

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-PT

Date: 14 May 2021

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Graciela Susana Gatti Santana
Judge Elizabeth Ibanda-Nahamya

Registrar: Mr. Abubacarr Tambadou

Decision of: 14 May 2021

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

DECISION ON DEFENCE PRELIMINARY MOTION

Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Rashid S. Rashid
Mr. Rupert Elderkind

Counsel for Mr. Félicien Kabuga:

Mr. Emmanuel Altit

1. The Trial Chamber of the International Residual Mechanism for Criminal Tribunals (“Trial Chamber” and “Mechanism”, respectively)¹ is seised of a motion filed by Mr. Félicien Kabuga on 29 March 2021² alleging defects in the form of the amended indictment filed by the Prosecution on 1 March 2021.³ The Prosecution filed its response on 12 April 2021.⁴

I. BACKGROUND

2. A more detailed recounting of the indictments filed against Kabuga before the International Criminal Tribunal for Rwanda (“ICTR”) is set forth in prior decisions and need not be detailed here.⁵ Notably, on 15 January 2021, the Prosecution sought leave to amend the operative indictment, arguing that it would, *inter alia*, update the allegations and pleadings in view of developments in case law and available evidence.⁶ The Defence did not oppose the request, and the Trial Chamber, on 24 February 2021, granted the Prosecution leave to file the Indictment.⁷ The Motion, which challenges the form of the Indictment under Rule 79 of the Rules, was submitted on 29 March 2021 in compliance with the Trial Chamber’s prior instructions.⁸ The Motion requests that the Trial Chamber order the Prosecution to amend the Indictment in order to cure the identified deficiencies and remove charges for which the Prosecution cannot provide further, necessary details.⁹

II. APPLICABLE LAW

3. In accordance with Article 16(4) of the Statute and Rule 48(C) of the Rules, upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the

¹ See Order Assigning a Trial Chamber, 1 October 2020, p. 1.

² Defence Motion Pursuant to Rule 79 of the Rules of Procedure and Evidence, 8 April 2021 (original French version filed on 29 March 2021) (“Motion”).

³ Second Amended Indictment, 1 March 2021 (public, with confidential annex). For the purposes of this decision, the Trial Chamber shall refer to the Second Amended Indictment and the Confidential Schedule annexed to it and as reflected in Registry pagination 1008-992 collectively as the “Indictment”.

⁴ Prosecution Response to Defence Preliminary Motion, 12 April 2021 (“Response”).

⁵ See, e.g., Decision on Prosecutor’s Request to Amend the Arrest Warrant and Order for Transfer, 27 May 2020, paras. 2, 3.

⁶ See Decision on Prosecution Motion to Amend the Indictment, 24 February 2021 (“Decision of 24 February 2021”), para. 7.

⁷ Decision of 24 February 2021, paras. 1, 22. In allowing the Prosecution to file the Indictment, the Trial Chamber noted that Kabuga may raise objections to the sufficiency of the supporting material in support of the Indictment by way of preliminary motion alleging defects in the form of the relevant indictment under Rule 79 of the Rules of Procedure and Evidence (“Rules”). See Decision of 24 February 2021, para. 20. The Motion, however, does not raise any such challenges.

⁸ See Decision on Defence Motion for Extension of Time to File Preliminary Motions, 23 December 2020, pp. 1, 2; Order Regarding Commencement and Conduct of the Status Conference, 9 March 2021 (public, with public Annex A and confidential Annex B), Annex A, para. 2, n. 15.

⁹ Motion, p. 9.

