The Prosecutor v. Elizaphan NTAKIRUTIMANA and Gérard NTAKIRUTIMANA

Cases N° ICTR-96-10 and ICTR-96-17

Case History : Elizaphan Ntakirutimana

- Name : NTAKIRUTIMANA
- First Name : Elizaphan
- Date of Birth : 1924
- Sex : male
- Nationality : Rwandan
- Former Official Function : Pastor of the Seventh Day Adventist Church in Mugonero (Kibuye)
- Date of Indictment's Confirmation :

  1. Case N° ICTR-96-10 : 20 June 1996 [1]

  2. Case N° ICTR-96-17 : 7 September 1996 [2]
- Counts :

  1. *The Prosecutor v. Elizaphan Ntakirutimana, Gérard Ntakirutimana, Obed Ruzindana et Charles Sikubwabo*, Case N° ICTR-96-10 : genocide, complicity in genocide, conspiracy to commit genocide and crimes against humanity;

  2. *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana,* Case N° ICTR 96-17 : genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date of the decision to joint Trials : 22 February 2001 – Gérard Ntakirutimana, Obed Ruzindana and Charles Sikubwabo (ICTR-96-10)
- Date and Place of Arrest : 26 February 1998, in Texas, United States of America
- Date of Transfer : 24 March 2000
- Date of Initial Appearance : 31 March 2000
- Pleading : not guilty
- Date Trial Began : 18 September 2001
- Date and content of the Sentence : 19 February 2003, 10 years imprisonment
- Appeal dismissed on 13 December 2004

[1] The text of the indictment is reproduced in the *1995-1997 Report*, p. 684. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 688.

[2] The text of the indictment is reproduced in the *1995-1997 Report*, p. 660. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 664.

Le Procureur c. Elizaphan NTAKIRUTIMANA et Gérard NTAKIRUTIMANA

Affaires N° ICTR-96-10 et ICTR-96-17

Fiche technique : Elizaphan Ntakirutimana

- Nom : NTAKIRUTIMANA
- Prénom : Elizaphan
- Date de naissance : 1924
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : pasteur de l'église adventiste du septième jour (Kibuye)
- Date de la confirmation de l'acte d'accusation :

  1. Affaire N° ICTR-96-10 : 20 juin 1996 [1]

  2. Affaire N° ICTR-96-17 : 7 septembre 1996 [2]
- Chefs d'accusation :

  1. *Le Procureur c. Elizaphan Ntakirutimana, Gérard Ntakirutimana, Obed Ruzindana et Charles Sikubwabo*, affaire N° ICTR-96-10 : génocide, complicité dans le génocide, entente en vue de commettre le génocide, crimes contre l'humanité

  2. *Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana*, affaire N°ICTR-96-17 : génocide, complicité dans le génocide, entente en vue de commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du protocole additionnel II de 1977
- Date de jonction d'instance : 2 février 2001 – Gérard Ntakirutimana, Obed Ruzindana et Charles Sikubwabo (ICTR-96-10)
- Date et lieu de l'arrestation : 26 février 1998, au Texas, Etats-Unis
- Date du transfert : 24 mars 2000
- Date de la comparution initiale : 31 mars 2000
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 18 septembre 2001
- Date et contenu du prononcé de la peine : 19 février 2003, 10 ans d'emprisonnement
- Appel rejeté le 13 décembre 2004

[1] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 684. Le texte de la décision confirmant l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 688.

[2] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 660. Le texte de la décision confirmant l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 664.

• Released after completing his sentence (6 December 2006)
• Died on 22 January 2007, in Moshi, Tanzania

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Case History : Gérard Ntakirutimana

• Name : NTAKIRUTIMANA
• First Name : Gérard
• Date of Birth : 12 August 1958
• Sex : male
• Nationality : Rwandan
• Former Official Function : Medical Doctor at Mugonero hospital (Kibuye)

• Date of Indictment's Confirmation :
1. Case N° ICTR-96-10 : 20 June 1996 [3]
2. Case N° ICTR-96-17 : 7 September 1996 [4]
• Counts :
1. *The Prosecutor v. Elizaphan Ntakirutimana, Gérard Ntakirutimana, Obed Ruzindana et Charles Sikubwabo*, Case N° ICTR-96-10 : genocide, complicity in genocide, conspiracy to commit genocide and crimes against humanity;

2. *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana,* Case N° ICTR 96-17 : genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity and serious violations of article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II

• Date of the decision to joint Trials : 22 February 2001 – Elizaphan Ntakirutimana, Obed Ruzindana and Charles Sikubwabo (ICTR-96-10)
• Date and Place of Arrest : 29 October 1996, in Ivory Coast
• Date of Transfer : 30 November 1996
• Date of Initial Appearance : 2 December 1996
• Pleading : not guilty
• Date Trial Began : 18 September 2001
• Date and content of the Sentence : 19 February 2003, 25 years imprisonment

• Appeal dismissed on 13 December 2004

[3] The text of the indictment is reproduced in the *1995-1997 Report*, p. 684. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 688.
[4] The text of the indictment is reproduced in the *1995-1997 Report*, p. 660. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 664.

• A purgé sa peine le 6 décembre 2006
• Décédé le 22 janvier 2007, à Moshi, en Tanzanie

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Fiche technique : Gérard Ntakirutimana

• Nom : NTAKIRUTIMANA
• Prénom : Gérard
• Date de naissance : 12 août 1958
• Sexe : masculin
• Nationalité : rwandaise
• Fonction occupée au moment des faits incriminés : médecin à l'hôpital de Mugonero (Kibuye)
• Date de la confirmation de l'acte d'accusation :
1. Affaire N° ICTR-96-10 : 20 juin 1996 [3]
2. Affaire N° ICTR-96-17 : 7 septembre 1996 [4]
• Chefs d'accusation :
1. *Le Procureur c. Elizaphan Ntakirutimana, Gérard Ntakirutimana, Obed Ruzindana et Charles Sikubwabo,* affaire N° ICTR-96-10 : génocide, complicité dans le génocide, entente en vue de commettre le génocide, crimes contre l'humanité
2. *Le Procureur c. Elizaphan Ntakirutimana et Gérard Ntakirutimana,* affaire N°ICTR-96-17 : génocide, complicité dans le génocide, entente en vue de commettre le génocide, crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du protocole additionnel II de 1977
• Date de jonction d'instance : 22 février 2001 – Elizaphan Ntakirutimana, Obed Ruzindana et Charles Sikubwabo (ICTR-96-10)
• Date et lieu de l'arrestation : 29 octobre 1996, en Côte d'Ivoire
• Date du transfert : 30 novembre 1996
• Date de la comparution initiale : 2 décembre 1996
• Précision sur le plaidoyer : non coupable
• Date du début du procès : 18 septembre 2001
• Date et contenu du prononcé de la peine : 19 février 2003, 25 ans d'emprisonnement
• Appel rejeté le 13 décembre 2004

[3] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 684. Le texte de la décision confirmant l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 688.
[4] Le texte de l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 660. Le texte de la décision confirmant l'acte d'accusation est reproduit dans le *Recueil 1995-1997*, p. 664.

Decision on Release of Closed Session Transcript of Witness OO for Use in the Trial of Bagosora et al. 16 February 2004 (ICTR-96-10-T and ICTR-96-17-T)

(Original : Not Specified)

Trial Chamber I

Judges : Erik Møse

Gérard Ntakirutimana, Elizaphan Ntakirutimana – Disclosure of transcripts of closed session testimony, Modification of Measures of Protection of the Witnesses, Ongoing authority of the Chamber to review its own decisions though differently constituted – Motion granted

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

SITTING as Judge Erik Møse, designated by the Trial Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

BEING SEIZED OF the Defence of Ntabakuze "Requête urgente … aux fins de communication des procès-verbaux des audiences à huis clos des pièces deposés sous scellés lors de la déposition du témoin OO", filed on 12 February 2004;

HEREBY DECIDES the motion.

1. Aloys Ntabakuze, one of the defendants in the case of *Bagosora et al*., requests disclosure of transcripts of closed session testimony, and any exhibits under seal, of a protected witness who appeared at the trial of *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Witness OO. That witness is scheduled to testify as Prosecution witness KJ in the trial of *Bagosora et al*. The Defence submits that it needs the transcripts to prepare for the testimony and states that it is willing to be bound by the protective measures applicable to this material, namely, the witness protection decision in the *Ntakirutimana* case.

2. The order requested requires modification of the Ntakirutimana witness protection decision to permit the Registry to disclose the information to the moving party. Trial Chamber I, though now differently constituted than at the time of the witness protection decision, has ongoing authority to review its own decisions, including the conditions under which the records of the Chamber are kept. A valid reason for modifying an order governing the testimony of a protected witness is the need of the Defence in another case to know the content of the witness's prior testimony, which may be relevant to the assessment of the witness's credibility. The Chamber follows past decisions in finding that its protective order should be modified to permit the moving party access to the protected material on condition that its terms shall apply mutatis mutandis to that party.

3. As to the timing of disclosure, the witness protection order in effect in the case of *Bagosora et al*. has already required that identifying information of protected witnesses be disclosed. Accordingly, the protected materials can be disclosed by the Registry to the Defence forthwith.

FOR THE ABOVE REASONS, THE CHAMBER

DECIDES that the transcripts of the closed session trial testimony of Witness OO in the Ntakirutimana case, and exhibits filed under seal therewith, shall be made available to any Defence team in the case of Bagosora et al. which undertakes in writing filed with the Registry, on behalf of itself and the Accused represented, to be bound by the witness protection decision of 22 August 2000, attached hereto as Annex A;

ORDERS that any person or party in receipt of such closed session testimony and exhibits filed under seal therewith shall be bound mutatis mutandis by the witness protection decision of 22 August 2000;

ORDERS the Registry to carry out the terms of this Decision, and to otherwise continue to enforce the terms of the witness protection decision of 22 August 2000.

Arusha, 16 February 2004

[Signed] : Erik Møse

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Decision on the Urgent Application by Defendant Elizaphan Ntakirutimana for Adjournment of the Hearing 5 April 2004 (ICTR-96-10-A and ICTR-96-17-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Elizaphan Ntakirutimana – Adjournment of the Hearing, Good cause : accident of the sole Counsel of the Accused, Credible medical opinion and advice by the Counsel's surgeon, Absence of prejudice to Gérard Ntakirutimana – Motion granted

International Instrument cited :

Directive for the Registry of the Tribunal, art. 36

1. On 20 November 2003, the Appeals Chamber re-scheduled the hearing of these Appeals for the period of 19-22 April 2004[1]. On 17 March 2004, counsel for the

[1] Decision on Extremely Urgent Prosecution Application for an Adjournment of the Oral Hearing, 20 November 2003.

defendant Elizaphan Ntakurtimana, Mr. Ramsey Clark, filed an "Urgent Application by Defendant Elizaphan Ntakirutimana Pursuant to Article 36 of the Directive for the Registry of the Tribunal for an Adjournment of the Hearing of These Appeals." In this application, Mr. Clark seeks an adjournment of the oral hearing until some date after the middle of May 2004.

2. Mr. Clark explains that on 28 February 2004 he suffered an automobile accident which required extensive surgery and necessitates a prolonged post-operatic recovery period. Mr. Clark's surgeon and physicians informed him, and are ready to confirm so to the Appeals Chamber, that a long travel by air from Mr. Clark's residence in New York, United States, to Arusha, Tanzania, prior to mid-May will pose a life-threatening risk to him. The physicians also indicated that it would be preferable for Mr. Clark not to undertake a flight of such duration for three months after surgery, namely until June at the earliest. Accordingly, Mr. Clark seeks an adjournment of the oral hearing of the Appeals in this case until after the middle of May.

3. The Appeals Chamber may grant a request for adjournment of a hearing made pursuant to Article 36 of the Directive for the Registry of the Tribunal where good cause for the adjournment is shown[2].

4. Mr. Clark's accident was an unforeseen event; his inability to travel to Arusha, Tanzania, until mid-May is justified by his medical condition, which is amply documented in his application and is based on credible medical opinion and advice. Mr. Clark expresses his willingness to attend the hearing as soon as his physicians permit it, even before their preferred date of the early June.

5. Mr. Clark is the sole counsel for the defendant Elizaphan Ntakirutimana and has represented him continuously during the proceedings before the Tribunal. Mr. Clark represents that he is the only lawyer familiar with the record of the trial and the issues presented in these Appeals, and therefore the only lawyer capable of effectively presenting Elizaphan Ntakirutimana's appeal. This submission is not controverted, nor is there a reason to doubt it. Further, the issues presented in these Appeals are complex and there is a likelihood of substantial questioning from the bench[3]. Mr. Clark's participation at the hearing is essential to the proper consideration of these Appeals. "It is not in the interests of justice, of the Defendants, or of the Tribunal for the oral argument to proceed when one party is unable to make a meaningful contribution."[4]

6. Mr. Clark's request does not pose a likelihood of prejudice to the other defendant, Gerard Ntakirutimana. In fact, Mr. Clark represents that Gerard Ntakirutimana consents to his motion. The Prosecution also informed the Appeals Chamber orally that it does not oppose the request for adjournment.

7. The Appeals Chamber concludes that good cause for an adjournment has been established. The motion of Elizaphan Ntakirutimana's counsel for adjournment of the oral hearing is therefore granted. Taking into account the schedule of the Appeals Chamber, and Mr. Clark's representation that his physicians would prefer him not to undertake the flight to Arusha until June, the Appeals Chamber re-schedules the hear-

[2] *Ibid.*, para. 9.
[3] *Ibid.*, para. 13.
[4] *Ibid.*, para. 12.

ing of the Appeals in this case to Wednesday, 7 July, Thursday, 8 July, and Friday, 9 July 2004.

DISPOSITION

8. Pursuant to Article 36 of the Directive for the Registry of the Tribunal, the Appeals Chamber :

(1) GRANTS the application of counsel for the defendant Elizaphan Ntakirutimana for an adjournment of the hearing of the Appeals in this case;

(2) ORDERS that the hearing of these Appeals be re-scheduled for Wednesday, 7 July, Thursday, 8 July, and Friday, 9 July 2004;

(3) INFORMS the parties that a timetable for the hearing will be established in a subsequent scheduling order.

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

Done this 5th day of April 2004, at The Hague, The Netherlands

[Signed] : Theodor Meron, Presiding Judge

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Decision on Request for Admission of Additional Evidence 8 April 2004 (ICTR-96-10-A and ICTR-96-17-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Gérard Ntakirutimana, Elizaphan Ntakirutimana – Admission of Additional Evidence, Conditions of admission in Appeal : evidence not available at trial in any form and could not have been discovered though the exercise of due diligence, evidence relevant to a material issue, credible and could have had an impact on the verdict, Additional evidence considered in the context of the evidence given at the trial - Interpretation of the Rules of Procedure and Evidence, Amendment of the Rules of Procedure and Evidence between the Trial and the Appeal, Immediate entry in force of the amendment of the Rules except in case of prejudice to the rights of the Accused in a pending case – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 6 (C), 115, 115 (A), 115 (B) (i) and 115 (B)(ii)

International Cases cited :

I.C.T.R. : Appeals Chamber, Alfred Musema v. The Prosecutor*, Décision sur la «Confidential Motion (i) to File Two Witness Statements Served by the Prosecutor on 18 May 2001 Under Rule 68 Disclosure to the Defence, and (ii) to File the Statement of Witness II Served by the Prosecutor on 18 April 2001, and (iii) to File a Supplemental Ground of Appeal» et ordonnance portant calendrier, 28 September 2001 (ICTR-96-13-A, Rep. 2001, p. 2477); Appeals Chamber,* Georges Rutaganda v. The Prosecutor*, Decision on the Consolidated Evidence Motion for an Order Varying the Grounds of Appeal, for the Rehearing of Oral Arguments in the Appeal and for the Admission of Additional Evidence, and Scheduling Order, 19 February 2003 (ICTR-96-3-A, Rep. 2003, p. 3156)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zoran Kupreškić*, Appeal Judgement, 23 October 2001 (IT-95-16); Appeals Chamber,* The Prosecutor v. Radislav Krstić*, Decision on Applications for Admission of Additional Evidence on Appeal", 5 August 2003 (IT-98-33)*

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "International Tribunal," respectively) is seised of the "Urgent Defence Motion for Admission of Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence," filed on 17 October 2003 ("Motion"). The Appeals Chamber hereby decides this Motion on the basis of the written submissions of the parties.

A. The Motion

2. In his Motion, Gérard Ntakirutimana (the "Appellant") requests an order from the Appeals Chamber for the admission of additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules"). The Appellant seeks to have admitted as additional evidence the transcripts of the public and in camera testimony of Witness OO, who testified (under the pseudonym KJ) in the case of Eliézer Niyitegeka[1], and requests an order permitting him to file an addendum to his brief on Appeal ("Appellant's Brief")[2].

3. The Prosecution, in its response filed on 31 October 2003, agrees with the Appellant on the admission of the transcripts and does not object to an order permitting the Appellant to file an addendum to his Appellant's Brief[3]. The Prosecution contends,

[1] Case N° ICTR-96-14-A, presently before the Appeals Chamber at the pre-appeal stage. The witness testified on 1 and 2 November 2001 in *Ntakirutimana* and on 15 and 16 October 2002 in *Niyitegeka*.

[2] Appellant's Brief, filed 28 July 2003.

[3] Prosecution Response to Urgent Defence Motion for Admission of Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, filed confidentially on 31 October 2003.

however, that the transcripts do not constitute additional evidence but rather that they are "judicial proceedings of the Tribunal relevant to issues on appeal that may be properly placed onto the appellate record for proper determination of the appeal".[4]

B. The Applicable Law

4. Rule 115, as amended on 27 May 2003, reads :

> (A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than seventy-five days from the date of the judgement, unless good cause is shown for further delay. Rebuttal material may be presented by any party affected by the motion.
>
> (B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 118.
>
> (C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.
>
> (D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.

5. For evidence to be admitted pursuant to Rule 115 (B), the Appellant must establish that (i) the evidence was not available at trial in any form and could not have been discovered though the exercise of due diligence, and (ii) that the evidence is relevant to a material issue, credible, and such that it could have had an impact on the verdict, *i.e.* could have shown that the conviction was unsafe[5]. Where the evidence was available at trial or could have been discovered through the exercise of due diligence, the moving party must show also that exclusion of the additional evidence would lead to a miscarriage of justice. The additional evidence must be considered in the context of the evidence which was given at the trial and not in isolation.

6. The Appeals Chamber notes that Rule 115 (B) was amended on 27 May 2003, approximately three months after the Trial Chamber rendered its Judgement in this case and over four months before the Appellant filed this Motion.[6] Under Rule 6 (C) of the Rules, an amendment

[4] *Ibid*., para. 5.

[5] *Prosecutor v. Krstić*, "Decision on Applications for Admission of Additional Evidence on Appeal", Case N° IT-98-33-A, 5 August 2003, pp. 3-4.

[6] Prior to the amendment, Rule 115 (B) provided that "The Appeals Chamber shall authorize the presentation of such evidence if it considers that the interests of justice so require."

"shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case."

The Appellant does not contend that the amendment to Rule 115 (B) prejudices him, and indeed the standard incorporated by the amended Rule 115 (B) merely codifies the case law applying the prior version of Rule 115 (B)[7]. The Appeals Chamber therefore concludes that the amended Rule 115 (B) applies to this Motion.

C. Timeliness of the motion

7. Rule 115 (A) of the Rules, as amended in May 2003 at the International Tribunal's 13th plenary session, requires parties to file motions to admit additional evidence not later than seventy-five days from the date of the Trial Chamber Judgement, unless good cause is shown for further delay. Prior to its amendment, Rule 115 motions could be filed as late as fifteen days before the hearing of the appeal[8]. In the present case, the Judgement was delivered on 21 February 2003. The Appellant's motion was filed on 17 October 2003, nearly eight months after delivery of the Trial Judgement.

8. As the time period stipulated in the new Rule 115 (A) had already expired before the rule was amended, the Appeals Chamber considers that the Appellant would be prejudiced if his Motion were treated as subject to the new due date. Consequently, the Appeals Chamber holds that the due date in the old Rule 115 (A) continues to govern this case, as envisioned by Rule 6 (C) of the Rules. The Motion is therefore timely.

D. Discussion

9. Witness OO testified in *Niyitegeka* on 15 and 16 October 2002, while the Trial Chamber was deliberating in this case but before the Judgement was issued. Normally, the Appeals Chamber would decide whether this evidence was "available at trial" within the meaning of Rule 115 (B) of the Rules. However, in the circumstances of this case, it is unnecessary to address this issue. For the reasons given below, even if the transcript of Witness OO's testimony in the *Niyitegeka* case is deemed to have been unavailable at trial, the Appellant has not shown that the evidence could have had an impact on the verdict of the Trial Chamber in this case.

[7] See, *e. g.*, *Rutaganda v. Prosecutor*, N° ICTR-96-3-A, Decision on the Consolidated Evidence Motion for an Order Varying the Grounds of Appeal, for the Rehearing of Oral Arguments in the Appeal and for the Admission of Additional Evidence, and Scheduling Order, 19 February 2003, p. 5; *Musema v. Prosecutor*, N° ICTR-96-13-A, Décision sur la «Confidential Motion (i) to File Two Witness Statements Served by the Prosecutor on 18 May 2001 Under Rule 68 Disclosure to the Defence, and (ii) to File the Statement of Witness II Served by the Prosecutor on 18 April 2001, and (iii) to File a Supplemental Ground of Appeal» et ordonnance portant calendrier, 28 September 2001, pp. 4-6; see also *Prosecutor v. Kupreškić*, N° IT-95-16-A, Appeal Judgement, 23 October 2001, para. 68.

[8] See Rule 115 (A) of the Rules of Procedure and Evidence (as amended 6 July 2002).

10. The Appellant argues that the testimony of the witness in *Niyitegeka* differs from his testimony in *Ntakirutimana* on a number of points. He maintains that the inconsistencies call into question the overall credibility of Witness OO and therefore the Trial Chamber's findings based on that testimony, which concern the activities of the Appellant on 15 and 16 April 1994[9]. The Appeals Chamber notes that were the additional evidence to lessen the overall credibility of the witness, the findings of the Trial Chamber that the Appellant played a prominent role in some attacks in Bisesero during the period of April to June 1994 could also be affected[10].

(a) The Nature of the Witness's Detention

11. The first inconsistency raised by the Appellant relates to the witness's testimony as to the nature of his detention in Rwanda since 1994 and his knowledge of any pending charges against him. According to the Appellant, the witness claimed in *Niyitegeka* that he was held as a protected witness, whereas he testified in this case that he was a detainee awaiting trial[11]. In the submission of the Appellant, this inconsistency affects the credibility of the witness and is material in showing that the Trial Chamber erred at paragraph 173 of the Trial Judgement[12].

12. When appearing in the present case, the witness confirmed that he had been detained since December 1994, and testified that he is accused of having kept people in his home who subsequently died and of giving a pistol to a young man who was a civilian, and that he had yet to stand trial. Cross-examination was minimal on these matters[13].

13. By contrast, cross-examination in *Niyitegeka* on the nature of his "detention" and reasons for his arrest was extensive. In summary, the witness's evidence in *Niyitegeka* was that he had been first arrested by communal authorities in December 1994, released after one week, and subsequently arrested and detained by military authorities in February 1995. He was held under "house arrest" by the military authorities at a military camp, is unaware of any formal charges against him, has not been indicted, and is awaiting trial. Although not detained in a cell *per se,* the witness is unable to leave the military camp where he is held and can only move within the camp with permission of the guards[14].

[9] See Appellant's Brief, paras. 83 to 112.

[10] Trial Judgement, para. 720.

[11] Appellant's Brief, para. 64.

[12] Trial Judgement, para. 173 reads : "The Chamber found Witness OO to be a credible witness. In April 1994, he was a gendarme with the rank of sergeant at the Kibuye town camp of the gendarmerie. At the time of his testimony, and since 1994, the witness was, according to his account, in detention awaiting trial (not "in prison", as the Defence states). The witness testified : 'I am accused of having kept people in my home who subsequently died. I am also accused of giving a pistol to a young man who was a civilian.' There is no evidence to contradict Witness OO's account in this regard. Given the presumption of innocence enjoyed by a detained person awaiting trial, the Chamber will not draw any adverse inference against Witness OO on account of his status as a detainee." (Footnotes omitted.)

[13] T. 1 November 2001, pp. 187-191.

[14] *Niyitegeka* T. 15 October 2002, pp. 52-60, 66-67, 74-79.

14. Having reviewed the witness's testimony in both cases, the Appeals Chamber does not find that the witness's testimony in *Niyitegeka* is materially inconsistent with his limited evidence in *Ntakirutimana* regarding his status in Rwanda since 1994. In *Niyitegeka*, the witness presented substantial details during extensive cross-examination about his "detention" since December 1994, distinguishing first between his detention at the hands of the communal authorities in December 1994 and by the military authorities in February 1995. By comparison, his evidence in the present case is sparse and dealt with superficially. He confirms only that he has been held since December 1994 and is still being held. Absent any further details, his general and limited evidence in this case does not depart from that in *Niyitegeka* as concerns the duration of detention.

15. Regarding the Appellant's argument that the witness testified in *Niyitegeka* that he was a witness and not a detainee, the Appeals Chamber notes that, placed in context, the mention of being a "witness" does not suggest that he was a protected witness *per se*, but generally a witness to certain events. Indeed, the witness stated in *Niyitegeka* that he was "still considered as a suspect."[15] The remaining passages of the witness's *Niyitegeka* testimony cited by the Appellant likewise reveal no inconsistencies with the witness's position in *Ntakirutimana* that he was detained awaiting trial.[16] The argument that the Prosecution conceded that the witness contradicted his testimony in this case that he was detained awaiting trial is likewise without merit : the Prosecution's submissions in this case state that "the witness did not maintain that he was a purely protected witness, he did not deny that his original arrest was based on his status as a suspect and he acknowledged that he may, yet face criminal prosecution."[17]

16. Finally, the Appellant submits that whereas in *Niyitegeka* the witness emphatically denied being accused of anything, he indicated in *Ntakirutimana* that he is accused of having kept people in his home who subsequently died and of giving a pistol to a young man who was a civilian[18].

17. From a review of the relevant excerpts in *Niyitegeka*, the Appeals Chamber notes that the witness does affirm that he has no knowledge of formal charges against him and that he has not been indicted. Such statements, expressed in terms of formal procedure, indictment and case files, are not inconsistent with the witness's general awareness in *Ntakirutimana* that he is "accused" of particular activity. In this situation, the witness appears to use the word "accused" to mean "suspected" rather than "formally charged." Given that the remainder of the witness's evidence regarding his status is generally coherent and consistent, in particular as regards being a suspect who has yet to stand trial, the fact that he asserted in *Niyitegeka* that he knew of no formal charges against him could not have affected the Trial Chamber's finding of credibility.

[15] *Niyitegeka* T., 15 October 2002, p. 54.

[16] The Appellant refers to pages 53, 54, 57, 59, 66, 67, 79 and 86 of the witness's testimony in *Niyitegeka* on 15 October 2002.

[17] Prosecution's Consolidated Response Brief, para. 5.63.

[18] Motion, para. 29.

(b) The Witness's Motives

18. The Appellant submits that in *Niyitegeka* the witness demonstrated a sophisticated belief that he would be rewarded for "cooperation" with the International Tribunal and refers to the statement of the witness that "I know that if you testify before a Tribunal truthfully it amounts to a mitigating circumstance."[19] Although not expressly specified in the Motion, this could support the Appellant's argument in his Appellant's Brief that the witness had clear motives to provide evidence favourable to the Prosecution, and that the Trial Chamber erred by misapprehending this issue in its Judgement[20].

19. The witness did indeed acknowledge in Niyitegeka that there may be some benefit in testifying truthfully before the International Tribunal. However, he denied being motivated by such a possibility and noted that, despite having testified on two previous occasions before the International Tribunal, he is still in custody[21]. In light of the witness's explanation, and absent any showing by the Appellant of its untrustworthiness, the Appeals Chamber finds that this aspect of the witness's testimony in *Niyitegeka* could not have affected the Trial Chamber's decision in the present case.

(c) Conflicting Versions of Sequence of Events

20. The Appellant argues in his Motion that the evidence of the witness in *Niyitegeka* contradicts the findings of the Trial Chamber that the Appellant visited the Kibuye Gendarmerie camp on 15 and 16 April 1994 where he met 2nd Lieutenant Ndagijimana and that the Appellant travelled from the camp with 2nd Lieutenant Ndagijimana and Lieutenant Masengesho to an attack at Mugonero[22].

21. The crux of the Appellant's contention is that the witness's evidence in *Niyitegeka* and *Ntakirutimana* is inconsistent as to the sequence of events, in particular as regards the dates on which he saw the Appellant and Niyitegeka at the Kibuye *Gendarmerie* camp on their way to attacks at Mugonero and Mubuga respectively. The question for the Appeals Chamber thus is whether the evidence of the witness in *Niyitegeka* about Niyitegeka's visit some ten days after 6 April, but before 18 April, could have affected the Trial Chamber's findings regarding the acts and movements of the Appellant on 15 and 16 April 1994.

22. In assessing the merits of the Appellant's submissions, the Appeals Chamber has reviewed the relevant parts of the witness's testimony in both cases regarding events on 15 and 16 April 1994. The witness's evidence in *Niyitegeka* and *Ntakirutimana* demonstrates that the visits of Niyitegeka and the Appellant could not have occurred on the same day, be it either 15 or 16 April. However, this in itself could not have affected the Trial Chamber's findings in the present case.

23. In the instant case, the witness maintained that the Appellant visited the Kibuye Gendarmerie camp on 16 April 1994. He was subjected to extensive cross-examina-

[19] *Niyitegeka* T. 15 October 2002, p. 79.
[20] Appellant's Brief, paras. 84-86.
[21] T., 15 October 2002, pp. 79-81.
[22] Motion, paras. 19-22.

tion on the event and remained consistent throughout. By contrast, the evidence of the witness in *Niyitegeka* is vague and no clear date is specified by the witness regarding the day on which Niyitegeka visited the camp and took part in the attack at Mubuga. Likewise, the Trial Chamber finding in *Niyitegeka* is that the visit occurred "around 16 April". The lack of detail in the testimony of the witness in *Niyitegeka* is in contrast to the witness's specific evidence in this case.

24. The Appeals Chamber is therefore of the opinion that the witness's evidence in *Niyitegeka* is not such that it could have affected the verdict in this case.

25. Finally, the Appeals Chamber notes that the Prosecution has sought to rely on parts of Witness OO's *Niyitegeka* transcripts in its submissions on appeal in this case[23]. Given that the transcripts do not form part of the record in this case, and in light of the present decision not to admit them as additional evidence, the Appeals Chamber will not consider any references to the *Niyitegeka* transcripts in the determination of the appeals in this case.

E. Disposition

26. For the foregoing reasons, the Appeals Chamber DISMISSES the Appellant's motion for the admission of additional evidence and for permission to file an addendum to his Appellant's Brief and DECLARES that references to transcripts from *Prosecutor v. Niyitegeka* that do not form part of the record in *Prosecutor v. Ntakirutimana* will not be considered in the decision of the appeals in the *Ntakirutimana* case.

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

Done this 8th day of April 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron.

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Order of the Presiding Judge Replacing a Judge in a Case Before the Appeals Chamber 11 May 2004 (ICTR-96-10-A and ICTR-96-17-A)

(Original : English)

Appeals Chamber

Judge : Theodor Meron

[23] Prosecution's Consolidated Response Brief, paras. 5.59, 5.63 (citing *Niyitegeka* T. 15 October 2002, pp. 53-90, and *Niyitegeka* Judgement, para. 73).

Gérard Ntakirutimana, Elizaphan Ntakirutimana – Replacement of a Judge in a Case Before the Appeals Chamber

International Instrument cited :

Statute, art. 11 (3) and 13 (4)

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

CONSIDERING the Notices of Appeal filed on 21 March 2003 by Elizaphan and Gérard Ntakirutimana and the Prosecution against the Judgement and Decision rendered by Trial Chamber I on 21 February 2003;

CONSIDERING the composition of the Appeals Chamber of the International Tribunal set out in Document IT/222 of the International Criminal Tribunal for the former Yugoslavia ("Composition of the Appeals Chamber Following Election of New President"), dated 17 November 2003;

NOTING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal;

HEREBY ASSIGN, with immediate effect, Judge Florence Mumba to replace Judge Mohamed Shahabuddeen in the present case;

AND DETERMINE that the Appeals Chamber, in the joint case of *Elizaphan and Gérard Ntakirutimana v. The Prosecutor,* Case No. ICTR-96-10-A and Case No. ICTR-96-17-A, shall be composed as follows :

Judge Theodor Meron

Judge Florence Mumba

Judge Mehmet Güney

Judge Wolfgang Schomburg

Judge Inés Mónica Weinberg de Roca.

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

Done this 11th day of May 2004, at The Hague, The Netherlands

[Signed] : Theodor Meron, Presiding Judge of the Appeals Chamber

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Decision on Defence Motion to Strike Annex B from the Prosecution Response Brief and for Re-Certification of the Record 24 June 2004 (ICTR-96-10-A and ICTR-96-17-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Florence Mumba; Mehmet Güney; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Gérard Ntakirutimana, Elizaphan Ntakirutimana – Doubts on the accuracy and the reliability of the evidence – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rule 115

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "International Tribunal" respectively),

BEING SEISED OF the "Defence Motion to Strike Annex B from the Prosecution Response Brief, and for Re-Certification of the Record" ("Motion"), filed on 2 March 2004 by Gérard Ntakirutimana ("Appellant"), by which the Appellant requests *inter alia* :

(i) an order striking Annex B of the Prosecution's Response Brief ("Annex B") and all references to the documents therein from the Prosecution's Response Brief,

(ii) an order permitting the Appellant to file an addendum to his Appeal Brief to further arguments in respect of translation errors, and

(iii) an order for the re-translation, re-transcription and re-certification of all the testimony in the case so as to create a reliable Appeal Record;

NOTING the "Prosecution Response to Defence Motion to Strike Annex B from the Prosecution Response Brief, and for Re-Certification of the Record", filed on 11 March 2004, in which the Prosecution opposes the Motion as being without foundation;

NOTING that, to support one of his grounds of appeal, the Appellant argued, with reference to the transcript, that Witness GG had personally spelt names of people and places whilst testifying before the Trial Chamber, despite the witness' claim of illiteracy[1];

1 Defence Appeal Brief – Dr Gérard Ntakirutimana, 28 July 2003, paragraphs 96-97 ("Appellant's Brief").

NOTING that, in response, the Prosecution submitted that the transcript fails to reflect that it was the interpreter, rather than Witness GG, who spelt out the names and that, to support this conclusion, the Prosecution presented in Annex B a "Certification of audio transcripts by Mathias Ruzindana, Reviser; Language Services Section, 3 September 2003" ("Certification") and an internal Memorandum[2] which had been sent by a Prosecution Appeals Counsel to members of the Trial Team in this case;

NOTING that the Appellant argues, *inter alia,* that :

> the Certification and the internal Memorandum, and references thereto, are inadmissible as they are not part of the Trial record and that the Prosecution is merely attempting to introduce new evidence "in deceptive guise" to respond to his appeal submissions, and[3]
>
> Annex B casts doubt on the accuracy of the transcript generally and the numerous errors in translation uncovered by reviewing the audio recordings of the hearings and the transcripts require a re-translation, re-transcription and re-certification of the entire record[4].

CONSIDERING that the Certification and the internal Memorandum do not constitute additional evidence in the meaning of Rule 115 of the Rules of Procedure and Evidence as they do not challenge a finding of fact made by the Trial Chamber but merely attempt to clarify the record in order to address the Appellant's attack against Witness GG's credibility and that, as such, they can be admitted as an annex to the Prosecution's Response Brief;

CONSIDERING that the Certification provided in Annex B raises legitimate doubts on the accuracy of the transcript as to whether it was the Witness GG or the interpreter who spelt names during the Witness' testimony before the Trial Chamber and that, in view of the Appellant's argument regarding the credibility of Witness GG, it would be in the interests of justice to clarify the matter;

FINDING, after having reviewed them carefully, that the other examples of erroneous interpretations put forward by the Appellant to support his claim of re-translation do not raise any serious doubts on the accuracy and reliability of the transcripts which would require a re-translation and a re-certification of the entire record;

FOR THE FOREGOING REASONS,

HEREBY GRANTS the Motion in part and ORDERS the Registry to review the transcript of the testimony given by Witness GG before the Trial Chamber for accuracy and to submit to the Appeals Chamber and the parties newly certified copies of the accurate transcripts in the official languages of the International Tribunal not later than 1 July 2004;

DISMISSES the Motion in all other respects.

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

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[2] Request for assistance with certain matters arising in the appeal proceedings in Prosecutor v. Ntakirutimana et al, Case No ICTR-96-10-A and ICTR-96-17-A.

[3] Motion, paragraph 11.

[4] Motion, paragraphs 25-45.

Done this 24th day of June 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron, Presiding Judge

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Scheduling Order
24 June 2004 (ICTR-96-10-A and ICTR-96-17-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Florence Mumba; Mehmet Güney; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Gérard Ntakirutimana, Elizaphan Ntakirutimana – Schedule

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Judgement and Sentence" rendered in this case by Trial Chamber I on 21 February 2003;

NOTING, in respect of the Appeals of Gérard Ntakirutimana and Elizaphan Ntakirutimana, the "Defence Appeal Brief," filed on 28 July 2003 by Gérard Ntakirutimana, "Pastor Elizaphan Ntakirutimana's Appeal Brief," filed on 11 August 2003, the "Prosecution's Consolidated Response Brief," filed on 22 September 2003, and Gérard Ntakirutimana's "Defence Reply Brief" and "Pastor Elizaphan Ntakirutimana's Reply Brief," both filed on filed 13 October 2003;

NOTING, in respect of the Prosecution's appeal, the "Prosecution Appeal Brief," filed on 23 June 2003, the "Defence Response to the Prosecution Appeal Brief – Gérard Ntakirutimana," filed on 4 August 2003, the "Reply (sic) to the Prosecutor's Appeal Brief," filed on 5 August 2003 by Elizaphan Ntakirutimana and the "Prosecution Reply Brief," filed on 19 August 2003;

NOTING the "Decision on the Urgent Application by Defendant Elizaphan Ntakirutimana for an Adjournment of the Hearing" of 5 April 2004, in which the Appeals Chamber granted Elizaphan Ntakirutimana's request for an adjournment of appeal hearings and ordered that the hearing of these Appeals be re-scheduled for Wednesday, 7 July, Thursday, 8 July, and Friday, 9 July 2004;

HEREBY INFORMS the parties that the timetable of the hearing of the merits to be held in Arusha will be as follows :

Wednesday 7 July 2004

09:30 a.m. – 09:45 a.m.	Introductory Statement by the Presiding Judge (15 minutes)
09:45 a.m. – 11:15 a.m.	Appeal Submissions of Elizaphan Ntakirutimana (1 hour 30 minutes)
11:15 a.m. – 11:45 a.m.	*Pause (30 minutes)*
11:45 a.m. – 12:15 p.m.	Continued Appeal Submissions of Elizaphan Ntakirutimana (30 minutes)
12:15 p.m. – 1:15 p.m.	Appeal Submissions of Gérard Ntakirutimana (1 hour)
1:15 p.m. – 3:00 p.m.	*Pause (1 hour and 45 minutes)*
3:00 p.m. – 4:00 p.m.	Continued Appeal Submissions of Gérard Ntakirutimana (1 hour)
4:00 p.m. – 5:30 p.m.	Response by Prosecution (1 hour and 30 minutes)

Thursday 8 July 2004

9:30 a.m. – 11:00 a.m.	Continued Response by Prosecution (1 hour and 30 minutes)
11:00 a.m. – 11:30 a.m.	*Pause (30 minutes)*
11:30 a.m. – 12:00 p.m.	Reply by Elizaphan Ntakirutimana (30 minutes)
12:00 p.m. – 12:30 p.m.	Reply by Gérard Ntakirutimana (30 minutes)
12:30 p.m. – 2:30 p.m.	*Pause (2 hours)*
2:30 p.m. – 4:00 p.m.	Appeal Submissions by Prosecution (1 hour and 30 minutes)
4:00 p.m. – 4:15 p.m.	*Pause (15 minutes)*
4:15 p.m. – 5:15 p.m.	Continued Appeal by Prosecution (1 hour)

Friday 9 July 2004

11:00 a.m. – 12:00 p.m.	Response by Elizaphan Ntakirutimana (1 hour)
12:00 p.m. – 1:00 p.m.	Response by Gérard Ntakirutimana (1 hour)
1:00 p.m. – 1:30 p.m.	Reply by Prosecution (30 minutes)
1:30 p.m. – 1:40 p.m.	Brief Personal Address by Elizaphan Ntakirutimana (optional)
1:40 p.m. – 1:50 p.m.	Brief Personal Address by Gérard Ntakirutimana (optional)

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

Done this twenty fourth day of June 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron, Presiding

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Decision on Request for Admission of Additional Evidence 5 July 2004 (ICTR-96-10-A and ICTR-96-17-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Florence Mumba; Mehmet Güney; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Gérard Ntakirutimana, Elizaphan Ntakirutimana – Admission of Additional Evidence, Criteria of article 115 of the Rules not fulfilled – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 115

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 is seised of the "Urgent Consolidated Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115", filed confidentially by Gérard and Elizaphan Ntakirutimana ("Appellants") on 03 June 2004 ("Motion"), and of the "Motion for the Admission and Full Consideration of Additional Evidence Not Available at Trial Pursuant to Rule 115 of the Rules of Procedure and Evidence," filed confidentially by the Appellants on 23 June 2004 ("Second Motion").

