18.

146. Paragraph 41 does not name the Accused Nzuwonemeye or allege a relationship between him and the persons named in paragraph 41, who are Mpiranya and Sagahutu.

**B. Count 4: Crimes Against Humanity (Murder)**

147. The paragraphs which name the Accused are 78, 103, 104, 105 and 108.

148. The four essential elements for crimes against humanity are 1)the act must be inhumane, causing great suffering, or serious mental or physical injury; 2) the act must be committed as part of a widespread or systematic attack; 3) the act must be committed against the civilian population; and 4) the act must be committed on one or more discriminatory grounds, namely national, political, ethnic, racial or religious grounds. See Akayesu, Trial Chamber Judgment, 2 September, 1998,

para. 578.

149. In the indictment, the Accused is charged with the murder of ten UNAMIR peacekeeping troops (para. 78), the murder of Prime Minister Uwilingiyimana and three members of her entourage, including her husband and the murder of patients or refugees at CHK (para. 108).

150. First, in no paragraph are there factual allegations to support that the alleged acts were "part of widespread or systematic attacks against a civilian population," one of the key legal elements which distinguish ordinary crimes from crimes against humanity.

151. Para. 108 states, "In Kigali, as soon as the massacres began in April 1994...," but the Prosecution does not allege that the murders of the Prime Minister, or UNAMIR troops were connected to these massacres. At most, the allegations of murders of patients or refugees at CHK, in the same paragraph, could be construed to allege a connection to the massacres.

152. The indictment fails to allege any discriminatory grounds for the murders. There are no allegations as to a discriminatory basis for the killing of the Prime Minister, or the UNAMIR troops. In respect to the patients or refugees, para. 108 states: "On several occasions, those soldiers selected patients or refugees and killed them there. Moreover, a list of Tutsi staff members were drawn up and several of them were killed." The Defence notes that there is no allegation that the patients or refugees were Tutsis.

153. On the issue of identity of victims, there is no allegation to support the identity of two members of the Prime Minister's entourage. Similarly, the language of para. 108 is vague:
"those soldiers," "patients or refugees," and "several of them."

154. Under Count 4, the Accused is charged with both 6(1) and 6(3) participation, but there are no allegations in reference to 6(1), and the Prosecution does not distinguish which acts support each form of participation.

155. In paragraph 108, there is no identity of the person(s) responsible for drawing up the lists of Tutsis.

156. There are no specific allegations of time in paragraph 108. "On several occasions" is obviously vague, and provides no notice to the Accused.

**C. Count 4: Crimes against Humanity (rape)**

157. In respect to the Accused Nzuwonemeye, this count is pleaded in paragraphs 110 and 112.

158. Paragraph 110 includes the statutory language for crimes against humanity ("widespread or systematic"), but, as mentioned above, does not include factual allegations to support this conclusory language, and is, therefore, defective.

159. Paragraph 112 is impermissibly vague as to the issues of time, location, victims and alleged criminal conduct.

a. Time frame: The allegation of "April, May and June 1994" provides no notice to the Accused as to the dates of the alleged criminal conduct.

b. Criminal conduct: The paragraph alleges that the soldiers. . . ."raped them or mistreated them." There is no crime of mistreatment under the Statute. There are, further, no specific allegations to support the criminal conduct.

c. Identity of victims: The paragraph is impermissibly vague as to the identity of victims. The alleged victims are not named, nor is the category to which they belong identified (as to whether the victims were patients or refugees).

d. Time and location of alleged criminal acts: The phrase, ". . .rapes often took place inside the kiosks" [underling added] offers no notice as to the time and location of the alleged rapes, since "often" is not specified and the criminal acts are alleged to have taken place over an approximately ninety-day period, and the kiosks are not described.

160. Paragraph 112, in addition, fails to identify the relationship between the Accused and the co-Accused, Sagahutu, who is also charged in this paragraph. It alleges that the RECCE soldiers had Interahamwe accomplices, but no where in the indictment is there any relationship alleged between RECCE and Interahamwe.

161. The Defence notes that the allegations under the charge of rape do not cure the defect which the Prosecution admitted existed in the original complaint.

In the Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment Issued 20 January 2000 and Confirmed on January 2000, under the Reasons for and scope of the Amendement, the Prosecution argued:

[II]7. In fact, the Indictment under amendment - and the

> Defence will agree with us, seeing their numerous Motions - has in places overly vague charges that are inconsistent with the precision required under criminal law (see paragraphs 5.19, 5.43 to 5.45, to cite only a few).