Statute. Article 19(4)(a) of the Statute requires that an accused has the right to be informed promptly and in detail of the nature and cause of the charges against him. The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.¹⁰ Whether particular facts are “material” depends on the nature of the Prosecution’s case.¹¹ However, an indictment need not have the degree of specificity of the evidence underpinning it.¹²

4. Decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case are the Prosecution’s characterization of the alleged criminal conduct and the proximity of the accused to the underlying offence.¹³ For example, if the Prosecution alleges that an accused personally committed the criminal acts in question, the indictment should include details which explain this allegation, such as the identity of the victim(s), the time and place of the events, and the means by which the offence was committed.¹⁴ By contrast, as the proximity of the accused person to those crimes becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him.¹⁵

5. The Prosecution is expected to know its case before proceeding to trial and cannot omit material facts 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.¹⁶ Even where it is

¹⁰ *Augustin Ngirabatware v. Prosecutor*, Case No. MICT-12-29-A, Judgement, 18 December 2014 (“*Ngirabatware* Appeal Judgement”), para. 32; *Augustin Ndindiliyimana et al. v. The Prosecutor*, Case No. ICTR-00-56-A, Judgement, 11 February 2014 (“*Ndindiliyimana et al.* Appeal Judgement”), para. 171; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014 (“*Šainović et al.* Appeal Judgement”), paras. 213, 225, 262. See also *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-T, Decision on Stanišić’s Motion for Further Particularisation of the Prosecution Case, 2 May 2018 (“*Stanišić and Simatović* Decision of 2 May 2018”), para. 11.

¹¹ *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR72(C), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011 (“*Uwinkindi* Decision of 16 November 2011”), para. 4; *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Judgement, 1 April 2011, para. 53; *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, para. 292. See also *Stanišić and Simatović* Decision of 2 May 2018, para. 11.

¹² *Ngirabatware* Appeal Judgement, para. 32; *Šainović et al.* Appeal Judgement, para. 225; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, para. 302. See also *Stanišić and Simatović* Decision of 2 May 2018, para. 11.

¹³ *Uwinkindi* Decision of 16 November 2011, para. 5. See *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, para. 23. See also *Stanišić and Simatović* Decision of 2 May 2018, para. 11.

¹⁴ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 (“*Kvočka et al.* Appeal Judgement”), para. 28 and reference cited therein.

¹⁵ *Kvočka et al.* Appeal Judgement, para. 65.

¹⁶ *Ngirabatware* Appeal Judgement, para. 32; *Ndindiliyimana et al.* Appeal Judgement, para. 172; *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-A, Judgement, 8 May 2012, para. 73. See *Prosecutor v.*

impracticable to provide full details of a material fact, and barring special circumstances, the Prosecution must indicate its best understanding of the case against the accused.¹⁷

III. DISCUSSION

6. The Motion argues that the Indictment is insufficiently precise in relation to: (a) the acts attributed to Kabuga; (b) the incidents to which the charges relate; (c) the facts establishing the relevant *mens rea* for the crimes and modes of responsibility; and (d) the pleading of the joint criminal enterprise.¹⁸

A. Acts Attributed to Kabuga

7. Kabuga argues that the pleading of his conduct lacks sufficient details and that the Prosecution does not plead a causal link between his actions and the alleged crimes.¹⁹ In particular, he argues that the Indictment does not plead material facts supporting “any link” between: (i) Kabuga’s alleged conduct; (ii) the *interahamwe*’s conduct; and (iii) the victims.²⁰ Furthermore, he contends that the timing of events alleged in Indictment paragraphs 44, 46, 48, and 50-59 is insufficiently precise and that, in relation to paragraphs 46, 58, and 59, further precision as to Kabuga’s alleged conduct is required to provide him sufficient notice to investigate the charges against him.²¹ The Prosecution responds that Kabuga’s conduct and the timing of events are sufficiently pleaded in the Indictment.²²

8. The Trial Chamber observes that Kabuga is charged under Article 6(1) of the ICTR Statute through his participation in a joint criminal enterprise and/or as an aider and abettor in relation to Counts 1, 2, and 4 through 6.²³ He is also charged with conspiracy to commit genocide under Count 3 as a direct participant.²⁴ In this respect, neither joint criminal enterprise nor aiding and abetting liability requires that an accused’s conduct has a direct causal link on the ensuing crime.²⁵

Zoran Kupreškić et al., Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 92. *See also Stanišić and Simatović* Decision of 2 May 2018, para. 11.

¹⁷ *Kvočka et al.* Appeal Judgement, para. 30.

¹⁸ Motion, paras. 12-28.

¹⁹ Motion, paras. 12-15.