2. In the Motion the Appellants request (i) an order from the Appeals Chamber for the admission of additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, (ii) an order permitting the filing of an addendum to their Appeal Briefs, (iii) an order for permitting filing of oversized motion, (iv) a reconsideration by the Appeals Chamber of its Decision on Request for Additional Evidence[1] ("Rule 115 Decision"), and (v) a hearing of the Motion. The Appellants seek to have admitted as additional evidence (i) a statement dated 13 and 14 January 2004 and transcripts of the testimony of Witness KJ (Witness OO in the instant case), who testified in the case of *Bagosora et al.* from 19 to 27 April 2004.[2] and (ii) the transcripts of the testimony of Witness AT (Witness GG in the instant case) who testified in the *Muhimana* case on 19 and 20 April 2004.[3]

[1] Decision on Request for Additional Evidence, dated 08 April.
[2] *Prosecutor v. Théoneste Bagosora et al.* "Military I", Case No ICTR-98-41-T.
[3] *Prosecutor v. Mika Muhimana*, Case No ICTR-95-1B-T.

3. The Prosecution, in its response filed on 14 June 2004,[4] argues that the Motion of the Appellants should be dismissed in its entirety, although it does not object to the page extension. The Prosecution is content that the Motion be decided without oral hearing.

4. In the Second Motion the Appellants request admission of materials from proceedings before a United States Immigration Court in a case involving several individuals who testified as witnesses at the Appellants' trial[5]; transcripts of the testimony of Witness BH (Witness DD in the instant case), who testified in the *Muhimana* case on 8 April 2004 and transcripts of the testimony of Witness BI (Witness YY in the instant case), who testified in the *Muhimana* case on 8 April 2004. The Prosecution opposes the request and argues that the Second Motion should also be dismissed[6].

5. The Appeals Chamber decides both motions on the basis of the Parties' written submissions[7]. Finding both motions to be timely within the meaning of Rule 115, the Appeals Chamber concludes that the evidence which the Appellants seek to have admitted does not meet the criteria of admissibility under Rule 115. The Appeals Chamber is also not persuaded by the Appellants arguments that it should reconsider its previous Rule 115 Decision in this case, wherein the Appeals Chamber dismissed the Appellant's argument that the witness presented inconsistent evidence in this case and in *Niyitegeka*. The Appeals Chamber therefore DISMISSES the Motion and the Second Motion. The reasons for the Appeals Chamber's decision will be provided at a later date.

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

Done this 5th day of July 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron, Presiding Judge.

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[4] Prosecution Response to Defence Urgent Consolidated Motion for the Admission of Additional Evidence Pursuant to Rule 115, dated 14 June 2004.

[5] Stating that the record of the immigration proceedings is not public, the Appellants's Second Motion refers to the immigration proceedings by an alias "In the Matter of AAA". The Appeals Chamber does the same in this Decision.

[6] Prosecution Response to Motion for the Admission and Full Consideration of Additional Evidence not Available at Trial Pursuant to Rule 115, filed as confidential on 29 June 2004.

[7] Including "Defence Reply to the Prosecution Response to the Urgent Consolidated Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115" dated 18 June 2004, ("Reply") and "Reply to Prosecutor Response to Appellants Motion of June 23, 2004 for the Admission and full Consideration of Additional Evidence not Available at Trial Pursuant to Rule 115 of the Rules of Procedure and Evidence and Motion for an Order authorizing the Filing of Additional Evidence in Excess of Page Limitations", dated 3 July 2004.

Decision on Registrar's Submission Under Rule 33 B 7 July 2004 (ICTR-96-10-A and ICTR-96-17-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron; Florence Mumba; Mehmet Güney; Wolfgang Schomburg; Inés Monica Weinberg de Roca

Gérard Ntakirutimana, Elizaphan Ntakirutimana – Good cause with regard to an extension of time, Verification of the accuracy of the translation – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 33 (B)

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994,

BEING SEIDED of the "Registrar's Submission Under Rule 33 (B) of the Rules of Procedure and Evidence Following Decision on Defense Motion to Strike Annex B from the Prosecution Response Brief and for Re-certification of the Record", filed on 30 June 2004;

RECALLING the Appeals Chamber's Decision on Defence Motion to Strike Annex B from the Prosecution Response Brief and for Re-certification of the Record, rendered on 24 June 2004, which ordered the Registry to review the transcript of the testimony given by Witness GG before the Trial Chamber for accuracy and to submit to the Appeals Chamber and the parties newly certified copies of the accurate transcripts in the official languages of the International Tribunal not later than 1 July 2004;

NOTING the Registry's request that it be permitted to check for accuracy, and retranslate if needed, only those portions of the French and English transcripts identified by the Defence as inaccurate, and that it be granted an extension of time to perform this task;

CONSIDERING that the Registry has shown good cause with regard to an extension of time;

HEREBY GRANTS in part the Registry's request, and

ORDERS the Registry to review for accuracy, by Thursday 8 July 2004, the portions of the transcript of the testimony given by Witness GG before the trail Chamber which were identified by the Defence as inaccurate and, in accordance with the Appeals Chamber's Decision of 24 June 2004, to review for accuracy the entire transcript of the testimony of the said Witness before the Trial Chamber not later than 30 September 2004.

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

Done this 7th day of July 2004, at Arusha, Tanzania.

[Signed] : Theodor Meron

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Reasons for the Decision on Request for Admission of Additional Evidence Cases 8 September 2004 (ICTR-96-10-A and ICTR-96-17-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Florence Mumba; Mehmet Güney; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Gérard Ntakirutimana, Elizaphan Ntakirutimana – Admission of Additional Evidence, Conditions of admission in Appeal : evidence not available at trial in any form and could not have been discovered though the exercise of due diligence, evidence relevant to a material issue, credible and could have had an impact on the verdict, Additional evidence considered in the context of the evidence given at the trial – Unavailability of evidence at trial, Physical availability of the witness during trial does not resolve the question of availability for the purposes of Rule 115 (B) analysis, Diligence of the Defence counsel in the research of the evidence – Admission of materials from the proceedings of an immigration court in the United States, Admission of transcripts of the testimonies heard in the Muhimana case – Interpretation of the Rules of Procedure and Evidence, Amendment of the Rules of Procedure and Evidence between the Trial and the Appeal, Immediate entry in force of the amendment of the Rules except in case of prejudice to the rights of the Accused in a pending case – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 6 (C), 115, 115 (A), 115 (B) (i) and 115 (B)(ii)

International Cases cited :

I.C.T.R. : Appeals Chamber, Alfred Musema v. The Prosecutor, *Décision sur la « Confidential Motion (i) to File Two Witness Statements Served by the Prosecutor on 18 May 2001 Under Rule 68 Disclosure to the Defence, and (ii) to File the Statement of Witness II Served by the Prosecutor on 18 April 2001, and (iii) to File a Supplemental Ground of Appeal » et ordonnance portant calendrier, 28 September 2001 (ICTR-96-13-A, Rep. 2001, p. 2477); Appeals Chamber,* Georges Rutaganda v. The

Prosecutor, *Decision on the Consolidated Evidence Motion for an Order Varying the Grounds of Appeal, for the Rehearing of Oral Arguments in the Appeal and for the Admission of Additional Evidence, and Scheduling Order, 19 February 2003 (ICTR-96-3-A, Rep. 2003, p. 3156); Appeals Chamber,* The Prosecutor v. Gérard and Elizaphan Ntakirutimana*, Decision on Request for Admission of Additional Evidence, 8 April 2004 (ICTR-96-10 and 96-17, Rep. 2004, p.* ***XXX****)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Zoran Kupreškić*, Appeal Judgement, 23 October 2001 (IT-95-16); Appeals Chamber,* The Prosecutor v. Radislav Krstić*, Decision on Applications for Admission of Additional Evidence on Appeal", 5 August 2003 (IT-98-33); Appeals Chamber,* The Prosecutor v. Radislav Krstić*, Reasons for the Decisions on Applications for Admission of Additional Evidence on Appeal, 6 April 2004 (IT-98-33)*

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "International Tribunal," respectively) is seised of the "Urgent Consolidated Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115", filed confidentially by Gérard and Elizaphan Ntakirutimana ("Appellants") on 3 June 2004 ("Motion"), and of the "Motion for the Admission and Full Consideration of Additional Evidence Not Available at Trial Pursuant to Rule 115 of the Rules of Procedure and Evidence," filed confidentially by the Appellants on 23 June 2004 ("Second Motion"). The Appeals Chamber dismissed both motions in its Decision on Request for Admission of Additional Evidence, rendered on 5 July 2004. The reasons for this Decision follow.

A. Background

2. In the Motion the Appellants request (i) an order from the Appeals Chamber for the admission of additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules"), (ii) an order permitting the filing of an addendum to their Appeal Briefs, (iii) an order permitting filing of oversized motion, (iv) a reconsideration by the Appeals Chamber of its Decision on Request for Additional Evidence[1] ("Rule 115 Decision"), and (v) a hearing of the Motion.

3. The Prosecution, in its response to the Motion filed on 14 June 2004[2] ("Prosecution Response"), argues that the Motion of the Appellants should be dismissed in its entirety, although it does not object to the page extension. The Prosecution is content that the Motion be decided without oral hearing.

[1] Decision on Request for Additional Evidence, rendered 8 April 2004.

[2] "Prosecution Response to Defense Urgent Consolidated Motion for the Admission of Additional Evidence Pursuant to Rule 115," filed on 14 June 2004.

4. In the Second Motion the Appellants request admission of materials from proceedings before a United States Immigration Court in a case involving several individuals who testified as witnesses at the Appellants' trial[3]. The Appellants also request admission of transcripts of the testimony of Witness BH (Prosecution Witness DD in the instant case) and Witness BI (Prosecution Witness YY in the instant case) who testified in the *Muhimana* case on 8 April 2004. The Prosecution opposes the request and argues that the Second Motion should also be dismissed[4].

5. The Appeals Chamber decided both motions on the basis of the Parties' written submissions[5].

B. The Applicable Law

6. Rule 115, as amended on 27 May 2003, reads :

> (A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than seventy-five days from the date of the judgement, unless good cause is shown for further delay. Rebuttal material may be presented by any party affected by the motion.
>
> (B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 118.
>
> (C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.
>
> (D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.

7. For evidence to be admitted pursuant to Rule 115 (B), the Appellant must establish "that (i) the evidence was not available at trial in any form and could not have been discovered through the exercise of due diligence, and (ii) that the evidence is

[3] Stating that the record of the immigration proceedings is not public, the Appellants' Second Motion refers to the immigration proceedings by an alias *In the Matter of AAA*. The Appeals Chamber does the same in this Decision.

[4] "Prosecution Response to Motion for the Admission and Full Consideration of Additional Evidence Not Available at Trial Pursuant to Rule 115," filed as confidential on 29 June 2004.

[5] Including "Defence Reply to the Prosecution Response to the Urgent Consolidated Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115" dated 18 June 2004," dated 18 June 2004, ("Reply").

relevant to a material issue, credible, and such that it could have had an impact on the verdict, i.e. could have shown that the conviction was unsafe."[6]

8. The Appeals Chamber notes that Rule 115 (B) was amended on 27 May 2003 at the International Tribunal's 13th plenary session, approximately three months after the Trial Chamber rendered its Judgement in this case[7]. Under Rule 6 (C) of the Rules, an amendment "shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case." As the Appeals Chamber has previously indicated, the standard incorporated by the amended Rule 115 (B) merely codifies the case law applying the prior version of Rule 115 (B)[8]. There being no prejudice to the Appellants, the Appeals Chamber considers that Rule 115(B) as amended applies to the Motion and the Second Motion.

C. Timeliness of the Motions

9. Rule 115 (A) of the Rules, as amended in May 2003, requires parties to file motions to admit additional evidence not later than seventy five days from the date of the Trial Chamber Judgement, unless good cause is shown for further delay.[9] In the present case, the Judgement was delivered on 21 February 2003. The Motion was filed on 3 June 2004, which is more than 15 months after delivery of the Judgement, and a month before the hearing of the appeals, scheduled for 7 to 9 July 2004. The Second Motion was filed even later, on 23 June 2004. Both Motions come therefore after the expiry of the time period stipulated in the new Rule 115(A). However, as the Appeals Chamber previously explained in its Rule 115 Decision, as the time period stipulated in the new Rule 115 (A) had already expired before the rule was amended, the Appellant would be prejudiced if his Motions were treated as subject to the new due date. Therefore the Appeals Chamber holds that the due date in the old Rule 115 (A) continues to govern this case, as envisioned by Rule 6 (C) of the Rules. The Motion and the Second Motion are therefore timely.

D. Discussion

I. The Motion

10. The Appellants seek to have admitted as additional evidence (i) a statement dated 13 and 14 January 2004 and transcripts of the testimony of Witness KJ (Prosecution Witness OO in the instant case), who testified in the case of *Bagosora et al.*

[6] "Rule 115 Decision", paras. 4 and 5, see also Prosecutor v. Krstić, "Decision on Applications for Admission of Additional Evidence on Appeal," Case N° IT-98-33-A, 5 August 2003, pp. 3-4.

[7] Prior to the amendment, Rule 115 (B) provided that "[t]he Appeals Chamber shall authorize the presentation of such evidence if it considers that the interests of justice so require."

[8] See "Rule 115 Decision," para. 6.

[9] Prior to its amendment, Rule 115 motions could be filed as late as fifteen days before the hearing of the appeal. See Rule 115 (A) of the Rules of Procedure and Evidence (as amended 6 July 2002).

from 19 to 27 April 2004[10], and (ii) the transcripts of the testimony of Witness AT (Prosecution Witness GG in the instant case) who testified in the *Muhimana* case on 19 and 20 April 2004[11].

11. The first question to be considered is whether the above evidence was available at trial within the meaning of Rule 115 (B). While the witness testified, and was examined and cross-examined, during the trial proceedings in this case, the physical availability of the witness during trial does not resolve the question of availability for the purposes of Rule 115 (B) analysis. This inquiry turns on the availability of particular evidence which the Appellants seek to present, and while the trial availability of the source of that evidence – here, one of the Prosecution witnesses – is a necessary part of the analysis, it is not a dispositive one[12]. In this case, the evidence the Appellants seek to admit is the testimony Witnesses OO and GG gave in subsequent judicial proceedings. This testimony, the Appellants argue, is so inconsistent with the witnesses' trial testimony in this case as to cast doubt upon their credibility and lead the Trial Chamber, had it had access to this later testimony, to render a different verdict.

12. As the most natural reading of the term "available" suggests, this new testimony was not available during the trial in this case for the simple reason that the witnesses in question have not yet given it. It is true that the witnesses were present on the stand during trial, and, of course, they possessed the allegedly contradictory information they were to give later in the *Bagosora* and *Muhimana* proceedings. The question then is whether a diligent defence counsel has applied all reasonable efforts to elicit these contradictory statements in the course of examining the witnesses' credibility[13]. If counsel has appropriately tested the veracity of the witness on cross-examination, and despite such efforts the witness gives evidence in a later case which casts

[10] *Prosecutor* v. *Bagosora et al*. "Military I", Case N° ICTR-98-41-T.

[11] *Prosecutor* v. *Muhimana*, Case N° ICTR-95-1B-T.

[12] In so concluding, the Appeals Chamber agrees with the decision reached on this issue by the ICTY Appeals Chamber. In the case of *Prosecutor* v. *Krstić*, IT-98-33-A, the ICTY Appeals Chamber was presented with a request to admit, under ICTY Rule 125 (B) which is identical to the corresponding rule in the ICTR, the testimony that Mr. Richard Butler, the Prosecution's military expert during the *Krstić* trial proceedings, had given in a later trial, that of *Prosecutor* v. *Blagojević*, IT-02-60-T. *See Prosecutor* v. *Krstić*, Appeal Transcript, p. 182 (the Defence counsel "moving the introduction of Mr. Butler's testimony under Rule 115"). The ICTY Appeals Chamber granted the motion. *See ibid.*, pp. 183, 216. As the ruling was oral, the ICTY Appeals Chamber did not discuss the question of availability. The ICTY Appeals Chamber did not, however, disagree with the parties' submission that the new testimony of Mr. Butler was not available at trial within the meaning of Rule 115 because "Mr. Butler's testimony incorporate[d] his latest thinking and analysis of the relevant evidence." *Prosecutor* v. *Krstić*, "Motion for the Filing of Rule 68 Evidence, Admission of Rebuttal Evidence and Admission of 115 Evidence in Response to the Defence Supplemental Motion to Present Additional Evidence Pursuant to Rule 115," filed on 18 November 2003, para. 17; *see also* "Defence Reply to the Prosecution's Motion for the Filing of Rule 68 Evidence, Admission of Rebuttal Evidence and Admission of 115 Evidence in Response to the Defence Supplemental Motion to Present Additional Evidence Pursuant to Rule 115," filed on 20 November 2003, paras. 1-3 (not contesting the Prosecution's analysis of availability).

[13] *Cf. Prosecutor* v. *Krstić*, Reasons for the Decisions on Applications for Admission of Additional Evidence on Appeal, IT-98-33-A, 6 April 2004, para. 10.

his credibility into doubt, the new evidence should be viewed as not having been available at trial or discoverable by a diligent counsel.

13. In this case, the matters to which the evidence proffered speaks were discussed prominently at trial, and the Defence cross-examined Witness OO and Witness GG about their testimony, which is now allegedly contradicted by the evidence they gave in subsequent trials. Given that defence counsel applied reasonable efforts to test the truthfulness of these witnesses at trial, the Appeals Chamber concludes that the evidence now tendered was not available at trial within the meaning of Rule 115[14].

1. Witness OO

14. Having determined that the evidence the Appellants seek to admit was not available at trial, the question now is whether this evidence is such that, had it been presented at trial, it could have affected the Trial Chamber's verdict. In the Motion, the Appellants present excerpts of transcripts of Witness OO's testimony in *Bagosora et al*. dated 19, 20 and 27 April 2004 to show that the witness's evidence on certain issues contradicts his evidence in the present case, and that the witness's credibility is therefore undermined.

15. The Appellants submit that the witness gave contradictory evidence regarding the transfer from Kibuye town of a certain Major Jabo, who is said to have opposed the killings in the region. In the present case, the witness stated that Major Jabo was

[14] It merits reminding that even where the evidence was not available at trial within the meaning of Rule 115, that conclusion does not conclude the inquiry. The Appeals Chamber must still proceed to the second step of the analysis and consider the evidence on its merits, but under a more stringent standard of asking whether the evidence would have affected the Trial Chamber's verdict. See, e.g., *Prosecutor v. Ntakirutimana*, Decision on Request for Admission of Additional Evidence, 8 April 2004, para. 5 ("Where the evidence was available at trial or could have been discovered through the exercise of due diligence, the moving party must show also that exclusion of the additional evidence would lead to a miscarriage of justice."); *Prosecutor v. Krstić*, IT-98-33-A, Reasons for the Decision on Applications for Admission of Additional Evidence on Appeal, 6 April 2004, para. 12 ("In order to have additional evidence admitted where it was available at trial or could have been discovered through the exercise of due diligence, the appellant must establish that its exclusion would lead to a miscarriage of justice.") (citations omitted). In addition, it must be noted that the Appeals Chamber always retains the power, once it decides to admit additional evidence under Rule 115, to call the witness in question to present the evidence in person and to be available for cross-examination and questioning. The Appeals Chamber can invoke this power under either Rule 54, combined with Rule 107, which confer upon the Appeals Chamber the power to issue any orders necessary to perform its functions, or Rule 98, combined with Rule 107, which permit the Appeals Chamber to summon witnesses. The experience of the ICTY Appeals Chamber is again instructive. With respect to Mr. Butler's evidence in *Prosecutor v. Krstić*, the ICTY Appeals Chamber ordered that the evidence be presented through Mr. Butler's in-court testimony. See *Prosecutor v. Krstić*, IT-98-33-A, Appeal Transcript, p. 183. The *Krstić* Appeals Chamber followed the same approach with respect to three other witnesses whose evidence it admitted under Rule 115, ordering those witnesses to be present in court for examination. See *Prosecutor v. Krstić*, IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003; Decision on the Admissibility of Material Presented by the Prosecution in Rebuttal to Rule 115 Evidence Admitted on Appeal, 19 November 2003.

transferred in mid April, at least before the attack on Gatwaro stadium, which occurred on 18 April 1994[15]. In cross-examination he claimed that Major Jabo had left by 14 April[16].

16. By contrast, in *Bagosora et al*., in the extracts cited by the Appellants, the witness explained that he went to Kigali with Major Jabo on 14 and 15 April 1994. They returned to Kibuye, and two days thereafter Major Jabo was transferred from Kibuye. When cross-examined about the apparent inconsistency between his evidence in *Ntakirutimana* and *Bagosora et al*., the witness explained that

> "I don't know whether I was talking about the trip to Kigali, but if that is the date which I gave, then I've already apologised because I said that I cannot give you an exact date. When I gave that answer, I was thinking of the question that had been put to me regarding the trip to Kigali. I don't know whether he was asking me a question regarding the first occasion or the second occasion when Jabo left."[17]

On review of the transcripts in this case, however, it is clear that Witness OO's testimony about the departure of Major Jabo related not to the alleged trip to Kigali but rather to the date of Major Jabo's actual transfer from Kibuye during the events. The witness did not testify in this case to Major Jabo visiting Kigali and returning to Kibuye prior to his transfer[18]. As such, there appears to be a possible inconsistency between the witness's evidence in the two cases.

17. The date on which Major Jabo left Kibuye relates to the Defence claim that, because of Jabo's opposition to the killings, Gérard Ntakirutimana would have been unable to go to the gendarmerie on 15 or 16 April to procure gendarmes and weaponry for the subsequent attacks. In that way, the issue of the date of Jabo's departure – and that of the credibility of Witness OO's statement to that effect – do relate to an important part of the verdict. After extensive cross-examination in this case, Witness OO confirmed that Jabo left Kibuye by 14 April. This testimony was the basis on which the Trial Chamber concluded that it was possible for Gérard Ntakirutimana to go to the gendarmerie on 15 or 16 April.

18. The Appeals Chamber must determine whether the Trial Chamber would have reached the same conclusion with respect to Witness OO's credibility in light of the presented evidence. The Trial Chamber considered the Defence argument that Witness OO's evidence as to the date of Major Jabo's departure was contradictory, as at one time the witness fixed that date as being before 18 April and at another time as being after 18 April[19]. The Trial Chamber nevertheless concluded that the witness gave a satisfactory explanation for these inconsistencies, and therefore credited Witness OO's testimony that Jabo left on 14 April[20]. In *Bagosora*, Witness OO stated that Jabo was transferred out of Kibuye around 17 April. This date is consistent with the evidence of Witness OO on which the Defence relied at trial to show that the witness was not

[15] T, 1 November 2001, pp. 141-144.
[16] T, 2 November 2001, p. 52.
[17] T, 27 April 2004, p. 39.
[18] See in particular, T, 1 November 2001, pp. 142-144, T, 2 November 2001, pp. 51-54.
[19] Trial Judgement, paras. 168, 174.
[20] *Ibid.*, para. 180.

credible[21]. Because the evidence which the Defence now seeks to admit is substantively the same as the evidence the Trial Chamber has already considered, the Appellants failed to show that the Trial Chamber would not have adhered by its conclusion that "the inconsistencies [in Witness OO's testimony] are not so material as to affect the substance of his testimony"[22] even if it had the new evidence before it.

19. The Appellants also argue that the witness presented contradictory evidence regarding his knowledge of sketches and ability to use them[23]. In this case, during cross-examination, the witness explained that "I've never had to read sketches because I have never had training in this area". By contrast, in *Bagosora et al*., the witness testified that although he had not had an "in depth" course on how to read maps, he had received training in how to use a map, that he could draw sketches and that he could find bearings on maps[24]. As in the present case, the witness was nevertheless reluctant to identify locations on a map in court, preferring instead to draw his own sketch[25]. The witness therefore appeared to provide differing evidence about training he may have received in the use of maps and sketches. This evidence of inconsistency, however, is collateral to factual matters determined by the Trial Chamber, and therefore could not have affected the verdict.

20. In addition, the Appellants submit that there exist material inconsistencies in the witness's explanations in relation to the chronology of events in his previous witness statements.[26] In *Bagosora et al*., the witness was questioned about the chronology of events. In the Motion, the Appellants cite an exchange between the witness and the Bench, during which the witness states that

> "if your read my statement, you will see that I narrated events one after the other according to the sequence of their occurrence."

[21] *Ibid.*, para. 168. Of course, during his *Bagosora* testimony Witness OO now added an additional detail, namely that he and Major Jabo made a trip from Kibuye to Kigali on either 14 or 15 April. Although this is a detail not present in the witness's earlier testimony, it is not of such a magnitude that it could have altered the Trial Chamber's assessment of his credibility.

[22] *Ibid.*, para. 180.

[23] Motion, paras. 16-17.

[24] T, 20 April 2004, pp. 34-41.

[25] T, 20 April 2004, p. 39. "The problem isn't that it -- whether or not it's difficult for me to read the map, but, rather, the following : The person who drafted -- I don't know who drafted this map. I don't know if this person did not make any mistakes, and as I am going to be reading the map, I'm not sure that I'll be able to see the mistakes that the persons might have made."

[26] In the present case, inconsistencies between the chronology of events in his written statement of 6 – 11 August 1998 and his testimony were assessed by the Trial Chamber : "Several inconsistencies between the chronology of events as represented in Witness OO's statement of 6-11 August 1998 and his testimony before the Chamber, including the date of departure of Jabo, were addressed by the witness : 'When the investigators were questioning me they were taking down notes and when they went to type out my statement … they did not maintain the chronology of events. And I did not have the opportunity to read that over with them to be able to correct that error.' He added : 'I signed the statement all right … And I said to myself that even if there was a problem with the statement, I was going to solve it since I would be present [before the Trial Chamber] myself.' The Chamber accepts this explanation of the witness and concludes that the inconsistencies are not so material as to affect the substance of his testimony." Trial Judgement, para. 180 (citations omitted).

The witness also confirms that he related only the sequence of events and not the dates of their occurrence.[27] The Appeals Chamber notes that, although the Appellants indicate in their Motion that the witness was referring to his 1998 statement, it is unclear from the transcripts whether this is the case. The Appeals Chamber is unable therefore to consider the merits of this submission.

21. Finally, the Appellants submit that in his written statement of 13 and 14 January 2004, the witness affirmed the accuracy of his earlier statements. However, the Appeals Chamber considers that in his statement of 13 and 14 January 2004, the witness does not explicitly state that the content and chronology of his earlier statement were accurate. Rather, he confirmed only that he had made an earlier statement, which he did not wish to change, but that he wanted to add to it.

22. The Appeals Chamber therefore rejects the Appellants' request for admission of the evidence given by Witness OO in the case of *Bagosora et al*. under Rule 115.

23. The Appeals Chamber is also not persuaded by the Appellants arguments that it should reconsider its previous Rule 115 Decision in this case, wherein the Appeals Chamber dismissed the Appellants' argument that the witness presented inconsistent evidence in this case and in *Niyitegeka*.

2. Witness GG

24. The Appellants seek to have admitted the evidence of Witness AT who testified in the *Muhimana* case and appeared in the instant case under the pseudonym GG. Prosecution Witness GG's evidence was relied upon by the Trial Chamber in its findings on the participation of Gérard Ntakirutimana in attacks at the Mugonero Complex and at Muyira Hill[28].

25. The Appellants submit that a review of the testimony of the witness in *Muhimana* reveals important inconsistencies with his evidence in the instant case[29]. They argue that the witness's credibility is undermined on the basis that, in *Muhimana*, he deviated from his evidence given in this case about the number of vehicles he saw on 16 April 1994 at the Mugonero Complex, so as "to meet the needs of the Muhimana case,"[30] that he furnished specific times for events, which he was unable to do in the present case, and that he again presented contradictory evidence about his schooling.

26. The Appellants contend that the witness changed his evidence significantly about his observations of Gérard Ntakirutimana at the start of the attacks on Mugonero Complex on 16 April 1994[31]. In the instant case, the witness's mention of Gérard Ntakirutimana, cited in the Motion, arose during his cross-examination on the alleged shooting of Charles Ukobizaba on 16 April 1994. Asked to confirm whether his evidence in examination-in-chief was that this was his first sighting of Gérard Ntakirutimana, the witness explained that he had initially seen Gérard Ntakirutimana not during this alleged shooting, but earlier in the day, with Mathias Ngirinshuti and Enoch

[27] T, 20 April 2004, pp. 7-8.
[28] Trial Judgement, paras 291, 629-636.
[29] Motion, paras. 18, 20.
[30] Motion, para. 23.
[31] Motion, paras. 21-22.

Kabaga, "placing the attackers in such a way that they surrounded the hospital." The witness was not asked for further details about this observation[32].

27. In *Muhimana*, the witness was questioned extensively about the arrival and identity of the attackers on the morning of 16 April 1994 at the Mugonero complex. The witness identified Gérard Ntakirutimana in the hospital vehicle with other attackers. Once the shooting started, the witness fled first to the Church and then sought refuge in the hospital building[33].

27. It is clear that in both cases, the witness was consistent that he first saw Gérard Ntakirutimana before he saw him shooting Charles Ukobizaba at the start of the attack, and that he fled towards the Church once the shooting commenced.

28. It must be acknowledged that there are certain inconsistencies in the witness's evidence regarding the arrival of the attackers and the number of vehicles he saw at the start of the "main attack" at the Mugonero Complex. In the present case, Witness GG's evidence is that on 16 April 1994 he saw a second wave of attackers arrive at the Mugonero Complex for the "main attack". He described seeing Elizaphan Ntakirutimana and Obed Ruzindana, and a number of attackers including Mika and Sikubwabo. The witness clarified that he saw the vehicles of Elizaphan Ntakirutimana and of Obed Ruzindana[34]. By contrast, in *Muhimana*, in addition to these two vehicles, the witness mentions seeing the vehicle of Sikubwabo, the hospital vehicle driven by Gérard Ntakirutimana, the vehicle with Kayishema and a truck carrying soldiers[35].

29. The witness's evidence in *Muhimana* therefore appears to differ from his testimony in the present case insofar as he testified to seeing not only the vehicle of Elizaphan Ntakirutimana and of Obed Ruzindana, but also the hospital vehicle driven by Gérard Ntakirutimana and a number of other vehicles. In the present case, evidence about Gérard Ntakirutimana driving the hospital vehicle is absent.

30. It is, however, normal for a witness who testified in several trials about the same event or occurrence to focus on different aspects of that event, depending on the identity of the person at trial and depending on the questions posed to the witness by the Prosecution. It is, moreover, not unusual for a witness's testimony about a particular event to improve when the witness is questioned about the event again and has his memory refreshed. The witness may become more focused on the event and recall additional details. Given that the *Muhimana* proceedings were subsequent to the trial proceedings in this case, the fact that Witness GG gave additional details about

[32] T, 24 September 2001, pp. 124-125.

[33] T, 19 April 2004, pp. 8-11.

[34] T, 21 September 2001, pp. 135-142.

[35] T, 19 April 2004, p. 16 ("We first saw the vehicle of Ntakirutimana, Elizaphan. It was a Toyota vehicle. He parked the vehicle in front of his office. And the other vehicles also parked in front of his office. Afterwards, we saw the vehicle of Ruzindana, which was carrying Mika and some soldiers. After that, we saw another vehicle – Ruzindana's vehicle was red. It was not covered. This was followed by the vehicle of the Gishyita *bourgmestre*; that is Sikubwabo. After that we saw the hospital vehicle that was carrying soldiers and which came from Kibuye. After that we saw the vehicle of Kayishema, who was accompanied by another truck in which there were soldiers.").

the events at the Mugonero Compex during his *Muhimana* testimony does not necessarily indicate that the witness was not credible.

31. The Appellants also rely on other alleged inconsistencies in the evidence of Witness GG, arguing that they undermine his credibility. The Appellants argue that although in the instant case the witness testified that he was unable to furnish precise times, in *Muhimana* he provided precise times as to events during the attacks. In their Reply, the Appellants underscore that in making its finding that Gérard Ntakirutimana shot Charkes Ubokizaba on 16 April 1994, the Trial Chamber relied on the corroboration of time between Witness GG and Witness HH[36].

32. In the present case, the witness testified of two attacks which occurred at the Mugonero complex on 16 April 1994. Questioned about the time of the first attack, the witness indicated that "the sun was already shining", "the attack began when the sun had already risen for quite some time", "it started in the morning", "I would say that it was a short time before midday" and "it began in the morning."[37] The witness also indicated that during the events he did not have a watch[38]. When asked whether he understood the concept of "noon" the witness stated that "for we people who do not have a watch, we normally use the sun."[39]

33. In *Muhimana*, the witness testified that the main attack occurred around 09 :00 hrs and that he sought refuge in the hospital around 11 :00 hrs[40]. He explained that he did not have a watch, and therefore could only estimate the time at which he sought refuge in the hospital[41].

34. Finally, the Appellants submit that Witness GG provided different answers in the present case and in *Muhimana* about the number of years of education he had received. They argue that the witness's readiness to furnish inaccurate answers and to rationalize inconsistencies are material[42]. In the present case, the witness explained that he attended school for only one year, during which he met Obed Ruzindana. Challenged with his testimony in the *Kayishema and Ruzindana* case that he had had four years of education, the witness explained that he had never stated that he had been to school for four years[43].

35. In *Muhimana*, the witness confirmed that he had spent fours years at school, and testified that he had not been a strong student, and that he cannot read or write. He stated that he had been "promoted from one class to another, just to please [him.]" Confronted with his testimony in the present case, namely that he had only attended school for one year, the witness explained that "if you were to ask me the question, I would tell you that I didn't even do the first year of primary school." He added that "he could not boast that [he] went to school when the schooling was not useful to me", and that "one year and four years are the same thing."[44]

[36] Reply paras. 19-20.
[37] T, 24 September 2001, pp. 97-100, and 104-105.
[38] *Ibid.*, p. 99.
[39] *Ibid.*, p. 138.
[40] T, 19 April 2004, p. 37.
[41] T, 19 April 2004, p. 13, p. 51.
[42] Motion, paras 23-24.
[43] T, 24 September 2001, pp. 55-60.
[44] T, 19 April 2004, pp. 43, 44.

36. A comparison of the evidence shows that in *Muhimana* not only did the witness furnish additional evidence implicating Gérard Ntakirutimana in the preparation of the attacks on the morning of 16 April 1994, but he was also more specific about the times the events happened. Despite these additional details, however, the witness's evidence in *Muhimana* is materially consistent with the witness's version of events in the present case. Moreover, as already explained, it is not unusual for a witness to remember additional details when testifying about the same event in subsequent proceedings[45].

37. The witness in this case did mention seeing Gérard Ntakirutimana "placing the attackers in such a way that they surrounded the hospital." This observation was before the shooting of Charles Ukobizaba, and is consistent with the witness's evidence in *Muhimana* that he saw Gérard Ntakirutimana at the beginning of the attacks.

38. Although the witness gave more precise times in *Muhimana*, these were generally consistent with his evidence in this case as to the unfolding of the events[46]. The witness's failure to furnish precise times regarding the attack and shooting of Charles Ukobizaba did not prevent the Trial Chamber from relying on his evidence insofar as it was corroborated by that of Witness HH on a number of details.[47]

39. The evidence of inconsistencies about the number of years the witness attended school could not have affected the Trial Chamber's assessment on the credibility of Witness GG. In fact, the question of the number of years spent at school by the witness was in issue during Witness GG's examination. The witness was confronted with the contradiction between his evidence in *Kayishema and Ruzindana* regarding the number of years he attended school, and despite the apparent inconsistency and the witness's affirmation that he had not previously testified that he had been schooled for four years, the Trial Chamber still found the witness credible and relied on his evidence.

40. Consequently, it has not been shown that the Trial Chamber's findings on Witness GG's credibility could have been affected presented with the witness's additional evidence in *Muhimana*.

II. The Second Motion

41. In this Motion the Appellants first seek admission of materials from the proceedings of an immigration court in the United States[48]. The Appellants seek to sup-

[45] *See* para. 31, *supra*.

[46] And, as explained above, *see* paras. 31, 37, *supra*, a more specific testimony given about the same event in a subsequent proceeding does not necessarily cast doubt upon the credibility of the witness's testimony in the earlier proceeding.

[47] It should be noted that the Trial Chamber did not find it proved beyond reasonable doubt that Gérard Ntakirutimana conveyed attackers on the morning of 16 April 1994.

[48] The Appellants failed to present this evidence with their motion, submitting it only several days later, on 5 July 2004, in a confidential "Annexure to July 3, 2004 Reply to Prosecutor Response to Appellants [sic] Motion of June 23, 2004 for the Admission and Full Consideration of Additional Evidence Not Available at Trial Pursuant to Rule 115 of the Rules of Procedure and Evidence and Motion for an Order Authorizing the Filing of Additional Evidence in Excess of Page Limitations." Originally, the Appellants only provided a list of seven exhibits which they

port a defence raised at trial and pursued on appeal of the existence of a political campaign to falsely incriminate and convict the Appellants. They submit that the additional evidence indirectly casts doubt as to the credibility of all of Prosecution's factual witnesses.

42. The Prosecution first opposes this part of the Second Motion on the grounds that the Appellants failed to provide all of the evidence that they are apparently seeking to have admitted as additional evidence. The Prosecution secondly argues that the findings of another judge in other proceedings concerning unrelated issues in a completely different jurisdiction are of little value in determining whether the Trial Chamber in this case reached reasonable conclusions from the testimony of Prosecution Witnesses SS, UU and YY.

43. Given that the evidence the Appellants present in their Second Motion postdates the trial proceedings in the present case, there is no dispute that the evidence was not available at trial within the meaning of Rule 115.

1. Witness SS

44. As to Witness SS, the Second Motion highlights the following four excerpts of the U.S. Immigration Judge's decision :

> The most remarkable claim is that of SS, who stated that at Gitwe he saw AAA rape and kill the witness' fiancée, FFF. The witness was hiding by the side of the road only 10 meters away from where AAA committed this crime, yet remained undetected by the Respondent and the group of 20 men Respondent was leading. The witness apparently did nothing to intervene to try to assist his fiancée, but simply watched this all occur while remaining in hiding. The Court has serious reasons to doubt the veracity of this version of events.
>
> .. . .
>
> SS stated that he was only 10 meters (30-35 feet) away from the Respondent at Mugonero when he saw Respondent put his foot on the head of a dead girl. SS was about 25 meters away from AAA during the April 16 attack at Mugonero. At that time, the witness saw AAA carrying a rifle, leading a crowd. In the chaos of the attack, he saw AAA shoot at two men. At Bisesero, he saw the Respondent shooting people, and was about 30 to 50 meters from Respondent at the time. Considering that these attacks were carried out in a context of total

wished to admit (listing the decision of the U.S. Immigration Judge and six witness testimonies), failing to attach any of them to the motion. The Appellants did attach what they claim to be a relevant excerpt from the Immigration Judge's decision. That excerpt, however, was not even a photocopy of a portion of a decision but a few pages of text re-typed by counsel themselves. The excerpt therefore possessed no indicia of its real origin or reliability to enable the Appeals Chamber to evaluate this request. At the time the Second Motion was filed with the Appeals Chamber, the Appellants failed to provide any basis on which the Appeals Chamber could evaluate their request. The hearing of the appeal was scheduled from 7 to 9 July 2004. Were any additional evidence admitted, the parties would have had to argue its reliability and weight during that hearing. The Appellants are hereby reprimanded for failing to submit the evidence they sought to admit along with their Second Motion, and consequently failing to facilitate the Chamber's consideration of their request in the short time available before the appeal hearing.

chaos, these claims of such close proximity to a gun-toting AAA are quite questionable.

.. . .

SS's statements about Respondent's political activities are obviously false. Dr. Des Forges indicated that it was unlikely the Respondent would have taken a leadership role at meetings were much more prominent figures were present. The Witnesses' claims about Respondent being involved in political meetings are just not credible.

.. . .

SS was interviewed by Africa rights representatives in 1997 or 1998. In Immigration Court, he could not recall whether in that interview he mentioned AAA's role, or the rape and murder of FFF[49].

45. As to the first excerpt, the rape of FFF is not an issue in the present appeal and was not part of SS's testimony. This issue is therefore immaterial to the present case. Even more importantly, as recounted in the excerpt in question, the testimony of witness SS is not incredible. The fact that the witness would have done nothing to assist his *fiancée* while she was raped and killed by the Respondent can easily be explained by the presence of a group of 20 men led by the Respondent and the fear the witness would have had for his own life. The same applies to the second excerpt and the Immigration Judge's conclusion that close proximity of the witness to a gun-toting AAA would be highly questionable in a context of total chaos. The chaotic context within which the witness is said to have observed the crimes being committed is not incompatible with this observation having occurred at close proximity. As to the third excerpt, the testimony in question is immaterial to the present appeal. Moreover, even if the opinion of Dr. Des Forges could affect the Immigration Judge's assessment of the credibility of Witness SS, that subsequent assessment would have been based on the opinion of Dr. Des Forges and not on the witness's live testimony. The inference as to the credibility of Witness SS would therefore be too attenuated to support a conclusion that the evidence presented could have altered the Trial Chamber's assessment of Witness SS's credibility. For the same reasons, the fourth excerpt does not appear determinative of the witness credibility either.

2. Witness UU

46. The Trial Chamber found, on the basis of the evidence of Witness UU :

"that Witness UU knew Gérard Ntakirutimana and was in a position to identify him. The Chamber also finds that the Accused attended three meetings in Kibuye town, held between 10 and 18 June 1994 (approximately), at which he made statements about the need to eliminate all Tutsi and called for more arms and ammunition. The details are set out in the discussion above. At those meetings Gérard Ntakirutimana also participated in the distribution of weapons, discussed the planning of attacks at Bisesero, was assigned a role in such an attack, and reported back on its success. Witness UU's evidence, taken together with the whole of Witness OO's evidence (see, in particular, II.3.7 above) leads the Cham-

[49] Attachment A to the Second Motion, at 3-4; *see also* Second Motion, paras. 26-28.

ber to conclude that Gérard Ntakirutimana played a prominent role in some attacks in Bisesero during the period of April to June 1994."[50]

47. During the immigration hearing, the Government withdrew Witness UU, and did not call him to testify. The Immigration Judge's finding that Witness UU fabricated his evidence rests on the opinion of Dr. Alison Des Forges that the witness's account of a meeting on June 1994 was not plausible. The Immigration Judge added that "presumably, it was Des Forges who advised the Government attorneys about the false preposterous claims." As such, the Immigration Judge's opinion on Witness UU's lack of credibility is based on Dr. Des Forges's opinion and the government's withdrawal of the witness, and not on the witness's live testimony before the immigration hearing. This being so, and for reasons already explained, the findings of the immigration Judge for Witness UU could not have affected the Trial Chamber's assessment of Witness UU in this case.