162. If we examine the paragraphs admitted to be vague by the Prosecution, the subject matter is rapes, sexual assaults, and crimes of a sexual nature. The allegations generally charge all the accused, from a period of April to July 1994 (5.43). Para. 5.45 includes ".. .in many of those places, soldiers and militia men abducted, killed and raped or sexually assaulted Tutsi women. . . . ."

163. In sum, the amended indictment still suffers from the same defects, including imprecision, originally identified and acknowledged by the Prosecution close to four years ago.

**D. Counts 7 & 8: Violations of Article 3 Common to the Geneva Convention and Additional Protocol II: Count 7 (Murder) & Count 8 (Rape, humiliating and degrading treatment)**

164. In respect to the specific underlying crimes (murder and rape), the Defence incorporates the arguments above in reference to the defects in the forms of participation (for allegations of murder, 6(1) and 6(3) and for allegations of rape 6(3)) and the defects in the pleading of the substantive criminal conduct.

165. In addition, in respect to the pleading of Count 7, Violations of Common Article 3, the indictment fails to support the material element of civilian status as to the 10 Belgian peacekeepers. Common Article 3 applies to "persons taking no part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause. . ." 1949 Geneva Conventions and 1977 Additional Protocol II.

166. Violations of the provisions of Common Article 3 are criminalized under Article 4, ICTR Statute. The class of victims under Article 4 comprises "persons not taking an active part in the hostilities." Akayesu TC: 629, see also, Kayishema and Ruzindana TC, paras 169-183. This means that civilian status of the victims is a material element of the crime charged, and must be supported by factual allegations in the indictment.

167. In para. 118, the indictment alleges ". . .ten Belgian UNAMIR peacekeepers, whose mandate did not include combat (see Chapter 6 of the United Nations Charter), whom moreover were disarmed. . ."

168. The Defence submits this characterization of the UNAMIR peacekeepers is wholly conclusory, and there are no factual allegations to support it. For example, it is undeniable that Chapter 6 refers to the Pacific Settlement of Disputes. However, the Prosecution must support the material element of civilian status of UNAMIR. The Prosecution does not give notice of documents or resolutions, upon which it relies to conclude that UNAMIR was a Chapter VI Mission.[20] Hence, the

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[20] Contradictions as to the civilian status of UNAMIR found in the Prosecution's own disclosure and evidence underscore the significance of this point.

a. Disclosure from the Prosecution on the UNAMIR CD#1 indicates that the Belgian UNAMIR soldiers, in fact, were military -- contradicting the allegation of civilian status.

Document K0068574 is the Agreement between the U.N. and the Government of Rwanda on the status of the UNAMIR. Under section IV(a), it states that the UN "shall ensure that UNAMIR shall conduct its operation with full respect for the principles.....applicable to the conduct of military personnel. . ." Under Section IV (b), it states that "the Government undertakes to treat at all times the military personnel of UNAMIR. . . " (K0068575).

Page K0068601, attached to the Agreement, includes a spreadsheet for "UNAMIR-MILITARY DIVISION - Weekly Personnel State, dated February 1994. This sheet lists Belgium infantry battalions as 406.

Document K0080684, from Colonel Gatsinzi, dated 9 April 1994, is titled: Object: Assassinat des Mil Belges de la MINUAR. [note: Mil is an abbreviation for Military]

b. The Prosecution's PTB continues to develop this erroneous theory, which, in fact, has been contradicted by its own witness, Luc Lemaire. In the PTB, paras. 287-293, the Prosecution argues the civilian status of UNAMIR (para. 291) and that UNAMIR was never authorized to take up arms and fight, even in self-defence (para. 288).