²⁰ Motion, para. 16.

²¹ Motion, para. 16.

²² Response, paras. 3-5, 8, 12, 13.

²³ Indictment, paras. 21-35, 65, 66.

²⁴ Indictment, paras. 36, 67.

²⁵ *See, e.g., Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009, para. 695 (recalling that joint criminal enterprise liability does not require that an accused’s contribution be criminal *per se*, that it is not required that the accused physically committed or participated in the *actus reus* of the perpetrated crime, and that the accused’s contribution need not involve the commission of a specific crime and instead may take the form of assistance in, or contribution to, the execution of the common purpose or the performance of acts that in some way are directed to

Furthermore, and although the Indictment does not specify the type of joint criminal enterprise alleged, it otherwise details the material elements that must be pleaded in relation to joint criminal enterprise liability, including Kabuga's contribution to it.²⁶ The Indictment similarly identifies Kabuga's conduct that is alleged to have offered substantial assistance to the principal perpetrators where he is charged with aiding and abetting.²⁷ As it pertains to the charge of conspiracy to commit genocide, this crime is an inchoate offence that is criminalized irrespective of whether the substantive crime of genocide has been committed²⁸ and the *actus reus* that must be pleaded in the Indictment is an agreement among individuals aimed at the commission of genocide.²⁹ The relevant agreements and their participants, which include Kabuga, are expressly set forth in the Indictment.³⁰

9. Bearing in mind the general nature of the challenge presented in the Motion,³¹ Kabuga does not demonstrate that the Indictment, when read as a whole, lacks necessary detail in linking his conduct to the crimes for which he is charged.³² Consequently, in view of the forms of responsibility alleged (joint criminal enterprise and aiding and abetting) and the nature of the crimes charged (conspiracy), Kabuga fails to demonstrate how the Indictment is insufficiently precise to the extent it does not plead a causal link between his conduct and the ensuing crimes pleaded in the Indictment.

10. Turning to Kabuga's challenges that the Indictment is insufficiently precise as to the timing of events pleaded in Indictment paragraphs 44, 46, 48, and 50-59, the Trial Chamber recalls that the sheer scale of the alleged crimes committed in the context of the Rwandan genocide makes it impracticable to require a high degree of specificity in such matters as, *inter alia*, the dates of the commission of the crimes.³³ In this context, and as it pertains specifically to Indictment paragraphs 44, 46, 48, 50, 51, and 53-57, the Trial Chamber considers that the alleged date ranges or approximations contained therein are sufficiently specific to give Kabuga notice to effectively prepare his defence, particularly given the other material facts pleaded in relation to the events,

furthering the joint criminal enterprise in the sense that the accused significantly contributes to the commission of the crimes involved in it); *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement, 14 December 2015 ("*Nyiramasuhuko et al.* Appeal Judgement"), para. 2083 (recalling that proof of a causal relationship, in the sense of a *conditio sine qua non*, between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition to the commission of the crime, is not required as long as the support of the aider and abettor has a substantial effect upon the perpetration of the crime).

²⁶ See *infra* paras. 23, 24.

²⁷ See Indictment, paras. 30, 34, 66.

²⁸ See, e.g., *Jean-Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, Judgement, 9 October 2012, para. 262.

²⁹ See, e.g., *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement"), para. 344.

³⁰ See Indictment, paras. 36, 67 and references cited therein.

³¹ See Motion, para. 14.

³² See, e.g., Indictment, paras. 8-11, 39-42, 44, 46, 48-52.