3. Witness YY

48. The Appellants argue that Witness YY was part of a political campaign to incriminate them, and refer to the Immigration Judges observations on the credibility of the government case in the immigration hearing to support this proposition.

49. In the Immigration Judgement, the Judge observed that the withdrawal by the Government of two witnesses put some degree of a taint on all eyewitness evidence offered by the Government, which presumably includes Witness YY. According to the Appellants, the Immigration Judge found Witness YY's claim of observing AAA shoot persons at Mugonero and Bisesero questionable, and found that the witnesses, including YY, grossly exaggerated the number of attackers and victims at Mugonero and Gitwe.

50. These observations, even if correct, could not have affected the Trial Chamber's findings in this case. The fact that Witness YY may have exaggerated the number of victims and attackers before the Immigration Judge does not cast doubt over his credibility as in the present case. Witness YY already estimated in the present case that there were 50000 refugees at the Mugonero Complex[51], which was approximately 30000 more than the next highest estimation, made by Witness MM. The Trial Chamber therefore was already aware of this possible criticism of Witness YY's evidence when it assessed his credibility.

51. Regarding the allegation that the Appellants attended an MRND political meeting, it appears, according to the excerpt presented by the Appellants, that Witness EEE and not Witness YY was the source of this evidence. Similarly, there is no mention in the excerpt of the Immigration Judgement on which the Appellants rely on a finding that Witness YY's observation of AAA shooting at persons is questionable.

4. Muhimana *Transcripts*

52. The Appellants also request admission of transcripts of the testimony of Witness BH (Prosecution Witness DD in the instant case) and Witness BI (Prosecution

[50] Trial Judgement, para. 720.
[51] Trial Judgement, para. 71.

Witness YY in the instant case) who testified in the *Muhimana* case[52]. The Appellants submit that the testimony recently given by witnesses DD and YY in that case is inconsistent with the testimony these witnesses gave at the Appellants' trial. These inconsistencies, the Appellants allege, undermine the Trial Chamber's findings with respect to the credibility and reliability of the witnesses in question. The Prosecution argues that there is no inconsistency between the evidence given by DD at the Appellants' trial and his testimony at the *Muhimana* trial. The Prosecution also argues that there is no inconsistency between the evidence given by YY at the Appellants' trial and his testimony in *Muhimana*, and even if there was, given the reliance of the Trial Chamber in the Appellants' Trial upon the testimony of a number of witnesses, it could have had no impact on the outcome of the appeal.

a. Witness DD

53. The Appellants note that in his original statement in this case, dated 11 November 1999, Witness DD made no mention of either of them being at Mubuga school. In a Reconfirmation statement of 28 July 2001, the witness is said to have alleged that Elizaphan Ntakirutimana killed his wife and two children and that Gérard Ntakirutimana killed the witness's uncle and a child in the Mubuga primary school. According to the Appellants, on 22 October 2001 the Prosecution filed a letter/second reconfirmation statement, in which the witness indicated that Elizaphan Ntakirutimana was not at Mubuga school, and that it was Gérard Ntakirutimana who murdered the witness's wife and two children there. Finally, according to the Appellants, during his testimony in the present case DD made no mention of Mubuga school.

54. The Appellants argue that the witness's reliability is called into question on the basis that he testified in *Muhimana* to the killing of his wife in Mugonero, whereas in 2001 statements he mentioned that they were killed at Mubuga school. This argument is not convincing. In *Muhimana*, the witness only indicated, very generally, that his family had been killed at the Mugonero hospital. The Appeals Chamber notes that earlier in his testimony, he had described his family as his four children, his wife, his father and his mother, and "also members of another family that was related to us." Without more details, and given the witness's very general and imprecise description of his family, which included even members of another, related family, it is difficult to conclude whether the witness's reference to "his family" in *Muhimana* was meant to include his wife and children among those who had been killed at Mugonero. The Trial Chamber was made aware of the inconsistencies between the witness's various statements regarding the killing of his wife and children, yet still found him credible. The proffered additional evidence could not have had an impact upon the verdict.

[52] It must be noted that nowhere in their Second Motion did the Appellants expressly request the admission of the testimony derived from the *Muhimana* proceedings. While the Appeals Chamber construes the Appellant's extensive discussion of this testimony as a request for admission under Rule 115, it warns the Appellants that a failure to formally request admission of particular evidence could be sufficient ground not to consider that evidence at all.

b. Witness YY

55. The Appellants argue that in his testimony in *Ntakirutimana*, Witness YY testified that on the morning of 16 April 1994 he initially saw two cars driving towards Elizaphan Ntakirutimana's house, and then saw four cars, including Elizaphan Ntakirutimana's vehicle, coming from the direction of the house and arriving at the Mugonero Complex[53]. According to the Appellants, Witness YY estimated the distance from which he observed the vehicles to be 20 meters[54]. The Appellants note that in the *Muhimana* trial, by contrast, Witness YY testified that he saw only two vehicles, and made no mention of a vehicle belonging to Elizaphan Ntakirutimana[55]. Moreover, so the Appellants note, Witness YY now testified that he observed the vehicles from the distance of 30 to 40 meters[56]. On the basis of these inconsistencies, the Appellants argue that Witness YY has fabricated his testimony in the instant case and the Trial Chamber erred in crediting Witness YY's testimony. Without his testimony, the Appellants contend, the Trial Chamber could not have found that Elizaphan Ntakirutimana "conveyed attackers to the Mugonero Complex on the morning of 16 April 1994[57].

56. The Appeals Chamber has already considered an analogous argument of the Appellants with respect to discrepancies in the evidence given by Witness GG in the instant case and in the *Muhimana* proceedings[58]. There, the Appellants also relied on inconsistencies in the evidence given by the witness in two different proceedings with respect to the number of vehicles he saw arrive at the Mugonero Complex. While acknowledging these inconsistencies, the Appeals Chamber concluded that they were not of such magnitude that they could have altered the Trial Chamber's verdict. The same conclusion follows here.

57. In addition, it must be noted that the Trial Chamber did not rely solely on Witness YY's evidence in placing Elizaphan Ntakirutimana at the Mugonero Complex. The Trial Chamber's finding was also based on the evidence given by Witness MM, Witness GG, Witness PP and Witness HH[59]. In light of that testimony, the Trial Chamber could legitimately have found Witness YY to be credible. Moreover, even if Witness YY were found not to be credible, the evidence of the other witnesses would have been sufficient to support the Trial Chamber's finding that Elizaphan Ntakirutimana conveyed attackers to the Mugonero Complex on 16 April 2004. The additional evidence of Witness YY is therefore not such that it could have influenced the Trial Chamber's determination on that factual issue.

E. Conclusion

58. For the foregoing reasons, the Appeals Chamber DISMISSES the Motion and the Second Motion on 5 July 2004.

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[53] Second Motion, para. 35.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*, para. 36 (quoting Trial Judgement, para. 310).
[58] *See* paras. 25, 29-31, *supra*.
[59] Trial Judgement, paras. 226-260.

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

Done this 8th day of September 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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Separate Opinion of Judge Schomburg

1. While I agree with the disposition set out in the decision, I respectfully disagree with some of the reasons given.

2. In my opinion, availability of evidence pursuant to Rule 115 (B) of the Rules has to be defined narrowly. In fact, it is limited to exceptional scenarios where evidence did exist during trial, but was not accessible due to specific factual obstacles beyond the control of the International Tribunal (*e.g.*, archives not yet opened, non-co-operation of States).

3. In the present case the witness was available at trial for examination-in-chief, cross-examination and re-examination. Therefore, the decisive factor is the physical availability of the witness at trial, and not the content of any later testimony of this witness. This later testimony did not yet exist during trial, thus the question of availability of a testimony in a later case does not arise. Subsequent testimony does not – and by nature cannot – have any impact on the issue of the availability of the testimony upon which the Trial Chamber based its decision due to the fact that only this first testimony forms part of the trial record.

4. Credibility is a secondary question only, emanating from substantial factual discrepancies. Credibility, to be assessed by the trier of fact, should not be confused with availability. A later testimony containing substantial discrepancies does not necessarily endanger the assessment of the first testimony which can be the correct one. Furthermore, how can the Appeals Chamber, confronted with substantial discrepancies, come to the conclusion that the later testimony, the requested additional evidence, was credible, this being one prerequisite of Rule 115 (B) of the Rules?

5. The problem and its solution have to be found in the nature of the discrepancy. Marginal discrepancies are attributable to human nature. Substantial discrepancies, however, that go to the heart of a conviction/verdict and could have occasioned a miscarriage of justice, have to be first clarified by the second trier of fact.

6. Only in those cases where such a fundamental discrepancy has not been resolved by the second trier of fact, it is for the Appeals Chamber to clarify this discrepancy. Therefore, *sedes materiae* is not Rule 115 of the Rules but the obligation to search for the truth. Truth cannot be established by assessing which of the conflicting testimonies are more credible or less credible. Only establishing the underlying facts once and forever can resolve the problem at issue. Acting this way means to manage a case proactively. To hold otherwise would mean that any new testimony could trigger

further motions to present additional evidence under Rule 115 of the Rules, thus creating the risk of a successfully obstructive conduct of a party.

7. Under extraordinary circumstances – *e.g.*, if the Appeals Chamber becomes aware of a substantial discrepancy that goes to the heart of a conviction/verdict and could have occasioned a miscarriage of justice –, the Appeals Chamber may resort to summoning the witness *proprio motu* pursuant to Rule 98, sentence 2 of the Rules in order to finally resolve the discrepancies found in the witness's conflicting testimonies already given.

Dated this eighth day of September 2004, at The Hague, The Netherlands.

[Signed] : Wolfgang Schomburg

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Scheduling Order
19 November 2004 (ICTR-96-10-A and ICTR-96-17-A)

(Original : Anglais)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Florence Mumba; Mehmet Güney; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Gérard Ntakirutimana, Elizaphan Ntakirutimana – Schedule

International Instrument cited :

Rules of Procedure and Evidence, rule 118 (D)

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING Rule 118 (D) of the Rules of Procedure and Evidence of the International Tribunal;

HEREBY ORDERS that a public hearing shall be held on Monday, 13 December 2004 at 09 :00 in Arusha to deliver the Judgement.

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

Done this 19th day of November 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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Judgement
13 December 2004 (ICTR-96-10-A and ICTR-96-17-A)

(Original : English)

Appeals Chamber

Judges : Theodore Meron, Presiding; Florence Mumba; Mehmet Güney; Wolfgang Schomburg; Inès Monica Weinberg de Roca

Gérard Ntakirutimana, Elizaphan Ntakirutimana – Legal Errors, Errors relating to the Indictments, Appreciation of the issue of waiver by the Trial in the context of each separate argument, Principles of double jeopardy : no violation by admission of two counts based on the same facts, Allegation of failure of the Indictments to plead various material facts underlying the convictions, Law governing challenges to the vagueness of an indictment, Absence of prejudice to Accused's ability to defend against the charges, Test of sufficient pleading of the material facts and if they do not, whether the Prosecution cured the defects through clear, consistent, and timely communications, Test directed to the clarity and consistency of the Prosecution's announcement of the material facts it intends to prove rather than to Prosecution' evidence as disclosed to the accused, Standard of evidence for acts physically committed by the accused (if feasible, identity of the victim, the time and place of the events and the means), Discrepancies differences between the indictment and the evidence presented at trial, Impact of the sheer scale of the crimes on the specificity of the material facts, Amendment of the Indictment as soon as possible for material facts unknown at the time of the initial indictment – Burden of showing that there was no unfairness to the accused to the Prosecution when revealing material facts for the first time at trial, Obligation of the Prosecution to be as clear as possible about the factual allegations it intends to prove at trial – Legal Errors, Errors relating to the burden of proof, Failure of the Trial Chamber to consider the risk relating to testimony of detained witness (fabrication of evidence), No evidence that the error of law invalidates the decision, No requirement that convictions be made only on evidence of two or more witness – Legal Errors, Errors relating to the treatment of prior inconsistent statements – Legal Errors, Indicia of witness coaching– Legal Errors, Errors relating to the alibi – Legal Errors, Evidence relating to motive – Factual errors, Trial Chamber's role to make findings of fact, Erroneous finding revoked or revised only if the error occasioned a miscarriage of justice – Error in finding of credibility is an error of fact – Existence of a Political Campaign – Joint criminal enterprise, Extended form of joint criminal enterprise, Mirror articles identifying the modes of liability in ICTY and ICTR Statutes, No express reference made by the Prosecution to joint criminal enterprise, common plan or purpose in the Indictment, Error in the Trial Chamber's decision – Genocide, No more requirement of the Dolus specialis required for genocide for each mode of participation under Article 6(1), Mens rea of aiding and abetting liability based on the knowledge of the Accused – Extermination, Element of the crime : customary international law does not require a precise description or designation by name of victims, Actus reus for aiding and abetting the crime of extermination : acts specifically directed to assist, encourage or lend moral support to the perpetration of that crime, Mens rea : knowledge that the acts assist the com-

mission of the crime, Permissible convictions for genocide and extermination as a crime against humanity based on the same facts – Murder, Personal commission as one of the modes of liability – Prosecution's obligation to set out a concise statement of the facts in the indictment, Unacceptable for the Prosecution to omit material aspects of its main allegations in the indictment, Preferable that the Prosecution indicates in relation to each individual count precisely and expressly the particular nature of the responsibility alleged – Assessment of witnesses' credibility, Issue of the use of prior consistent statements to bolster a witness's credibility, Corroboration as a factor for assessing witnesses' credibility, No possible relying of the Chamber on facts that have not been proven beyond a reasonable doubt, Possibility to the Chamber to rely upon some parts of the testimony only – Presumption of innocence, Action of the Trial Chamber on an "impression" of the Appellant's behaviour not proven beyond a reasonable doubt, Impression base on based on Accused's testimony, Improper standard of proof but sufficient evidence to support the conclusion – Purpose of an alibi, Reversal of the onus – Sentence, considerable discretion to the Trial Chamber, Intervention of the Appeals Chamber only in case of a discernible error – Conviction of Gérard Ntakirutimana, Maintaining of the 25 years verdict – Conviction of Elizaphan Ntakirutimana, Special consideration to mitigating circumstances : notably age and state of health, Maintaining of the 10 years verdict – Trial Chamber's Judgement partially quashed, News conviction entered for aiding and abetting genocide, extermination and murder as crimes against humanity, Convictions maintained

International Instrument cited :

International Law Commission Draft Code of Crimes against the Peace and Security of Mankind, art. 18; Rules of Procedure and Evidence, rules 47 (C), 89 (C), 101 (A), 103 (B), 107 and 118; Statute, art. 2, 2 (2), 2 (3)(e), 3, 3 (a), 3 (b), 6 (1), 6 (3), 17 (4), 20(2), 20(4)(a), 20(4)(b), 23 and 24; ICTY Statute, art. 7 (1), 18 (1), 21 (2), 21 (4) (a) and 21 (4) (b); Statute of the International Criminal Court, art. 7(1)(b); Statute of the Nuremberg International Military Tribunal, art. 6(c)

International and National Cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Jean-Paul Akayesu, *Judgement, 2 September 1998 (ICTR-96-4-T, Rep. 1998, p. 44); Trial Chamber II,* The Prosecutor v. Clément Kayishema and Obed Ruzindana, *Judgement, 21 May 1999 (ICTR-95-1-T, Rep. 1999, p. 824); Trial Chamber I,* The Prosecutor v. Georges Anderson Rutaganda, *Judgement and Sentence, 6 December 1999 (ICTR-96-3-T, Rep. 1999, p. 1704); Trial Chamber I,* The Prosecutor v. Alfred Musema, *Judgement, 27 January 2000 (ICTR-96-13-T, Rep. 2000, p. 1512); Appeals Chamber,* The Prosecutor v. Jean-Paul Akayesu, *Judgement, 1st June 2001 (ICTR-96-4-A, Rep. 2001, p. 16); Appeals Chamber,* The Prosecutor v. Clément Kayishema and Obed Ruzindana, *Judgement (Reasons), 1 June 2001 (ICTR-95-1-A, rep. 2001, p. 2132); Trial Chamber I,* The Prosecutor v. Ignace Bagilishema, *Judgement, 7 June 2001 (ICTR-95-1A-T, Rep. 2001, p. 398); Appeals Chamber,* The Prosecutor v. Alfred Musema, *Judgement, 16 November 2001 (ICTR-96-13-A, Rep. 2001, p. 2484); Trial Chamber **XXX**,* The Prosecutor v. Juvénal Kajelijeli, *Judgement, 12 January 2002 (ICTR-98-44A-**XX**, Rep. 2002, p. **XXX**); Trial Chamber III,* The Prosecutor v. Laurent Semanza, *Judgement and Sentence, 15 May 2003 (ICTR-97-20-T, Rep. 2003, p. 3622); Trial Chamber I,* The Pros-

ecutor v. Eliezer Niyitegeka, *Judgement and Sentence, 16 May 2003 (ICTR-96-14-T, Rep. 2003, p. 2442); Appeals Chamber,* The Prosecutor v. Georges Rutaganda, *Judgement, 26 May 2003 (ICTR-96-3-A, Rep. 2003, p. 3180); Appeals Chamber,* The Prosecutor v. Eliezer Niyitegeka, *Judgement, 9 July 2004 (ICTR-96-14-A, Rep. 2004, p.* ***XXX****); Trial Chamber* ***XXX****,* The Prosecutor v. Jean de Dieu Kamuhanda, *Judgement, 22 January 2004 (ICTR-99-54-T, Rep. 2004, p.* ***XXX****)*

I.C.T.Y. : Trial Chamber, The Prosecutor v. Duško Tadić, *Judgement, 7 May 1997 (IT-94-1); Trial Chamber,* The Prosecutor v. Anto Furundžija, *Judgement, 10 December 1998 (IT-95-17/1); Appeals Chamber,* The Prosecutor v. Duško Tadić, *Judgement, 15 July 1999 (IT-94-1); Trial Chamber,* The Prosecutor v. Zoran Kupreškić et al., *Judgement, 14 January 2000, (IT-95-16-T); Appeals Chamber,* The Prosecutor v. Zdravko Mucić et al. *(Čelebići Case), Judgement, 20 January 2000 (IT-96-21); Appeals Chamber,* The Prosecutor v. Zlatko Aleksovski, *Judgement, 24 March 2000 (IT-95-14/1); Appeals Chamber,* The Prosecutor v. Anto Furundžija, *Judgement, 21 July 2000 (IT-95-17/1); Trial Chamber,* The Prosecutor v. Radoslav Brdanin and Momir Talic, *Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 (IT-99-36); Appeals Chamber,* The Prosecutor v. Dragoljub Kunarac, *Judgement, 12 June 2002 (IT-96-23 and 23/1); Trial Chamber,* The Prosecutor v. Radislav Krstić, *Judgment, 2 August 2001 (IT-98-33); Trial Chamber,* The Prosecutor v. Mitar Vasiljevic, *Judgement, 29 Novembre 2002 (IT-98-32); Trial Chamber,* The Prosecutor v. Milan Milutinovic et al., *Decision on Defence Preliminary Motion Filed by the Defence for Nikola Sainovic, 27 March 2003 (IT-99-37); Trial Chamber,* The Prosecutor v. Milomir Stakić, Judgement, *31 July 2003 (IT-97-24); Appeals Chamber,* The Prosecutor v. Milorad Krnojelac, *Judgment, 17 September 2003 (IT-97-25); Appeals Chamber,* The Prosecutor v. Mitar Vasiljević, *Judgement, 25 February 2004 (IT-98-32); Appeals Chamber,* The Prosecutor v. Radislav Krstić, *Judgement, 19 April 2004 (IT-98-33)*

Canada : Supreme Court of Canada, R. v. Beland and Phillips, *36 C.C.C. (3d) 418, 489 (1987), 15 October 1987*

United States of America : Supreme Court of the United States, Tome v. United States, *513 U.S. 150, 157 (1995), 10 January 1995*

The United Nations War Crimes Commission, Essen Lynching, *Case n° 8, 22 December 1945*

U.S. Army Investigation and Trial Records of War Criminals : United States of America v. Kurt Goebell et al., *Feb. 6 - Mar. 21 1946*

I. INTRODUCTION

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1. The Appeals Chamber of International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal" respectively) is seised of appeals by Elizaphan Ntakirutimana and Gérard Ntakirutimana ("Appellant" individually or "Appellants" collectively, or "Accused") and by the Prosecution, against the Judgement rendered by Trial Chamber I in the case of *Prosecutor v. Elizaphan and Gérard Ntakirutimana* on 21 February 2003 ("Trial Judgement")[1].

INTRODUCTION

A. The Appellants

2. Elizaphan Ntakirutimana was born in 1924 in Ngoma secteur, Gishyita commune, Kibuye prefecture, Rwanda. He is married and has eight children, including Gérard Ntakirutimana. In the period April to July 1994, he was pastor and president of the West Rwanda Association of the Seventh Day Adventist Church based in the Mugonero Complex, Gishyita commune, Kibuye prefecture, Rwanda.

3. Gérard Ntakirutimana was born in 1958 in Ngoma secteur, Gishyita commune, Kibuye prefecture, Rwanda. From April 1993, Gérard Ntakirutimana was medical doctor at the Seventh Day Adventist's hospital at Mugonero Complex, Gishyita commune. He is married and has three children[2].

B. The Judgement and Sentence

4. Elizaphan Ntakirutimana and Gérard Ntakirutimana were joined tried on the basis of two indictments, Indictment n° ICTR-96-10-I, as amended on March 2000 and on October 2000, in the case of *Prosecutor v. Elizaphan Ntakirutimana, Gérard Ntakirutimana, and Charles Sikubwabo* ("Mugonero indictment"); and Indictment n° ICTR-96-17-I, as amended on 7 July 1998, in the case of *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana* ("Bisesero Indictment"). The charges against Charles Sikubwabo, who was at large at the time of the trial, were severed from the Mugonero indictment[3]. The Appeals Chamber notes that the Indictments, which form the basis of the convictions, do not charge the Appellants for the 1994 genocide in Rwanda in its entirety, but for their individual criminal responsibility relating to selected incidents.

[1] For ease of reference, two annexes are appended to this Judgement : Annex A – Procedural Background and Annex B – Cited Materials/Defined Terms.

[2] See Trial Judgement, §§34-38.

[3] See *idem*, §§7-8.

5. The Trial Chamber found Elizaphan Ntakirutimana guilty for genocide (Count 1A of the Mugonero indictment and Count 1 Bisesero Indictment) and of murder as a crime against humanity (Count 3 of the Mugonero indictment and Count 4 of the Bisesero Indictment). The Trial Chamber sentenced Gérard Ntakirutimana to 25 years' imprisonment with credit for time spent in custody awaiting trial.

C. The Appeals

6. The Appellants appeal from all of the factual findings against them and also allege a number of legal errors. They have indicated that they rely on each other's appeals. Accordingly, where appropriate, the Appeals Chamber has considered many of the Appellants' submissions as being relevant to the two of them.

7. Gérard Ntakirutimana submits that the Trial Chamber made errors of law invalidating the decision and errors of facts which occasioned a miscarriage of justice[4]. His Appeal Brief divides legal errors into six general categories : (a) errors relating to the Indictments; (b) errors relating to the burden of proof; (c) errors relating the treatment of prior inconsistent statements; (d) indicia of witness coaching; (e) errors relating to the alibi; and (f) evidence relating to motive. In addiction, Gérard Ntakirutimana asserts that none of the factual findings on which his convictions rest could have been made bye a reasonable tribunal.

8. Elizaphan Ntakirutimana contends generally that the Trial Chamber committed a number of recurring legal and factual errors in relation to the Mugonero and Bisesero Indictments[5]. He has regrouped the errors into seven broad categories, relevant to (i) the burden of proof, (ii) the treatment of inconsistent statements, (iii) credibility evaluation, (iv) the Indictments, (v) procedure, (vi) the treatment of the alibi, and (vii) character evaluation. Each of these categories is then sub-divided into a number of legal errors[6]. In addition, Elizaphan Ntakirutimana presents the following grounds of appeal : (i) failure of the Prosecution to provide notice, (ii) that Defence testimony raised a reasonable doubt, (iii) that the Trial Chamber erred by failing to consider the Defence's motion to dismiss, (iv) that there was insufficient evidence to establish that Tutsi refugees at the Mugonero Complex were targeted solely on the basis of their ethnicity, and (v) that punishment cannot be imposed for aiding and abetting in genocide. Finally, the Appellants present a joint ground of appeal on the existence of political campaign against them.

9. The Prosecution filed a consolidated response to the appeals of Elizaphan Ntakirutimana and Gérard Ntakirutimana[7].

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[4] Gérard Ntakirutimana's "Defence Appeal Brief" filed 28 July 2003 ("Appeal Brief (Gérard Ntakirutimana)"), and Gérard Ntakirutimana's "Defence Reply Brief" filed 13 October 2003 ("Reply (G. Ntakirutimana)").

[5] "Pastor Elizaphan Ntakirutimana's Appeal Brief" filed 11 August 2003 ("Appeal Brief (E. Ntakirutimana)"), and "Pastor Elizaphan Ntakirutimana's Reply Brief" filed 13 October 2003 ("Reply" or "Reply (E. Ntakirutimana")).

[6] See Appeal Brief (E. Ntakirutimana), pp.29-32

[7] "Prosecution Response Brief", filed on 22 September 2003 ("Prosecution Response").

10. The Prosecution presents six grounds for appeal[8]. The Prosecution asserts that the Trial Chamber erred (i) by failing to apply the "joint criminal enterprise" doctrine to determine Elizaphan Ntakirutimana's and Gérard Ntakirutimana's respective responsibility for the crime of genocide, (ii) in restricting Gérard Ntakirutimana's conviction for genocide to the acts of killing or serious bodily harm that he personally inflicted on Tutsis at the Mugonero Complex and in Bisesero, and (iii) in its definition of the *means rea* requirement for aiding and abetting genocide. The Prosecution's fourth and fifth grounds of appeal address issues relating to crimes against humanity (extermination) and crimes against humanity (murder). As a sixth ground of appeal, the Prosecution challenges the sentences imposed by the Trial Chamber. Elizaphan Ntakirutimana and Gérard Ntakirutimana filed responses to the Prosecution appeal[9].

D. Standards for Appellate Review

11. The Appeals Chamber recalls the requisite standards for appellate review pursuant to Article 24 of the Statute. Article 24 addresses errors of law which invalidate the decision and errors of fact which occasion a miscarriage of justice. Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law[10].

12. As regards errors of fact, as has been previously underscored by the Appeals Chamber of both this Tribunal and the International Criminal Tribunal for the former Yugoslavia (ICTY), the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber. Where an erroneous finding of fact is alleged, the Appeals Chamber must give deference to the trial chamber that received the evidence at trial as it is best placed to assess the evidence, including the demeanour of witness. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. If the finding of fact is erroneous, it will be quashed or revised only if the error occasioned a miscarriage of justice[11].

13. The Appeals Chamber emphasises that on appeal, a party cannot merely repeat arguments that did not succeed at trial, in the hope that the Appeals Chamber will consider them afresh. The appeals process is not a trial *de novo* and the Appeals Chamber is not a second trier of fact. It is incumbent on the party alleging the error

[8] "Prosecution Appeal Brief", filed on 23 June 2003 and "Prosecution Reply Brief" filed on 19 August 2003 ("Prosecution Reply").

[9] "Defence Response to the Prosecution Appeal Brief", filed by Gérard Ntakirutimana on 4 August 2003 ("Response (Gérard Ntakirutimana)"); "Reply (sic) to the Prosecutor's Appeal Brief", filed by E. Ntakirutimana on 5 August 2003 ("Response (E. Ntakirutimana)").

[10] *Niyitegeka* Appeal Judgement, para 7; *Vasiljevic* Appeal Judgement, §6 (citation omitted). See also, e.g. *Rutaganda* Appeal Judgement, §20; *Musema* Appeal Judgement, §16.

[11] *Niyitegeka* Appeal Judgement, §8; *Krstic* Appeal Judgement, §40; *Krnojelac* Appeal Judgement, §§11-13, 39; *Tadic* Appeal Judgement, §64; *Celebici* Appeal Judgement, §434; *Aleksovski* Appeal Judgement, §63; *Vasiljevic* Appeal Judgement, §8.

to demonstrate that the Trial Chamber's rejection of arguments constituted such an error as to warrant the intervention of the Appeals Chamber. Thus, arguments of a party which do not have the potential to cause the impugned decisions to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits[12].

14. Moreover, in its submissions, the appealing party must provide precise references to relevant transcript pages or paragraphs in the trial judgement to which the challenge is being made[13]. Failure to do so, or if the submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies, makes it difficult for the Appeals Chamber to assess fully the party's arguments on appeal[14].

15. Finally, it is within the inherent jurisdiction of the Appeals Chamber to select those submissions which merit a reasoned opinion in waiting. Arguments which are evidently unfounded may be dismissed without detailed reasoning[15].

II. Appeals of Gerard Ntakirutimana

A. Legal Errors

16. Gérard Ntakirutimana submits that Trial Chamber made errors of law invalidating the decision. His Appeal Brief divides them into six general categories : (a) errors relating to the Indictments; (b) errors relating to the burden of proof; (c) errors relating to the treatment of prior inconsistent statements; (d) indicia of witness coaching; (e) errors relating to the alibi, and (f) evidence relating to motive.

1. The Indictment

17. As a general matter, the Prosecution responds that many of Gérard Ntakirutimana's arguments regarding perceived legal errors in the Indictments have been waived as they were not presented to the Trial Chamber[16]. The Appeals Chamber will address the issue of waiver in the context of each separate argument.

(a) Double Jeopardy

18. Gérard Ntakirutimana contends that the Appellants genocide conviction violate principles of double jeopardy because the convictions under the Mugonero and Bis-

[12] See in particular *Rutaganda* Appeal Judgement, §18.

[13] Practice Direction on Formal Requirements for Appeals from Judgements, 16 September 2002, §4(b). See also *Rutaganda* Appeal Judgement, §19; *Kayishema and Ruzindana* Appeal Judgement, §137; *Vasiljevic* Appeal Judgement, §11.

[14] *Niyitegeka* Appeal Judgement, §§9-10; *Vasiljevic* Appeal Judgement, §12; see also *Kunarac et al*. Appeal Judgement, §§43,48.

[15] *Niyitegeka* Appeal Judgement, §11; *Rutaganda* Appeal Judgement, §19; *Kunarac et al*. Appeal Judgement, §§47-48; *Vasiljevic* Appeal Judgement, §12.

[16] Prosecution Response, §2.2 and n. 6 (citing authorities).

esero Indictments rely "on the same delicts"[17]. The Prosecution argues that this argument was not included in the Notice of Appeal and does not respond to it in substance[18]. The Appeals Chamber notes that Gérard Ntakirutimana's Notice of Appeal does not contend that his convictions violate double jeopardy, nor is it clear that this issue was raised before the Trial Chamber. The Appeals Chamber is of the view that Gérard Ntakirutimana has waived the right to adduce this argument on appeal[19].

19. Moreover, the Appeals Chamber considers that Gérard Ntakirutimana's argument, to the extent it is developed, lacks merit. The Appeal Brief asserts that

> "[c]onvicting the Accused of two counts based on the same conduct is contrary to principles of double jeopardy"

and that his two genocide convictions rely "on the same delicts"[20]. This is an inaccurate description of the Judgement. The *actus reus* supporting the genocide conviction under the Mugonero indictments was the finding that Gérard Ntakirutimana was "individually criminally responsible for the death of Charles Ukobizaba"[21], whereas the genocide conviction under the Bisesero Indictment was for other acts enumerated in paragraph 832 of the Trial Judgement that do not include the killing of Ukobizaba. Counsel for Gérard Ntakirutimana acknowledged this when he argued that the Trial Chamber should refuse a Prosecution request to combine the allegations in a single indictment, a move he opposed because the Mugonero and Bisesero allegations "do not come out of the same act of …same transaction"[22].

20. Gérard Ntakirutimana appears to take issue with the Trial Chamber's reliance on all the genocidal acts he was found to have committed, both in Mugonero and Bisesero, as a basis for concluding that he had the requisite *mens rea* for the two genocide convictions, namely that he intended "to destroy, in whole, the Tutsi ethnic group"[23]. However, the Appeal Chamber notes that his Appeal Brief does not elaborate any argument that double jeopardy principles are offended by two convictions with mental elements established by the same conduct but each with an *actus reus* distinguishable in time, location, and identity of victims. There is no need to decide whether such an argument could be successfully mounted; it suffices for present purposes that Gérard Ntakirutimana has failed to do so here.

(b) Failure to Plead Material Facts

21. Gérard Ntakirutimana's principal allegation of error regarding the Indictments concerns the alleged failure of the Indictments to plead various material facts underlying his convictions[24]. The Appellant submits that the Indictments did not

[17] Appeal Brief (G. Ntakirutimana), §1.
[18] Prosecution Response, §2.1.
[19] *Kunarac et al*. Appeal Judgement, §61.
[20] Appeal Brief (G. Ntakirutimana), §1.
[21] Trial Judgement, §§794-795.
[22] T.2 November 2001, p. 4 (closed session).
[23] Trial Judgement, §§793, 834.
[24] Appeal Brief (G Ntakirutimana), §§2-3.

> "set [] out the material facts of the Prosecution case with enough detail to inform [him] clearly of the charges against him so that he may prepare his defence,"[25]

such as

> "the identity of the victim, the time and place of the events and the means by which the acts were committed"[26].

The Appellant has also challenged certain of the allegations concerning Elizaphan Ntakirutimana.

22. The Prosecution contends that Gérard Ntakirutimana waived this argument by failing to present it to the Trial Chamber[27]. It adds that, normally, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment in order to conduct further investigation in order to respond to the unpleaded allegation. The Prosecution submits that the Appellant took none of these steps during trial[28].

23. In this case, however, the Trial Chamber's Judgement makes clear that the Appellants challenged the admission of evidence of unpleaded facts in manner that the Trial Chamber considered adequate. The judgement contains a detailed discussion entitled "Specificity of the Indictments"[29] and explicitly states that

> "the Chamber does not accept the Prosecution's submission that the Defence sat on its right and did not challenge the lack of specificity in the Indictments"[30].

In some situation, the Trial Chamber refused to make findings against the Appellants because it found that the Bisesero Indictment was defective due to its failure to plead the relevant allegation and that the defect was not subsequently cured[31]. Given that the Trial Chamber expressly found that the vagueness challenge was properly presented, the issue may also be properly raised on appeal.

24. The law governing challenges to the vagueness of an indictment is set out in details in the ICTY Appeals Chamber's Judgement in *Kupreskic*. As in that case, because this issue is being raised after the Accused have been tried and a verdict rendered, the complaint will be considered only in relation to the counts under which the Accused were actually convicted[32], namely the genocide counts for both Accused and the count of crimes against humanity (murder) for Gérard Ntakirutimana.

25. The *Kupreskic* Appeal Judgement stated that Article 18(4) of the ICTY Statute, read in conjunction with Articles 21 (2), 4(a) and 4(b),

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[25] *Kupreskic et al*. Appeal Judgement, §88.
[26] *Ibid*., §89.
[27] Prosecution Response, §2.2.
[28] *Id*., §§2.2, 2.27.
[29] Trial Judgement, Chapter II, 2.
[30] *Ibid*., §52.
[31] *Ibid*., §§565 (allegation of an attack at Gitwe Primary School), 698 (allegation of killings at Murambi Church).
[32] See *Kupreskic et al*., Appeal Judgement, §79.

> "translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in indictment, but not the evidence by which such material facts are to proven"[33].

Whether certain "facts" are "material" depends on the nature of the case. *Kupreskic* discussed several possible factors that could bear on the determination of materiality. For example, if the Prosecution charges personal physical commission of criminal acts, the indictment should set forth

> "the identity of the victim, the time and place of the events and means by which the acts were committed"[34].

On the other hand, such detail need not be pleaded if the

> "sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters"[35].

Even in case where a high degree of specificity is "impratical", however,

> "since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so"[36].

26. Kupreskic also envisioned the possibility in which Prosecution was unable to plead with specificity because the material facts were not in the Prosecution's possession. As a general matter, "the Prosecution is expected to know its case before it goes to trial" and cannot expect to

> "mould [] the case against the accused in the course of the trial depending on how the evidence unfolds"[37].

If the Defence is denied the material facts of the accused's alleged criminal activity until the Prosecution files its pre-trial brief or until the trial itself, it will be difficult for the Defence to conduct a meaningful investigation for trial until then. A trial chamber must be mindful of whether proceeding to trial in such circumstances is fair to the accused. *Kupreskic* indicated that while there are "instances in criminal trials where the evidence turns out differently than expected", such situations may call for measures such as an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment[38].

27. If an indictment is insufficiently specific, *Kupreskic* stated that such a defect "may, in certain circumstances cause the Appeals Chamber to reserve a conviction"[39]. However, *Kupreskic* left open the possibility that a defective indictment could 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"[40]. The question whether the Prosecution has cured a defect in the indictment is equivalent to the question whether the defect has caused any prejudice to the Defence or, as the

[33] *Ibid.*, §88.
[34] *Ibid.*, §89.
[35] *Ibid.*
[36] *Ibid.*, §90.
[37] *Ibid.*, §92.
[38] *Ibid.*
[39] *Ibid.*, §114.
[40] *Ibid.*

Kupreskic Appeal Judgement put it, whether the trial was "rendered unfair" by the defect[41]. Kupreskic considered whether notice of the material facts that were omitted from the indictment was sufficiently communicated to the Defence in Prosecution's pre-trial brief, during disclosure of evidence, or through proceedings at trial[42]. In this connection, the timing of such communications, the importance of the information to the ability of the Accused to prepare its defence, and the impact of the newly-disclosed material facts on the Prosecution's case are relevant[43]. As has been previously noted, "mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements" of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial[44].

28. In Kupreskic, the omitted facts were not clearly stated in the pre-trial brief or in the Prosecution's opening statement[45]; the underlying witness statement was not disclosed until "one to one-and-a-half weeks prior to trial and less than a month prior to [the witness's] testimony in court"[46]; and the omitted fact was indicative of a "radical transformation" of the Prosecution's case from one alleging "wide-ranging criminal conduct… during a seven-month period" to a targeted prosecution for persecution because of participation "in two individual attacks"[47]. Moreover, the Appeals Chamber concluded that

> "whether the Trial Chamber would take into account [the unpleaded facts] as a possible basis for liability in respect of the persecution count was, until the very end of trial, not settled"[48],

and that this uncertainly "materially affected" the ability of the accused to prepare their defence[49]. These factors eliminated the possibility that the failure to plead material facts in the indictment had not prejudiced the accused in Kupreskic; rather, their "right to prepare their defence was seriously infringed" and their trial "rendered unfair"[50].

29. The allegation against Elizaphan and Gérard Ntakirutimana must be assessed in light of these standards. The Trial Chamber acknowledged that "some paragraphs of the Mugonero and Bisesero Indictments are rather generally formulated"[51]. The question, then, is whether these general formulations meet the Kupreskic test for sufficient pleading of the material facts on which the Trial Chamber based the convictions and, if they do not, whether the Prosecution cured the defects through post-indictment communications.

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[41] *Ibid*., § 122.
[42] *Ibid*., §§ 117-120.
[43] *Ibid*., §§ 119-121.
[44] *Prosecutor v. Radoslav Brdanin and Momir Talic*, Case n° IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, § 62.
[45] *Kupreskic et al*. Appeal Judgement, §§ 117-118.
[46] *Ibid*., § 120.
[47] *Ibid*., § 121.
[48] *Ibid*., § 110.
[49] *Ibid*., § 119.
[50] *Ibid*., § 122.
[51] Trial Judgement, § 43.

(i) Did the Mugonero Indictment Fail to plead Material Facts?

30. The principal allegations in the Mugonero indictment are follows :

> 4.7 On or about the morning of 16 April 1994, a convoy, consisting of several vehicles followed by a large number of individuals armed with weapons went to the Mugonero Complex. Individuals in the convoy included, among others, Elizaphan Ntakirutimana, Gérard Ntakirutimana and Charles Sikubwabo, members of the National Gendarmerie, communal police, militia and civilians.
>
> 4.8 The individuals in the convoy, including Elizaphan Ntakirutimana, Gérard Ntakirutimana and Charles Sikubwabo, participated in an attack on the men, women and children in the Mugonero Complex, which continued throughout the day.
>
> 4.9 The attack resulted in hundreds of deaths and a large number of wounded among the men, women and children who had sought refuge at the Complex.
>
> 4.10 During the months that followed the attack on the Complex, Elizaphan Ntakirutimana, Gérard Ntakirutimana and Charles Sikubwabo, searched for an [*sic*] attacked Tutsi survivors and others, killing and causing serious bodily or mental harm to them[52].

31. Under this Indictment, the Prosecution alleged and the Trial Chamber found that Gérard Ntakirutimana "procured ammunition and gendarmes for the attack on the Complex" and

> "killed Charles Ukobizaba by shooting him in the chest, from a short distance, in Mugonero Hospital courtyard around midday on 16 April 1994"[53].