Prosecution witness Luc Lemaire, however, testified that UNAMIR weapons could be used in self-defence [bold-type added] :

> We have not yet broached the issue of the rules of engagement, but there -- it is crucial. If I was to compare the UNAMIR mission to the mission we had in Somalia, in Somalia, people were not authorised to carry weapons. As soon as one had a weapon, he could be arrested or he could be fired at, prevented from engaging. It is important to note that and to explain that that is why the group was to leave Ngongo, but UNAMIR's rules of engagement were very restrictive, extremely restrictive, **so we could only use our weapons in cases of self-defence -- legitimate self-defence, but we had to endeavour to exhaust communication channel -- use the channel of communication.** If it was impossible to convince them, we would order them and, if not, we would fire warning shots. So there was no way we could shoot, even if it was just to stun people into leaving. So these measures had a negative impact, as in the present case, because a soldier is efficient if he is allowed to use weapons he carries. Personal weapons are extremely effective between 150 and 200 metres, so that if a person approaches your position with hostile intentions, even a small group of just three men can give warnings at a distance, can fire, and if it is verified intentions are hostile, they

pleading of UNAMIR peacekeepers, with no factual allegations to support the single paragraph count, is conclusory, and thus, defective as to its form.[21]

169. In respect to Count 8, the status of Tutsi civilian women is alleged, but their characterization as being "categorized by their tormentors as being virtual members of the RPF or accomplices of that movement" is wholly conclusory, and unsupported by any factual allegations.

170. In addition, both Counts 7 and 8 fail to specify which soldiers are alleged to be under the authority of each Accused charged (four Accused are charged in count 7, and three are charged in count 8). Count 7 alleges that the Accused persons (without identifying who), had authority over civilians, without giving any specific information. Count 8 alleges that soldiers acted in concert with militiamen, but gives no notice as to the identity of the militiamen. These examples, as others listed herein, violate the Accused's Article 20 rights, under the ICTR Statute.

171. Lastly, the Defence submits that the counts of murder and rape, charged in both under Counts 4, 6, 7 and 8 are defective because they are cumulatively charged. In Kayishema and Ruzindana, the Trial Chamber held that under certain circumstance, where the crimes share the same elements, they should be charged in the alternative (crimes of genocide and crimes against humanity should be charged in the

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are allowed to use their weapons effectively. Transcript, 20 October 2005, p.65 (bold-type added)

[21] It is interesting to note that Count 7, which is paragraph 118, omits the description of "troops," which is found in the underlying murder allegation in Count 4. .

> Count 4 alleges: ". . . murder of ten UNAMIR peacekeeping troops, whose mandate did not include combat and who were, moreover, disarmed, during the same attacks. . ."
>
> Count 7 alleges: ". . . moreover, at the same place and time, soldiers under the command of. . .killed ten Belgian UNAMIR peacekeepers, whose mandate did not include combat (see Chapter 6 of the United Nations Charter), whom moreover were disarmed, allegedly because. . ." [underling added]

The Defence suggests that the omission of "troops" from Count 7, and the characterization of UNAMIR as peacekeepers in Count 7, is intended to satisfy the requirement that the victims of Common Article 3 must be pleaded as civilians.

alternative). Trial Judgment, 21 May 1999.[22]

172. In Kayishema and Ruzindana, the Trial Chamber articulated the test to determine impermissible cumulative charging: a) are the primary objectives of the charges the same? b) Are the victims the same? c) Is the Prosecution's case the same for both crimes? D) are the elements of both offences the same? See Trial Judgment, 21 May 1999, Section VII, paras. 625-650.

173. The Defence submits that the fact that the Prosecution uses the same allegations to support both the crimes of murder and rape as Crimes Against Humanity, and as Common Article 3 Violations supports the position that the four-pronged test in Kayishema and Ruzindana is satisfied.

174. Therefore, the Chamber should not permit the cumulative charging of the crimes of murder and rape under multiple counts.

## VI. REMEDIES REQUESTED

Considering that the Trial Chamber has not yet ruled on the defects in pleading in the amended indictment in respect to the substantive counts or forms of liability, and. that the Trial Chamber deferred any ruling on the adequacy of the pleading of joint criminal enterprise in March 2006 and has not yet decided the matter,

The Defence respectfully requests that the Trial Chamber dismiss all counts and forms of liability as facially defective for the reasons stated herein, as violative of the Accused's rights to a fair trial under Article 20, ICTR Statute.

Respectfully submitted,

Chief Charles Taku, Lead Counsel

Beth S. Lyons, Co-Counsel

Tharcisse Gatarama, Legal Assistant

[22]The holding, and the legal test on which it is based, has never been challenged on appeal by the Prosecution, or rejected by the Appeals Chamber in its appellate decision in the case. Hence, the Defence submits that the law is sound precedent.

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