³³ See, e.g., *Ngirabatware* Appeal Judgement, para. 140.

including: (i) the alleged participants' identities individually³⁴ and/or by category; (ii) the locations of where the events are alleged to have occurred; and/or (iii) Kabuga's conduct as specifically alleged. While Indictment paragraphs 52 and 58 provide no indication as to timing and Indictment paragraph 59 also provides no timing information concerning the allegation that Kabuga procured arms and ammunition, *chapeau* Indictment paragraph 48, which expressly relates to these allegations, pleads "[b]etween April and July 1994".³⁵ The Trial Chamber considers this qualification as to the timing sufficiently specific for Kabuga to prepare his defence when reading the Indictment as a whole and in view of the other details provided in relation to these allegations.³⁶

11. Finally, the Trial Chamber is not satisfied that Kabuga has demonstrated that further detail is required in connection with paragraphs 46, 58, and 59 of the Indictment. Contrary to Kabuga's contention, Indictment paragraph 46 specifies the ownership of the building placed at the disposal of the *interahamwe* by stating that the relevant building was "part of his Muhima building" and that it was used for meetings and training.³⁷ In addition, Indictment paragraph 58 also specifies the place where Kabuga's vehicles were allegedly operating, specifically referring to the transport of victims and bodies to and from *commune rouge* in Gisenyi prefecture.³⁸ The Trial Chamber is not convinced that the specific type of vehicles is a material fact. The Trial Chamber also finds that Indictment paragraph 59 pleads the necessary details outlining Kabuga's role in transporting arms and ammunition, specifically noting the use of his trucks, some marked with "his initials KF", to transport weapons and ammunition brought into Rwanda from Zaire.³⁹

12. The Trial Chamber dismisses Kabuga's challenges in this respect.

B. Incidents

13. Kabuga argues that, in relation to crimes committed as a result of broadcasts of the *Radio télévision libre des mille collines* ("RTL"), the Indictment does not explain how his conduct in relation to them can be connected with the underlying crimes, and he contends that Indictment paragraph 19 is insufficiently precise as to the timing of incidents in which victims were killed.⁴⁰ In

³⁴ See, e.g., Indictment, paras. 44, 51.

³⁵ See also Response, para. 13, n. 43.

³⁶ Cf. *Nyiramasuhuko et al.* Appeal Judgement, para. 493; *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008, paras. 57-61.

³⁷ See Indictment, para. 46 ("Félicien KABUGA placed part of his Muhima building at the disposal of *interahamwe*").

³⁸ Indictment, para. 58 ("Félicien KABUGA provided transportation for use by *interahamwe* in Gisenyi, including to move victims who had been or were to be killed by *interahamwe* to *Commune Rouge* in Gisenyi").

³⁹ See Indictment, para. 59 ("Arms and ammunitions procured by Félicien KABUGA were brought to Gisenyi, including via Goma airport in the Democratic Republic of the Congo (then Zaire). Félicien KABUGA used trucks, including those marked with his initials 'KF', to transport such supplies. The transport was not limited to Gisenyi

relation to crimes committed by the *interahamwe* to whom he is alleged to have offered material support, Kabuga contends that Indictment paragraph 43 does not provide sufficient details as to: (i) the dates of incidents; (ii) the circumstances in which victims died; and (iii) the causal link between Kabuga's conduct and the incidents.⁴¹ The Prosecution disputes these challenges.⁴²

14. The Trial Chamber observes that Indictment paragraphs 8-11 set forth information related to the establishment of RTLM and Kabuga's role within it. Notably, Indictment paragraph 9 alleges:

From its inception until the end of its broadcasts in July 1994, Félicien KABUGA served as President of RTLM and, as such, had control over programming, operations, and finances of RTLM. He chaired RTLM's *Comité d'Initiative*, which functioned as RTLM's management committee. Félicien KABUGA was responsible for the overall management and direction of the radio station, supported by other members of the *Comité d'Initiative*, including Ferdinand NAHIMANA, and Jean-Bosco BARAYAGWIZA and by Phocas HABIMANA, the general manager of the station.

Indictment paragraph 11 further alleges as follows:

From at least 1 January 1994 until July 1994, Félicien KABUGA, Ferdinand NAHIMANA, Jean-Bosco BARAYAGWIZA, Joseph NZIRORERA, Phocas HABIMANA, Joseph SERUGENDO, Ephrem NKEZABERA and RTLM journalists, including Valérie BEMERIKI, Gaspard GAHIGI, Noël HITIMANA, Georges RUGGIU, Kantano HABIMANA, Ananie NKURUNZIZA and Philippe MBILIZI operated RTLM in a manner that furthered hatred and violence against Tutsi and others perceived as "accomplices" or "allies" of the Rwandan Patriotic Front [...] and agreed to disseminate an anti-Tutsi message with the goal to eliminate the Tutsi ethnic group in Rwanda.