These findings supported the Trial Chamber's conclusion that Gérard Ntakirutimana had the requisite intent for genocide and, in the case of the killing of Ukobizaba, the conclusion that Gérard Ntakirutimana was "individually criminally responsible" for his death and therefore was guilty of genocide[54]. The killing of Ukobizaba also grounded the conclusion that Gérard Ntakirutimana was guilty of murder as a crime against humanity[55]. Gérard Ntakirutimana was therefore found guilty of genocide at Mugonero because of acts committed by him personally, namely the killing of Ukobizaba and the procurement of ammunition and gendarmes. Similarly, Elizaphan Ntakirutimana was pronounced guilty of genocide because the Trial Chamber found that he "convoyed armed attackers to the Mugonero Complex in his vehicle on the morning of 16 April 1994"[56].

32. Under *Kupreskic*, criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible

> "the identity of the victim, the time and place of the events and the means by which the acts were committed"[57].

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[52] *Mugonero* indictment, §§4.7-4.10 (emphasis omitted).
[53] Trial Judgement, §791.
[54] *Ibid*., §§793-795.
[55] *Ibid*., §§806-810.
[56] *Ibid*., §§788-790.
[57] *Kupreskic et al*., Appeal Judgement, §89.

The Appeals Chamber must therefore consider whether the material facts underlying the Mugonero convictions were sufficiently pled in the Indictment and, if not, whether that failure was cured by other means.

a. The Allegation that Gérard Ntakirutimana murdered Charles Ukobizaba

33. The Mugonero indictment does not state Ukobizaba's name or any of the circumstances surrounding his killing that were eventually found in the Judgement. Yet nothing suggests that it was "impracticable to require a high degree of specificity" in this matter[58]. On the contrary, as the Trial Chamber pointed out, the witness statements of several Prosecution witness and the Prosecution's Pre-Trial Brief mentioned Ukobizaba's name and alleged that Gérard Ntakirutimana personally killed him[59]. The Prosecution was therefore in a position to plead specific material facts regarding Ukobizaba's killing in the Mugonero indictment, yet it failed to do so? This failure renders the counts of genocide and crimes against humanity (murder) against Gérard Ntakirutimana defective.

34. Kupreskic next requires consideration of whether the defect was cured by other Prosecution communications regarding the material facts underlying its case, and of whether such information was timely, clear and consistent enough to ensure that the Appellant suffered no undue prejudice from the Mugonero indictment's failure to plead Ukobizaba's killing in detail. The Trial Chamber held that the Prosecution's Pre-Trial Brief and witness statements disclosed to the Accused cured the omission, and the Prosecution relies on this conclusion on appeal[60].

35. The witness statements of Witnesses GG and HH, disclosed to the Appellant no later than 10 April 2000, aver that Gérard Ntakirutimana killed Ukobizaba at Mugonero on 16 April 1994, with Witness GG specifically stating that Ukobizaba was shot with a gun[61]. The Prosecution also refers to a statement of Witness AA, but explicitly stated that he could not say whether Gérard Ntakirutimana shot anyone[62]. Moreover, AA gave investigation a list of Mugonero victims that states that Ukobizaba "was killed with a machete", not with a gun[63]. The disagreement between the statements of Witness GG and HH, on the one hand, and the statement of Witness

[58] *Ibid.*

[59] Trial Judgement, §60; See also Prosecution Response, §2(9) and note 21.

[60] Trial Judgement, §§60, 62-63; Prosecution Response, §§2(9), 2(9).

[61] Statement of Witness GG dated 30 June 1996, p.5 ("I saw Dr. Gerard Ntakirutimana walking in front of the attackers. He was armed with a gun. I saw that they were holding the accountant of the hospital. His name was Charles Ukobizaba. I saw that they took the key of the office from Ukobizaba by force. After that I saw that Dr. Gerard Ntakirutimana killed Ukobizaba with a gun. It was a pistol".), disclosed 10 April 2000 (p. PNO190); Statement of Witness HH dated 2 April 1996, p.3 ("I even saw Doctor Gerard Ntakirutimana kill the hospital account named Ukobizaba Charles after having confiscated the key to his office".), disclosed 10 April 2000 (p.PNO17).

[62] Statement of Witness AA dated 11 April 1996, p.3 ("You ask me if I saw that Ruzindana or Dr. Gerard Ntakirutimana actually shooting [sic] anybody. I can not tell you that".).

[63] List Attached to Statement of Witness AA dated 28 November 1995 ("Ukobizaba Charles, comptable (accountant) of the hospital Mugonero (he was killed with a machete)"); List attached to Statement of Witness AA dated 30 November 1995 ("Ukobizaba Charles, account at Mugonero hospital, he was macheted".).

AA, on the other, demonstrates that disclosure of those statements alone did not offer "clear" or "consistent" information with respect to the role of Ukobizaba's killing in the Prosecution's case.

36. The Pre-Trial Brief, filed 16 July 2001, stats : "Dr. Gérard Ntakirutimana personally killed several Tutsi individuals including the hospital accountant, Charles Ukobizaba and one Kajongi"[64]. Annex B to the Pre-Trial Brief, which was filed 15 August 2001, summarized the planned testimony of Prosecution witness. Annex B gave notice of Witness GG's testimony that "[d]uring the attack he saw Dr Gérard Ntakirutimana kill Ukobizaba, the hospital accountant, and take the keys of his office"[65], and of Witness HH's testimony that "[i]n the course of the attack the witness saw Dr Gérard Ntakirutimana kill the hospital accountant Ukobizaba Charles after confiscating the key to his office"[66].

37. In contrast to the witness statements alone, the Pre-Trial Brief made it unequivocal that the Prosecution intended to prove that Gérard Ntakirutimana personally killed Ukobizaba. Annex B further indicated that the Prosecution planned to rely on the testimony of Witness GG and HH in this regard. Thus, the Prosecution had clearly and consistently informed the Defence by 16 July 2001 that it planned to assert that Gérard Ntakirutimana killed Ukobizaba at Mugonero on 16 April 1994. The Prosecution further informed the Defence on 15 August 2001 of the witness on whose testimony this charge was based.

38. In order to satisfy *Kupreskic*, however, the disclosure made in the Pre-Trial Brief and Annex B must also be found to be timely, such that the Defence suffered no prejudice from the failure of the Indictment to allege specifically that Gérard Ntakirutimana killed Ukobizaba. The Pre-Trial Brief was filed two months before the opening of trial, and Annex B was filed one month before trial, both pursuant to an oral order of the Trial Chamber on 2 April 2001 that was later reaffirmed in a written decision[67]. The proximity of these filings to trial, however, is not the only consideration. The Mugonero indictment stated that Gérard Ntakirutimana was responsible for "the killings and causing of serious bodily or mental harm to members of the Tutsi population"[68] and "the murder of civilians"[69]. In this context, allegations that Gérard Ntakirutimana personally killed a Tutsi individual, particularly allegations supported by two witnesses, would necessary be of significant importance.

39. Unlike in Kupreskic, where the unpleaded facts represented a "drastic change in the Prosecution case" and were coupled with "ambiguity as to the pertinence" of the underlying evidence, which was only disclosed in the weeks before trial[70], here the fact of Ukobizaba's killing fit directly into the Prosecution's case as pleaded in the Mugonero indictment, was clearly supported by two previously-disclosed witness

[64] Pre-Trial Brief, §15.
[65] Annex B to Pre-Trial Brief, p. 5.
[66] See Decision on Prosecution Motion for contempt of Court and on Two Defence Motions for disclosure fit, 16 July 2001, §11 (citing T.2 April 2001, pp. 29-34).
[67] *Kupreskic et al*.,Appeal Judgement, §121.
[68] *Mugonero* indictment, Count 1A.
[69] *Ibid*., Count 3.
[70] *Kupreskic et al*., Appeal Judgement, §121.

statements, and was made unambiguously known to the Appellant two months before trial.

40. Gérard Ntakirutimana argues that the two witness statements cannot, on their own, remedy the Indictment alone because they were "inconsistent"[71]. First of all, Gérard Ntakirutimana does not identify any inconsistencies between the two statements, but only purported inconsistencies between the trial testimony of Witness GG and HH[72], which, though relevant to their credibility at trial, are irrelevant to the question of whether their statements aided in curing an error in the Indictment. More importantly, however, the *Kupreskic* test is not directed to the clarity and consistency of the Prosecution' *evidence* as disclosed to the accused, but rather to the clarity and consistency of the Prosecution's announcement of the *material facts* it intends to prove. Here, the Appellants were informed by the Pre-Trial Brief and Annex B that the Prosecution would argue that Gérard Ntakirutimana killed Ukobizaba and rely on the evidence of Witness GG and HH as support. Whether Witness GG and HH gave consistent testimony in their statements would affect the Prosecution's ability to prove the charge, but it has no bearing on Gérard Ntakirutimana's notice of that charge against him or ability to prepare a defence against it.

41. Of course, if the only arguable notice to the Defence regarding the Prosecution's intent to prove a particular material fact is its inclusion in conflicting or ambiguous disclosure, the chamber will be unlikely to find that the accused had "timely, clear, and consistent information detailing the factual basis underpinning the charges against him or her"[73]. In this regard, the mere fact of disclosure of witness statements on 10 April 2000 was insufficient to cure the indictment error, because of the contradiction between the statements of Witness GG and AA with regard to the method of Ukobizaba' murder. The Pre-Trial Brief and Annex B made plain that the Prosecution planned to rely on Witness GG's and HH's testimony, not AA's – a decision that is hardly surprising given the obvious importance of an allegation of direct commission of murder to the Prosecution's case. Thus, while Gérard Ntakirutimana is correct that the witness statements alone were not sufficient to overcome the defect in the Indictment, the explicit mention of Ukobizaba's murder in the Pre-Trial Brief and Annex B's identification of Witness GG and HH as the witnesses on which the Prosecution would rely, when combined with the previously-disclosed statements of those two witnesses, constitute the 'timely, clear, and consistent information" required by *Kupreskic*.

42. Gérard Ntakirutimana lastly argues that the Pre-Trial Brief was not a reliable source of information for the Prosecution's charges, because it included an allegation that Gérard Ntakirutimana killed "one Kajongi"[74], an allegation that was not presented at trial. The Prosecution has the discretion to forgo presentation of material facts, even if they are specifically alleged in the indictment. In this situation, the Pre-Trial put the Appellants on sufficient notice that the Prosecution would seek to prove that Gérard Ntakirutimana killed Ukobizaba. The fact that the Appellants were also on notice of another charge that was later dropped does not alter this conclusion.

[71] Appeal Brief (G. Ntakirutimana), §10, b.
[72] See Reply (G. Ntakirutimana), §6 (citing Appeal Brief (G. Ntakirutimana), §91).
[73] *Kupreskic et al*., Appeal Judgement, §114.
[74] Pre-Trial Brief, §15.

43. Naturally, the Prosecution cannot intentionally seesk to exhaust itsopponent's resources by leaving the Defence to investigate charges that it has no intent to prosecute. The Prosecution should make every effort to ensure not only that indictment specifically pleads the material facts that the Prosecution intends to prove but also that it does not intend to prove are removed. The same applies to other communications that give specific information regarding the Prosecution's intended case, such as the Pre-Trial Brief. It would be a serious breach of ethics for the Prosecution to draw the Defence into lengthy and expensive investigations of facts that the Prosecution does not intend to prove at trial. Gérard Ntakirutimana does not claim that the Prosecution did so in this case. For present purposes, then, it suffices to state that the Pre-Trial Brief's allegation regarding Kajongi does not affect the conclusion that the Pre-Trial Brief, Annex B, and the statements of Witness GG and HH cured the Mugonero indictment's failure to allege that Gérard Ntakirutimana murdered Charles Ukobizaba.

44. In light of all the circumstances, the Appeals Chamber is satisfied that the Prosecution has met its burden of showing that its failure to mention Ukobizaba's killing in the Indictment did not actually prejudice Gérard Ntakirutimana's ability to defend against this charge.

b. The Allegation That Gérard Ntakirutimana Procured Arms, Ammunitions and Gendarms

45. The allegation that Gérard Ntakirutimana procured weapons, ammunitions and gendarmes for the attack at Mugonero Complex does not appear in the Indictment. Like the allegation relating to the murder of Charles Ukobizaba, the Prosecution was in a position to plead specific details regarding the matter, given that it possessed the statement of Witness OO dated 12 August 1998, which contains a lengthy description of Gérard Ntakirutimana's activities at the Kibuye gendarmerie camp and was the sole evidentiary basis for he Prosecution's allegation[75]. The Prosecution's failure to include a specific pleading of the fact therefore rendered the Indictment defective.

46. The Trial Chamber found, however, that the defect was cured by the fact that the allegation of procurement of weapons, ammunitions and gendarmes was included in the Pre-Trial Brief[76]. The Pre-Trial Brief asserts that

> "[b]etween 10 and 16 April 1994 Dr. Gérard Ntakirutimana frequently visited the Kibuye Gendarme camp headquarters from where he procured arms, ammunitions and gendarmes, for purposes of launching an attack on Tutsi refugees gathered at Mugonero complex"[77].

Annex B announces that Witness OO would testify that "in April 94 he saw *Dr. Gerard Ntakirutimana* at the base on several occasions, sometimes with soldiers and gendarmes. On one or two such occasions the witness saw *Dr. Gerard Ntakirutimana* being supplied with arms, ammunitions and gendarmes for purposes of 'mounting operations' at the Mugonero complex"[78]. The statement of Witness OO, noted above,

[75] Statement of Witness OO dated 12 August 1998.
[76] Trial Judgement, §172.
[77] Pre-Trial, §11.
[78] Annex B to Pre-Trial Brief, p. 10.

contains a lengthy narrative description of events at the Kibuye gendarmerie camp, including of Gérard Ntakirutimana'a arrival at the camp in the morning of the Mugonero attack, driving a white pick-up "filled with about 10 *Interahamwe* militiamen", who shot their guns in the air and said "we need weapons and ammunition because you have failed"[79]. Although it is not clear from the record when OO's witness statement was first disclosed to the Defence, a confidential memorandum from the Prosecution filed with the Registry of the Tribunal states that it was disclosed on 29 August 2000[80].

47. Gérard Ntakirutimana contends that the Pre-Trial Brief's statement that he visited the Kibuye camp "[b]etween 10 and 16 April 1994" did not give proper notice of what he submits is the Prosecution's "unequivocal trial allegation of 15 April" as the date of the procurement of weapons and gendarmes; he also argues that the 15 April date "falls outside the period specified for the Mugonero allegations"[81]. The Trial Chamber found that Gérard Ntakirutimana took gendarmes and ammunition with him from the Kibuye camp on 16 April, not 15 April[82]. This finding was well within the time period specified in the Mugonero indictment, which states that Gérard Ntakirutimana was part of a "convoy, consisting of several vehicles followed by a large number of individuals armed with weapons" that went to the Mugonero complex "[o]n or about the morning of 16 April 1994"[83]. The statement in the Pre-Trial Brief that Gérard Ntakirutimana visited the Kibuye camp "[b]etween 10 and 16 April 1994" is precise enough to enable the preparation of a defence to the charge of procurement, particularly when viewed in combination with Annex B and the statement of Witness OO. Annex B makes clear that the allegation of procurement rests on the testimony of Witness OO, whose statement in turn makes clear that Gérard Ntakirutimana physically obtained arms and personnel at the Kibuye camp on the morning of the day of attack on the hospital and the church. Based on these three documents, the Appellants were clearly informed that the Prosecution intended to prove that Gérard Ntakirutimana visited the camp between 10 and 16 April and that he obtained arms and gendarmes there on the morning of 16 April.

48. Gérard Ntakirutimana submits that the allegation of procurement was "buried among 83 statements disclosed"[84]. This argument would have great force if the allegation were insignificant in the context of the case pleaded in the Indictment and if it were never mentioned except in isolated references in a witness statement. In this situation, however, the assertion in Witness OO's statement that Gérard Ntakirutimana procured weapons and attackers on the morning of the attack on the Mugonero complex is obviously one of direct relevance to the pleaded allegation that Gérard Ntakirutimana "participated in an attack on the men, women and children in the Mugonero Complex[85]. While the importance of the allegation might not have been enough to cur an Indictment defect on its own given that it was contained in a single

[79] Statement of Witness OO dated 12 August 1998, p. 12.
[80] Confidential memorandum from Renifa Madenga to Koffi Afandé, April 2003, p. 6.
[81] Appeal Brief (G. Ntakirutimana),§10 a.
[82] Trial Judgement, §186.
[83] Mugonero indictment, §§4.7-4.8.
[84] Appeal Brief (G. Ntakirutimana), §10 a.
[85] Mugonero indictment, §4.8.

witness statement, it must be viewed together with the unambiguous information in the Pre-Trial Brief and Annex B that the Prosecution intended to rely on Witness OO's evidence as proof that Gérard Ntakirutimana was "supplied with arms, ammunition and gendarmes" for the purpose of an attack on Mugonero[86]. As with the killing of Ukobizaba, this information sufficed to cure the vagueness in the Indictment. Gérard Ntakirutimana failed to identify any particular prejudice to his ability to defend against the charge of procurement at trial by the fact that the Prosecution failed to communicate it specifically until the Pre-Trial Brief was on 15 July 2001. These circumstances compel the conclusion that the Prosecution sufficiently cured the defect in the Indictment by subsequent clear, consistent, and timely information regarding the nature of its case.

c. The allegation that Elizaphan Ntakirutimana conveyed armed attackers[87]

49. The Trial Chamber also found that Elizaphan Ntakirutimana

> "convoyed armed attackers to the Mugonero Complex in his vehicle on the morning of 16 April 1994, and that these attackers proceeded to kill Tutsi refugees at the Complex"[88].

Although the Mugonero indictment alleges that Elizaphan Ntakirutimana was one of the "[i]ndividuals in the convoy" that went to Mugonero on 16 April[89] and that he "participated in an attack" on the Complex[90], the allegation that he convoyed other attackers to the Complex is not alleged in the indictment. In the view of the Appeals Chamber, the distinction is important because Elizaphan Ntakirutimana's genocide conviction under the Mugonero indictment was based not on a finding of personal physical "participat[ion] in an attack"[91], as alleged in the indictment, but rather on the finding that "in conveying armed attackers to the Complex, Elizaphan Ntakirutimana is individually criminally responsible for aiding and abetting in the killing and causing of serious bodily or mental harm to the Tutsi refugees at the Complex"[92].

50. As a preliminary matter, the Prosecution submits that this argument has been waived as it was not presented to the Trial Chamber. This argument has some force because, although the Trial Chamber specifically discussed and disposed of the challenge to the indictment in its discussion of the killing of Ukobizaba[93] and the procurement of arms and gendarmes by Gérard Ntakirutimana[94], it did not do so in discussing Elizaphan Ntakirutimana's transport of armed attackers.

51. It is clear that the Prosecution could have pleaded its material allegation that Elizaphan Ntakirutimana conveyed attackers to the Mugonero attack. Witness MM,

[86] Annex B to Pre-Trial Brief, p. 10.
[87] Although the argument regarding this point raised in the brief of Gérard Ntakirutimana, not Elizaphan Ntakirutimana, the Appeals Chamber will consider it in light of the Appellant's respective incorporation of the arguments in cach other's brief. Appeal Brief (E. Ntakirutimana), p. 88.
[88] Trial Judgement, §788.
[89] Mugonero indictment, §4.7.
[90] *Ibid*., §4.8.
[91] *Ibid*.
[92] Trial Judgement, §790.
[93] *Ibid*., §§60-63.
[94] *Ibid*, §172.

one of several witness upon whom the Prosecution relied to prove this fact, had previously attested to this allegation in a statement in 1996[95]. Accordingly, the Prosecution was in a position to plead this material fact in the indictment, and its failure to do so rendered the indictment defective.

52. The Appellants do not appear to have objected to this error at trial when the Prosecution presented evidence that Elizaphan Ntakirutimana conveyed attackers to Mugonero[96]. The Appellant's fillings before the Appeals Chamber do not reference any specific objection, nor does it appear that they asked for more time to cross-examine the relevant witness or to conduct further investigations. Normally, the defence's silence would constitute a waiver of the argument : "a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the event of an adverse finfing against that party"[97]. The Appeals Chamber recalls, however, that the Trial Chamber concluded that the challenges that the appellants presented to the vagueness of the indictments were properly presented and enabled the Trial Chamber to evaluate the issue[98]. The Trial Chamber also cited certain portions of the Defence Closing Brief, which specifically challenges the allegation that Elizaphan Ntakirutimana transported attackers, although it does so in the context of challenging the credibility of the evidence underlying the allegation and it does not specifically address the indictment's failure to plead this fact[99]. The Trial Chamber's unequivocal statement that it believed the challenge to the vagueness of the indictment to have been properly presented and its specific citation of a page of the Defence Closing Brief that addresses the allegation that Elizaphan Ntakirutimana conveyed attacks to Mugonero indicate that the Appellants brought the point to the attention of the Trial Chamber in a manner that permitted the Trial Chamber to consider it to its satisfaction. The Appeals Chamber will therefore treat this argument as properly raised below.

53. In contrast to the killing of Ukobizaba and Gérard Ntakirutimana's procurement of arms and gendarmes, however, the allegation regarding Elizaphan Ntakirutimana transporting attackers to Mugonero is not clearly set out in the Pre-Trial Brief. Rather, the Pre-Trial states only that "a convoy of military and civilian attackers arrived at Mugonero complex in vehicle belonging to Pastor Elizaphan Ntakirutimana and others" and that "pastor Elizaphan [Ntakirutimana] and Dr. Gerard Ntakirutimana were present during the attack at the complex"[100]. As the Trial Chamber pointed out, the Pre-Trial Brief "does not specifically either allege that either accused was in the convoy"[101]. By contrast, the Pre-Trial Brief contains several passages specifically alleging that Elizaphan Ntakirutimana conveyed attackers to sites other than the Mugonero complex. When making allegations about the Seventh Day Adventist Church at Murambi, the Pre-Trial Brief clearly states that

[95] Statement of witness MM dated 11 April 1996, p. 4 (" J'ai vu le Pasteur Ntakirutimana venire vers l'hôpital avec sa camionnette contenant 4 ou 5 des militaries à l'arrière".).

[96] See, e.g., T. 19 September 2001, p. 84 (Witness MM); T. 20 September 2001, p. 135 (Witness GG).

[97] *Kayishema and Ruzindana* Appeal judgement, §91.

[98] Trial Judgement, §52.

[99] *Ibid*., §48 and n. 53 (citing Defence Closing Brief, p. 78).

[100] Pre-Trial Brief, §60.

[101] Trial Judgement, §60.

"Dr. Gérard Ntakirutimana and Pastor Elizaphan Ntakirutimana conveyed attackers and personally pursued the refugees at this location"[102].

Similarly, with regard to events in Bisesero, the Pre-Trial Briel states that

"around May 1994, 'Interahamwe' who were taken there by Pastor Elizaphan Ntakirutimana, captured a witness"[103],

and that

"[o]n many occasions between April, May and June 1994 Pastor Elizaphan Ntakirutimana took armed attackers in his vehicle to the Bisesero area and pointed out hiding Tutsi for the attackers to kill"[104].

These allegations show that, when it chose to do so, the Prosecution was able to allege specifically in its Pre-Trial Brief that, Elizaphan Ntakirutimana conveyed attackers to particular sites. A similar allegation with respect to conveying attackers to Mugonero is conspicuously absent.

54. The Trial Chamber concluded generally that the Appellants were

"entitled to conclude that the allegations in [Annex B to the Pre-Trial Brief] were the allegations it would have to meet at trial"[105].

The Prosecution also relies on the summaries in Annex B of the testimony of witness FF, MM and YY[106]. The Appeals Chamber must therefore consider whether Annex B, on its own, clearly, consistently and timely informed Elizaphan Ntakirutimana that he would be obliged to meet the allegation that he transported attackers to Mugonero.

55. With regard to witness FF, Annex B states : "The witness will testify that around 9 a.m. on 16 April 94 armed soldiers were conveyed to the hospital in three cars belonging to *Pastor Ntakirutimana*, Dr. Gérard Ntakirutimana and the hospital administration"[107]. Witness YY was to testify that "he saw thousands of armed civilians come to attack the refugees at the complex" and that "[t]he attackers included Dr. Gérard Ntakirutimana, Pastor Elizaphan Ntakirutimana, [and others]"[108]. Although Annex B later stated that witness YY "will testify further, that he saw pastor Elizaphan Ntakirutimana transporting attackers in his vehicle, and that on one occasion he saw him supervising *Interahamwe* to take off the iron sheets of Murambi Adventist Church"[109]. Like the Pre-Trial Brief, Annex B's summaries of the testimony of witnesses FF and YY do not clearly state that Elizaphan Ntakirutimana transported attackers to Mugonero. The only witness summary cited by the Prosecution that does contain this allegation is that of witness MM, which states that "Pastor Elizaphan Ntakirutimana took soldiers to the hospital in his hilux pick-up truck"[110].

[102] Pre-Trial Brief, §&§.
[103] *Ibid*., §20.
[104] *Ibid*., §21.
[105] *Ibid*., §62.
[106] Prosecution response, §2.11 and n. 28.
[107] Annex B to Pre-Trial Brief, p. 4.
[108] *Ibid*., p. 17.
[109] *Ibid*.
[110] *Ibid*., p. 9.

56. Other summaries of testimony in Annex B add to the uncertainty regarding Elizaphan Ntakirutimana's role in the Mugonero attack. The summary of witness GG's testimony states only that Elizaphan Ntakirutimana was among the attackers at Mugonero[111]. This is consistent with GG's prior statements to investigators, none of which stated that Elizaphan Ntakirutimana conveyed attackers in his vehicle[112]. Annex B's summaries of the testimony of witnesses KK and PP state that Elizaphan Ntakirutimana was "[a]mong the attackers" at Mugonero, but not that he conveyed attackers there[113]. Despite these summaries, these three witnesses, along with witnesses MM and YY, were five of six principal witnesses on which the Trial Chamber relied in concluding that Elizaphan Ntakirutimana conveyed attackers to Mugonero[114]. As for the sixth, witness HH, Annex B of the Pre-Trial Brief does not state that the witness even saw Elizaphan Ntakirutimana at Mugonero, let alone that he conveyed attackers there[115].

57. In sum, there is only one sentence in Annex B to the Pre-Trial Brief alleging that Elizaphan Ntakirutimana conveyed attackers to Mugonero. When viewed together with the Pre-Trial Brief itself, which failed to state the allegation even though it contained similar facts regarding Bisesero, it cannot be said that the Prosecution clearly or consistently informed the defence that it intended to rely on the transport of attackers as the basis for the Mugonero indictment's count of genocide against testify that Elizaphan Ntakirutimana conveyed attackers, the Annex and the statements disclosed did not communicate the important role that the testimony of five other witnesses – GG, KK, PP, YY and HH – would have in proving this allegation. In this context, the Pre-Trial Brief and Annex B thereto did not provide clear, consistent, or timely information regarding the Prosecution's case on this point.

58. The Prosecution contends that the Appellants have not show any actual prejudice from the asserted vagueness in the indictment because their defence was based on alibi, challenge to witness credibility, and internal inconsistencies in witness statements[116]. Article 20 (4)(a) of the Statute of the Tribunal guaranties the accused the right to "be informed promptly and in detail … of the nature and cause of the charge against him". As such, a vague indictment, not cured by timely and sufficient notice, leads to prejudice. The defect may be deemed harmless "through demonstrating that [the accused's] ability to prepare their defence was not materially impaired"[117]. *Kupreskic* places this burden of showing that the defence was not materially impaired squarely on the Prosecution. The Prosecution's submission that the Appellants have not shown any actual prejudice rests on the speculative assumption that, had Eliza-

[111] *Ibid*., p. 5.

[112] Statement of witness GG dated 20 June 1996, p. 4 (stating that Elizaphan Ntakirutimana and Obed Ruzindana arrived at about the same time and that "there were armed civilians in the pick up of Ruzindana", but not stating that anyone role with Elizaphan Ntakirutimana).

[113] Annex B to Pre-Trial Brief, pp. 7-11.

[114] Annex B also stated that witness AA would testify that attackers arrived at Mugonero in Elizaphan Ntakirutimana's vehicle, but it is equivocal on the question whether Elizaphan Ntakirutimana transported them himself. Annex B to Pre-Trial Brief, p. 1. Witness AA was not called at trial.

[115] Annex B to Pre-Trial Brief, p. 6.

[116] Prosecution response, §6.

[117] *Kupreskic et al*., Appeal judgement, §122.

phan Ntakirutimana been given proper notice of the omitted allegation, he would have conducted his defence in an identical manner. The Prosecution cannot cure a vague indictment by presuming that the Appellants' defence would not have changed had proper notice of a material fact been given A defence based on alibi and challenges to the credibility of Prosecution witnesses is still dependent on sufficient notice of the material facts the Prosecution intends to prove. The defence's use of its investigative resources necessary resolves around the particular facts proven, as do its preparation for the cross-examination of Prosecution witnesses. In case, based on the indictment, the Pre-Trial Brief and Annex B, counsel for Elizaphan Ntakirutimana could reasonably have prepared to favour the allegation of Elizaphan Ntakirutimana's physical participation in the Mugonero attack and have given less attention to the allegation that he conveyed attackers there. Whether counsel could in fact have prepared a more effective cross-examination in this context is beside the point. Since the Prosecution had several opportunities to inform the defence of this material fact and yet has not shown that it did so, and since the defence adequately raised the issue, the Prosecution cannot rely on the mere assertion that the Appellant's counsel did not suffer by it.

59. The Prosecution has not shown that it cured the failure of the Mugonero indictment to plead that Elizaphan Ntakirutimana conveyed attackers to the Mugonero complex. Accordingly, the Trial Chamber erred in concluding that a conviction could be based on this unpleaded material fact.

(ii) Did the Bisesero Indictment fail to plead material facts?

60. The relevant allegations in the Bisesero Indictment are as follows :

> 4.10. Many of those who survived the massacre at Mugonero complex filed to the surrounding areas, one of which was the area knows as Bisesero.
>
> 4.11. The area known as Bisesero spans the two communes of Gishyita and Gisovu in Kibuye Prefecture. From April through June 1994, hundreds of men, women and children sought refuge in various locations in Bisesero. These men, women and children were predominantly Tutsis and were seeking refuge from attacks on Tutsis which had occurred throughout the Prefecture of Kibuye. The majority of these men, women and children were unarmed.
>
> 4.12. From April through June 1994, convoys of a large number of individuals armed with various weapons went to the area of Bisesero. Individuals in the convoy included, among others, Elizaphan Ntakirutimana and Gérard Ntakirutimana, members of National Gendarmerie, communal police, militia and civilians.
>
> 4.13. The individuals in convoys, including Elizaphan Ntakirutimana and Gérard Ntakirutimana, participated in the attacks on the men, women and children in the area of Bisesero which continued almost on daily basis for several months.
>
> 4.14. The attacks resulted in hundreds of deaths and a large number of wounded among the men, women and children who had sought a refugee in Bisesero.
>
> 4.15. During the months of these attacks, individuals, including Elizaphan Ntakirutimana and Gérard Ntakirutimana, searched for and attacked Tutsi survivors and others, killing or causing serious bodily or mental harm to them.

> 4.16. At one point during this time period, Elizaphan Ntakirutimana was in Murambi within the area of Bisesero. Elizaphan Ntakirutimana went to a church located in Murambi where many Tutsis were seeking refugee from the ongoing massacres. Elizaphan Ntakirutimana ordered the attackers to destroy the roof of this church so that it could no longer be used as a hiding place for the Tutsis[118].

61. In convicting Gérard Ntakirutimana of genocide under the Bisesero Indictment, the Trial Chamber relied on several findings of facts regarding the Appellant's participation in attacks on Tutsi in the Bisesero region. The Trial Chamber found that Gérard Ntakirutimana participated in nine separate attacks on Tutsi refugees in Bisesero, which were identified by specific dates, locations, or acts that Gérard Ntakirutimana took[119], and also found that he participated in additional acts at "unspecified locations in Bisesero"[120]. These findings underlay the Trial Chamber's conclusions that Gérard Ntakirutimana had committed the *actus reus* and had the requisite *mens rea* for genocide[121]. The Trial Chamber also found that, in addition to ordering the removal of the roof of the church in Murambi as alleged in paragraph 4.16 of the Bisesero Indictment, Elizaphan Ntakirutimana transported attackers to five additional sites in Bisesero region and assisted them in killing and causing of serious bodily harm to Tutsi refugee[122]. These findings supported the Trial Chamber's conclusions that Elizaphan Ntakirutimana aided and abetted others in the killing or causing of serious bodily or mental harm and the requisite *mens rea* for genocide[123].

62. In light of the preceding discussion regarding Kupreskic, it is clear that the facts enumerated by the Trial Chamber in support of its finding of genocidal acts and intent were material facts that should have been included in the Bisesero Indictment. Almost none of them were. The Appeals Chamber must therefore determine whether the Prosecution was in a position to include those facts in the indictment and, if it was, whether the failure to do so was cured by clear, consistent, and timely information communicated to the defence specifying that those allegations were part of the Prosecution's case.

a. The allegations that Gérard Ntakirutimana attacked refugees at Murambi Hill on or about 18 1pril 1994 and that he shot at refugees at Gitwe Hill in late April or May

63. The Trial Chamber found that "on or about 18 April 1994 Gérard Ntakirutimana was with Interahamwe in Murambi Hill pursuing and attacking Tutsi refugees" and the last part of April or possibly in May, Gérard Ntakirutimana was with attackers in Gitwe Hill where he shot at refugees"[124]. Both findings rested on the testimony of witness FF.

64. The attack at Murambi Hill was mentioned in one of witness FF's statements, which stated :

[118] Bisesero indictment, §§4.10-4.16.
[119] Trial Judgement, §832 (i) – (x).
[120] *Ibid*., §§704, 832 (x).
[121] *Ibid*., §§834-835.
[122] *Ibid*., §§827-828 (i) – (vi).
[123] *Ibid*., §§830-831.
[124] *Ibid*., §543.

> "I also saw Dr. Gérard Ntakirutimana many times in May and June of 1994 … On one occasion, I saw him in Murambi driving his car. He was wearing shorts and a long coat. He parked his car and spent the whole day with the killers running after the Tutsi and shooting him [sic]. He had a long gun, which he had in his shoulder"[125].

Regarding the attack at Gitwe, witness FF's statement states that the witness saw Gérard Ntakirutimana

> "[s]ometime in June … at Gitwe primary school. He was on foot with a group of attackers. I was hiding in the bush near the road near a spring or water. The Tutsi refugees were on the hill opposite. They called to him, 'How can you kill when you are the son of a pastor'"[126].

The Trial Chamber's findings, including Gérard Ntakirutimana's attire and the gun in his shoulder at Murambi, and the refugees' protest at Gérard Ntakirutimana's conduct at Gitwe, show that the statement refers to the same events as witness FF's trial testimony[127]. The Prosecution was therefore aware of significant details regarding this allegation prior to trial, including the particular locations (Murambi and Gitwe) and the means with which Gérard Ntakirutimana allegedly committed one of the attacks (the gun over the shoulder at Murambi). The Prosecution should have included these facts in the Bisesero Indictment. Failure to do so rendered the indictment defective.

65. The Trial Chamber held that the failure to allege these Murambi and Gitwe attacks in the indictment was cured. First, the Chamber noted that

> "the indictment alleges that attacks were carried out in the area of Bisesero, wherein Murambi and Gitwe Hills are located, thereby putting the defence on notice of these allegations"[128] .

The Trial Chamber also relied on the summary of witness FF's testimony provided in Annex B to the Pre-Trial Brief[129]. The Prosecution relies on these same arguments on appeal.

66. In the view of the Appeals Chamber, the allegation in the Bisesero Indictment that the Appellants participated in attacks "in the area of Bisesero which continued almost on a daily basis for several months" does not adequately inform them that the Prosecution intended to charge participation in specific attacks at Murambi or Gitwe. The Bisesero Indictment states that the area "spans the communes of Gishyita and Gisovu in Kibuye Prefecture"[130]; the Pre-Trail Brief calls it a "vast region with undulating hills and plains"[131]. Where the Prosecution has detailed information regarding the time and location of particular allegations, *Kupreskic* does not permit it to limit its allegations to a "vast region" that spans two communes. Rather, an indictment must "delve into particulars" where possible[132].

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[125] Statement of witness FF dated 15 November 1999, p. 7.
[126] *Ibid.*
[127] Trial Judgement, §§538-539.
[128] *Ibid.*, §540.
[129] *Ibid.*
[130] *Bisesero* indictment, §4.11.
[131] Pre-Trial, §19.
[132] *Kupreskic et al.*, Appeals judgement, §98.

67. The Appeals Chamber notes that the summary of witness FF's evidence in Annex B gives more specific information regarding the two allegations than the Bisesero Indictment. Regarding the Gitwe attack, the summary states that

> "[t]he witness will further testify that she saw Gérard Ntakirutimana in the company of Ngirunshuti Mathias, head of hospital staff shooting at Tutsi at Gitwe Hill. The witness will further testify that there were also soldiers, commune policemen and Hutu civilians among the attackers"[133].

The summary also indicates that the witness will testify to

> "several attacks between April and June 94 in the hills of Bisesero, including Rwamakena, Muyira, Murambi and Gitwe Hills where she saw Dr. Gérard Ntakirutimana"[134].

Although no specific details are given in the summary about the attack at Murambi, the summary clearly informed the defence that the Prosecution intended to allege, supported by witness FF's testimony that Gérard Ntakirutimana participated in those attacks. The summary also permitted Gérard Ntakirutimana to prepare his defence by reference to witness FF's witness statements, which contained further details regarding the allegations of attacks at Murambi and Gitwe.

68. For the Appeals Chamber, a problem arises, however, with regard to the timing of the attacks. The Annex B summary does not provide any time frame for the Gitwe attack and states only that the Murambi attack took place "between April and June 94", along with several others[135]. Witness FF's statement does not specify when the Murambi attack took place, although it immediately follows the allegation that witness FF

> "saw Dr. Gérard Ntakirutimana many times in May and June 1994 while [FF] was hiding in the hills"[136].

The statement avers that the Gitwe attack occurred "[s]ometime in June"[137]. Moreover, the statement specifically states that witness FF spent the day of 18 April 1994 at a collegue's home and did not leave until the evening, after which she went to her parents'home in Gisovu and then fled into the Bisesero hills where she witnessed the attacks at issue. Based on the information provided prior to trial, then, Gérard Ntakirutimana was justified in concluding that the Prosecution's case was that these two attacks occurred in May on June 1994, or at the very least after 18 April 1994.

69. At trial, however, witness FF testified that the Murambi attack took place "before noon" on the "[e]ighteenth of April 1994"[138] and the Gitwe attack "the next day"[139]. The Trial Chamber found that the Murambi attack occurred "around 18 April 1994" and the Gitwe attack

[133] Annex B to Pre-Trial Brief, p.4.
[134] *Ibid*.
[135] *Ibid*.
[136] Statement of witness FF dated 15 November 1999, p. 7.
[137] *Ibid*., p. 7.
[138] T. 28 September 2001, pp. 53-54.
[139] *Ibid*., pp. 55-56.

> "[t]he following day, on 19 1pril 1994"[140]. When cross-examined with regard to the timing of the attacks, witness FF specifically contradicted the mention in her statement that Gitwe attack took place in June and reaffirmed that both attacks took place in April 1994"[141].

70. In *Rutaganda,* the Appeals Chamber confronted the situation in which an indictment specifically pleaded that the accused distributed weapons "on or about 6 April 1994", but the Trial Chamber held that distribution occurred "on 8 and 15 April, and on or around 24 April 1994"[142]. The Appeals Chamber held that this discrepancy did not violate the rights of the accused, stating that

> "in general, minor differences between the indictment and the evidence presented at trial are not such as to prevent the Trial Chamber from considering the indictment in the light of the evidence presented at trial"[143].

In that case, however, the indictment "d[id] not show that the Prosecution necessary envisaged only a single act of weapons distribution" and the accused had shown no prejudice due to the variation in the date of the distribution[144]. The posture in this case is different. The Bisesero Indictment did not mention the Murambi or Gitwe attacks at all, let alone indicate a general date for their occurrence. Moreover, the information that the Prosecution suggests remedied this defect in the indictment – Annex B and witness FF's witness statements- not only reflected that the attacks occurred in different months, but actually *excluded* the dates proffered at trial by stating that the witness was elsewhere on those dates. The defence would have been quite justified in thinking, based on witness FF's witness statements, that it did not need to present an alibi for a Murambi attack on 18 April 1994. Had the Appelants known of the dates that the Prosecution eventually advanced at trial, they might have challenged witness FF's trial testimony by seeking out witness who would support the testimony given in witness FF's statement, such as the "Hutu colleague" who welcomed witness FF into her home for the day of 18 April, according to the statement[145].

71. The above discussion shown that the Prosecution did not provide clear, consistent or timely information relating to the allegation of these attacks. The Appeals Chamber finds that the Prosecution has therefore not met its burden of showing that the defect in the indictment was cured and that no prejudice resulted to the Appellant. Indeed, given that the information available to the defence in Annex B and witness FF's witness statements was inconsistent with the case that the Prosecution presented at trial, the defence was, in fact, prejudiced by lack of notice. The Trial Chamber

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[140] Trial Judgement, §§538-539 (citing T. 28 September 2001, pp. 52-60, and T. 1 October 2001, pp. 29-30, 45-48).

[141] T. 1 October 200, p. 38 ("The attack which was launched against Murambi took place in April … As for the atttack on Gitwe, it did not kake place in June either. As far as I recall, it would have been closer to the month of April. It is possible that that attack took place in May, but not in June".).

[142] *Rutaganda* Appeal judgement, §297.

[143] *Ibid*., §302.

[144] *Ibid*., §§304-305.

[145] Statement of witness FF dated 15 November 1999, p. 7.

therefore erred in relying on these findings in convicting Gérard Ntakirutimana of genocide under the Bisesero Indictment.

b. The allegation that Gérard Ntakirutimana transported attackers in Kidashya Hill and chased and shot Tutsi refugees in the hills

72. Also relying on trial testimony of witness FF, the Trial Chamber found "that sometime between April and June 1994, Gérard Ntakirutimana was in Kidashya Hill transporting armed attackers, and that he participated in chasing and shooting a Tutsi refugees in the hills"[146]. The Trial Chamber acknowledged, and the Prosecution does not content, that this allegation did not appear in the Bisesero Indictment and was not mentioned in the Pre-Trial Brief, Annex B thereto, or any of witness FF's statements[147]. Rather,

> "[t]he precise reference to Kidashya Hill appeared in witness FF's testimony and was not available to the Prosecution before the trial started"[148].