Indictment paragraphs 12-19 then set forth allegations that describe the nature of RTLM broadcasts as well as the crimes the Prosecution alleges were encouraged by them. Furthermore, Indictment paragraphs 21-35 plead Kabuga's responsibility based on his participation in a basic joint criminal enterprise and as an aider and abettor in relation to RTLM broadcasting. Indictment paragraph 36 alleges his responsibility in a conspiracy to commit genocide in relation to his participation in RTLM and the agreement upon which the charge is based. In this context, the Trial Chamber finds that the Indictment provides sufficient specificity as to how Kabuga's conduct is connected with the underlying crimes for which he is charged in order to prepare his defence and stresses that the Indictment need only plead material facts and not the evidence supporting them.

15. As to the timing of the events set forth in Indictment paragraph 19, the Trial Chamber considers that the alleged specific dates, date ranges, or approximations are sufficiently specific to give Kabuga notice to effectively prepare his defence, particularly in view of the specificity with

prefecture. For instance in May 1994, Félicien KABUGA supplied ammunition from Gisenyi to *interahamwe* in Kigali.").

⁴⁰ Motion, paras. 17-19.

⁴¹ Motion, para. 20.

⁴² See Response, paras. 8, 11-14.

which the victims are identified and when considering that Kabuga is not alleged to have personally participated in these attacks.⁴³

16. Turning to Kabuga's challenges in relation to allegations stemming from his material support to *interahamwe*,⁴⁴ the Trial Chamber equally finds that the dates, date ranges, or approximations, as well as the circumstances in which victims died, as set forth in Indictment paragraph 43, provide sufficient notice to allow Kabuga to prepare his defence in view of the other details, such as the category of assailants, the identity of the victims, and, in some instances, the locations where the crimes were committed.⁴⁵ Furthermore, the Trial Chamber recalls that, based on the pleaded modes of responsibility, the Indictment does not need to provide a direct causal link between Kabuga's conduct and the resulting crimes.⁴⁶ Kabuga's contentions in this respect are misplaced.

17. The Trial Chamber dismisses Kabuga's challenges in this respect.

C. Mens Rea

18. Kabuga argues that the Indictment does not plead material facts that he or alleged members of the joint criminal enterprise intended to commit or contribute to the commission of crimes, inhibiting his ability to investigate such allegations.⁴⁷ He further contends that the Indictment fails to sufficiently identify the alleged perpetrators of crimes referred to in Indictment paragraphs 32-35, 65, and 66, thereby inhibiting his ability to investigate their conduct and "intention", which is particularly problematic in relation to his liability for "complicity".⁴⁸ The Prosecution argues that Kabuga misunderstands the requirements for pleading *mens rea* and contends that the Indictment sufficiently pleads: (i) his *mens rea*; (ii) the *mens rea* of the principal perpetrators whom he is alleged to have aided and abetted; and (iii) the identity of the perpetrators.⁴⁹

19. The Trial Chamber recalls that an indictment may either: (i) plead the state of mind of the accused, in which case the facts by which that matter is to be established are matters of evidence, and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be

⁴³ See *supra* para. 4.

⁴⁴ Motion, para. 20.

⁴⁵ The Trial Chamber observes that, while Indictment paragraphs 43(K), (I)(iv), and (I)(v) do not expressly allege the dates of the attacks, the *chapeau* paragraph pleads "[b]etween 7 April 1994 and at least the end of June 1994". Likewise, Indictment paragraph 43(K) provides further information as to the timing of the event – namely "[w]hen *interahamwe* were fleeing Kimironko" – that would assist Kabuga in his investigations.

⁴⁶ See *supra* paras. 8, 9.

⁴⁷ Motion, paras. 21, 22, referring to Indictment, paras. 21-25.

⁴⁸ Motion, paras. 23, 24. Paragraph 23 of the Motion mistakenly refers to Indictment paragraphs "32-25" whereas the French original refers to paragraphs 32-35.

inferred.⁵⁰ In this respect, the Trial Chamber observes that the Indictment expressly pleads Kabuga's *mens rea* for: (i) joint criminal enterprise and aiding and abetting liability in relation to the crimes of direct and public incitement to commit genocide and persecution as a crime against humanity;⁵¹ (ii) aiding and abetting liability for crimes of genocide as well as extermination, murder, and persecution as crimes against humanity;⁵² and (iii) conspiracy to commit genocide.⁵³ The Indictment also expressly pleads the *mens rea* of the members of the joint criminal enterprise⁵⁴ as well as the relevant *mens rea* of the principal perpetrators alleged to have committed the underlying crimes either as aiders and abettors or members of a conspiracy to commit genocide.⁵⁵

20. As to the specificity of the alleged perpetrators in Indictment paragraphs 32-35, 65, and 66, the Trial Chamber recalls that indictments must be read as a whole,⁵⁶ that perpetrators need not be individually named in indictments, and that identification by general category can be sufficient to provide adequate notice for an accused to prepare his defence.⁵⁷ Bearing these principles in mind as well as the general nature of the challenge presented in the Motion,⁵⁸ the perpetrators of the relevant crimes with respect to Indictment paragraphs 32-35 are sufficiently identified by category⁵⁹ and in relation to the commission of specific crimes as detailed in Indictment paragraphs 16-19 by their timing, the identity of the victims, and/or location.⁶⁰ Similarly, the perpetrators identified in Indictment paragraphs 65 and 66 are further specified by category and in relation to particular crimes whose location, victims, and/or timing are set forth, for example, in Indictment paragraphs 43, 45, 47, and 60-63.

⁴⁹ Response, paras. 6, 7, 11.

⁵⁰ See, e.g., *Nahimana et al.* Appeal Judgement, para. 347.

⁵¹ See Indictment, paras. 23, 24, 31. See also Indictment, para. 22 (identifying Kabuga as a member of the joint criminal enterprise). The Trial Chamber considers that, when read as whole, the Indictment provides a clear basis to infer that Kabuga was aware of the principal perpetrator's specific intent where he is alleged to have aided and abetted specific intent crimes.

⁵² Indictment paras. 35, 66. See also *supra* n. 51.

⁵³ Indictment, paras. 36, 67. The state of mind that must be pleaded in an indictment alleging conspiracy to commit genocide is that the "individuals taking part in the [conspiracy to commit genocide] possessed the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such". See *Nahimana et al.* Appeal Judgement, para. 344.

⁵⁴ See Indictment, paras. 23, 24. See also Indictment, para. 22 (identifying the members of the joint criminal enterprise).

⁵⁵ See Indictment, paras. 27-29, 33, 36, 65, 67.

⁵⁶ See *Nyiramasuhuko et al.* Appeal Judgement, para. 471.

⁵⁷ *Nyiramasuhuko et al.* Appeal Judgement, para. 474; *Édouard Karemera and Matthieu Ngirumpatse v. The Prosecutor*, Case No. ICTR-98-44-A, Judgement, 29 September 2014, para. 370.

⁵⁸ See Motion, paras. 23, 24.

⁵⁹ See Indictment, para. 33 ("As described in paragraphs 16-19 above, *interahamwe* and others intentionally killed and harmed Tutsi, and other perceived 'accomplices' or 'allies' of the RPF."). See also Response, para. 11, referring to Indictment, paras. 15, 16, 18, 32-35, 43, 45, 47, 60-66 ("The Indictment properly pleads the identity of the physical perpetrators by identifying them by general category, namely *interahamwe*").

⁶⁰ Cf. *The Prosecutor v. Yussuf Muniyaki*, Case No. ICTR-97-36A-A, Judgement, 28 September 2011, para. 162 (recalling that the Appeals Chamber of the ICTR had previously "determined that an indictment properly pleaded the identity of the participants by identifying the physical perpetrators by general category, such as *Interahamwe*, and then further identifying them with geographic and temporal details related to each massacre site.").