73. The Trial Chamber held that the defence

> "had sufficient notice of the allegation in view of the sheer scale of the killings in the hills of Bisesero"[149].

The reference to "sheer scale" recalls the statement in *Kupreskic* that

> "there may be instances where the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of crimes"[150].

The *Kupreskic* Appeal judgement elaborated that, in situations in which the crimes charged involve hundreds of victims, such as where the accused is alleged to have participated "as a member of an execution squad" or "as a member of a military force", the name of the case might excuse the Prosecution from "specify[ing] every single victim that has been killed or expelled"[151]. This observation allows for the fact that, in many of the cases before the two International Tribunals, the number of individual victims is so high that identifying all of them and pleading their identities is effectively impossible. The inability to identify victims is reconcilable with the right of accused to know the material facts of the charges against him because, in such circumstances, the accused's ability to prepare an effective defence to the charges does not depend on known the identity of every single alleged victim.

74. The Appeals Chamber recalls that the situation is different, however, when the Prosecution seeks to prove that the accused personally killed or harmed a particular individual. Proof of a criminal act against a named or otherwise identified individual can be a significant boost to the Prosecution's case; in addition to showing that the accused committed one crime, it can support the inference that the accused was prepared to do likewise to other unidentifiable victims and had the requisite *mens rea* to support a conviction. As a consequence, the Prosecution cannot simultaneously

[146] Trial Judgement, §586, see also *ibid*., 832 (vi).
[147] *Ibid*., §583.
[148] *Ibid*.
[149] *Ibid*.
[150] *Kupreskic et al*., Appeal judgement, §89 (quoting *Kvocko* Decision of 12 April 1999, §17).
[151] *Ibid*., §90.

argue that the accused killed named individual yet claim that the "sheer scale" of the crime made it impossible to identify that individual in the indictment. Quite the contrary : the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual[152].

75. *Kupreskic* did not expressly address the application of its "sheer scale" pronouncement to material facts regarding the location of crimes. There may well be situation in which the specific location of criminal activities cannot be listed, such as where the accused is charged as having effective control over several armed groups that committed crimes in numerous locations. In cases concerning physical acts of violence perpetrated by the accused personally, however, location can be very important. If nothing else, notice of the alleged location of the charged activity permits the defence to focus its investigation on that area. When the Prosecution seeks to prove that the accused committed an act at a specified location, it cannot simultaneously claim that it is impracticable to specify that location in advance.

76. In this case, the Prosecution specifically sought to show, through the evidence of witness FF, that Gérard Ntakirutimana participated in an attack at Kidashya Hill. Witness FF's identification of that location itself refutes the argument that identifying it was somehow "impracticable". The "sheer scale" discussion in *Kupreskic* therefore does not apply here.

77. Rather, the Appeals Chamber considers that the Kidashya finding falls into a different category of allegations mentioned in Kupreskic, namely those which were not pled in the indictment "because the necessary information [was] not in the Prosecution's possession"[153]. Although the evidence at trial sometimes turns out to be different from the Prosecution's expectations, the accused are generally entitled to proceed on the basis that the material facts disclosed to them are "exhaustive in nature" unless and "until given sufficient notice that evidence will be led of additional incidents"[154]. Given that "the Prosecution is expected to know its case before it goes to trial", the question is whether it was fair to the Appellant to be tried and convicted based on an allegation as to which neither he nor the Prosecution had actual or specific notice[155]. On this question, as on the question of whether communications of information sufficed to cure an indictment defect, the Prosecution bears the burden of demonstrating that the new incidents that became known at trial caused no prejudice to the Appellant.

78. The Prosecution relies on three arguments : first, that the new allegation did not change the Prosecution's case fundamentally ; second, that the Appellants did not complain of the novelty of the allegation during trial ; and third, that the Appellants have failed to show any prejudice. The second and third arguments have already been dealt with : the Trial Chamber considered that the argument was properly raised and, where the error was not waived by the Appellants, the burden of showing that the error in the indictment was harmless falls on the Prosecution. The first argument sug-

[152] *Ibid.*, § 89.
[153] *Ibid.*, § 92.
[154] *Prosecutor v. Radoslav Brdanin and Momir Talic*, Case n° IT-99-36-PT, Decision on form of further amended indictment and Prosecution application to amend, 26 June 2001, § 63.
[155] *Kupreskic et al.* ; Appeal judgement, § 92.

gests that the Prosecution may obtain a conviction at trial based on evidence of acts neither party was aware would be part of the case, as long as the acts are generally consistent with the overall theme of the Prosecution case and do not "fundamentally" change it. Such a rule would reward the pleading of broad generalities and encourage the Prosecution to avoid narrowing its case t conform to the evidence it knows it can prove, in order to leave open the possibility of benefiting from testimony of criminal acts disclosed for the first time on the stand. The Appeals Chamber holds that this procedure cannot be reconciled with an accused's right to be informed of the nature and cause of the charge against him. Moreover, the Appeals Chamber cannot accept the Prosecution's argument that it was not possible to particularise the exact site of each attack because they were so numerous and occurred almost daily[156]. In the present situation, witness FF's witness statements mentioned alleged participation by Gérard Ntakirutimana in the attacks in Bisesero. The Prosecution thus had ample opportunity to obtain more specific information from the witness prior to trial.

79. The Prosecution has accordingly not shown that the witness-stand revelation of an attack at Kidashya Hill was fair to the Appellants. The Trial Chamber erred in basing a conviction on that material fact.

c. The allegation that Gérard Ntakirutimana shot at refugees at Mutiti Hill.

80. Witness FF also testified, and the Trial Chamber found, that Gérard Ntakirutimana participated in an attack at Mutiti Hill, where he shot at refugees[157]. The Mutiti allegation is not mentioned in the Bisesero Indictment, thereby rendering the indictment defective, and like the allegation regarding Kidashya Hill, is not mentioned in the Pre-Trial Brief, Annex B thereto, or any statement of witness FF.

81. The Trial Chamber found that there was "no issue of a lack of notice to the defence" because the Bisesero Indictment generally alleged attacks in the area of Bisesero, where Mutiti Hill is located, and because witness FF's statements indicated that she saw Gérard Ntakirutimana participate in attacks "in the hills of Bisesero, including Rwakamena, Muyira, Murambi and Gitwe hills"[158]. As discussed above, the general allegation of attacks in Bisesero does not clearly inform the Appellant that the Prosecution will present evidence of an attack at a specific location such as Mutiti. The same is true of witness FF's witness statements, which do not mention Mutiti. For the reasons discussed above, the Trial Chamber erred in basing a conviction on the Mutiti Hill attack.

d. The allegation that Gérard Ntakirutimana headed a group of armed attackers at Muyira Hill and shot at Tutsi refugees in June 1994

82. Relying on testimony of witness HH, the Trial Chamber found that

> "one day in June 1994, Gérard Ntakirutimana headed a group of armed attackers at Muyira Hill. He carried a gun and shot at Tutsi refugees"[159].

[156] Prosecution response, §2.6.
[157] Trial Judgement, §§674, 832 (ix).
[158] *Ibid*., §674.
[159] *Ibid*., §668; see also id., §832 (viii).

The Prosecution was clearly in a position to specify this allegation in the Bisesero Indictment; it was mentioned in the Prosecution's opening statement, which argued that

> "[t]he evidence will prove that Elizaphan and Gérard Ntakirutimana caused the death of Tutsi at Mugonero complex and at numerous places in Bisesero including Muyira, Murambi, Gisoro and Gitwe hills"[160].

The Muyira allegation should have been pleaded in the indictment, and failure to do so rendered the indictment defective.

83. The Trial Chamber found, however, that Annex B to the Pre-Trial Brief, when viewed in conjunction with a witness statement of witness HH, provided sufficient notice of this allegation. Annex B states that

> "[i]n May 1994 [HH] fled to Bisesero where he saw that Dr. Gérard Ntakirutimana … formed part of the contingent of attackers who attacked them almost daily between then and June 94. He observed them from various hills and other locations in the Bisesero area"[161].

The Trial Chamber also observed that

> " witness HH's reconfirmation statement of 25 July 2001, which was disclosed to the defence on 14 September 2001, specifically refers to witness HH's observation of Gérard Ntakirutimana 'attacking us with a rifle' at Muyira Hill, 'at some stage'"[162].

84. Although the "reconfirmation statement" did provide clear and consistent information that Gérard Ntakirutimana would face allegations regarding an attack at Muyira Hill, it cannot be said that such information came in a timely fashion. The Trial Chamber's summary states that it was not disclosed to the Appellants until 14 September 2001, four days before the beginning of trial and eleven days before witness HH began testifying. There is no explanation for the delay in disclosing this statement, particularly given that it was signed over seven weeks earlier on 25 July 2001. The Prosecution cannot wait until four days before trial to give clear notice that it will pursue an additional allegation of personal physical wrongdoing.

85. The Appeals Chamber therefore concludes that the error in the Bisesero Indictment regarding the attack at Muyira Hill in June 1994 was not cured by subsequent information. The Trial Chamber therefore erred in relying on this allegation to convict Gérard Ntakirutimana.

e. The allegation that Gérard Ntakirutimana took part in an attack on refugees at Muyira Hill in mid-May 1994

86. Relying on the testimony of witness GG, the Trial Chamber found that

> "[s]ometime in mid-May 1994, at Muyira Hill, Gérard Ntakirutimana took part in an attack on Tutsi refugees"[163].

[160] T. 18 September 2001, p. 33, cited in Trial Judgement, §633.
[161] Annex B to Pre-Trial Brief, p. 6.
[162] Trial Judgement, §665; see also id., §633.
[163] *Ibid*., §832 (v); see also id., §635.

There is no suggestion that the Prosecution could not have included this allegation in the Bisesero Indictment, and the indictment is defective due to the omission. Moreover, the details of this attack are not specifically set out in the Pre-Trial Brief, in Annex B thereto, or in any of GG's witness statements.

87. The Trial Chamber found, however, that sufficient notice was given that the Prosecution would charge Gérard Ntakirutimana with an attack at Muyira Hill through the "reconfirmation statement" of witness HH dated 25 July 2001. As stated above, however, that statement was disclosed to the defence too late for it to be considered as "timely" information regarding the nature of the Prosecution's case. Since HH's statement did not provide adequate notice of the allegation for a Muyira Hill attack in June testified to by witness HH, it no more provides adequate notice of an allegation of a separate Muyira Hill attack in mid-May testified to by witness GG.

88. The Appeals Chamber considers therefore that the failure of the Bisesero Indictment to plead an attack at Muyira Hill in mid-May was not cured. The Trial Chamber erred in placing weight on this allegation in convicting Gérard Ntakirutimana.

f. The allegation that Gérard Ntakirutimana participated in an attack against Tutsi refugees at Muyira Hill on 13 May 1994 and shot and killed the wife of Nzamwita

89. Based on the testimony of witness YY, the Trial Chamber found that Gérard Ntakirutimana "participated in the attack aginst Tutsi refugees at Muyira Hill on 13 May 1994 and that he shot and killed the wife of one Nzmwita, a tutsi civilian"[164]. As stated above, attacks at Muyira Hill were not specifically mentioned in the indictment, nor was the allegation that Gérard Ntakirutimana personally murdered an individual identifiable as "the wife of one Nzamwita". The indictment is defective due to the omissions.

90. In determining that the failure to plead these allegations specifically had been cured, the Trial Chamber relied on its prior finding that "the defence received sufficient notice that they would have to meet allegations relating to both accused's participation in attacks against Tutsi refugees at Muyira Hill"[165]. For these reasons biven above, the Appeals Chamber finds that this conclusion was erroneous.

91. Consequently, the Appeals Chamber finds that the Trial Chamber erred in resting a conviction on the allegation of an attack at Muyira Hill on 13 May 1994 and on the allegation that Gérard Ntakirutimana shot and killed the wife of Nzamwita.

g. The allegation that Gérard Ntakirutimana participated in an attack at Gitwe Hill at the end of April or beginning May 1994 and that he shot and killed one Esdras

92. The Trial Chamber held that Gérard Ntakirutimana participated in an attack at Gitwe Hill, near Gitwe primary school, at the end of April or the beginning of May 1994, and that he killed a person named "Esdras" during that attack[166]. This finding was based on evidence of witness HH[167].

[164] *Ibid*., §642; see also id., §832 (iv).
[165] *Ibid*., §640.
[166] *Ibid*., §832 (iii).
[167] *Ibid*., §§552-559.

93. Although the allegation of a Gitwe attack was not included in the indictment, the Trial Chamber found that the Appellants were sufficiently informed that the Prosecution would allege an attack at Gitwe Hill by Annex B to the Pre-Trial Brief, in combination with the witness statement of witness HH. Annex B states that witness HH would testify that Gérard Ntakirutimana "formed part of the contingent of attackers who attacked … almost daily between [May 1994] and June 94" in the Bisesero area[168]. Witness HH's prior statement contains a detailed description of an attack at Gitwe, which specifies that Gérard Ntakirutimana "still with gun in hand" was one of the attackers who pursued refugees who had fled to "the *colline* [hill] of Gitwe"[169]. The statement adds that "Doctor Gérard Ntakirutimana was among the persons who chased after us to kill us"[170]. The Trial Chamber concluded that this statement, together with the specific indication in Annex B that witness HH would testify to attacks in Bisesero, adequately informed the defence that the Prosecution intended to prove that Gérard Ntakirutimana participated in the attack at Gitwe Hill.

94. In light of the principles discussed above, the Trial Chamber's conclusion was correct. Although the allegation of an attack at Gitwe Hill could and should have been specifically pleaded in the indictment, the defence was subsequently informed in clear, consistent, and timely manner that it had to defend against this allegation.

95. In the view of the Appeals Chamber, the allegation regarding Esdras, however, is different matter. Witness HH's statement does not name any particular murder victim. The Trial Chamber found that "[t]is information was not available to the Prosecution before the witness gave his testimony"[171]. The Trial Chamber concluded that

> "this is an example of a situation where the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of victims and the dates of the commission of the crime"[172].

96. As discussed above, however, the "sheer scale" discussion in *Kupreskic* does not apply to situations in which the Prosecution contends that the accused personally killed a specific, identifiable person. The "sheer scale" exception allows the pleading of charges without the names of victims in situations where it would be impracticable to identify them. In this situation, it was clearly practicable to identify Esdras a victim; he was so identified as witness at trial. Rather, as with the allegation regarding Kidashya Hill, this is a situation in which the Prosecution did not possess the relevant information until witness HH took the stand.

97. The question, then, is whether it was fair to require Gérard Ntakirutimana to defend against the charge of murdering Esdras without any prior notice. Gérard Ntakirutimana argues in this regard that the revelation of Esdras's name and identity at trial made it impossible for the defence to determine who Esdras was and if he was in fact dead[173]. The Prosecution relies on the same arguments it submitted with

[168] Annex B to Pre-Trial Brief, p. 6.
[169] Statement of witness HH dated 2 April 1996, p. 3.
[170] *Ibid.*
[171] Trial Judgement, §558.
[172] *Ibid.*
[173] Appeal brief (G. Ntakirutimana), §21.a.

relation to Kidashya Hill, and adds that the defence "failed to demonstrate that they ever tried" to investigate Esdras's death[174].

98. The suggestion that the defence must show that it attempted to investigate Esdras's death in order to avoid criminal liability on an allegation that first appeared at trial misstates the law. As stated in connection with Kidashya Hill, the burden of showing that the indictment's failure to plead a material fact was harmless, assuming the error is not waived, belongs to the Prosecution. The remaining Prosecution arguments have been addressed in connection with the discussion of Kidashya Hill.

99. The Appeals Chamber considers therefore that the Trial Chamber erred in concluding that convictions could be based on the uncharged killing of Esdras. However, it did not err in finding that the Appellants had sufficient notice that Gérard Ntakirutimana would be charged with participation in an attack at Gitwe Hill where he pursued and shot at Tutsi refugees.

h. The allegation that Gérard Ntakirutimana participated in an attack at Mubuga Primary School in June 1994

100. Relying on testimony of witness SS, the Trial Chamber found that "Gérard Ntakirutimana participated in an attack at Mubuga Primary School in June 1994 and shot at Tutsi refugees"[175]. This allegation was not included in the Bisesero Indictment.

101. The Trial Chamber concluded that sufficient information was given regarding this allegation due to the summary of witness SS's testimony in Annex B to the Pre-Trial Brief and one of SS's prior witness statements, which was disclosed on 7 February 2001; In the view of the Appeals Chamber, this conclusion was correct. Annex B informed the Appellants that witness SS "will further testify that he saw Dr. Gérard Ntakirutimana again after the attack at Mugonero complex, attacking Tutsis hiding in Mubuga in Bisesero area"[176]. The witness statement adds even more information, specifically stating that Gérard Ntakirutimana was "shooting at the people hiding in the school"[177]. Although the statement identifies the location as "Mu Mubuga", the reference to "Mubuga in Bisesero area" in Annex B makes clear the nature of the Prosecution's allegation.

102. The Appeals Chamber considers that the Trial Chamber therefore did not err in finding that the failure to plead this allegation in the indictment was cured by subsequent information communicated to the defence.

[174] Prosecution response, §2.29.

[175] Trial Judgement, §628; see also id. 832 (vii).

[176] Annex B to Pre-Trial Brief, p. 14.

[177] Statement of witness SS dated 18 December 2000, p. 5 ("I saw Dr. Gérard Ntakirutimana once again after the attack at Mugonero complex, when he was attacking the hiding tutsis at Mu Mubunga in Bisesero area. At that time, I was hiding in that area and I saw him chasing the fleeing people with his gun. I was hiding around 40 m away from Mu Mubunga primary school where tutsi wer hiding. From there, I saw him shooting at the people hiding in the school and when people started running here and there, he was running after them and shooting at them".)

i. The allegation that Elizaphan Ntakirutimana transported armed attackers chasing Tutsi survivors at Murambi Hill

103. Also relying on witness SS, the Trial Chamber found that

> "one day in May or June 1994, Elizaphan Ntakirutimana transported armed attackers who were chasing Tutsi survivors at Murambi Hill"[178].

This allegation does not appear in the Bisesero Indictment.

104. As with the allegation of Gérard Ntakirutimana's participation in the attack at Mubuga school, the Trial Chamber held that the summary of witness SS's testimony in Annex B to the Pre-Trial Brief and witness SS's prior witness statement provided sufficient information regarding the Prosecution's intent to advance this allegation at trial[179]. The Appeals Chamber agrees. Annex B announced that witness SS would testify "that he field to Bisesero and then Gitwe where he saw Pastor Elizaphan Ntakirutimana between Gitwe and Ngoma, near Murambi. The Pastor was with about twenty-five people who were armed. They chased the witness and others, firing at them"[180]. Witness SS's statement, in turn, contains the following information :

> "I saw Pastor Elizaphan Ntakirutimana between Gitwe and Ngoma near to Murambi. I saw him in a Hilux single cabin vehicle. I saw him through window [sic] but after that I fled away and then I saw him from a distance. The vehicle stopped and the Pastor Elizaphan Ntakirutimana came out of the vehicle. He was with 25-30 people, some of whom came walking and few in his vehicle. Those people started chasing me. The people running behind us were chanting that Pastor Elizaphan Ntakirutimana told them that [sic] 'Gold told me that you should kill and finish all tutsis'[sic]"[181].

Annex B, together with the added detail regarding the attack in SS's witness statement, clearly informed the accused that the Prosecution would present evidence of the Murambi attack.

105. The Trial Chamber therefore committed no error in concluding that the Bisesero Indictment's failure to allege Elizaphan Ntakirutimana's transportation of attackers in the Murambi attack was cured by subsequent information communicated to the accused.

j. The allegation that Elizaphan Ntakirutimana transported attackers and pointed out fleeing refugees in Nyarutovu cellule.

106. Based on the evidence of witness CC, the Trial Chamber held that

> "Elizaphan Ntakirutimana brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill one day in the middle of May 1994"

and that

> "at this occasion, Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers who then chased these refugees"[182].

[178] Trial Judgement, §§579, 828 (v).
[179] *Ibid.*, §576.
[180] Annex B to Pre-Trial Brief, p. 14.
[181] Statement of witness SS dated 18 December 2000, p. 5.
[182] Trial Judgement, §594; see also id., §828 (ii).

These allegations were omitted from the Bisesero Indictment.

107. The Trial Chamber concluded that Annex B of the Pre-Trial Brief and the prior statement of witness CC, disclosed on 29 August 2000, sufficient to inform the defence of this allegation[183]. This conclusion was correct. The Trial Chamber's findings make clear that the finding of an attack at Nyarutovu rests on evidence of an attack in that region near the road between Gishyita and Gisovu[184]. The summary of witness CC's evidence in Annex B to the Pre-Trial Brief states that witness CC would testify that

> "he saw the Pastor [Elizaphan Ntakirutimana] on the road between Gishyita and Gisovu in his white Toyota pick-up. In the car were armed civilians. When the car stopped the Pastor and the attackers disembarked. The Pastor pointed out groups of Tutsi refugees to the attackers. The attackers went to the said refugees and killed them"[185].

Witness CC's statement expands on these allegations :

> "I saw [Elizaphan Ntakirutimana] on the road between Gishyita and Gisovu. I think it was somewhere in the middle of the events. I saw him in his car. It was a Toyota pick-up. The colour of the car was white. I saw that the Pastor drove the car by himself. There were armed civilians on the car of the Pastor. I saw that some of those civilians were armed with guns. Because the Pastor was in the car, I couldn't see, if carried a gun. The civilians were dressed in civilian clothes. I saw that the Pastor stopped the car. At that time the distance between the car of the Pastor and me was about 100-150 meters. I was standing on the sleep [sic] of mountain, so I could see the Pastor and his car with the armed civilians, very clear. As soon the Pastor stopped the car, I saw that the armed civilians got out of the car. Also the Pastor got out of the car. I saw him very clearly. I saw him pointing out groups of Tutsis to the attackers. As soon as he pointed them out, the attackers started to attack them. They killed the Tutsis with guns, machetes and clubs"[186].

108. The details in Annex B and the statement of witness CC notified the defence that the Prosecution would allege that Elizaphan Ntakirutimana transported attackers and pointed out Tutsi refugees near the Gisyita-Gisovu road. The Trial Chamber therefore committed no error in concluding that the Bisesero Indictment's failure to allege these facts was cured.

k. The allegations that Elizaphan Ntakirutimana participated in a convoy of vehicles carrying attackers to Kabatwa Hill and that he pointed out Tutsi refugees at neighbouring Gitwa Hill

109. Relying on evidence of witness KK, the Trial Chamber found that

> "Elizaphan Ntakirutimana participated in a convoy of vehicles carrying armed attackers to Kabatwa Hill at the en of May 1994, and that, later on that day, at

[183] *Ibid*., § 590.
[184] *Ibid*., §§ 589, 591.
[185] Annex B to Pre-Trial Brief, p. 2.
[186] Statement of witness CC dated 13 June 1996, p. 4.

neighbouring Gitwa Hill, he pointed out the whereabouts of Tutsi refugees to attackers who attacked the refugees causing injury to witness KK"[187].

These allegations do not appear in the Bisesero Indictment.

110. Annex B to the Pre-Trial Brief does not clearly mention these allegations, although it does state that witness KK would testify that he "saw pastor Ntakirutimana… at the hills, in the company of attackers, almost daily"[188]. The Trial Chamber noted, albeit in a different part of the judgement, that witness KK's witness statement "contains an explicit reference to an event at Kabatwa Hill"[189]. This reference, however, appears to refer to an attack[190]. The statement does mention another attack that is very similar in its distinguishing characteristics to the attack that the Trial Chamber found occurred at Kabatwa Hill "at the end of May 1994"[191]; it mentions that Elizaphan Ntakirutimana stood near his car while the attack progressed, that *Interahamwe* harvested peas and loaded them into Elizaphan Ntakirutimana's vehicle, and that witness KK himself was seriously wounded by shrapnel from a grenade. However, the statement describes this event as occurring "around the 4th May 1994" at two unspecified hills in Bisesero[192]. Finally, although witness KK testified, and the Trial Chamber found, that Elizaphan Ntakirutimana had directed the attackers to run after and attack the group of refugees of which witness KK was a part, the statement attributes this other attacks, not to Elizaphan Ntakirutimana[193].

111. Annex B and the statement of witness KK therefore provided sufficient notice that Elizaphan Ntakirutimana would be charged with liability for presence at an attack during which he stood near his car while peas were loaded into it and during which witness KK was wounded by grenade shrapnel. The information available to the Appellants before trial, however, provides no notice of the location of the event, contained a date that the Trial Chamber found was inaccurate, and did not allege that Elizaphan Ntakirutimana had pointed out refugees to attackers during the event. On the other hand, it appears that witness KK's identification of the location and date of the attack and his allegation that Elizaphan Ntakirutimana directed the attackers were not available to the Prosecution before trial. The question, therefore, is whether it was fair to Elizaphan Ntakirutimana to convict him for this attack given that neither he nor the Prosecution had notice of the correct date or precise location of its occurrence or of a key element of Elizaphan Ntakirutimana's alleged participation.

112. As was discussed in relation to the Kidashya Hill allegation, in circumstances where the Prosecution relies on material facts that were revealed for the first time at trial, the Prosecution bears the burden of showing that there was no unfairness to the accused. The Prosecution does not advance any arguments in this regard other than those already addressed in connection with Kidashya Hill. The Appeals Chamber therefore concluded that the Prosecution has not carried the burden of showing that

[187] Trial Judgement, §607.
[188] Annex B to Pre-Trial Brief, p. 8.
[189] Trial Judgement, §547.
[190] Statement of witness KK dated 8 December 1999, p. 9.
[191] Trial Judgement, §607.
[192] Statement of witness KK dated 8 December 1999, p. 10.
[193] *Ibid*., ("On the hill opposite there was another group of attackers. They saw us and shouted, 'catch them, catch them'. Then a group of military came downhill after us".).

no unfairness resulted from the conviction of Elizaphan Ntakirutimana on the basis of an attack the material facts of which were first revealed at trial The Trial Chamber should not have based its conviction of Elizaphan Ntakirutimana on these allegations.

113. On the basis of evidence of witness GG, the Trial Chamber found that Elizaphan Ntakirutimana

> "was present in the midst of the killing of Tutsi at Mubuga in mid-May, that he was in his vehicle transporting armed attackers as part of a convoy which included two buses, all carrying armed attackers"[194].

The Trial Chamber noted that these allegations were not specifically mentioned in the Bisesero Indictment, the Pre-Trial Brief, Annex B thereto, or any of witness GG's witness statements[195]. The best information provided to the defence regarding this allegation was the statement in Annex B to the Pre-Trial Brief that witness GG

> "often saw Pastor Ntakirutimana, Dr. Gérard Ntakirutimana, and the Prefect in Mumubuga [sic] between April and June 1994"[196].

114. The Appeals Chamber notes that the Trial Chamber judgement does not clearly state why it considered that the Appellants had sufficient notice of this allegation. The Prosecution's only argument in this regard is that the witness statement of a different witness, witness CC, put Elizaphan Ntakirutimana on notice that he "would be charged with several incidents of transporting attackers"[197]. Yet the Prosecution does not argue, and the Trial Chamber did not find, that the specific information that surfaced at trial regarding the date, location, and specific involvemebt of Elizaphan Ntakirutimana in the Mubuga attack was not available to the Prosecution beforehand. Indead, the fact that the Prosecution was able to include in Annex B an allegation that witness GG saw Elizaphan Ntakirutimana at "Mumubuga" suggests that it possessed more information than was included in witness GG's or CC's witness statements, which do not mention Mubuga or "Mumubuga" at all. The lone statement in Annex B, unsupported by any witness statement, that witness GG saw Elizaphan Ntakirutimana at "Mumubuga" is not the type of "clear" information regarding the Prosecution's case that Kupreskic holds is essential to cure an indictment's failure to plead material facts.

115. The Appeals Chamber finds that the Trial Chamber therefore erred in convicting Elizaphan Ntakirutimana based on his alleged presence at and transportation of attackers to an attack at Mubuga.

m. The allegation that Elizaphan Ntakirutimana was part of a convoy including attackers at Ku Cyapa

116. Relying on witness SS, the Trial Chamber found that

> "one day in May or June [Elizaphan Ntakirutimana] was seen arriving at Ku Cyapa in a vehicle followed by two buses of attackers"

and that he

[194] Trial Judgement, §614; see also id., 828 (iv).
[195] *Ibid*., §613.
[196] Annex B to Pre-Trial Brief, p. 5.
[197] Prosecution response, Annex A, Row 14.

"was part of a convoy which included attackers", who that day "participated in the killing of a large number of Tutsi"[198].

This allegation is lacking from the Bisesero Indictment and its omission renders the indictment defective.

117. Annex B to the Pre-Trial Brief contains a brief description of this event in the summary of witness SS's testimony :

"A few days later [after the Murambi Hill attack] the witness saw Pastor Elizaphan Ntakirutimana again. The witness also saw the vehicle of Ruzindana in the area"[199].

Witness SS's witness statement, however, contains more detail, notably the location :

"After [the Murambi Hill attack] again after a few days, when I saw crossing the road at Cyapa while I was going to Muyira, a small place in Bisesero area, I saw the Pastor Elizaphan Ntakirutimana going in his vehicle. There were many vehicles, even buses moving in Bisesero area but I could come across the vehicle of Pastor Elizaphan Ntakirutimana while crossing the road and fleeting to hide myself. That moment, I also noticed the vehicle of Ruzindana in the area"[200].

118. The Appeals Chamber note that neither witness SS's statement not Annex B specifically states that "there was a wide-scale attack at Ku Cyapa" or that the buses travelling with the Appellant were "a convoy which included attackers" who then killed "a large number of Tutsi"[201]. However, from the context of both the witness statement, which describes several attacks in which Elizaphan Ntakirutimana allegedly participated, and Annex B, which summarizes evidence of attacks in Bisesero, the witness statement's reference to the vehicles of Elizaphan Ntakirutimana and Ruzindana in connection with an "incident at Cyapa"[202], and Annex B's inclusion of it in its summary of facts to be proven at trial, makes clear that the Prosecution intended to present witness SS as a witness to Elizaphan Ntakirutimana's presence at Ku Cyapa, with a number of other vehicles carrying attackers. The difference between "Cyapa" and "Ku Cyapa" does not appear to be material.

119. The Appeals Chamber therefore finds that the failure in the Bisesero Indictment to allege with specificity that Elizaphan Ntakirutimana was in a convoy which included attackers was cured by subsequent information communicated to the defence.

120. In relation to the fact that these same attackers were subsequently involved in attacks against Tutsi at Ku Cyapa, the Appeals Chamber considers that the failure to plead this with specificity in the Bisesero Indictment was not cured by the information contained in the witness statement and Pre-Trial Brief. That being said, the Appeals Chamber notes that, although the Trial Chamber concluded that these attackers subsequently killed Tutsi at Ku Cyapa, it did not rely on these findings in convicting Elizaphan Ntakirutimana[203]. Thus no prejudice resulted from the error.

[198] Trial Judgement, §661; see also id., §828 (vi).
[199] Annex b to Pre-Trial Brief, p. 14.
[200] Statement of witness SS dated 18 December 2000, p. 5.
[201] Trial Judgement, §661.
[202] Statement of witness SS dated 18 December 2000, p. 5.
[203] Trial Judgement, §828 (vi).

n. Challenges to allegations that did not support convictions

121. The Appellants assert that the Bisesero Indictment failed to plead facts did not constitute "criminal conduct for which [the accused were] convicted"[204], but rather were used only as evidence supporting convictions for other criminal acts in Bisesero area. This category includes the allegation that Gérard Ntakirutimana attended planning meetings in Kibuye[205] and the allegation that Elizaphan Ntakirutimana was present in the company of assailants during an attack at Gitwa cellule in the second half of May 1994[206]. Because the Trial Chamber did not find the Appellants criminally responsible for these acts or based convictions thereon, they were not "material fact" the absence of which from the Bisesero Indictment would render the pleading defective. Accordingly, the Appellants' argument with respect to these facts need not be addressed because, even if successful, it would not state an error of law invalidate the decision of the Trial Chamber[207].

o. Ambiguity regarding number of attacks

122. Gérard Ntakirutimana finally argues that allegations and testimony regarding attacks at Mubuga and Muyira Hill were fatally defective because it was not clear whether the allegations related to a single attack or several separate attacks[208]. Gérard Ntakirutimana argues that the Prosecution did not make its case clear in this regard, even at trial, and that it was left to the Trial Chamber to decide whether there was only one attack at Mubuga witnessed by witnesses GG, SS, and HH[209] or three separate attacks witnessed by each. Likewise, it was not clear whether the Prosecution was alleging five attacks at Muyira Hill and nearby Ku Cyapa witnessed by witnesses GG, YY, II[210], SS, and HH, or one single attack witnessed by all five. Gérard Ntakirutimana argues that, as a result of this imprecision, the defence "did not know the case it had to meet until the judgement was received"[211].

123. The Prosecution does not appear to dispute Gérard Ntakirutimana's argument that the Prosecution case was not clarified until the Trial Chamber decided to treat the witnesses as testifying to separate events. The Trial judgement appears to bear out Gérard Ntakirutimana's argument that it was the Trial Chamber that finally decided, based on variation between the testimony of the witnesses, to treat each one as testifying about separate events[212].

124. The Appeals Chamber recalls that it is, of course, incumbent on the Prosecution to be as clear as possible about the factual allegations it intends to prove at trial. However, in this case, it was clear from the beginning that the Prosecution 's case

[204] *Kupreskic et al*. Appeal judegement, §79.
[205] Trial Judgement, §720.
[206] *Ibid*., §§595-598.
[207] See Statute, art. 24 (1) (a).
[208] Appeal Brief (G. Ntakirutimana), §§19, 21.c.
[209] The Trial Chamber did not rely on the testimony of witness HH regarding Mubuga in convicting either Appelant.
[210] The Trial Chamber did not rely on the testimony of witness II regarding Muyira in convicting either Appellant.
[211] Appeal Brief (G. Ntakirutimana), §19.
[212] Trial Judgement, §§611, 635.

regarding Bisesero was that convoys of attackers, including the two Appellants, went to Bisesero to attack Tutsi civilians "almost on a daily basis for several months"[213]. The Prosecution at no point indicated that it planned to treat any two witnesses as corroborating each other on aspecific fact. Gérard Ntakirutimana does not point to any such indication by the Prosecution, nor does he show that he was misled into believing that the witnesses who testified to attacks at Mubuga or at Muyira were testifying to anything other than separate attacks. The Prosecution also points out that counsel for the defence appear to have proceeded on the assumption that each witness testified to an independent occurrence, in that they challenged the credibility of each witness individually. The Appeals Chamber notes that Gérard Ntakirutimana does not indicate how the defence could have been informed that the Mubuga and Muyira witnesses were testifying to separate attacks, as the Trial Chamber found. In these circumstances, the Appeals Chamber considers that the Prosecution has shown that any uncertainty regarding whether it was charging single or several attacks at Mubuga and Muyira did not result in any unfairness the accused.

p. Concluding remark

125. It is evidence from the foregoing analysis that the indictments in this case failed to allege a number of material facts for which the Appellants were tried and convicted. The Appeals Chamber, having accepted many of the Appellant's complaints of a lack of notice resulting in prejudice, stresses to the Prosecution that the practice of failing to allege known material facts in an indictment is unacceptable and that it is only in exceptionnel cases that such a failure can be remedied, for instance, "if the Prosecution provides the charges against him or her"[214]. The Appeals Chamber emphasises that, when material facts are unknown at the time of the initial indictment, the Prosecution should make efforts to ascertain these important details through further investigation and seek to amend the indictment at the earliest opportunity.

2. The burden of proof

126. Gérard Ntakirutimana contends that the Trial Chamber made various errors in assessing the evidence that amounted to errors of law in the application of the burden of proof.

(a) Assessing the detention of witness OO

127. Gérard Ntakirutimana contends that the Trial Chamber erred in refusing to draw an adverse inference against a Prosecution witness, witness OO, who was being detained in Rwanda at the time. Gérard Ntakirutimana claims that the Trial Chamber gave witness OO "the benefit of the doubt"[215], contrary to the requirement that the Prosecution prove its case beyond a reasonable doubt, due to the following sentence in the judgement :

[213] *Bisesero* indictment, §4.13.
[214] *Kupreskic et al*., Appeal judgement, §114.
[215] Appeal Brief (G. Ntakirutimana), §27.

> "Given the presumption of innocence enjoyed by a detained person awaiting trial, the Chamber will not draw any adverse inference against witness OO an account of his status as a detainee"[216].

128. The Appeals Chamber notes that it is not clear from the Trial judgement why the Trial Chamber invoked the presumption of innocence in this context. The most likely reading is that it was resolving a dispute between the parties as to whether witness OO was detained because he had been sentenced to prison for committing a crime, as the Appellants argued, or whether he was "detained awaiting trial"[217]. The Trial Chamber stated that the evidence showed that witness OO was awaiting trial for "having kept people in [his] home who subsequently died" and for "giving a pistol to a young man who was a civilian"[218]. In this context, the Trial Chamber's reference to the "presumption of innocence" may be understood as making clear that witness OO was a suspect who had not been convicted or sentenced, contrary to the Appellant's position.

129. Even this explication, however, does not fully account for the next step of refusing to draw an adverse inference. As Gérard Ntakirutimana points out, a witness who faces criminal charges that have not yet come to trial "may have real or perceived gains to be made by incriminating accused persons" and may be tempted or encouraged to do so falsely[219]. This risk, when properly raised and substantiated, should be considered by the Trial Chamber. In this case, it appears that the Trial Chamber failed to consider this risk because witness OO was a suspect who had not yet been convicted, even though suspects who are detained awaiting trial may also have motives to fabricate testimony. This was an error of law.

130. The Appeals Chamber recalls that a party showing an error of law must also explain "in what way the error invalidates the decision"[220]. In this situation, therefore, it is incumbent on Gérard Ntakirutimana to demonstrate that, had the Trial Chamber properly considered whether to draw an adverse inference on account of witness OO's detention awaiting trial on criminal charges, it would have done so. Gérard Ntakirutimana does not make any argument in this regard in his Appeal Brief, other than the general suggestion that persons facing criminal charges "may have" motives to fabricate evidence[221]. Gérard Ntakirutimana does not assert any basis for concluding that witness OO did have such a motive or in fact fabricated evidence against him. The bald assertion that criminal suspects sometimes lies on the witness stand does not invalidate the Trial Chamber's decision that witness OO's testimony in this case was credible.

(b) Assessing uncorroborated alibi testimony

131. Gérard Ntakirutimana next argues that the Trial Chamber unfairly assessed the evidence by accepting uncorroborated testimony of Prosecution witness and rejecting

[216] Trial Judgement, § 173.
[217] *Ibid*.
[218] *Ibid*. (quoting T. 1 November 2001, pp. 188-191).
[219] Appeal Brief (G. Ntakirutimana), § 27.
[220] *Rutaganda* Appeal judgement, § 20.
[221] Appeal Brief (G. Ntakirutimana), § 27.

defence witness testimony because it lacked corroboration[222]. Gérard Ntakirutimana contends that the Trial Chamber required the defence to corroboration its alibi, whereas no such requirement was applied to Prosecution evidence.

132. As Gérard Ntakirutimana acknowledges[223], there is no requirement that convictions be made only on evidence of two or more witness. Corroboration is simply one of many potential factors in the Trial Chamber's assessment of a witness's credibility. If the Trial Chamber finds a witness credible, that witness's testimony may be accepted even if not corroborated. Similarly, even if a Trial Chamber finds that a witness's testimony is inconsistent or otherwise problematic enough to warrant its rejection, it might choose to accept the evidence nonetheless because it is corroborated by other evidence.

133. Of course, a Trial Chamber should not apply differing standards in its treatment of evidence of the Prosecution and the defence. Yet, in the view of the Appeals Chamber, Gérard Ntakirutimana's argument that the Trial Chamber committed such an error is not borne out by the Trial judgement. The three examples that Gérard Ntakirutimana cites in which the Trial Chamber rejected the evidence of alibi witness display not the imposition of a blanket requirement of corroboration on alibi witnesses, but rather evaluations of the totality of evidence presented.

134. Gérard Ntakirutimana suggests that the Trial Chamber rejected his alibi solely because other witness did not corroborate his own testimony[224], but the judgement is clear that the Trial Chamber viewed other defence witnesses as actually contradicting Gérard Ntakirutimana's testimony. While Gérard Ntakirutimana testified that he was at his father's house on 15 April and the morning of 16 April 1994, defence witnesses 16 and 9 specifically testified that they did not see him at Elizaphan Ntakirutimana's house. The Appeals Chamber considers that the Trial Chamber's analysis shows that it did not require that other witness corroborate Gérard Ntakirutimana's testimony; rather, it merely reacted to the fact that witnesses 16 and 9 undermined Gérard Ntakirutimana's account of events.

135. Gérard Ntakirutimana next contends that the Trial Chamber incorrectly rejected the accused's alibi testimony for the period of the end of April 1994 to July 1994. The accused testified that they spent that time at Mugonero, except for certain specific trips to other places, and therefore could not have participated in attacks at Bisesero[225]. Gérard Ntakirutimana fastens onto the Trial Chamber's statement that both accused frequently left Mugonero for "destinations … about which there is little direct evidence other than the words of the accused"[226]. Gérard Ntakirutimana contends that this phrase indicates that the Trial Chamber "relied on the absence of corroboration to reject defence evidence"[227].

136. The Trial Chamber's analysis reveals, however, that the alibi was rejected because the defence witnesses presented an "implausibly sanitized account of the

[222] *Ibid*., §§28-30.
[223] Reply (G. Ntakirutimana), §17.
[224] Appeals Brief (G. Ntakirutimana), §29.a.
[225] Trial Judgement, §§521-528.
[226] *Ibid*., §530.
[227] Appeal Brief (G. Ntakirutimana), §§29 and 29.b.

times, with life at Mugonero existing in a kind of vacuum" in which the Appellants and the people around them supposedly

> "resumed the normalcy of their pre-April lives… despite the massive attack at the complex on 16 April, the subsequent fighting in the neighbouring district of Bisesero, the overall breakdown of law and order and the facts that Rwanda was at war"[228].

The Trial Chamber was therefore faced with two accounts of what the Appellants did when they left Mugonero on those occasions : the testimony of the Appellants, which the Trial Chamber had already found implausible, and the testimony of Prosecution witnesses, which the Trial Chamber had found credible. Even though the Appellants testified that they often travelled in the company of other named persons, nobody other than the Appellants gave evidence regarding where they went when they left Mugonero during this period. In this context, the statement that defence's account of the Appellant's of the Appellant's destinations when they left Mugonero was supported by "little direct evidence other than the words of the accused"[229] does not reflect a requirement of corroboration unevenly imposed on the Appellants. Rather, the Appeals Chamber finds that it simply summarizes the Trial Chamber's assessment that no witness testified credibly that the Appellants never travelled to Bisesero, whereas several Prosecution witnesses testified credibly that they did.

137. The Appeals Chamber considers that the same is true of the Trial Chamber's rejection of the claim that Elizaphan Ntakirutimana was ill during the letter half of April 1994. The Trial Chamber found the claim implausible because Elizaphan Ntakirutimana "did not name his ailment" and

> "whatever the condition he might have had, it did not seem to prevent him, according to his own account, from going to work six times per week, or travelling to places outside Mugonero"[230].

Although the claim of illness was supported by testimony of Elizaphan Ntakirutimana's wife, the Trial Chamber found that her testimony was not credible, in part because her testimony regarding the alibi of Gérard Ntakirutimana during the same time period was contradicted by two other defence witnesses[231]. Having found that all testimonies regarding Elizaphan Ntakirutimana's illness during the latter half of April 1994 were not credible, it was quite proper for the Trial Chamber to add that such evidence was not supported by any other defence witness who could be expected, due to his or her proximity to Elizaphan Ntakirutimana at the relevant time, to be in a position to corroborate the claim. Thus, the fact that Elizaphan Ntakirutimana's wife's claim that her husband was ill "was not corroborated by witness 16, 7, 6, 12, or 5, who made day-trips to Gishyita"[232] simply reinforces the finding that all of the witnesses who were in a position to testify to Elizaphan Ntakirutimana's illness either did not do so or did so in a manner that lacked credibility.

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[228] Trial Judgement, § 529.
[229] *Ibid*., § 530.
[230] *Ibid*., § 522.
[231] *Ibid*., § 480.
[232] *Ibid*.

138. Finally, in the view of the Appeals Chamber, it is worth noting that the Trial Chamber used a similar analysis in rejecting the evidence of certain Prosecution witnesses[233]. Accordingly, the Appeals Chamber finds Gérard Ntakirutimana's argument that the Trial Chamber took an uneven approach to corroborate is unfounded.

(c) Declining to make findings of fact in favour of the Accused

139. Gérard Ntakirutimana contends that the Trial Chamber was required to resolve certain factual disputes in the Appellant's favour and erred by simply holding that the evidence was insufficient to make findings against Gérard Ntakirutimana[234]. Specifically, witnesses XX and FF testified to certain factual allegations that the Trial Chamber concluded were not proven beyond reasonable doubt : that Gérard Ntakirutimana withheld medication from Tutsis, locked up medicine cabinets, kept the only keys to certain rooms at Mugonero Hospital, and that Red Cross vehicles brought patients to the hospital[235]. Gérard Ntakirutimana contends that, had the Trial Chamber taken the additional step of making affirmative findings contrary to testimony of witnesses XX and FF, the credibility of the testimony of those witnesses on other points would have been seriously diminished[236]. Gérard Ntakirutimana contends that, by refraining from making affirmative findings in Gérard Ntakirutimana's favour, but rather holding only that the Prosecution had not proven them beyond a reasonable doubt, the Trial Chamber committed an error of law.

140. Although Gérard Ntakirutimana frames this argument as one of "failing to rule" on the factual disputes regarding Gérard Ntakirutimana's behaviour at the hospital, the Appeals Chamber considers that it is really a challenge to the credibility of Witness XX and FF in their testimony to other factual allegations. Since the accused has no burden to prove anything at criminal trial, a trial chamber need not resolve factual disputes further once it has concluded that the Prosecution has not proven a fact beyond a reasonable doubt. The Appeal Chamber recalls that the presumption of innocence does not require the trial chamber to determine whether the accused is "innocent" of the fact at issue; it simply forbids the trial chamber from convicting the accused based on any allegations that were not proven beyond a reasonable doubt. Gérard Ntakirutimana's only legal support for his contrary position is a citation to paragraph 233 of the *Kupreskic* Trial Judgement, which does not bear on this issue at all[237].

141. This argument, therefore, fails to demonstrate that the Trial Chamber committed an error of law. The question whether the Trial Chamber was unreasonable in crediting the testimony of Witnesses XX and FF on others matters will be considered

[233] See, e.g., Trial Judgement, §655 (rejecting testimony of witness II in part because of lack of corroboration).

[234] Appeals Brief (G. Ntakirutimana), §31.

[235] *Ibid*., §31. a-c.

[236] *Ibid*., §31.

[237] *Ibid*., The cited paragraph recites a factual findings by the *Kupreskic* Trial Chamber and identifies the evidence that the Trial Chamber relied upon in making the finding. *Kupreskic et al* . Trial Judgement, §233.

in the context of the Appellants' challenges to the factual findings underlying their convictions[238].

(d) Relying on credible testimony as background evidence

142. Gérard Ntakirutimana next identifies passages in which the Trial Chamber treats testimony that it considered to be credible as relevant to or corroborative of evidence of other events, even though the fact that the Prosecution sought to prove by means of the testimony was not proven beyond a reasonable doubt[239]. Gérard Ntakirutimana contends that, unless the fact asserted in a witness's testimony is found beyond a reasonable doubt, that testimony must be entirely disregarded in the Trial Chamber's consideration of the evidence.

143. The Appeals Chamber notes that Gérard Ntakirutimana does not cite any authority in support of his argument. Rather, he asserts that

> "[o]nce a Trial Chamber has expressed doubts about whether a fact has been proven; it contravenes the presumption of innocence… to continue to rely on it"[240].

This abstract statement is correct as far as it goes : the trial chamber may not rely on *facts* that have not been proven beyond a reasonable doubt. But Gérard Ntakirutimana does not show the Trial Chamber erred in relying on *testimony* that, while insufficient to prove the fact for which the Prosecution adduces it, is relevant to another fact in the case.

144. Moreover, even if the Appellant had identified an error of law in this context, he has not shown that it would invalidate any part of the decision. Gérard Ntakirutimana finds fault with the Trial Chamber's statement that it would consider testimony of Witnesses YY and KK "as part of the general context in the days preceding the attack on 16 April", but does not show how this "general context " was or could have been used to his disadvantage[241]. The same is true of the Trial Chamber's statement that it would place "limited reliance" on Witness MM's testimony that he saw Gérard Ntakirutimana taking stock of dead bodies in the basement of Mugonero Hospital[242]. If anything, in the view of the Appeals Chamber, the fact that the Trial Chamber concluded that there was insufficient evidence that Gérard Ntakirutimana did anything of the kind[243] indicates that whatever "reliance" was placed on Witness MM's evidence, it was so "limited" as to have no effect on the verdict. Finally, although it is clear that the Trial Chamber had doubts about the accuracy of the testimony of Witness KK, owing to inconsistencies with his prior statement[244], it appears to have treated Witness KK's problematic testimony as cumulative of that of six other witnesses who

[238] See infra section II. B. 2. (a), where the Appeals Chamber concludes that, because the convictions based only on the testimony of Witness FF were quashed abd that the remaining findings based on Witness FF's testimony did not ground any conviction, it is not necessary to address Gérard Ntakirutimana's challenge to Witness FF's credibility? A similar reasoning is applicable in the case of Witness XX, since no conviction was based on that witness's testimony.

[239] Appeal Brief (G. Ntakirutimana), §32.

[240] *Ibid*., §33.

[241] Trial Judgement, §120.

[242] *Ibid*., §426.

[243] *Ibid*., §430.

[244] *Ibid*., §267.

testified that they saw Elizaphan Ntakirutimana driving his car in the Mugonero area on 16 April, five of whom saw him transporting attackers[245]. It is clear that the Trial Chamber would have reached the same conclusion had it not treated Witness KK's testimony as corroborative. According, the Appeals Chamber considers that Gérard Ntakirutimana has not shown that this potential error, if error it was, would result in invalidation of any finding in the Judgement.

(e) Reference to Prior Consistent Statements

145. Gérard Ntakirutimana next asserts that the Trial Chamber erred in allowing the introduction of prior consistent statements by Prosecution witnesses as proof of the matter asserted (hearsay) or to bolster the credibility of the witness' in-court statements[246]. Gérard Ntakirutimana submits that prior consistent statements are only rarely relevant or probative because it is always possible that both the prior statement and the in-court testimony are false or mistaken in a consistent way[247]. Gérard Ntakirutimana argues that Rule 89 (C) of the Rules should incorporate the common law rule that holds prior consistent statements to be inadmissible when offered to bolster a witness's credibility[248]. Gérard Ntakirutimana then points out several situations in which the Trial Chamber noted that a witness's statement was consistent with the witness's in-court testimony and contends that the Trial Chamber used that consistency "as a basis for crediting [his or her] evidence"[249].

146. The Prosecution does not appear to disagree with Gérard Ntakirutimana's statement of the common law rule regarding prior consistent statements, but asserts that his examples do not reflect an improper use of consistent statements or did not cause prejudice[250].

147. Although the jurisprudence of the Tribunal contains several comments on the use of prior *inconsistent* statements to impeach witness testimony[251], it has not commented significantly on the proper uses of prior *consistent* statements. The Rules of procedure and evidence of the Tribunal do not expressly forbid the use of prior consistent statements to bolster credibility. However, the Appeals Chamber is of the view that prior consistent statements cannot be used to bolster a witness's credibility, except to rebut a charge of recent fabrication of testimony[252]. The fact that a witness testifies in a manner consistent with an earlier statement does not establish that the witness was truthful on either occasion; after all, an unlikely or untrustworthy story is not made more likely or more trustworthy simply by rote repetition[253]. Another reason

[245] *Ibid*., §281.
[246] Appeal Brief (G. Ntakirutimana), §§34-36.
[247] *Ibid*., §36.
[248] *Ibid*.,
[249] *Ibid*., §37.
[250] Prosecution response, §§4.26-4.27.
[251] *Akayesu* Appeal Judgement, §142; *Musema* Appeal Judgement, §99.
[252] See, e.g., *Tome v. United States*, 513 U.S. 150, 157 (1995) ("Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited".); *R. v. Beland and Phillip*s, 36 C.C.C. (3d) 418, 489 (Supreme Court of Canada 1987).
[253] See 4 J.H. Wigmore, Evidence in Trials at Common Law, §1124 (J.H. Chadbourn rev. 1972).

supporting this position is that, if admissible and taken as probative, parties would invariably adduce numerous such statements in a manner that would be unnecessarily unwieldy to the trial[254].

148. However, there is a difference between using a prior consistent statement to bolster the indicia of credibility observed at trial and rejecting a Defence challenge to credibility based on alleged inconsistencies between testimony and earlier statements. The former is a legal error, while the latter is simply a conclusion that the Defence's arguments are not persuasive. As the following paragraphs indicate, the Appeals Chamber considers that the examples cited in Gérard Ntakirutimana's Appeal Brief are primarily examples of the latter phenomenon.

149. For example, Gérard Ntakirutimana objects to the Trial Chamber's statement that Witness FF's testimony "was generally in conformity with her previous statements to investigators (see below)"[255] reference makes plain that the Trial Chamber is merely summarizing the following paragraph in the judgement, which rejects various Defence arguments claiming that Witness FF's testimony was not credible because it contained allegations with or omitted from her prior statements[256]. The Trial Chamber's comment about "conformity with her previous statements" is therefore not a bolstering of credibility, but rather a simplified dismissal of the Defence's arguments of lack of credibility.

150. The same is true of several other examples cited by Gérard Ntakirutimana. The Trial Chamber's comments that Witness XX testified in a manner consistent with her previous statements[257] were made in paragraphs that being with a summary of the Appellants' challenge to Witness XX's credibility, citing directly to the Defence Closing Brief[258]. That Brief made reference to Witness XX's prior statements and sought to identify inconsistencies between the two statements and between the statements and XX's testimony, particularly with regard to events in Bisesero[259]. It therefore appears that the Trial Chamber's discussion of consistency in Witness XX's witness statements was a refutation of the Defence's assertion of inconsistency, not a bolstering of credibility beyond the indicia of credibility discernible at trial. Likewise, the Trial Chamber's finding that Witness MM's testimony regarding Elizaphan Ntakirutimana's conveying of attackers to Mugonero "was generally in conformity with his previous statements[260] and, in a footnote immediately thereafter, "was also generally in conformity with his statement to Africa Rights"[261], is clearly a prelude to the finding in the next sentence that some "minor discrepancies between his first and second statements" were immaterial[262].

[254] See *Ibid.*
[255] Appeal Brief (G. Ntakirutimana), §37.b (quoting Trial Judgement, §127).
[256] Trial Judgement, §18.
[257] *Ibid.*, §§131-132.
[258] *Ibid.*, §131 and n. 162 (citing Defence Closing Brief, pp. 70-75).
[259] Defence Closing Brief, pp. 71-75.
[260] Trial Judgement, §228.
[261] *Ibid.*, n. 299.
[262] *Ibid.*, §228.

151. The Trial Chamber's discussion of consistency between the prior statements of Witness FF[263] also responds to the Defence's claim that Witness FF's testimony regarding attacks at Murambi and Gitwe Hills did not match her prior statements[264]. The same is true regarding FF's testimony regarding an attack at Kidashya Hill[265]. The analysis of the statement of HH[266] likewise answers the Defence argument that "[t]he witness' prior statement to investigators contradicts" the allegation regarding the killing of Esdras[267]. The Defence likewise argued that Witness CC "was not credible because of discrepancies between his testimony and his prior statements"[268]; it was not an improper bolstering for the Trial Chamber to reject the Defence's argument by concluding that Witness CC's testimony was "consistent with the written statement"[269].

152. Similarly, the Appeals Chamber notes that the reference to Witness DD's prior witness statement responds to the Defence's claim that Witness DD testified to events "not mentioned in his two reconfirmations" and that his testimony "consistently contradicted" his written statements[270]; the Trial Chamber concluded that, while there are "some differences between the statement and the testimony", the testimony regarding the material facts at issue was not inconsistent[271]. Moreover, in its findings of fact, the Trial Chamber rejected Witness DD's evidence on this point because it was "not convinced beyond a reasonable doubt that Witness DD could recognize Gérard Ntakirutimana in semi-darkness or from his voice"[272]. Because the Trial Chamber did not make any factual finding in reliance on Witness DD's purportedly bolstered evidence[273], any error in the treatment of the prior consistent statement could not invalidate the decision.

153. Gérard Ntakirutimana also cites the Trial Chamber's treatment of Witness HH's testimony that Gérard Ntakirutimana asked refugees to leave Mugonero hospital and relocate to the Ngoma Adventist Church[274]. Witness HH testified that Gérard Ntakirutimana's reason for giving this request was that "the livestock of the refugees was soiling the hospital"; the Trial Chamber then stated that this reason "is in conformity with his written statement to investigators of 2 April 1996"[275]. It is not clear whether the Trial Chamber mentioned this consistency as a factor bearing on Witness HH's credibility, or whether the Trial Chamber simply meant to draw a distinction

[263] *Ibid.*, § 541.
[264] Trial Judgement, § 537.
[265] Trial Judgement, § 585 ("It is true, *as argued by the Defence*, that Witness FF did not mention Kidashya Hill specifically in any of her prior written statements; However, as mentioned above she told investigators in four of her statements that she saw Gérard Ntakirutimana on several occasions in Bisesero". (Emphasis added).
[266] Trial Judgement, § 559.
[267] *Ibid.*, § 551.
[268] *Ibid.*, § 588.
[269] *Ibid.*, § 594.
[270] Defence Closing Brief, p. 138.
[271] Trial Judgement, § 427.
[272] *Ibid.*, § 428.
[273] *Ibid.*, § 430.
[274] Appeal Brief (G. Ntakirutimana), § 37. a.
[275] Trial Judgement, § 108.

between Witness HH and another witness, KK, who stated a different reason in his earlier statement and no reason at all in his trial testimony[276]. More importantly, however, the Trial Chamber did not make a finding as to the reason Gérard Ntakirutimana gave for asking the refugees to relocate. The Trial Chamber found only that "Gérard Ntakirutimana did request the refugees to leave for the Ngoma Church", a fact testified to by Witnesses HH, KK, and MM[277]. Accordingly, even if the Trial Chamber did not improperly view Witness HH's testimony regarding Gérard Ntakirutimana's reason for his request as bolstered with his prior consistent witness statement, such an error, in the view of the Appeals Chamber, could not invalidate any finding of the Chamber. Similarly, Gérard Ntakirutimana's challenge to the evaluation of Witness II's testimony[278] is moot in light of the Trial Chamber's finding that it was "not in a position to conclude beyond a reasonable doubt that Elizaphan Ntakirutimana participated and behaved as alleged by the Prosecution" and as testified to by the witness[279].

154. Gérard Ntakirutimana's final example cites to a portion of the Trial Judgement summarizing the Prosecution's argument to the Trial Chamber, not the analysis of the Chamber itself[280].

155. Accordingly, although Gérard Ntakirutimana has correctly stated the law regarding the impermissibility of using prior consistent statements to bolster witness credibility, the Appeals Chamber finds that he has failed to show any instance of it by the Trial Chamber that could have invalidated the Judgement. This ground of appeal therefore fails.

(f) Application of the presumption of innocence

156. Gérard Ntakirutimana cites several passages in the Trial Judgement that he contends reveal the Trial Chamber's misapprehension of the legal principle that the accused is presumed innocent unless and until the Prosecution proves guilt beyond a reasonable doubt[281]. First, Gérard Ntakirutimana cites sentences in which the Trial Chamber rejected Defence arguments because it was not "convinced" or "persuaded" by the Defence argument[282]. Gérard Ntakirutimana contends that these formulations indicate that the Trial Chamber placed a burden on the Defence to persuade or convince it of its position, rather than leaving the burden on the Prosecution to show guilt beyond a reasonable doubt. Second, Gérard Ntakirutimana notes instances in which the Trial Chamber rejected Defence evidence because there was a "distinct possibility" that it was unfounded and accepted Prosecution arguments or evidence because they were "plausible", because they gave the Trial Chamber an "impression", or because the situation "may" or "could" well have unfolded as the Prosecution submitted[283].

[276] *Ibid*.
[277] *Ibid*.
[278] Appeal Brief (G. Ntakirutimana), §37.k.
[279] Trial Judgement, §655.
[280] Appeal Brief (G. Ntakirutimana), §37.c (citing Trial Judgement, §362).
[281] Appeal Brief (G. Ntakirutimana), §39.
[282] *Ibid*., §§39. a-b, f-g (citing Trial Judgement, §§129, 229, 370, 591).
[283] *Ibid*., §§39. c-e, h-l (citing Trial Judgement, §§133,153,335, 480, 539, 584, 597, 643).

157. The Prosecution bears the burden of proving the Accused's criminal responsibility beyond a reasonable doubt. Gérard Ntakirutimana contends, however, that the Trial Chamber's phrasing in the sentences excerpted above shows that the Trial Chamber convicted the Accused because they failed to persuade the Chamber of their innocence.

158. It is necessary to determine whether the word choices identified by Gérard Ntakirutimana indicate that the Trial Chamber made factual findings against the Accused even though the totality of the evidence on the point admitted of a reasonable doubt[284].

159. A review of the passages in which the Trial Chamber states that is not "convinced" or "persuaded" by Defence arguments shows that, rather than imposing a burden on the Appellants, the Trial Chamber merely rejected Defence challenges to witness credibility. The Appeals Chamber considers that nothing in the Trial Chamber Judgement suggests that the Trial Chamber held the witnesses to be credible even though a reasonable doubt remained as to the credibility of the witnesses at issue. Rather, the Trial Chamber found that the Appellants' arguments seeking to raise a reasonable doubt failed to do so. Thus, the Trial Chamber held that the Defence's claim that Witnesses FF and MM were part of a campaign to convict the Appellants did not undermine the evidence of Witness FF's credibility[285]; that the discrepancies identified by the Defence between Witness CC's trial testimony and his prior statement likewise did not affect his credibility[286]; and that Witness HH had credibility testified that he was able to see the shooting of Ukobizaba, contrary to the Defence's argument based on Witness HH's location at the time[287]. The Appeals Chamber considers that nothing in the Trial Judgement suggests that the use of the terms "convinced" or "persuaded" reflected an impermissible burden on the Appellants; rather, these words simply express the Trial Chamber's conclusion that the Prosecution proved that its witness were credible beyond reasonable doubt despite the Defence's arguments to the contrary.

160. The Appeals Chamber considers that the same is true of the Trial Chamber's conclusion that, although Witness CC had not mentioned seeing Elizaphan Ntakirutimana at an attack at Gitwa Cellule,

> "the general formulation according to which the witness saw the Accused at least four times during the attacks in the Bisesero area *could well* include the incident at Gitwa"[288].

The Appellants' had argued at trial that Witness CC's evidence was not credible because it was inconsistent with his prior statements[289]. The Trial Chamber found, however, that the witness was "generally consistent and credible" and that, because there was no necessary contradiction between trial testimony of a specific attack at Gitwa and a prior statement of seeing Elizaphan Ntakirutimana at four attacks in Bisesero generally, the Appellants' argument of inconsistency failed to raise a reasonable

[284] See *Musema* Appeal Judgement, §210.
[285] Trial Judgement, §§129, 229.
[286] *Ibid.*, §591.
[287] *Ibid.*, §370.
[288] *Ibid.*, §597 (emphasis added).
[289] *Ibid.*, §588.

doubt as to Witness CC's credible testimony. The Appeals Chamber considers that Gérard Ntakirutimana has accordingly not shown that the Trial Chamber impermissibly gave the Prosecution the benefit of the doubt.

161. Gérard Ntakirutimana's challenge to the statement regarding a "distinct possibility" rests on a misreading. The Trial Chamber identified contradictions in the alibi evidence that, in its view, gave rise

> "to the distinct possibility that [three alibi witnesses] were either not aware of all of Gérard Ntakirutimana's movements or were minimising his absences to assist his defence"[290].

The Trial Chamber was not stating that there was only a "possibility" that the alibi evidence was inconsistent and therefore incredible. Rather, it clearly found that the witnesses did contradict each other; the "possibility" language refers to potential reasons for the inconsistency, which though useful in the interest of completeness are not material facts that must be found beyond a reasonable doubt. Once the Trial Chamber found, beyond a reasonable doubt, that the alibi witnesses were not credible, it was not required to make findings beyond a reasonable doubt regarding the reasons why witnesses might offer incredible and inconsistent accounts of events.

162. Gérard Ntakirutimana attacks the Trial Chamber's use of the word "plausible" in accepting the testimony of Witness FF[291]. The context in which the Trial Chamber used this word makes clear that the Trial Chamber simply viewed it as a synonym for "credible". There is no suggestion that the Trial Chamber acted on evidence that it believed could admit of reasonable doubt. The similar complaint regarding Witness II is misplaced, since the paragraph cited refers to a summary of the Prosecution's submission, not the analysis of the Trial Chamber[292].

163. Gérard Ntakirutimana argues that the Trial Chamber improperly concluded that he "simply abandoned the Tutsi patients" at Mugonero Hospital not because it was proven beyond a reasonable doubt, but because "[t]he overall impression [left] the Chamber with th[at] impression"[293]. The Trial Chamber did not rely upon this in making a finding of fact, but it did state that it "note[d] the element as part of the general context"[294]. Its statement that

> "[t]his behaviour is not in conformity with the general picture painted by the Defence of the Accused as a medical doctor who cared for his patients"

suggests that the Trial Chamber at least relied on the "impression" in forming an opinion of the character of the Appellant. It therefore cannot be excluded that the Trial Chamber acted on an "impression" of the Appellant's behaviour that was not proven beyond a reasonable doubt.

164. In the view of the Appeals Chamber, the context of this error, however, reveals its harmlessness. The "impression" received by the Trial Chamber was based on testimony of Gérard Ntakirutimana himself, who "acknowledge[d] that he departed the hospital leaving the Tutsi patients behind" and "did not return to the hospital to

[290] *Ibid*., §480.
[291] Appeal Brief (G. Ntkirutimana), §§39. i-j (referring to Trial Judgement, ««542, 584).
[292] Id., §39 k (citing Trial Judgement, §643).
[293] Trial Judgement, §153.
[294] *Ibid*.

inquire as to the condition of patients and staff"[295]. The Appellant does not argue that the Trial Chamber could not have found, based on his own testimony and beyond a reasonable doubt, that he "simply abandoned the Tutsi patients"[296]. Thus, although it appears that the Trial Chamber based a conclusion regarding the Appellant's behaviour on an improper standard of proof, it is indisputable that the evidence was sufficient to support the conclusion when the correct standard is applied. Accordingly, the Appeals Chamber considers that this error of law does not invalidate the Trial Chamber's decision.

165. Gérard Ntakirutimana likewise attacks the Trial Chamber's statement following its enumeration of several named individuals who were killed in the attack at Mugonero :

> "(The Chamber did not receive information about the ethnicity of each of these individuals, but it is left with the clear impression that most of them were Tutsi)"[297].

Again, the Appellant argues that the Trial Chamber should not have made a finding adverse to him based merely on a "clear impression". However, it does not appear to the Appeals Chamber that this parenthetical sentence supported a finding regarding the ethnicity of those individuals. Rather, the naming of the deceased opens a discussion of the number of people killed in the Mugonero attack[298]. This discussion culminates in the conclusion that "paragraph 4.9 of the Indictments has been made out", namely that the Mugonero attack resulted in "hundreds of deaths and a large number of wounded"[299]. The ethnicity of the dead and wounded is not mentioned in paragraph 4.9 of the two Indictments. Accordingly, while the statement challenged by Gérard Ntakirutimana does not appear to rely on proof beyond a reasonable doubt, its context and the use of parentheses indicate that it was meant as a side comment only. The finding regarding the ethnicity of the persons killed at Mugonero takes place in subsequent paragraphs and does not rest on a mere "impression" of the Trial Chamber[300].

166. Finally, Gérard Ntakirutimana challenges the Trial Chamber's observation, in response to arguments regarding an omission of a fact from Witness DD's prior statement, that the fact "*may have* been omitted during the recording of the interview"[301]. This equivocal construction suggests, as Gérard Ntakirutimana points out, that the Trial Chamber was not entirely convinced that the omission was due to a recording error, rather than to Witness DD's failure to mention it during the interview[302]. The remainder of the Trial Chamber's discussion does not remedy the uncertainty. The Chamber merely states that the witness cannot read and that there were obviously communication problems between Witness DD and the investigators. Therefore, the Appellant appears to be correct that the Trial Chamber was not entirely confident in Witness DD's testimony on this point. However, the Trial Chamber then noted that

[295] *Ibid.*
[296] *Ibid.*
[297] *Ibid.*, §335.
[298] *Ibid.*, §§335-337.
[299] *Ibid.*, §337 (quoting *Mugonero* and *Bisesero* Indictments, §4.9).
[300] *Ibid.*, §§338-340.
[301] *Ibid.*, §133 (emphasis added).
[302] Appeal Brief (G. Ntakirutimana), §39.c.

Witness DD's testimony was corroborated by other witnesses[303]. In the view of the Appeals Chamber, this is therefore a situation in which the Trial Chamber, though perhaps not convinced of a fact beyond a reasonable doubt based solely on the testimony of one witness, was convinced by the corroboration of that witness's testimony by other witnesses. Whether this conclusion was reasonable is a question of fact to be decided later. At this stage, the fact that the Trial Chamber relied on corroboration in making its finding shows that the Trial Chamber did not base a finding solely on evidence as to which it expressed doubt.

167. In conclusion, it is worth noting that the Trial Chamber's choice of words in these situations could have been more precise in certain situations. However, on review of the specific contexts of each of the phrases challenged by Gérard Ntakirutimana, it becomes evident that the Trial Chamber properly understood and applied the presumption of innocence. This ground of appeal is therefore dismissed.

(g) Consideration of the alibi

168. Gérard Ntakirutimana next contends that the Trial Chamber erred by rejecting the alibi because it was not "reasonably possibly true"[304]. The phrase "reasonably possibly true" comes from the Appeals Chamber's Judgement in *Musema,* which adopted the following statement of law :

> In raising the defence of alibi, the Accused not only denies that he committed the crimes for which he is charged but also asserts that he was elsewhere than at the scene of these crimes when they were committed. The onus is on the Prosecution to prove beyond a reasonable doubt the guilt of the Accused. *In establishing its case, when an alibi defence is introduced, the Prosecution must prove, beyond any reasonable doubt, that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence. The alibi defence does not carry a separate burden of proof. If the defence is reasonably possibly true, it must be successful*[305].

169. The Appellant contends, in effect, that the Trial Chamber seized on the words "reasonably possibly true" and ignored the rest, which imposed upon Gérard Ntakirutimana the burden of proving that his alibi was "reasonably possibly true", rather than requiring the Prosecution to disprove it beyond a reasonable doubt. He raises two arguments : first, that the "reasonably possibly true" formulation places an impermissible burden on the Defence, and second, that under that formulation, the Trial Chamber could reject an alibi if it were uncertain about whether the alibi evidence showed that the alibi was "reasonably possibly true", even though uncertainties should resolved in favour of the alibi.

170. The context of the *Musema* discussion makes clear that the phrase "if the defence is reasonably possibly true" is equivalent to the phrase "if the defence raises a reasonable doubt". Shortly before it quoted the above language, the Appeals Chamber stated :

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[303] Trial Judgement, §§133-134.

[304] Appeal Brief (G. Ntakirutimana), §40.

[305] *Musema* Appeal Judgement, §205 (quoting *Musema* Trial Judgement, §108) (emphasis added by *Musema* Appeal Judgement).

"The sole purpose of an alibi, when raised by a defendant, is only to cast a reasonable doubt on the Prosecution case"[306].

The Chamber then stated

"[W]hen the alibi has been properly raised, the onus is on the Prosecution to disprove it beyond a reasonable doubt failing which the Prosecution case would raise a reasonable doubt as to the accused's responsibility"[307].

171. The Appellant does not appear to quarrel with this statement of the law, under which a trial chamber may reject an alibi only if the Prosecution establishes "beyond a reasonable doubt that, despite the alibi, the facts alleged are nevertheless true"[308]. Rather, Gérard Ntakirutimana contends that the Trial Chamber's rejection of the alibi because it was not "reasonably possibly true" did not conform to this standard. However, the Trial Chamber articulated the standard in a clear and correct manner when it first considered alibi evidence :

"It follows from case law that when the Defence relies on alibi, the Prosecution must prove, beyond a reasonable doubt, that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi. If the alibi is reasonably possibly true, it must be successful"[309].

None of the paragraphs cited by the Appellant suggest that the Trial Chamber used the phrase "reasonable possibility" in any way other than as a synonym for "reasonable doubt". Indeed, the Appeals Chamber considers that the context makes clear that the Trial Chamber evaluated the totality of the evidence and concluded that the Prosecution witnesses had proven criminal responsibility beyond a reasonable doubt despite the alibi[310].

172. The Appellant's second argument is that the "reasonably possibly true" formulation could result in the giving of the benefit of the doubt to the Prosecution in cases of uncertainty. This argument loses its force when, as here, the Trial Chamber correctly understands the "reasonably possibly true" standard as identical to the standard of "reasonable doubt". It is true that, in borderline cases in which the Trial Chamber is unable to conclude whether the totality of the evidence shows guilt beyond a reasonable doubt, the Trial Chamber must resolve the uncertainty in the Accused's favour. But there is no suggestion that the Trial Chamber in this case erred in law by doing the contrary[311]. Accordingly, this ground of appeal fails.

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[306] Id., § 200.

[307] Id., § 201.

[308] Id., § 202.

[309] Trial Judgement, § 294.

[310] Ibid., §§ 309 (« The Chamber does not find that this evidence, considered together with the evidence of the Prosecution witnesses, raises a reasonable possibility that the two Accused were not present in the vicinity of the Mugonero Complex between 8.00 and 9.00 on 16 April"); 480 ("The evidence does not raise a reasonable possibility that they were not at those locations in Murambi and Bisesero where Prosecution witnesses testify to having seen them in April".); 530 ("[T]he Chamber need only consider whether the alibi evidence creates a reasonable possibility that the Accused were not at locations at Murambi and Bisesero at certain times alleged by Prosecution witnesses, as summarized at the beginning of this discussion. The Chamber finds that no such reasonable possibility has been established").

[311] The Trial Chamber's assessment of the Appellants' alibi has been addressed more fully in section H of the Appeals Chamber's discussion of Elizaphan Ntakirutimana's grounds of appeal.

(h) Consideration of allegation of a "political campaign"

173. The submissions in relation to existence of a political campaign are discussed below under Section IV (Common ground of appeal on existence of a political campaign against the Appellants) of the present judgement.

(i) Consideration of testimony of Prosecution witnesses

174. Gérard Ntakirutimana claims that the Trial Chamber erred in law by

> "crediting the testimony of Prosecution witnesses when, without rational bases, it compartmentalized their testimony so as to insulate those aspects relied upon, from those aspects that were not believed beyond a reasonable doubt"[312].

Although the Appellant frames this ground of appeal as one of law, it is in reality a challenge to various findings of credibility made by the Trial Chamber; Gérard Ntakirutimana does not argue that the Trial Chamber is forbidden, as a matter of law, from concluding that a witness's testimony, though not credible on one point, is credible on others. Rather, Gérard Ntakirutimana takes issue from the Trial Chamber's findings that certain specific Prosecution witnesses were credible as to some portions of their testimony, even though their evidence was rejected on other points. An error in finding of credibility is an error of fact. An appellant cannot turn an error of fact into an error of law simply by contending that the trial chamber made a similar error in assessing the credibility of several witnesses on several occasions. These arguments will therefore be assessed in the context of reviewing the reasonableness of the Trial Chamber's factual decisions regarding credibility.

3. Other errors of law asserted by Gérard Ntakirutimana

175. Gérard Ntakirutimana asserts four remaining grounds of appeal under the heading of "legal errors". First, he claims that the Trial Chamber committed legal errors in its dismissal of various Defence challenges to the credibility of Prosecution witnesses based on their witness statements[313]. The Appellant's argument is that the Trial Chamber "seized upon rationalizations not grounded in evidence to discount the significance of inconsistencies in the Prosecution evidence"[314]. Second, he argues that, because four Prosecution witnesses within the same week asked the Trial Chamber to prefer their in-court testimony to their prior statements, the Trial Chamber should have inferred (even though Gérard Ntakirutimana did not raise the issue) that they had been improperly coached by someone familiar with the jurisprudence of the International Tribunal and should have discounted their testimony accordingly[315]. Third, the Appellant contends that the Trial Chamber had no cogent reasons for rejecting the alibi evidence other than an irrational preference for Prosecution witnesses[316], erred in convicting him for attacks that were identified as occurring at a specific time without finding beyond a reasonable doubt that there was no alibi for

[312] Appeal Brief (G. Ntakirutimana), §44.
[313] *Ibid*., §§45-52.
[314] *Ibid*., §45.
[315] *Ibid*., §53; Reply (G. Ntakirutimana), §27.
[316] Appeal Brief (G. Ntakirutimana), §55.

that time[317], erred in failing to reconcile the finding that the alibi left open the "intermittent chance" for the Appellants to travel to Bisesero with the testimony of certain Prosecution witness that they saw them in Bisesero on regular occasions[318]; and erred in failing to consider that the Prosecution's account that the Appellants repeatedly ventured into Bisesero to participate in attacks was "preposterous"[319]. Fourth, Gérard Ntakirutimana asserts that the Trial Chamber improperly failed to account of the Defence's evidence that the Accused lacked any motive to commit the crimes charged.

176. As discussed above in connection with the Trial Chamber's assessment of Prosecution witnesses, however, these challenges attack the Trial Chamber's conclusion regarding the credibility of various witnesses or the conclusion that the evidence as a whole proved criminal responsibility beyond a reasonable doubt. These are challenges of fact. These arguments will therefore be assessed in reviewing the reasonableness of the Trial Chamber's factual decisions, to which the Appeals Chamber now turns.

B. Factual errors

177. Gérard Ntakirutimana asserts that none of the factual findings on which his convictions rests could have been made by a reasonable tribunal. As aforementioned, the Tribunal's jurisprudence firmly established that it is the Trial Chamber's role to make findings of fact, including assessments of the credibility of witnesses[320]. The Appeals Chamber "will not lightly disturb findings of fact by a Trial Chamber"[321]. The Appeals Chamber will revise them only where the Appellant establishes that the finding of fact is one that no reasonable tribunal could have reached. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice[322].

178. This difference to the finder of fact is particularly appropriate where the factual challenges concern the issues of witness credibility. These are the kinds of questions that the trier of fact is particularly well suited to assess, for

> "[t]he Trial Chamber directly observed the witness and had the opportunity to assess her evidence in the context of the entire trial record"[323].

[317] Ibid., §56.
[318] Ibid., §56.
[319] Ibid., §57.
[320] *Musema* Appeal Judgement, §18.
[321] *Ibid.*; see also *Niyitegeka* Appeal Judgement, §8; *Krstic* Appeal Judgement, §40; *Krnojelac* Appeal Judgement, §11; *Kupreskic et al*. Appeal Judgement, §32; *Furundzija* Appeal Judgement, §37; *Tadic* Appeal Judgement, §35; *Aleskovski* Appeal Judgement, §63.
[322] *Krstic* Appeal Judgement, §40; *Niyitegeka* Appeal Judgement, §8.
[323] *Kupreskic et al*., Appeal Judgement, §130.

1. Mugonero Indictment

(a) Procurement of ammunition and gendarmes (Witness OO)

179. The Trial Chamber relied on Witness OO's testimony to find that Gérard Ntakirutimana attended a meeting with the commander of the Kibuye gendarmerie camp and Obed Ruzindana in Kibuye town on the afternoon of 15 April 1994, and that he procured gendarmes and ammunition for the attack on Mugonero Complex on 16 April 1994[324].

(i) Witness OO's status as a detainee in a rwandan prison

180. The Appellant argues that the evidence supplied by Witness OO is suspect because he had been in custody in Rwanda for seven years awaiting trial and therefore was likely to provide false testimony to curry favour with the authorities. In Gérard Ntakirutimana's submission, the Trial Chamber misunderstood this objection, refusing to draw an adverse inference from the fact that Witness OO was detained on the basis that Witness OO was entitled to the presumption of innocence. The objection, Gérard Ntakirutimana argues, was not that Witness OO was a bad character but that he had a motive to lie even if he was innocent. In addition, Gérard Ntakirutimana submits that Witness OO had previously lied about his status as a detainee in *Niyitegeka*[325].

181. The Trial Chamber considered Witness OO's detention but refused to draw an adverse inference as to the witness's credibility[326]. It must be acknowledged that the reason given by the Trial Chamber – that a detained person enjoys the presumption of innocence (a legal error that has been discussed above)- does not answer the Defence argument that Witness OO had a reason to give untruthful evidence to ingratiate himself with the Rwandese authorities. Nevertheless, the mere fact that an incarcerated suspect had a possible incentive to perjure himself on the stand in order to gain leniency from the prosecutorial authorities is not sufficient, by itself, to establish that the suspect did in fact lie. The authorities cited by the Appellant are not to the contrary : none shows that an in-custody informant must necessary be treated as unreliable. The Appellant also fails to substantiate his claim with any direct evidence of collusion between Witness OO and the Rwandese prosecutorial or prison authorities, or even with evidence of how Witness OO's testimony could have helped the witness national authorities in Rwanda. In fact, the available evidence tends toward the opposite conclusion : as the Appeals Chamber has already noted, the witness did acknowledge, when on the stand in *Niyitegeka*, that there may be some benefit in testimony before the Tribunal. The witness, however, denied being motivated by such a possibility[327]. As the Appeals Chamber indicated on that occasion, the Appellant made no showing that would cast the truthfulness of that explanation into doubt[328].

[324] Trial Judgement, § 186.
[325] Appeal Brief (G. Ntakirutimana), §§ 63-64 (citing Trial Judgement, § 173).
[326] Trial Judgement, § 173.
[327] Decision on request for admission of additional evidence, 8 April 2004, § 19.
[328] *Ibid.*

182. Insofar as the Niyitegeka transcripts of Witness OO's testimony are concerned, the Appeals Chamber has already explained that these transcripts do not form part of the record in this case, and it has rejected the Appellant's request to admit them as additional evidence[329]. Therefore, it will not consider any references to the *Niyitegeka* transcripts in the determination of the appeals in this case[330].

(ii) Witness OO's statement on Gérard Ntakirutimana's presence at the Kibuye gendarme camp at the end of April or beginning of May 1994

183. The Appellant argues that Witness OO is not credible because Witness OO testified to seeing Gérard Ntakirutimana at the Kibuye gendarmerie camp at the end of April or beginning of May, and described the scene in great detail, including that Gérard Ntakirutimana had an ever-present military companion. By contrast, the Appellant points out, no other witness testified to this fact. He adds that in Musema, Witness OO testified that this event occurred in May 1994; when confronted with this inconsistency, the witness claimed to be testifying about two different yet identically detailed events[331].