21. The Trial Chamber dismisses Kabuga's challenges in this respect.

D. Joint Criminal Enterprise

22. Kabuga argues that Indictment paragraphs 21-25 are deficient in that they do not contain material facts underlying the cumulative elements of a joint criminal enterprise charge.⁶¹ Specifically, he contends that the Indictment omits information as to, *inter alia*, the formalization and structure of the joint criminal enterprise, when it was implemented, and to "what effect".⁶² He further argues that the Indictment does not plead the joint criminal enterprise's criminal nature, the co-perpetrators and their roles in and contributions to the implementation of the plan, or their degree of control.⁶³ The Prosecution contends that the material elements of the basic form of joint criminal enterprise liability are properly pleaded in the Indictment.⁶⁴

23. The Trial Chamber observes that, with respect to joint criminal enterprise liability, the Prosecution must plead the nature and purpose of the enterprise, the period over which the enterprise is said to have existed, the identity of the participants, and the nature of the accused's participation therein.⁶⁵ The indictment should also clearly indicate which form of joint criminal enterprise is being alleged – basic, systemic, or extended – and, because the forms differ based on the particular *mens rea* requirement for each, the indictment must plead the *mens rea* element of each category on which the Prosecution intends to rely.⁶⁶

24. Although not expressly designated as a basic joint criminal enterprise, the Trial Chamber finds that the Indictment sufficiently pleads the material elements of this mode of liability in the Indictment.⁶⁷ Specifically, Indictment paragraph 23 pleads the joint criminal enterprise's common criminal purpose and alleges that its members, which include Kabuga, shared the intent to give effect to the common criminal purpose and possessed the specific intent for the crimes of direct and public incitement to commit genocide and persecution as a crime against humanity. The temporal duration of the joint criminal enterprise is pleaded in Indictment paragraph 21 and its participants

⁶¹ Motion, paras. 25-28.

⁶² Motion, para. 26.

⁶³ Motion, para. 27.

⁶⁴ Response, paras. 9, 10.

⁶⁵ See, e.g., *Uwinkindi* Decision of 16 November 2011, para. 11.

⁶⁶ See *Uwinkindi* Decision of 16 November 2011, para. 11.

⁶⁷ See *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, para. 77 ("In this regard, the Appeals Chamber recalls that the three categories of [joint criminal enterprise] vary only with respect to the *mens rea* element, not with regard to the *actus reus*. Accordingly, an accused will have sufficient notice of the category of [joint criminal enterprise] with which he is being charged where the indictment pleads the *mens rea* element of the respective category.") (internal citation omitted). See also Response, para. 9 (arguing that the indictment properly pleads the material elements of "the *basic* form of [joint criminal enterprise]") (emphasis added).

are named in paragraph 22. Kabuga's contributions are specified in Indictment paragraphs 8-11.⁶⁸ In this context, Kabuga's contentions that the Indictment fails to plead other required material facts in support of this mode of liability are without basis.⁶⁹

25. Consequently, the Trial Chamber dismisses Kabuga's challenges on this basis.

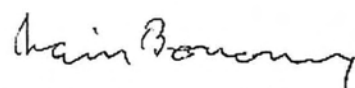
IV. DISPOSITION

26. Based on the foregoing, the Trial Chamber **HEREBY:**

DISMISSES the Motion.

Done in English and French, the English version being authoritative.

Done this 14th day of May 2021,
At Arusha,
Tanzania



Judge Iain Bonomy
Presiding Judge

[Seal of the Mechanism]

⁶⁸ See Indictment, para. 25.

⁶⁹ Kabuga's contentions that the Indictment must plead the formalization or structure of the joint criminal enterprise lack merit given that the common purpose of a joint criminal enterprise need not be previously arranged or formulated, that it may materialize extemporaneously, and may be inferred from the fact that a plurality of persons acts in unison to put it into effect. See, e.g., *Ildéphonse Nizeyimana v. The Prosecutor*, Case No. ICTR-00-55C-A, Judgment, 29 September 2014, para. 327. Likewise, there is no need to plead or prove that Kabuga, or any other member of the joint criminal enterprise, exercised any degree of control over the other members.



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