184. The Appellant's arguments are unpersuasive. Witness OO did indeed state in his statement to investigators of 12 August 1998 that he had seen Gérard Ntakirutimana and others come to the Kibuye gendarmerie camp to collect fuel for a bulldozer and four gendarmes to bury the bodies of killed Tutsi at the end of May 1994, whereas at trial he stated that this happened at the end of April or beginning of May 1994. This discrepancy – even if otherwise left unexplained- does not mean, however, that the Trial Chamber could not have relied on Witness OO's testimony with respect to a different event, which supports the ground of the judgement below. As the settled jurisprudence of the Tribunal establishes, the Trial Chamber may find some parts of a witness's testimony credible, and rely on them, while rejecting other parts as not credible[332]. The event with respect to which the Kibuye gendarmerie camp on 15 and 16 April 1994, to procure attackers for the assault on Mugonero Complex on 16 April 1994. The Trial Chamber made no finding with regard to the specific event that Appellant discusses.

185. As mentioned above, the Appellant also points to the fact that Witness OO stated at trial that Gérard Ntakirutimana arrived at the Kibuye gendarmerie camp after the events of 16 April 1994 with the bulldozer "with a soldier, who accompanied him everywhere"[333], even though no other witness ever testified about such an ever-present military companion. As explained above, the Trial Chamber did not base any findings on this part of Witness OO's testimony. Moreover, Witness OO referred to this military companion only once in one sentence at trial and was not further questioned on the matter. In the view of the Appeals Chamber, this statement is therefore not sufficient to find the witness unreliable.

[329] *Ibid*., §§24-25.
[330] *Ibid*., §25.
[331] Appeal Brief (G. Ntakirutimana), §65.a.
[332] *Musema* Appeal Judgement, §20; *Celebici* Appeal Judgement, §§485 and 498.
[333] Citing T. 1 November 2001, p. 171.

(iii) Witness OO's testimony on Kayishema's presence at a meeting at Charroi Naval Post

186. The Appellant next argues that Witness OO is not credible because he asserted in his witness statement, and later repeated in his testimony in *Musema*, that Kayishema was present at a meeting at Charroi Naval Post, but testified to the contrary at trial here[334]. The issue of Kayishema's presence at a meeting at Charroi was used by the Trial Chamber to support any finding against the Appellant. Even if the Appellant could establish that there is a discrepancy in Witness OO's statement and testimony as to Kayishema's presence at a meeting at Charroi Naval Post, that fact is not sufficient to establish that no reasonable Trial Chamber would have found Witness OO credible with respect to other matters.

(iv) Witness OO's statements on gendarmes' freedoms at the Kibuye gendarmerie camp

187. In this contention, the Appellant argues that Witness OO is not credible and that he is not self-contradictory because he testified that gendarmes at the Kibuye camp could do what they wanted, while also stating that they could never leave the camp[335]. The Appeals Chamber considers that, contrary to the Appellant's argument, no inconsistency arises from Witness OO's statements at trial that during the war gendarmes at the Kibuye camp gendarmerie camp would do whatever they wanted and that "no soldier had any right to leave camp". The statements instead suggest that no soldier had any right to leave the camp but that, when within the camp between April and July, they were not subjected to ordinary military discipline.

(v) Witness OO's claim that investigators did not maintain the chronology and that he did not read through his statement

188. The Appellant argues that Witness OO was not credible on the basis that, when confronted with an inconsistency in his witness statement, he claimed that he had not read the statement even though he signed it, believing that he could correct errors in the statement at trial. The Appellant further points out that Witness OO testified that investigators did not maintain a chronology, which is belied by the statement itself. Moreover, the Appellant contends, the Prosecution relied on the statement in its effort to cure indictment errors[336].

189. The Appellant fails to show that no reasonable Trial Chamber would have Witness OO's explanation that the investigators did not maintain the chronology of events. The witness explained that the investigators took notes when they were questioning him and then went to type out his statement, and that they did not maintain the chronology of events[337]. This explanation is entirely plausible, because, as the Appellant acknowledges[338], the statement refers to specific dates only sporadically,

[334] Appeal Brief (G. Ntakirutimana), §65.a.
[335] *Ibid*., §65.c., citing T. 2 November 2001, pp. 98, 110.
[336] *Ibid*., §65. c-d.
[337] T. 2 November 2001, p. 54.
[338] Reply Brief (G. Ntakirutimana), §32.

normally employing liking phrases such as "the next morning" or "the following afternoon". This mode of reference makes it difficult if not impossible to confirm precise dates for many of the events discussed. As a result, paragraphs could easily have been put "upside down"[339] by the investigators, as the witness had claimed on the stand.

190. The Appellant also fails to show that no reasonable Trial Chamber would have concluded that Witness OO did not lie about the fact that he did not read through his statement. When questioned about this fact by the Trial Chamber, the witness stated that he "did not have the opportunity to read that [the statement] over with [the investigators] to be able to correct that error"[340], and immediately clarified the reason why he signed the statement without reading it first : "I signed that statement al right, but I was told that I was going to come and confirm what I stated before the Trial Chamber. And I said to myself that even if there was a problem with the statement, I was going to solve it since I would be present, myself"[341]. The Trial Chamber accepted this explanation, and the Appellant fails to show why it would have been unreasonable for a Trial Chamber to credit such an explanation.

(vi) Witness OO's alleged discrepancies about the timing of events on 15-16 April

191. Gérard Ntakirutimana argues that, even if Witness OO was credible, the Trial Chamber drew unreasonable conclusions from his testimony. From Witness OO's testimony that he saw Gérard Ntakirutimana sometimes before 18 April, the Trial Chamber concluded that he was at the Kibuye gendarmerie camp on 15 and 16 April. Gérard Ntakirutimana argues further that Witness OO's testimony that there was one day between Gérard Ntakirutimana's visits to the camp contradicts the Trial Chamber's finding that he was there on consecutive days (15 and 16 April)[342].

192. The Appeals Chamber notes that even though the witness initially testified that "between when [Gérard Ntakirutimana] returned and his first visit, one day had elapsed"[343], in the next sentence he clarifies that the return "was the following day". The context in which the witness's statements are placed shows that the witness was repeatedly and consistently referring to the time of the return as the morning after Gérard Ntakirutimana's first visit to the camp on 15 April, namely to the morning of 16 April[344]. The Trial Chamber's finding is therefore reasonable.

193. Gérard Ntakirutimana also claims that Witness OO changed his testimony about timing of events to suit stories. The Appellant lists a number of examples : (a) Witness OO's pre-trial statement said that the Gatwaro stadium attack occurred after the camp commander (Major Job) was transferred to Kigali, yet at trial he testified that it happened before the transfer, and when confronted with the inconsistency, he said the attack happened on 14 April, never resolving whether it was before or after the transfer; (b) in *Musema*, Witness OO testified that the Gatwaro attack and an attack on Home St. Jean occurred on the same day, yet in his statement he alleged

[339] T. 2 November 2001, p. 52.
[340] Ibid., p. 54.
[341] Ibid., p. 55.
[342] Appeal Brief (G. Ntakirutimana), §66 (citing Trial Judgement, §§144, 175).
[343] T. 2 November 2001, p. 71.
[344] See T. 2 November 2001, pp. 62, 64, 65, 70, 71.

that the Home St. Jean attack occurred later; (c) in *Musema*, Witness OO claimed that he first saw Musema at the camp at the end of April, yet in his statement he claimed he saw Musema with Gérard Ntakirutimana at a meeting that the Trial Chamber concluded took place on April 15[345].

194. The Trial Chamber has expressly considered the inconsistency between Witness OO's pre-trial statement and his trial testimony as to the date of Major Job's transfer. Accepting Witness OO's explanation for why he believed his pre-trial statement to have been inaccurate, the Trial Chamber credited the witness's trial testimony instead[346]. As already explained, the Trial Chamber's conclusion that the witness provided a creditable explanation for the differences between his pre-trial statement and trial testimony was reasonable, as was the Trial Chamber's decision to credit the chronology of events that the witness provided at trial.

195. As to the alleged inconsistencies in Witness OO's testimony concerning the chronology of the attacks on Gatwaro and on Home St. Jean, the witness, at trial, acknowledged that he was not sure about the exact chronology : "I think it was on the same day and I think it was on the 18th"[347]. Given this admission, the fact that he gave a slight divergent testimony on different occasions does not cast doubt upon his credibility or demonstrate that the Trial Chamber was unreasonable in relying upon Witness OO's evidence.

196. As to the alleged discrepancy between Witness OO's pre-trial statement and his testimony in Musema about the first time he saw Musema, it was –as the Appellant acknowledges- the Trial Chamber and not the witness who concluded that the date of 15 April 1994 was the date on which the meeting between Gérard Ntakirutimana and Musema took place. In his statement to investigators, the witness did not ascribe any precise date to that meeting. Rather, the meeting is one of the events that the witness linked to other events by words such as "the following day". Considering the context of the witness's statement, the meeting seems to have taken place between the middle and end of April 1994; The Appeals Chamber considers that the witness's statement in Musema that he had seen Musema for the first time at the camp at the end of April is therefore not inconsistent with his statement to investigators in this case.

197. Gérard Ntakirutimana next challenges the Trial Chamber's acceptance of Witness OO's chronology of events on the morning of 16 April. In particular, he points to Witness OO's statement that Gérard Ntakirutimana arrived at the Kibuye camp between 7:00 and 7:30 a.m. on 16 April, which would have made it impossible for him to procure gendarmes, return to Mugonero, and leave for Gishyita at 8:30, which was the Prosecution's theory. Therefore, the Appellant argues, Witness OO changed his testimony at trial to state that Gérard Ntakirutimana arrived earlier, between 6:30 and 7:30[348]. The Appellant further argues that even this chronology is still impossible because one could not travel the distance involved and accomplish the tasks alleged in 90 minutes[349]. Finally, the Appellant points out that Witnesses GG and SS contra-

[345] Appeal Brief (G. Ntakirutimana) §57.
[346] Trial Judgement, §180.
[347] T. 2 November 2001, p. 41.
[348] Appeal Brief (G. Ntakirutimana), §68.
[349] *Ibid*., §§68-69 (citing Trial Judgement, §§161, 195).

dicted Witness OO's chronology, since they claim to have observed the house where Gérard Ntakirutimana was staying that morning, yet did not testify that he left between 5:30 and 6:30 a.m., as alleged by the Prosecution[350].

198. The inconsistencies in Witness OO's estimation of time alleged by the Appellant are not of such magnitude that no reasonable Trial Chamber would have accepted Witness OO's trial testimony as truthful. The Appellant provided no evidence which would suggest that the witness was deliberately untruthful in his trial testimony, so as to accommodate the Prosecution's trial theory. In addition, as already explained above, the Trial Chamber carefully considered the witness's explanation for the disparities in chronology between his pre-trial statement and trial testimony, and found the explanation credible.

(vii) Witness OO's evidence of vehicles carrying attackers, the identity, clothing and number of attackers

199. Gérard Ntakirutimana challenges the connection made by the Trial Chamber between Witness OO's testimony that he conveyed gendarmes from Kibuye in the hospital vehicle and two other vehicles and the finding that these gendarmes then took part in the Mugonero attack. The Appellant contends that the Trial Chamber was left in doubt as to whether any of the vehicles Witness OO said he saw in Kibuye were ever at Mugonero. Gérard Ntakirutimana argues that no witness at Mugonero observed people matching the detailed description Witness OO gave of the gendarmes at Kibuye; contrary to the Trial Chamber's finding, Witness 25 described them very differently. In addition, the Appellant submits, no witness described as many as 15 or 30 gendarmes (which was witness OO's figure) arriving at Mugonero[351]. Gérard Ntakirutimana adds that Witness OO's testimony that the gendarmes returned at 5 p.m. is also contradicted by the Prosecution's own theory that the fighting continued beyond 5 p.m.[352]. Finally, he states that Witness OO's testimony is also contradicted by evidence that there was initial fighting between refugees and attackers[353].

200. The Trial Chamber expressly considered the arguments the Appellant now puts forward with respect to the lack of corroboration of Witness OO's evidence concerning the vehicle carrying the attackers. In the Trial Chamber's view, the fact that vehicles described by Witness OO were not described by any other witness did not cast doubt upon his credibility. As the Trial Chamber explained,

> Witness OO did not claim to know from his own experience what happened to the convoy after its departure [from the Kibuye camp]. He relied rather on indirect evidence, provided by the gendarme Nizeyimana, as to what the gendarmes (or at least some of the gendarmes) did after they left the camp. This does not diminish the reliability of the observations made by this witness in relation to the afternoon of 15 April and the morning of 16 April[354].

[350] Appeal Brief (G. Ntakirutimana), §70 (citing Trial Judgement, §224).
[351] *Ibid*, §§71-72 (citing Trial Judgement, §§224, 292).
[352] *Ibid*., §73.
[353] *Ibid*.
[354] Trial Judgement, §183.

201. The Trial Chamber limited its inquiry to the events that transpired at the Kibuye camp during that time, and to the specific question whether, at time, Gérard Ntakirutimana applied efforts to procure gendarmes. The Trial Chamber therefore did not assess the broader factual matrix of what happened to the convoy of gendarmes procured by the Appellant after it left the camp. The Trial Chamber acknowledged that the description of the vehicle that arrived at the Mugonero Complex, given by the witnesses to that event, did not conform to the description of vehicles leaving the Kibuye camp given by Witness OO[355]. The Trial Chamber nevertheless dismissed this inconsistency as irrelevant to Witness OO's credibility on the rationale that the witness did not testify first-hand to the events that took place at Mugonero Complex, and therefore provided no testimony directly inconsistent with the testimony of the other witnesses.

202. The Appeals Chamber considers the Trial Chamber's logic to be puzzling. Implicit in the Trial Chamber's findings and reasoning is the assumption that the vehicles procured by Gérard Ntakirutimana on the morning of 16 April at Kibuye were the same vehicles that arrived afterwards at Mugonero would be consistent with the description of the vehicles seen leaving Kibuye. There is no suggestion in the judgement or in the testimony of the witnesses that Gérard Ntakirutimana and the accompanying gendarmes switched the vehicles en route from Kibuye to Mugonero. While such a possibility cannot be excluded, it was incumbent upon the Trial Chamber to make appropriate factual inquiry in order to ascertain the complete sequence of events and to assess fully Witness OO's credibility. On the record as it exists, a reasonable trial chamber could not have reconciled the differences in the testimony of Witness OO and the Mugonero witnesses solely on the basis of the fact that Witness OO did not testify directly about the kind of vehicles that had arrived at Mugonero.

203. The question remains, however, whether a reasonable trier of fact could nevertheless have credited Witness OO's testimony about the events that took place at Kibuye on 15-16 April, despite the doubts whether his description of the vehicles was accurate. In finding that there was insufficient evidence that Gérard Ntakirutimana conveyed attackers to the Mugonero Complex, the Trial Chamber cast serious doubt upon the credibility of the testimony given by the witnesses who purported to have seen Gérard Ntakirutimana in the Complex on the morning of 16 April[356]. For instance, the Trial Chamber was unconvinced by the testimony of Witness HH, who claimed to have seen the Appellant arrive at the Complex in a white Peugeot pick-up[357]. The Trial Chamber observed that this description of Gérard Ntakirutimana's vehicle was not consistent with the vehicle description given by any other witness. Similarly, the Trial Chamber expressed doubts about the testimony given by Witness KK, who claimed to have seen the Appellant arrived at the Complex in a hospital vehicle[358]. The Trial Chamber also expressed doubt about the evidence given by

[355] *Ibid.*, §182.
[356] Trial Judgement, §§286-292.
[357] *Ibid.*, §286.
[358] *Ibid.*, §287.

another witness, Witness PP, who claimed to have seen Gérard Ntakirutimana arrived at the Complex in his father's car[359].

204. Given the doubts expressed by the Trial Chamber about the evidence of these three witnesses with respect to their observations of the convoy which arrived at Mugonero on 16 April, a reasonable trial chamber could have decided to credit instead the vehicle description given by Witness OO, whom the Trial Chamber found to be a credible witness[360]. As already explained, the Trial Chamber is unique position to evaluate the demeanour of the testifying witness, to question the witnesses directly about the gaps or inconsistencies in their testimonies, and to evaluate their credibility on the basis of the witnesses' reaction to the difficult questions put to them by the parties or by the judges. The Trial Chamber's decision to find Witness OO's testimony credible is therefore entitled to substantial deference.

205. Furthermore, even if the Trial Chamber had concluded that Witness OO's description of the vehicles was subject to doubt, that conclusion does not necessarily cast doubt upon the rest of his testimony with respect to the events of 15-16 April, which the Trial Chamber found to be detailed and consistent[361]. Finally, even if the testimony of Witness OO were to be disbelieved entirely, and if the Trial Chamber's concomitant finding that Gérard Ntakirutimana procured the gendarmes were to be reversed, that reversal alone would not negate the Trial Chamber's finding that the Appellant had the requisite genocidal intent[362]. That finding relied, in addition, on the Trial Chamber's findings that the Appellant participated in the attacks at Mugonero on 16 April and shot at refugees, that he killed Charles Ukobizaba, and that he participated in the attack on Witness SS[363]. The Trial Chamber's acceptance of Witness OO's testimony with respect to whether the Appellant procured gendarmes at Kibuye on 15-16 April, even if erroneous, therefore did not result in a miscarriage of justice and need not be set aside.

206. As to the Appellant's arguments with respect to Witness OO's testimony about the identity and clothing of attackers, the Appeals Chamber finds those contentions to be unfounded. Several other witnesses testified to seeing *Interahamwe* take part in the attack on the Mugonero Complex, and these witnesses did not specify how they were dressed[364]. Their testimony, therefore, does not cast doubt upon the evidence given by Witness OO on this point. Furthermore, Witness 25, on whose testimony the Appellant relies, in fact stated that while some people were wearing civilian clothing others wore "branches of trees and leaves", which is consistent with Witness OO's description. The fact that Witness 25 did not specify whether these individuals were *Interahamwe* or someone else does not undermine the credibility of Witness OO's evi-

[359] *Ibid.*, §288. Three other witnesses whose testimony was considered by the Trial Chamber "did not claim that Gérard Ntakirutimana conveyed the attackers", and the Trial Judgement therefore contains no discussion of the description of the arriving vehicles given by these witnesses. Trial Judgement, §289.

[360] *Ibid.*, §173.

[361] *Ibid.*, §§180, 186.

[362] *Ibid.*, §793.

[363] *Ibid.*, §791.

[364] See, e.g. , Witness FF, T. 28 September 2001, pp. 28, 36; Witness KK, T. 4 October 2001, p. 16; Witness DD, T. 23 October 2001, pp. 83, 84; Witness MM, T. 19 September 2001, pp. 92, 93, 115, 150.

dence. Witness 25 did not testify that these people were not *Interahamwe* or attackers, stating rather that "there were people of all kinds, dressed in all ways"[365]. Therefore, the Trial Chamber was not unreasonable in concluding that Witness 25's statement corroborated Witness OO's statement on the identity and clothing of attackers. In addition, Witness OO's testimony is corroborated, in part, by that of Witness HH, who testified that attackers were wearing military clothes, khaki-coloured clothes or uniforms[366].

207. The Appellant's argument that Witness OO's numerical estimate if individuals leaving Kibuye wit Gérard Ntakirutimana is higher than the estimate of attackers given by the Mugonero witnesses also fails. First, it is clear from the evidence given by the Mugonero witnesses that the attackers who arrived at the Mugonero Complex were substantial in number. The testimony of Witness HH stated that about 15-20 people arrived at Mugonero in one car[367], and that there were at least 100-120 attackers altogether[368]. Gérard Ntakirutimana's argument as to the timing of the gendarmes' return also fails, as there was evidence that the attackers left the Complex at various times throughout the day.

208. In any event, for reason explained above, even if Witness OO's testimony had been inconsistent with the testimony of other witnesses on the issues of the attackers' identity, clothing and numbers, that does not necessarily invalidate the remainder of his testimony or lead to a miscarriage of justice.

(viii) Reliability of Witness OO's hearsay evidence that the gendarmes collected by the Appellant participated in the attack on the Mugonero Complex

209. The Appellant next argues that the Trial Chamber lacked any evidence establishing that the gendarmes, Interahamwe and ammunition he procured were ever in Mugonero[369]. The Appellant avers that only hearsay statements alleged by Witness OO suggest that the gendarmes from Kibuye arrived at Mugonero; the Appellant submits that these statements are not reliable. The Appellant first notes Witness OO's claim that Gérard Ntakirutimana told him of the need to "beat the Tutsis who were in the hospital, the church and even the store"[370]. It is unlikely and unbelievable, so the Appellant argues, that Gérard Ntakirutimana would have made such a statement to a stranger. The Appellant points out that Witness OO also testified that gendarme Nizeyimana told him that Gérard Ntakirutimana said that the gendarmes took part in the attack. The Appellant argues that this statement, even if made, is unreliable and undermined by the absence of evidence of the vehicles or the gendarmes being at Mugonero[371].

210. Contrary to the Appellant's argument, the Appeals Chamber considers that the Trial Chamber was not unreasonable in relying on Witness OO's hearsay evidence.

[365] T. 15 February 2002, pp. 30, 31.
[366] T. 25 September 2001, pp. 126-128.
[367] *Ibid*., p. 125.
[368] *Ibid*., pp. 134, 135.
[369] Appeal Brief (G. Ntakirutimana), §72.
[370] *Ibid*., §73.
[371] *Ibid*.

The first item of Witness OO's testimony that the Appellant attacks –Witness OO's report that Gérard Ntakirutimana told him of the need to "beat the Tutsi who were in the hospital, the church and even the store"- is a direct testimony by Witness OO as to the words the Appellant had spoken to him. While the Appellant argues that it was unlikely and unbelievable that he would have made a statement of that kind to a stranger, the Trial Chamber found that Witness OO "had known the Accused for about three of four months prior to seeing him at the gendarmerie camp [,and] had visited the hospital and had received treatment from the Accused"[372]. A reasonable Trial Chamber therefore could conclude that the Appellant would have disclosed his intentions to a member of the gendarmerie from whom he sought to procure soldiers and ammunitions, especially given that it was a gendarme whom the Appellant knew from prior interactions. There is no evidence that the Appellant intended to keep secret the goal with which he arrived at the Kibuye camp.

211. As to Witness OO's testimony about the information he obtained from gendarme Nizeyimana, that hearsay raises greater concerns of reliability, because the truthfulness of that information depends not only on the credibility of Witness OO and the accuracy of his observation, but also on the credibility and reliability of Nizeyimana. The Trial Chamber found that Nizeyimana "reported to the witness that he and Gérard Ntakirutimana had taken part in an attack again Tutsi persons at the Mugonero Complex"[373]. This finding, if correct, could support an inference that the gendarmes procured by the Appellant, as well as the Appellant himself, participated in the attack on the Mugonero Complex and the atrocities carried out there. The Trial Chamber, however, rejected the Prosecution's contention that Gérard Ntakirutimana conveyed the attackers to the Mugonero Complex for insufficiency of evidence[374]. Nor did the Trial Chamber rely on Witness OO's hearsay evidence about his conversation with Nizeyimana in its finding that Gérard Ntakirutimana participated in attacks on 16 April at the Mugonero Complex and shot at refugees. That finding was based on testimony given by other witnesses. In these circumstances, the hearsay evidence reported by Witness OO, even if incorrect or unreliable, has not contributed to the Appellant's conviction and has not led to a miscarriage of justice. The Appeals Chamber finds therefore that the Trial Chamber's acceptance of the hearsay evidence need not be set aside.

(ix) Alibi evidence

212. Finally, Gérard Ntakirutimana submits that the Trial Chamber was wrong to conclude that he adduced no evidence that he was at his father's house on 15 April and the early morning of 16 April. The Appellant points out that Witnesses XX and 16, Elizaphan Ntakirutimana's wife, and the two Appellants all testified in support of the alibi that the Appellants left Elizaphan Ntakirutimana's house in Mugonero for Gishyita at 6:15 a.m. in Elizaphan Ntakirutimana's vehicle, they left Gishyita between 7:10 and 7:30, arrived back in Mugonero at 8:00, were told by a gendarme to leave shortly thereafter, took five minutes to pack and left for Gishyita for the second time.

[372] Trial Judgement, § 166.
[373] *Ibid*, § 186.
[374] *Ibid*., § 292.

They picked up others on the road and arrived in Gishyita between 8:30 and 9:30 a.m. In the Appellant's submission, the Trial Chamber unreasonably relied on Witness OO instead of these witnesses to conclude that Gérard Ntakirutimana was at the Kibuye camp procuring gendarmes[375]. The Appellant asserts that, contrary to the Trial Chamber's finding, there is a simple explanation why Witnesses 9, 16, and Elizaphan Ntakirutimana's wife did not see Gérard Ntakirutimana early on the morning of the April 16; Gérard Ntakirutimana's car was parked outside the compound overnight and left for Gishyita in the early morning hours[376].

213. In the view of the Appeals Chamber, the Trial Chamber, which considered the issue of the alibi at length, did not act unreasonably when rejecting the Appellant's alibi evidence. As the Trial Chamber noted, only the Appellant himself and his father, Elizaphan Ntakirutimana, claimed that Gérard Ntakirutimana was at his parents' house on the afternoon of 15 April and the morning of 16 April. The Trial Chamber concluded that neither Defence Witness 16 nor Defence Witness 9, who both were at Elizaphan Ntakirutimana's house on that morning, had seen Gérard Ntakirutimana there, and even the wife of Elizaphan Ntakirutimana did not mention her son when describing her activities at the house early on 16 April[377]. Although she did see the hospital vehicle, usually driven by Gérard Ntakirutimana, parked on the road outside the compound of her house, she gave the time for that observation as being around 8 a.m., which is not the relevant time[378]. To the extent that the Trial Chamber did not credit parts of the testimonies of the Defence witnesses, it acted within the permissible bounds of its discretion in evaluating the credibility of witnesses testifying before the court. In so doing, the Appeals Chamber is satisfied that the Trial Chamber did not rely upon an absence of corroboration to reject defence evidence as alleged by the Appellant[379].

(b) The shooting of Charles Ukobizaba at Mugonero (Witnesses HH and GG)

(i) Witness HH

a. General challenge to the credibility

214. Gérard Ntakirutimana lists seven instances where Witness HH testified to certain facts yet the Trial Chamber did not believe him. The Appellant points out that the Trial Chamber noted inconsistencies between Witness HH's testimony and his earlier statement, found that his explanations were "not entirely satisfactory", yet still credited his evidence. Gérard Ntakirutimana argues that the Trial Chamber should have had serious concerns about Witness HH's credibility and should have rejected his entire testimony[380].

[375] Appeal Brief (G. Ntakirutimana), §§74-76.
[376] *Ibid*., §77.
[377] Trial Judgement, §§184, 306.
[378] T. 10 April 2002, pp. 40, 52.
[379] Appeal Brief (G. Ntakirutimana), §29.
[380] *Ibid*., §§81-83 (citing Trial Judgement, §§249, 251, 256, 258, 286, 419, 556, 619, 620, 669).

215. As already explained, it is settled jurisprudence of the Tribunal that a Trial Chamber may find some portions of a witness's testimony credible, and rely upon them in imposing a conviction, while rejecting other portions of the same witness's testimony as not credible. The Appeals Chamber considers that where the Trial Chamber declined to rely upon the evidence given by Witness HH, it did so because of its concerns about the accuracy of his observations[381]. In no instance where the Trial Chamber disbelieved Witness HH's testimony did it question his sincerity as a witness. The Trial Chamber considered the impact of the instances where it found Witness HH's evidence faulty on his overall credibility, yet reaffirmed that those instances "do[] not render the rest of his evidence unreliable"[382]. The Appellant has not demonstrated the Trial Chamber was unreasonable in doing do. The Appellant's general challenge to Witness HH's credibility therefore fails.

b. Witness HH's connection to persons interested in the Appellants' conviction

216. Gérard Ntakirutimana argues that evidence shows that Witness HH was connected to persons and groups interested in the conviction of those charged before the ICTR. He asserts that Witness HH lied under oath and was evasive about his connection to Assiel Kabera, thereby raising serious questions about his credibility[383].

217. The Appeals Chamber considered this argument in Section IV of the present Judgement[384]. For reasons given in that section, the Appellant's arguments fail.

c. Inconsistencies between pre-trial statements and trial testimony

i. Omissions in pre-trial statements

218. Gérard Ntakirutimana submits that Witness HH's testimony included new allegation that were absent from his original statement and/or his "reconfirmation statement". The first point raised by the Appellant is that Witness HH never claimed to have seen Elizaphan Ntakirutimana at Mugonero in the original statement, yet this was a major feature of his trial testimony. This challenge is the same as the challenge brought by Elizaphan Ntakirutimana[385].

219. Witness HH testified that he saw Elizaphan Ntakirutimana at the Mugonero Complex with attackers on the morning of 16 April 1994. In his previous witness statement and reconfirmation statement, however, Witness HH made no mention of Elizaphan Ntakirutimana conveying attackers to Mugonero on 16 April 1994. During his testimony, the witness was asked about this failure to mention Elizaphan Ntakirutimana in his prior statements. The Trial Chamber reviewed the answers provided by the witness about the content of his statements and, although it found them not entirely satisfactory, the Chamber was of the view that they did not cast doubt on his testimony[386].

[381] See Trial Judgement, §§258, 292, 421, 556, 619, 620, 669.
[382] Trial Judgement, §258. To the same effect, see Trial Judgement, §373 ("other issues relating to the credibility of Witness HH do not reduce his credibility in the present context").
[383] Appeal Brief (G. Ntakirutimana), §84.
[384] "Common ground of appeal on the existence of a political campaign against the Appellant".
[385] Appeal Brief (E. Ntakirutimana), pp. 14-15;
[386] Trial Judgement, §§252-260.

220. The Appeals Chamber notes that, aside from repeating assertions previously made at trial, the Appellants do not attempt to substantiate their submission that the Trial Chamber erred; nor do they in any way address the treatment of the apparent inconsistencies between the witness's statements and his testimony. In particular it should be noted that the Trial Chamber observed generally that it gave "higher consideration to sworn witness testimony before it than prior statements" and concluded that the witness's previous statements were generally about massacres which occurred at the hospital in Mugonero and not specifically about the Appellants[387]. In addition, the Trial Chamber reasoned that although the witness's statements contained less information about the Appellant than his testimony, this did not reduce his overall credibility[388]. It also took into consideration that Witness HH's testimony regarding the actions of Elizaphan Ntakirutimana was consistent with that of other witnesses[389]. Accordingly, the Appeals Chamber finds that the Trial Chamber's conclusion was not unreasonable.

221. Gérard Ntakirutimana next argues that Witness HH never claimed in either statement to have seen Elizaphan Ntakirutimana at Bisesero, whereas at trial he testified to seeing Elizaphan Ntakirutimana there twice. At trial, the witness was asked why he had not mentioned Elizaphan Ntakirutimana's participation in events at Ku Cyapa and Mubuga. He explained that he had not been asked about these events. The Trial Chamber was satisfied with this answer and found the witness to be credible and consistent under cross-examination[390]. The Appellant does not advance any arguments to show that the Trial Chamber acted unreasonably. Consequently, this challenge fails.

222. Gérard Ntakirutimana also submits that Witness HH never claimed in either of his statements that he saw Gérard Ntakirutimana approach or enter the main building at Mugonero at sundown[391]. The Appeals Chamber notes that the entire discussion of the Mugonero attack in Witness HH's April 1996 statement was confined to a single paragraph, which contained no coverage of any specific events between Ukobizaba's shooting around noon on 16 April and 2 a.m. on 17 April. Nothing therefore indicates that Witness HH was questioned about specific matters during that time period. The fact of Gérard Ntakirutimana's entering the hospital building may not have been viewed as important at the interview stage, but it assumed importance only as a result of the evidence given by other witnesses.

223. The witness was questioned about omissions at trial, and he explained the absence of any mention in his prior statement of Gérard Ntakirutimana transporting attackers to the Complex in the following terms : "You should not think that three months of evens could be recorded on a document of a few pages"; and

> "if at a certain point in time I spoke about the presence of Gérard without mentioning his vehicle, then it's because I was not asked how he got there"[392]

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[387] Ibid., § 260.

[388] The witness's statement of 1996 is narrative form, and does not include any questions. Mention is made of Gérard Ntakirutimana and others taking part in the attack on Mugonero Complex on 16 April 1994. Elizaphan Ntakirutimana is mentioned only in relation to events at Gitwe Hill.

[389] Trial Judgement, § 257.

[390] *Ibid*., § 703.

[391] Appeal Brief (G. Ntakirutimana), § 85.

[392] T. 26 September 2001, p. 111.

Because

> "during the [pre-trial] interview Witness HH did not exhaustively list all attackers of vehicles conveying assailants",

the Trial Chamber concluded that "it does not reduce the credibility of Witness HH that the statement provides less information about Gérard Ntakirutimana than his testimony"[393]. The Trial Chamber did not find Witness HH's responses sufficient to cast doubt on his testimony, concluding that

> "the witness's statement was about 'the massacres which took place at the hospital in Mugonero' generally, and not specifically about the two Accused"[394].

In the Appeal Chamber's view, the Trial Chamber's assessment was reasonable.

224. Moreover, the Trial Chamber noted that the witness had failed to mention in his statement seeing the Appellant enter the main building around nightfall on 16 April, and treated his evidence with caution[395]. The Appellant has not shown that the approach of the Trial Chamber was unreasonable.

225. The Appellant next argues that Witness HH did not claim in his statements that Gérard Ntakirutimana killed Esdras, yet he testified to that effect at trial[396]. In particular, the Appellant notes that, in his statement, Witness HH said that Gérard Ntakirutimana "was among the persons who chased after us to kill us. However, it was difficult to see who killed who". Yet, the Appellant avers, Witness HH was able to testify in detail that Gérard Ntakirutimana killed Esdras.

226. As explained in Section II.A.1. (b)(ii) g. of the present Judgement, due to the insufficient notice afforded in the Indictment, the Appellant's conviction cannot be premised on the killing of Esdras. Therefore, even if the Appellant were to succeed in showing that Witness HH's evidence with respect to the killing of Esdras is not credible, this would have no effect on the verdict. Moreover, the Appeals Chamber does not consider that the Trial Chamber was unreasonable in finding Witness HH generally credible despite his failure to mention explicitly the killing of Esdras in his pre-trial statements. In this connection, the Appeals Chamber observers that the Trial Chamber noted the explanations provided by Witness HH[397] and seems to have considered that the statements were reconciliable with Witness HH's testimony at trial[398].

ii. Observation of the shooting of Charles Ukobizaba

227. The Appellant next alleges that Witness HH testified at trial that he saw the killing of Charles Ukobizaba from a window, whereas he said in his pre-trial statement that he saw the killing from small holes in the wall while hiding in the ceiling. The Appellant submits that the Trial Chamber should have rejected Witness HH's evidence on this point due to his implausible explanations for the inconsistencies with his statement[399].

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[393] Trial Judgement, §257.
[394] Trial Judgement, §260.
[395] *Ibid.*, §421.
[396] Appeal Brief (G. Ntakirutimana), §85.
[397] Trial Judgement, §555.
[398] *Ibid.*, §559.
[399] Appeal Brief (G. Ntakirutimana), §88.

228. The Trial Chamber considered the alleged inconsistency and Witness HH's assertion that the inconsistency was caused by a misunderstanding on the part of the investigators[400]. The Trial Chamber noted that the witness "was cross-examined extensively on this issue" and that he "explained that he hid in the building from around noon on 16 April to 2 a.m. on 17 April, that some of his observations were made through the perforated holes in the ceiling, whereas other observations, including the shooting of Ukobizaba, were made from the ground floor"[401] The Trial Chamber then concluded that "the declaration in the written statement did not reduce the credibility of this part of Witness HH's testimony"[402] The Appeals Chamber does not consider that the Trial Chamber was unreasonable. Having observed the witness in person, the Trial Chamber was entitled to accept his explanations and to credit the witness's testimony. Moreover, as the Trial Chamber noted, Witness HH's testimony that the Appellant shot Charles Ukobizaba was also corroborated by Witness GG's testimony[403].

229. The Appellant also submits that Witness HH's testimony as to the moment he went to hide in the ceiling was inconsistent[404]. In this connection, the Appellant avers that the witness first testified that he went into the ceiling "between 11 :00 and 2 :00"[405] and then, when he realized that the Defence was trying to pin him down to an early entry into the ceiling, he said he did not hide in the ceiling between 11 a.m. and 2 p.m., but rather that he went into the ceiling "at about 4 p.m."[406] This, says the Appellant, should have impelled the Trial Chamber to reject Witness HH's testimony.

230. The Appeals Chamber has considered the transcripts of 26 and 27 September and it is not convinced that the witness attempted to change his answer to avoid being "pinned down". Witness HH first testified that he went into the building sometime between 11 a.m. and 2 p.m. and that he hid into the ceiling about an hour later[407]. Witness HH's cross-examination continued the next day. When asked at what time he went into the ceiling, Witness HH replied : "You are asking me questions on time, but I've already told you that I didn't have a watch. And I think this question was put to me yesterday actually, and I gave you an estimate. I think that I left –that I went into the ceiling between 1100 and 1400 hours"[408] Moments later, the witness corrected himself, saying that he went into the building between 11 a.m. and 2 p.m., and that it was only an hour or two later that he went into the ceiling, concluding "[s]o I would say that I went into the ceiling at about 4 p.m."[409] This was in conformity with his testimony the previously day. Therefore, the Appeals Chamber is not persuaded that the above shows that Witness HH lacked credibility and that the Trial Chamber should have rejected his testimony.

[400] Trial Judgement (G. Ntakirutimana), 6 88.
[401] *Ibid*., §370.
[402] *Ibid*.
[403] *Ibid*., §§371-373.
[404] Appeal Brief (G. Ntakirutimana), §89.
[405] T. 27 September 2001, p. 9.
[406] *Ibid*., p. 12.
[407] T. 26 September 2001, pp. 115-116.
[408] T. 27 September 2001, p. 9.
[409] *Ibid*., pp. 11-12.

231. Finally, the Appellant contends that certain elements of Witness HH's testimony on this subject are simply beyond belief and that, as a result, a reasonable trial chamber would have been compelled to reject his testimony[410]. In this connection, the Appellant submits that Witness HH testified that he did not concentrate on how many shots were fired at Ukobizaba, yet he could situate where all attackers were standing and state whether they had guns and in which direction they fired.

232. In the Appeals Chamber's view, the fact that the witness did not concentrate on the number of shots fired bears little relation to his ability (or inability) to observe the shooters. As the Trial Chamber found, the observational conditions for Witness HH were good[411], and it was therefore reasonable for the Trial Chamber to conclude, given the overall evidence before it, that Witness HH could observe the events well enough to describe them in detail, even if he could not recall the number of shots fired at Ukobizaba.

iii. General challenges

233. The Appellant invokes a number of other alleged contradictions between Witness HH's pre-trial statements and his in-court testimony[412]. The Appellant also claims that the difficulties that Witness HH's statements posed had been drawn to his attention prior to testifying and that his responses were rehearsed[413] The Appellant further submits that Witness HH's explanations for the inconsistencies between his statements and his testimony were implausible[414]. In addition, the Appellant argues that other parts of Witness HH's testimony were beyond belief and should have impelled the Trial Chamber to reject his testimony[415].

234. The Appellant presents this list of alleged contradictions and inadequate explanation with the goal of attacking three findings made by the Trial Chamber : first, and mainly, the finding that the Appellant shot at Charles Ukobizaba[416]; second, the finding that the Appellant killed Esdras[417]; and third, that the Appellant headed a group of attackers at Muyira Hill where he shot Tutsi refuges[418]. As explained in Section II.A.1.b.(ii) of the present Judgement, the last two findings cannot serve as predicates of the Appellant's conviction due to the insufficiency of notice,. Therefore, the issue of whether the testimony of Witness HH with respect to those findings is credible is own moot insofar as those two findings are concerned.

235. As to the first finding –that the Appellant killed Charles Ukobizaba- the Appeals Chamber has considered above the inconsistencies alleged by the Appellant that relate directly to Witness HH's observation that the Appellant shot Charles Ukobizaba, and concluded that the Trial Chamber was not unreasonable in believing Witness HH's testimony on that issue. The other alleged inconsistencies, contradictions

[410] Appeal Brief (G. Ntakirutimana), §89.
[411] Trial Judgement, §371.
[412] Appeal Brief (G. Ntakirutimana), §86.
[413] *Ibid*., §87.
[414] *Ibid*., §88.
[415] *Ibid*., §89.
[416] *Ibid*., §78.
[417] *Ibid*., §90.
[418] *Ibid*., §90.

or exaggerations mentioned by the Appellant do not relate directly to Witness HH's observation of the shooting of Charles Ukobizaba and even if true, would not affect the finding that the Appellant killed Charles Ukobizaba[419].

(ii) Witness GG

a. General attack on credibility

236. Gérard Ntakirutimana submits that Witness GG was not credible because the Trial Chamber rejected many of his claims, including, notably, that the Appellant shot Ignace Rugwizangoga, that he was at Mubuga School, and that he was leader at the Muyira Hill attack. Gérard Ntakirutimana contends that these claims were not mistakes or memory lapses on the part of the witness; rather, they show that Witness GG lied[420].

237. An examination of the findings of the Trial Chamber in relation to the instances mentioned by Gérard Ntakirutimana shows that the Trial Chamber did not reject Witness GG's evidence due to credibility concerns[421], but rather found that the evidence presented, whether derived from Witness GG's testimony or from elsewhere, was insufficient to prove a fact beyond reasonable doubt[422]. The fact that a witness's testimony may not provide sufficient detail to prove a particular fact beyond reasonable doubt does not mean that the witness's testimony should be discredited.

238. The Appellant next challenges the Trial Chamber's finding that Witness GG could not read and its use of this finding to forgive inconsistencies in Witness GG's testimony. In support of his contention, the Appellant asserts that, in *Kayishema and Ruzindana*, Witness GG confirmed his witness statement and signature and never claimed he could not read; yet, in this case, Witness GG indicated that he had not (and could not) read his statement, that he had not signed it, and that someone had probably forged his signature[423]. The Appellant also submits that Witness GG voluntarily spelled out complicated words for the Trial Chamber, even correcting Defence counsel on the spelling of "Nbarybukeye"[424], yet on cross-examination he denied having spelled names during his testimony. Third, the Appellant points out that all four investigators who were involved in taking GG's statements noted that GG could write Kinyarwanda[425].

[419] In fact, the Trial Chamber expressly considered how the Defence's various challenges to the credibility of Witness HH's testimony on other issues –the challenges which largely parallel those brought by the Appellant now- affect the credibility of Witness HH on the issue of the shooting of Charles Ukobizaba. The Trial Chamber noted that these challenges "d[id] not reduce [Witness HH's] credibility in the present context". Trial Judgement, §373.

[420] Appeal Brief (G. Ntakirutimana), §§94-95.

[421] In fact, the Trial Chamber reiterated several times that Witness GG was credible (see Trial Judgement, §§238, 373, 535, 634, 682).

[422] Trial Judgement, §§535 (shooting of Ignace Rugwizangoga), 615 (presence of Gérard Ntakirutimana at Mubuga School), 636 (as to whether Gérard Ntakirutimana was a leader at the Muyira Hill attack).

[423] Appeal Brief (G. Ntakirutimana), §96.

[424] *Ibid.*

[425] *Ibid.*

239. The Appeals Chamber recalls that the Appellant presented this challenge in an earlier motion to this Chamber[426]. The Appellant contended, as he does in his brief here, that Witness GG had personally spelled names of people and places while testifying before the Trial Chamber, despite having claimed to illiterate. In response, the Prosecution submitted that it was in fact the court interpreter, and not the witness, who had spelled out the names[427]. In support of this argument, the Prosecution presented a "Certification of audio transcripts by Mathias Ruzindana, Reviser; Language Service Section, 3 September 2003", and an internal Memorandum sent by a Prosecution Appeals Counsel to members of the trial team[428]. The Appeals Chamber noted in its Decision of 24 June 2004 that there were "legitimate doubts on the accuracy of the [trial] transcript as to whether it was Witness GG or the interpreter who had spelled names during the Witness' testimony before the Trial Chamber"[429]. In order to ensure the accuracy and reliability of the transcript, the Appeals Chamber ordered the Registry to review the transcript of Witness GG's testimony and to submit to the Appeals Chamber and the parties a newly certified copy of the accurate transcript[430]. The Registry complied with these orders on 8 July 2004. The Appellant has not presented any new submission after the receipt of the material from the Registry.

240. Having examined the transcript, as corrected by the Registry, the Appeals Chamber now concludes that the evidence adduced by the Appellant does not establish that the witness has intentionally misled the Trial Chamber as to his literacy. The witness's credibility is therefore not affected.

241. Gérard Ntakirutimana also asserts that Witness GG's "fabricated" statement regarding his literacy prevent him from testing Witness GG's evidence. In this connection, the Appellant submits first that, when asked to identify a location on a sketch, Witness GG replied that he could not read, and that the Presiding Judge thus suggested not using the sketch[431]. Second, the Appellant contends that, when questioned about material inconsistencies between a prior statement and his testimony, Witness GG replied that he could not read his statement and he had signed the statement[432]. The Appellant concludes that the Trial Chamber accepted this "ludicrous" claim rather than finding that Witness GG lied to avoid cross-examination[433].

242. The Appeals Chamber is not convinced that these instances show that the Appellant was prevented from testing Witness GG's evidence under a false pretext. First, as found above, the Appellant has not established that the witness intentionally

[426] "Defence motion to strike Annex B from the Prosecution Response Brief, and for Re-certification of the Record", filed on 2 March 2004;

[427] "Prosecution Response to Defence Motion to Strike Annex B from the Prosecution Response Brief, and for Re-Certification of the Record", filed on 11 March 2004.

[428] This procedural history, as well as both supporting documents submitted by the Prosecution, are described in the Appeals Chamber's Decision on Defence Motion to Strike Annex B from the Prosecution Response Brief and for Re-Certification of the Record, rendered on 24 June 2004.

[429] Decision on Defence Motion to Strike Annex B from the Prosecution Response Brief and for Re-Certification of the Record, rendered on 24 June 2004.

[430] See Ibid. and Decision on Registrar's Submission Under Rule 33B, 7 July 2004.

[431] Appeal Brief (G. Ntakirutimana), §97 (i).

[432] *Ibid.*, §97 (ii).

[433] *Ibid.*, §97. In this connection, the Appellant refers to paragraph 231 of the Trial Judgement, but it does not seem that this paragraph is relevant to the issue at hand.

misled the Trial Chamber as to his literacy. As to the issue of Witness GG's ability to use sketches, the Appeals Chamber is of the view that this is a collateral matter and that the Appellant could test Witness GG's evidence otherwise[434]. As to questions relating to Witness GG's answers on the subject of his prior statements, the Appeals Chamber notes that Witness GG initially denied having signed a statement[435], but he subsequently corrected this and recognized his signature[436]. It was thus left to the Trial Chamber to determine how this affected Witness GG's credibility. In the Appeals Chamber's opinion, the Appellant has not shown that the Trial Chamber was unreasonable in its treatment of GG's testimony on this subject, despite bald assertions to this effect. Accordingly, this argument fails.

243. Finally, Gérard Ntakirutimana points to alleged inconsistencies between Witness GG's testimony in this case and his testimony in *Kayishema and Ruzindana*[437]. The Appellant argues that when he was challenged with these inconsistencies before the Trial Chamber, the witness attempted to explain them by claiming that his testimony in *Kayishema and Ruzindana* was not recorded correctly by the court reporters. The Appellant contends that the Trial Chamber erroneously credited his explanations, because it understood these as errors made by investigators, not by court reporters[438]. This shows, the Appellant argues, that the Trial Chamber unreasonably ignored the Defence argument and the contradictions in Witness GG's testimonies.

244. While the Appellant is correct that the Trial Chamber erred in treating the omission in question as one made by an investigator rather than a court reporter, that rationale was not the only reason the Trial Chamber credited Witness GG's testimony. The Trial Chamber stated that it accepted his testimony "[a]fter having observed the witness giving evidence"[439]. Thus, the Chamber credited Witness GG's testimony not only because of the recording error (about which it was mistaken), but also because it was in a position to observe his demeanour and assess his credibility for itself. The Appeals Chamber is loathe to disturb such credibility assessments on review, and the Appellant has not supplied sufficient reasons to doubt that the Trial Chamber' credibility assessment was in error.

b. Shooting of Charles Ukobizaba

245. The Appellant asserts that Witness GG's testimony regarding the shooting of Charles Ukobizaba was confusing and contradicted by his pre-trial statements[440].

246. The Appeals Chamber notes that the Trial Chamber considered these alleged contradictions and concluded that Witness GG's testimony concerning the killing of Ukobizaba appeared credible[441]. The Trial Chamber accepted the witness's explanations for the variations[442]. The Appellant has not submitted any argument to show

[434] See T. 24 September 2001, pp. 127 and foll.
[435] T. 24 September 2001, pp. 111-114.
[436] T. 25 September 2001, p. 68.
[437] Appeal Brief (G. Ntakirutimana), §99.
[438] *Ibid*., §99 (quoting Trial Judgement, §634).
[439] Trial Judgement, §369.
[440] Appeal Brief (G. Ntakirutiamana), §101.
[441] Trial Judgement, §§369, 373.
[442] *Ibid*., §369.

that the Trial Chamber acted unreasonably in crediting the witness's explanations, and in accepting as credible the evidence he gave in open court. The Appeals Chamber considers that the Trial Chamber's conclusion that those parts of the witness's testimony were credible is not unreasonable.

247. The Appellant also alleges that Witness GG testified in Kayishema and Ruzindana that he first saw a gun on 14 May 1994. However, GG testified in this case that he saw Gérard Ntakirutimana with a gun on 16 April 1994[443]. In the view of the Appeals Chamber, if the Trial Chamber was effectively presented with this contradiction, it gave more credence to the testimony of GG in this case. The Appellant has not demonstrated that it was unreasonable of Trial Chamber to do so.

248. As to the Appellant's argument that Witness GG was more precise about the times of the attack in his *Kayishema and Ruzindana* testimony than in his testimony in this case, the Appeals Chamber is not convinced that this suffices to show that the Trial Chamber should not have relied on Witness GG's testimony. Indeed, it is possible that the witness remembered the events more clearly at the time of his earlier testimony in *Kayishema and Ruzindana*, and he might have been more hesitant to give precise times when testifying four years later.

249. Lastly, the Appellant points to Witness GG's testimony that he went to hide on the first floor of the hospital after the shooting and "found people cutting others up". This, the Appellant argues, is contradicted by Baghel, Witness MM and Witness FF, who said the first floor was locked throughout; no witness testified to violence occurring there[444].

250. The Appeals Chamber considers that the evidence on which the Appellant seeks to rely does not support his contention. While Witness MM did testify that, in the days prior to the attack, the Appellant closed the first floor of the hospital to refugees staying at the Mugonero Complex[445], this does not necessarily mean that the floor remained inaccessible the day of the attack. As to the Appellant's reliance on the testimony of Witness FF, the citation of the record he provides does not contain any reference to the closure of the hospital's first floor, and therefore cannot help his argument. Finally, the testimony of Witness Baghel was too qualified and imprecise to support an inference that Witness GG was lying when he testified that he hid on the first floor of the hospital[446].

c. Attack sometime in mid-May at Muyira Hill

251. Gérard Ntakirutimana claims that Witness GG's testimony on this subject was confused, and contradicted and inconsistent with his testimony in *Kayishema and Ruzindana*[447].

252. As discussed in Section II.A.1.(b)(ii)e., the conviction based on these particular allegations has been set aside due to insufficient notice in the indictment. Moreover, the Appeals Chamber considers that the alleged inconsistencies are not of such

[443] Appeal Brief (G. Ntakirutimana), §101 (viii).
[444] Appeal Brief (G. Ntakirutimana), §101.
[445] T. 19 September 2001, p. 56.
[446] See T. 18 September 2001, pp. 127-128.
[447] Appeal Brief (G. Ntakirutimana), §§102-106.

magnitude that, even if proven true, they could discredit Witness GG's overall credibility to such an extent that no reasonable Trial Chamber would have relied on parts of his testimony to sustain convictions.

d. Witness GG's testimony that Elizaphan Ntakirutimana participated in an attack at Mubuga in mid-May, and that he ordered the removal of the Murambi church roof

253. The Appellant submits that Witness GG's statements regarding the attack at Mubuga further demonstrate his lack of credibility. In this connection, the Appellant points to a number of apparent inconsistencies, including GG's failure to mention the Appellants' involvement at any time prior to trial, the moment of the event, the identity of the victims, and the assertion that Elizaphan Ntakirutimana killed a certain Habayo[448]. The Appellant also argues that Witness GG's extensive testimony in Kayishema and Ruzindana and his statement to African Rights about the removal of the Murambi church roof contradict many parts of his evidence in this case[449]. Finally, the Appellant asserts that Witness GG first testified that he did not hear Elizaphan Ntakirutimana give reasons for ordering the removal of the church roof but later testified that Elizaphan Ntakirutimana said it was to deny shelter to Tutsis[450].

254. As the Appellant acknowledges, the Trial Chamber made no finding against him regarding a Bisesero-area event based on this evidence[451]. The Appellant relies on the alleged inconsistencies described above only in support of his general challenge to Witness GG's credibility. As already explained, a Trial Chamber is free to accept a portion of a witness's testimony as credible even if it rejects other portions of his testimony. Therefore, even if the Appellant were to succeed in showing that Witness GG could not be believed with respect to the question of whether Elizaphan Ntakirutimana was present during the killings at Mubuga and transported the attackers, it does not follow that the Trial Chamber was unreasonable in relying on Witness GG's evidence with respect to other factual findings underlying Gérard Ntakirutimana convictions. An appellant who wishes a court to draw the inference that a particular witness cannot be credited at all on the grounds that a particular portion of that witness's testimony is wrought with irredeemable inconsistencies has a high evidentiary burden : he or she must explain why the alleged inconsistencies are so fatal to the witness's overall credibility that they permeate his entire testimony and render all of it incredible.

255. The Appeals Chamber considers that the Appellant here fails to meet this high evidentiary burden. He fails to argue any connection between the alleged inconsistencies and the supposed untruthfulness of Witness GG in the rest of his testimony. The contradictions on which the Appellant relies are, in any event, not significant enough to cast doubt on the overall truthfulness of the witness. Witness GG's pretrial statements were very brief, particularly with respect to the Bisesero events, and therefore may not have reflected all of the witness's observations to which he later

[448] Appeal Brief (G. Ntakirutimana), §§107-108.
[449] *Ibid*., §§109-110.
[450] *Ibid*., §111.
[451] See Trial Judgement, §615 ("In relation to Gérard Ntakirutimana the Chamber notes the paucity of evidence and finds that the Prosecution has not proved beyond a reasonable doubt that he participated in the same attack at Mubuga Primary School").

testified at trial. As for the alleged inconsistency with Witness GG's evidence in *Kayishema and Ruzindana*, that testimony is ambiguous enough to support an inference that it referred to a different Mubuga event. Even if the event was the same, as the Appellants were not at trial in that case, the witness's failure to mention their presence during his testimony is not, by itself, sufficient to cast doubt upon his testimony in this case that the Appellants were present during the same events. The same reasoning applies to the events in Murambi : while the witness did testify in *Kayishema and Ruzindana* about attacks in Murambi generally, he was not asked about events at the church, and so may not have mentioned the Appellants' presence there. The additional discrepancies alleged by the Appellant are also insufficient to show that they infect the entire testimony of Witness GG so that no reasonable Trial Chamber could credit even a portion of it.

e. Witness GG's political motivation.

256. The Appellant contends that GG was politically motivated to convict the Appellants and that all factual findings based on his testimony are erroneous and produced a miscarriage of justice. For reasons given in Section IV.B.1. below (Common Ground of Appeal on the Existence of a Political Campaign against the Appellants), the Appeals Chamber rejects the claim that Witness GG's testimony was unreliable and not credible because it was politically motivated.

f. Alleged inconsistencies between the evidence of Witness HH and Witness GG

257. The Appellant contends that, apart from credibility concerns as to Witness HH and GG, their accounts rather than corroborate each other on the killing of Ukobizaba. In particular, the Appellant submits the following : (a) While both witnesses said the shooting occurred in a courtyard, each indicated a different courtyard; (b) HH said that Gérard Ntakirutimana was facing Ukobizaba as though having a conversation, that he was holding a gun close to his victim, and that the two men stood with nobody moving for some time, whereas GG said that Gérard Ntakirutimana called out to Ukobizaba and shot him when he turned, which would suggest some distance between them; (c) HH said that Ukobizaba gave a set of keys to Gérard Ntakirutimana after some conversation, whereas GG said that Gérard Ntakirutimana took the keys after Ukobizaba was shot and fell; (d) although the Trial Chamber found that both witnesses agreed that the shooting occurred "around noon", Witness GG was inconsistent as to the time of the shooting, while Witness HH was not prepared to commit to a time[452].

258. The Trial Chamber concluded that the variations between the accounts given by both witnesses were minor and could not outweigh the "overwhelming and convincing similarities" between the two accounts[453]. This conclusion was not unreasonable. On the whole, the two witnesses' testimonies corroborated one another : both testified that the Appellant faced Ukobizaba alone in a courtyard, shot him with a pistol, and took an object from him[454]. The Appellant correctly notes that there are

[452] Apeal Brief (G. Ntakirutimana), §91.
[453] Trial Judgement, §371.
[454] *Ibid*., §§365-371.

differences between the witnesses' testimonies, but those differences are more atmospheric than substantive. Witness GG observed the shooting of Ukobizaba as he was trying to find a hiding place in the wake of the attack an Mugonero – as he was, in the Prosecution's formulation, "running for his life"[455]. Witness HH, by contrast, witnessed the shooting through a window from inside a building where he was hiding. Both witnesses were under tremendous stress, and although of minor details may not have been perfectly precise, their memory of important points was clear, and they corroborated one another on these major points. Having considered these factors, the Trial Chamber not unreasonably concluded that the variations in their accounts did not undermine the core of their testimonies or the credibility of their statements.

g. Allegation that Witness HH and Witness GG colluded

259. The Appellant assert that, in their statements, both Witnesses HH and GG declare that Gérard Ntakirutimana went to Ukobizaba's office after shooting him. Yet both witnesses disavowed this at trial, HH claiming that he only assumed it, GG denying that he ever said it. Gérard Ntakirutimana contends that these supposed errors raise serious concerns about the integrity of the investigation, suggesting that they were collaborators, albeit inefficient ones[456].

260. The Appellant has not adduced enough evidence to substantiate an inference that the two witnesses collaborated in the preparation of their trial testimony. The aforementioned inconsistencies between the pre-trial statements and the evidence the witnesses gave in court are not sufficient to establish collusion between the witnesses.

(iii) The absence of proof of death of Ukobizaba and Esdras

261. The Appellant contends that the Trial Chamber unreasonably assumed that Ukobizaba and Esdras were killed. He asserts that the evidence of Witness HH only showed that they were shot and fell; however, many people who were shot survived. Absent proof of death, the Appellant argues, the Trial Chamber should not have assumed it. The Appellant adds that the Trial Chamber's finding that MM testified that Gérard Ntakirutimana mentioned "Ukobizaba" as being among the dead[457] is simply wrong; MM did not testify to that[458].

262. The Appeals Chamber does not consider that the Trial Chamber was unreasonable in drawing the inference that Charles Ukobizaba was killed from the testimonies of the witnesses, such as the testimony of Witness HH and Witness GG that the Appellant shot at Ukobizaba. It was reasonable to infer from the circumstances that Ukobizaba did not survive : he was shot at close proximity; he fell to the ground; and Witness MM testified that Mika and Ruzindana mentioned the name Ukobizaba while "taking an inventory of the cadavers"[459]

[455] Prosecution Response 62, §5.82 (citing T. 20 September 2001, pp. 143-146).
[456] Appeal Brief (G. Ntakirutimana), §92.
[457] Trial Judgement, n. 542.
[458] Appeal Brief (G. Ntakirutimana), §93.
[459] T. 20 September 2001, p. 67.

263. As to the argument that there was insufficient proof of the death, the Appeals Chamber has disallowed the conviction relying on that factual finding due to insufficient notice, and therefore the Appellant's present contention is moot.

(c) Attack on refugees at the Mugonero Complex (Witness SS)

i. General challenge to the credibility of Witness SS

264. Gérard Ntakirutimana incorporates the argument of Elizaphan Ntakirutimana's Appeal Brief regarding Witness SS and ads further arguments, notably that Witness SS's awareness of Philip Gourevitch's book *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families : Stories from Rwanda* (1998) influenced his testimony and undermined his impartiality, and that his association with the son of Charles Ukobizaba, who has an obvious interest in securing Gérard Ntakirutimana's conviction, casts a further doubt over Witness SS's credibility[460].

ii. Witness SS's Mugonero evidence

265. These arguments are addressed in IV.B.5. of this Judgement[461]. For reasons given there, the Appellant's general challenge to the credibility of Witness SS fails.

266. Gérard Ntakirutimana claims that Witness SS gave two different accounts of meeting Gérard Ntakirutimana as Witness SS was fleeing Mugonero. Witness SS testified that he was running the forest when he encountered Gérard Ntakirutimana and other attackers, whereas according to his statement he saw Gérard Ntakirutimana and the attackers when he was "trying to get into the bush"[462]. The Appellant notes that Witness SS refused to estimate the distance between himself and his attackers because there were no bushes in the courtroom, even though he was able to estimate distances when investigators recorded his statement[463]. The Appellant adds that the testimony of Witness SS is unbelievable and cites further aspects of Witness SS's testimony, including his identification of Gérard Ntakirutimana when firing a shot, his description of the smoking gun, and the general unfolding of the events[464]. The Appellant contends that the Trial Chamber was clearly troubled by Witness SS's testimony and rejected many of his claims, including his observation of the smoking gun and even the claim that Gérard Ntakirutimana shot at him, yet still found the witness's identification of the Appellant to be reliable. The Appellant submits that the Trial Chamber failed to grasp that Witness SS was inventing facts in an effort to convince the Chamber of Gérard Ntakirutimana's guilt[465].

267. Although, as the Appellant argues, Witness SS used different language in describing his encounter with Gérard Ntakirutimana in the witness statement and at trial, the Appeals Chamber considers that this difference does not give rise to an infer-

[460] Appeal Brief (G. Ntakirutimana), §§117-120.
[461] "Common Ground of Appeal on the Existence of a Political Campaign Against the Appellants".
[462] Appeal Brief (G. Ntakirutimana), §121.
[463] *Ibid.*, §122.
[464] Appeal Brief (G. Ntakirutimana), §123.
[465] *Ibid.*, §124.

ence of inconsistency. Describing his flight from the Mugonero Complex in his witness statement, Witness SS states that he "passed by the girls dormitory trying to get to the bush. There, however, I met another group of attackers"[466], among whom he claimed to have seen Gérard Ntakirutimana. At trial the witness stated that he met Gérard Ntakirutimana in the forest[467]. The difference between these two statements is not significant. Furthermore, when confronted with this discrepancy, the witness credibly explained that when talking about "the bush", he meant a place where there was vegetation, and that when giving his prior statement, he was very close to the forest to which he referred[468].

268. The Appeals Chamber is not persuaded that the witness's difficulty in estimating distances undermines his credibility. The witness consistently refused to estimate distances in his pre-trial statement as well as at trial, explaining that it was difficult for him to estimate distances indoors when the relevant situation had occurred outside. Other passages of his testimony consistently show that he had difficulty in estimating distances[469]. The distances were estimated by the investigators or by counsel and members of the Trial Chamber. The witness explained that estimating the relevant distance in his pre-trial statement was easier, as he could show the investigators outside, but still stressed that he himself had not estimated the distance, but rather that the investigators had done so.

269. The Trial Chamber was not convinced beyond reasonable doubt that Gérard Ntakirutimana shot at Witness SS, because Witness SS did not actually see Gérard Ntakirutimana aim or fire at him and, under the circumstances, it was not very likely that the witness could have seen the smoke come out of the Appellant's gun. In the opinion of the Appeals Chamber, this conclusion does not necessary imply that the witness was untruthful. Although the witness mentioned the detail of the gun smoke for the first time only at trial and, in the Trial Chamber's considered assessment, was mistaken about having seen the gun fired, the witness's error with respect to this important detail does not suffice to impugn his testimony as a whole. The Trial Chamber, as the assessor of the witness's demeanour, was placed to ascertain where the witness was embellishing his testimony and to separate these parts from the core of the witness's evidence.

270. The Trial Chamber repeatedly stated that SS was a credible witness[470], even though it was not convinced beyond reasonable doubt that the evidence presented showed that Gérard Ntakirutimana shot him[471]. Witness SS said that he had recognized Gérard Ntakirutimana, among others, even if he had just given a quick look to the group of attackers. This statement appears credible, as he had known Gérard Ntakirutimana by sight for several years. Furthermore, the witness explained that, as stated in his witness statement, he believed that the attackers were carrying guns in addition to traditional weapons because he saw Gérard Ntakirutimana carry a gun. An

[466] Witness statement of 18 December 2001, p. 4.
[467] T. 31 October 2001, pp. 59 *et seq.*
[468] *Ibid.*, pp. 60-61.
[469] See, e.g., T. 30 October 2001, pp. 99, 110, 111, 115-117, 124, 135; T. 31 October 2001, pp. 81, 105, 106, 108.
[470] Trial Judgement, §577 (citing §§277-285, 388-393, 577-579, 623-628, 658-661, 685-686).
[471] *Ibid.*, §392.

examination of his witness statement discloses that Witness SS first spoke to what kinds of weapons the attackers were carrying before turning to speak more directly about the weapon that Gérard Ntakirutimana was allegedly carrying. As a result, the Trial Chamber could reasonably rely on Witness SS's recognition of Gérard Ntakirutimana as member of the group of attackers even if it rejected Witness's submission that Gérard Ntakirutimana shot at him in the forest.

iii. Witness SS's sighting of Elizaphan Ntakirutimana at Mugonero

271. Gérard Ntakirutimana submits that Witness SS recounted seeing Elizaphan Ntakirutimana at Mugonero three times before the attack, including seeing him receive a letter from refugees seeking protection. However, the Trial Chamber found, and according to Gérard Ntakirutimana the Prosecution accepted, that Elizaphan Ntakirutimana was not at Mugonero at that time, but rather was delivering the letter to the *bourgmestre*. The Appellant submits that the Trial Chamber erred when it determined that Witness SS was credible yet failed to explain its reasons for disregarding Witness SS's incorrect testimony on this point when determining that he was generally credible[472].

272. In the Appeals Chamber's view, even if Witness SS testified that he saw Elizaphan Ntakirutimana on 16 April 1994, before the beginning of the attacks at the Mugonero Complex, this does not necessarily undermine his credibility. Acknowledging once again the deference that is ordinarily accorded to credibility findings of the Trial Chamber, the Appeals Chamber in this instance is not convinced that the Trial Chamber was unreasonable in crediting Witness SS's testimony on this point.

iv. Witness SS's evidence regarding Elizaphan Ntakirutimana at a Murambi attack between May and June 1994

273. Gérard Ntakirutimana asserts that Witness SS's testimony regarding an attack at Murambi is not credible. Gérard Ntakirutimana recalls that Witness SS testified that he encountered Elizaphan Ntakirutimana in a vehicle filled with attackers at Murambi and that he did not notice it until the vehicle was very close. Witness SS gave two explanations of why he did not hear the vehicle approach until it was very close : that he was "out of his head" because he was on his way to commit suicide, and that he was walking on banana leaves that drowned out the noise. According to Gérard Ntakirutimana, the Trial Chamber unreasonably accepted the explanation of Witness SS[473].

274. Gérard Ntakirutimana also takes issue with Witness SS's claim that "later on" he was hiding and heard attackers say that Elizaphan Ntakirutimana had told them that God ordered that the Tutsi be killed. Gérard Ntakirutimana submits that it is highly unlikely that attackers would have explained to each other why they had engaged in a chase that was already over. While the Trial Chamber rejected this as hearsay, the Appellant argues that it should have gone further and recognized this as evidence of Witness SS's bias and willingness to lie[474].

[472] Appeal Brief (G. Ntakirutimana), § 125.
[473] Appeal Brief (G. Ntakirutimana), §§ 126-127.
[474] *Ibid.*, § 127.

275. In his testimony, Witness SS described in detail his sighting of Elizaphan Ntakirutimana at the Murambi attack. His testimony was consistent with his statement. He explained that he saw Elizaphan Ntakirutimana driving his car carrying attackers when he crossed a road. He could recognize Elizaphan Ntakirutimana because he knew him since long before the attack, because it was daytime, and because he was a short distance away. Witness SS explained that shortly after he started running away from the attackers, he turned around to see what was happening behind him and could see Elizaphan Ntakirutimana standing right next to his car and watching the attackers chasing him[475]. The witness explained that he had not heard the vehicle approaching because he was walking on dry banana leaves in a plantation, which made a loud noise, and because he was about to commit suicide and therefore had "kind of lost [his] head"[476]. The Appeals Chamber does not consider that the Trial Chamber was unreasonable in accepting Witness SS's testimony on this.

276. As to Witness SS's assertion that he heard attackers say that Pastor Ntakirutimana had said that God had ordered that the Tutsi should be killed and exterminated[477], the Trial Chamber did not rely on this account because Witness SS had not personally heard Elizaphan Ntakirutimana make such a remark[478]. Therefore, this part of Witness SS's testimony formed no basis for the Trial Chamber's verdict. Moreover, even if Witness SS was untruthful in this part of his testimony, the Trial Chamber could still have found him credible with respect to other parts, on which it did rely in reaching its verdict. The Appeals Chamber does not consider that the Trial Chamber was unreasonable in its treatment of this part of Witness SS's evidence. The arguments raised by Elizaphan Ntakirutimana in relation to Witness SS's evidence have been addressed in Section III.C. of the present Judgement.

v. Witness SS's evidence of Gérard Ntakirutimana's presence at a Mubuga School incident

277. The Appellant alleges that Witness SS claimed for time in his testimony that he personally saw Gérard Ntakirutimana kill Tutsi at Mubuga Primary School, whereas his pre-trial statement merely alleged that he saw Gérard Ntakirutimana shooting at people hiding in the school. Gérard Ntakirutimana asserts that Witness SS invented a tale of Gérard Ntakirutimana's going to the door and shooting inside the school. He submits that the Trial Chamber properly ignored this part of Witness SS's testimony but adds that the Trial Chamber should have used this to question Witness SS's credibility. Gérard Ntakirutimana also contends that Witness SS was coached on how to respond to allegations of inconsistencies with his pre-trial statement[479].

278. In his witness statement and his testimony, Witness SS described that he saw Gérard Ntakirutimana shoot at refugees in and outside of the school. At trial, Witness SS also stated that Gérard Ntakirutimana had in fact killed people and that he later saw dead bodies in and outside of the school. The Appeals Chamber is not convinced

[475] T. 31 October 2001, p. 120.
[476] T. 31 October 2001, pp. 121, 123.
[477] T. 30 October 2001, pp. 131.
[478] Trial Judgement, §578.
[479] Appeal Brief (G. Ntakirutimana), §§128-131.

that there is a contradiction between Witness SS's pre-trial statement and his testimony. The Appeals Chamber notes that Witness SS's pre-trial statement was very short. Even if, in his statement, Witness SS not say expressly that the actions of Gérard Ntakirutimana had resulted in the death of people, this could reasonably be inferred in the circumstances. The alleged discrepancy between Witness SS's trial testimony and his prior statement is therefore not sufficient to show that Witness SS had a "demonstrated willingness to lie and embellish"[480], and that the Trial Chamber could not reasonably rely on Witness SS's testimony.

(d) Attacks on refugees at the Mugonero Complex (Witnesses YY, GG, HH, SS)

(i) Witness YY: General credibility challenge

279. The Appellant asserts that the Trial Chamber should not have accepted any part of Witness YY's evidence because he evidently invented at trial that Gérard Ntakirutimana killed Kagemana and Macantaraga. The Appellant argues that the evidence clearly showed that Kagemana was killed later by unknown persons, and the Trial Chamber itself concluded that Witness YY had not provided sufficient information to warrant a conclusion that Gérard Ntakirutimana killed Macantaraga. The Appellant contends that the Trial Chamber was "not entirely satisfied" with Witness YY's explanations of inconsistencies between his statement and his testimony, finding them to be "somewhat remarkable"[481]

280. As already explained, the settled jurisprudence of the Tribunal permits a Trial Chamber to accept a witness's testimony on one issue while rejecting it with respect to another. The Trial Chamber's decision not to accept Witness YY's evidence that Gérard Ntakirutimana killed Kagemana or Macantaraga[482] does not necessarily mean that the witness's evidence could not be accepted on other factual matters. The Trial Chamber concluded that the evidence was insufficient to show that Gérard Ntakirutimana killed Kagemana and Macantaraga. The Trial Chamber's decision not to accept Witness YY's evidence on this point, however, does not cast doubt upon the credibility of witness's overall testimony.

(ii) Witness YY: credibility, challenge with respect to the events in Murambi Church and the killing of Nzamwita's wife at Muyira Hill

281. The Appellant submits that Witness YY's credibility was damaged by his allegation, made for the first time at trial, that Gérard Ntakirutimana was involved in removing the roof from the Murambi Church and that both Appellants were involved in killings at Murambi Church. The Appellant argues that the Trial Chamber should have concluded, because these allegations had not been made in the witness's pre-trial statement, that Witness YY was not a trustworthy witness[483]. The Appellant adds that this supported by other examples of what he believes was inconsistent or evasive testimony[484]. The Appel-

[480] *Ibid*.
[481] Appeal Brief (G. Ntakirutimana), §§134-137 (quoting Trial Judgement, §§274, 357).
[482] Trial Judgement, §404.
[483] Appeal Brief (G. Ntakirutimana), §138.
[484] *Ibid*., §139.

lant also submits that other witnesses contradicted Witness YY's evidence, which further undermines his testimony and his credibility[485]. Finally, the Appellant avers that Witness YY's testimony that Gérard Ntakirutimana shot Nzamwita's wife at Muyira Hill was not plausible[486].

282. The inconsistencies alleged by the Appellant relate to two issues considered in the Trial Judgement : (a) the attack at Murambi Church and (b) the killing of Nzamwita's wife in the course of an attack at Muyira Hill. With respect to the first issue, the Appeals Chamber, in Section III.C.4.(a) of this Judgement, analyses an analogous argument of Elizaphan Ntakirutimana to the credibility of Witness YY. The Appeals Chamber concludes that Witness YY's account of the shooting that took place at the Murambi Church was not credible and that no reasonable Trial Chamber would have accepted his testimony on that point. With respect to the second issue, the Appeals Chamber concluded, in Section II.A.1 (b)(ii)f. of the Judgement, that the Appellant lacked sufficient notice about the allegation that he shot and killed Nzamwita's wife, and that the Trial Chamber erred in basing his conviction on that finding. Thus, the inconsistencies now alleged by the Appellant, even if true, would only further support the Appeals Chamber's conclusion in Section III.C.4.(a) and would have no effect with respect to the Trial Chamber's conviction invalided by the Appeals Chamber in Section II.A.1.(b)(ii)f. To be relevant to the remaining findings in the Trial Judgement that are based on the testimony of Witness YY, the Appellant must show how the inconsistencies alleged above cast the overall credibility of the witness into such doubt that no reasonable Trial Chamber would have accepted his testimony on any other matter. The Appellant fails to make that high showing. Moreover, with the exception of the disallowed conviction for the attack on Muyira Hill, any other conviction-relevant factual finding where the Trial Chamber relied on the testimony given by Witness YY was corroborated by the testimony of other witnesses[487]. Therefore, even if the testimony of Witness YY were altogether excluded as not credible, the Trial Chamber's factual findings would be unaffected.

(iii) Contradictory evidence as to the sightings of Gérard Ntakirutimana

283. Gérard Ntakirutimana argues that, even if credible, the evidence of Witness GG, HH, SS, KK, PP and YY is so confused and contradictory regarding Gérard Ntakirutimana's presence at Mugonero that it cannot prove beyond e reasonable doubt that he was there[488].

284. The alleged contradictions at paragraphs 144 and 145 of the Appellant's Brief relate to the arrival of vehicles carrying attackers at Mugonero an 16 April 1994 and

[485] *Ibid*., § 140.
[486] *Ibid*., § 141.
[487] See Trial Judgement, §§ 365-373 (relying on the evidence of Witnesses HH and GG that the Appellant shot Charles Ukobizaba, and therefore was present during the attack on the Mugonero Complex); §§ 388-393 (finding, on the basis of the testimony of Witness SS, that the Appellant shot at him on the day in question in the vicinity of the Mugonero Complex, a finding further supporting a conclusion that the Appellant was present in the complex on that day); §§ 702-704 (relying on the testimony of Witness HH to find that the Appellant participated in attacks in unspecified location in Bisesero).
[488] *Ibid*., §§ 143-147.

to whether Gérard Ntakirutimana accompanied these vehicles. In this connection, the Trial Chamber has concluded that the evidence on these issues "d[id] not provide a sufficiently detailed or coherent picture to conclude beyond a reasonable doubt that Gérard Ntakirutimana conveyed attackers to the Complex on the morning of 16 April 1994"[489]. The contradictions which the Appellant adduces here have no bearing on the Trial Chamber's conclusion that the Appellant was present during and participated in the attack on refugees at Mugonero.

285. The Appellant also contends that the evidence was contradictory on the question of where Gérard Ntakirutimana might have been at the start of the attack on the Complex[490]. However, the Trial Chamber made no finding on this issue[491] and the Appeals Chamber considers that, even it the evidence were found inconclusive, this would not affect the finding that Gérard Ntakirutimana killed Ukobizaba around midday. Accordingly, this argument fails.

286. The Appellant also notes that Witnesses GG and HH testified that, around midday, Gérard Ntakirutimana was in hospital courtyard Ukobizaba; however, this seems to contradict the evidence of Witness YY and SS who both placed the Appellant elsewhere around that time[492]. The Appeals Chamber finds that the evidence presented by the witnesses in question is not so conflicting regarding Gérard Ntakirutimana's presence that the Trial Chamber was unreasonable in finding, beyond a reasonable doubt, that he was at Mugonero. The fact that several witnesses were in the same general area does not necessarily mean that their observations about the identity and the location of those present have to be identical for the witnesses to be considered credible. The differences in their respective statements can be explained by the place from where these witnesses made their observations, as well as by the fact the witnesses did not give exact times for their observations. The Appeals Chamber has already rejected the Appellant's argument that the evidence given by Witnesses HH and GG was so contradictory as to make unreasonable the Trial Chamber's finding that he shot Charles Ukobizaba in the Mugonero hospital courtyard on 16 April 1994. This is also sufficient to support a conclusion that the Appellant was present during the attack on the Mugonero Complex on 16 April 1994. The Trial Chamber acted reasonably in concluding that "[t]he fact that the Accused was observed in other locations by Witness YY … and [Witness] SS … does not exclude his presence during the shooting of Ukobizaba"[493]. The distances within the Complex made it possible for Gérard Ntakirutimana to move from one location to another within a short time.

287. Finally, the Appellant contends that, despite the obvious contradictions between the testimonies of the Prosecution witnesses, the Trial Chamber unreasonably disbelieved the evidence of Defence Witness 25 which corroborated the Appellant's alibi[494]

[489] Trial Judgement, §292.
[490] Appeal Brief (G. Ntakirutimana), §§146-147.
[491] In relation to the events of 16 April 1994 at Mugonero, the Trial Chamber found that i) Gérard Ntakirutimana killed Ukobizaba around midday (§384); ii) Gérard Ntakirutimana participated in the attack on that day (§§393 and 404).
[492] Appeal Brief (G. Ntakirutimana), §146.
[493] Trial Judgement, §384.
[494] Appeal Brief (G. Ntakirutimana), §148.

Witness 25 testified that he saw the Appellants in Gishyita around 1.00-1.30 p.m. from about 80-100 metres, but that he did not approach them because he had been drinking, and he did not want the Pastor to know that since drinking is prohibited for Adventists. The Trial Chamber explained that it was not convinced by this testimony[495]. In the view of the Appeals Chamber, the Appellant has not demonstrated that this was unreasonable.

1. Bisesero Indictment

(a) The Bisesero finding based solely on testimony of Witness FF

288. Gérard Ntakirutimana argues that no reasonable tribunal could have found Witness FF credible. The Trial Chamber relied upon Witness FF's testimony alone to find that the Appellant (1) pursued and attacked Tutsi with Interahamwe at Murambi Hill on or about 18 April 1994; (2) was with attackers and shot at refugees at Gitwe Hill in late April or My; (3) transported attackers and chased and shot Tutsi at Kidashya Hill between April and June 1994; and (4) was with Interahamwe and shot at refugees in a forest by a church at Mutiti Hill in June 1994[496]. The Trial Chamber did not rely on Witness FF's testimony with respect to any other factual findings related to the Bisesero Indictment.

289. For reasons explained in Section II.A.1.(b)(ii) of the present Judgement; the Appeals Chamber has quashed the convictions of Gérard Ntakirutimana based on the four findings listed above due to the insufficiency of notice. This conclusion makes the Appellant's challenge to Witness FF's credibility, insofar as it seeks to invalidate the Trial Chamber's findings with respect to the Bisesero Indictment, moot.

290. The Trial Chamber also discussed the evidence given by Witness FF with respect to some events changed in the Mugonero indictment. The Trial Chamber relied on the testimony of Witness FF three instances. First, the Trial Chamber used the witness's evidence in finding that Gérard Ntakirutimana said, in the week prior to the attack on the Mugonero Complex, that the Hutu patients should leave the hospital[497]. Second, the Trial Chamber used the evidence provided by Witness FF to find that, prior to the attack, the Appellant "simply abandoned the Tutsi patients"[498]. The Trial Chamber then observed, "as part of the general context", that "[t]his behaviour [wa]s not in conformity with the general picture painted by the Defence of the Accused as a medical doctor who cared for his patients"[499]. Third, the Trial Chamber relied on Winess FF's testimony that she "saw 'soldiers' on board vehicles and Interahamwe on foot arrive at the [Mugonero] Complex at 9.00 a.m. on 16 April, and commenced killings, "progress[ing] from the open areas to the ESI Chapel, and thence to the hospital"[500].

291. The first two findings based on the evidence given by Witness FF – that the Appellant told the Hutu patients to leave the hospital and that he abandoned his Tutsi

[495] Trial Judgement, §382.
[496] Appeal Brief (G. ntakirutimana), §151.
[497] Trial Judgement, §134.
[498] *Ibid*., §153.
[499] *Ibid*., §324.
[500] *Ibid*., §324.

patients- were not used by the Trial Chamber, either on their own or as elements of a broader context, to support any of the convictions it imposed, nor to determine the appropriate sentence for Gérard Ntakirutimana after the conviction. With respect to the last observation given by Witness FF – that attackers arrived at the Mugonero Complex on the morning of 16 April and proceeded to kill the refugees congregating there- the Trial Chamber did not use that observation to make any particular finding. Moreover, the evidence as to the beginning of the attack was also given by other Prosecution witnesses, such as Witnesses GG, HH, YY, SS, MM and PP[501], as well as by a number of Defence witnesses, such as Witnesses 8, 5, 7, 6, 32 and 9[502]. Any conclusion the Trial Chamber had drawn from these testimonies would have remained the same even if it had disbelieved Witness FF. The credibility of Witness FF is also immaterial with respect to the conviction or the sentence imposed by the Trial Chamber under the Mugonero Indictment. There is consequently no need to address the Appellant's challenge to Witness FF's credibility.

(b) The Bisesero findings based solely on testimony of Witness HH

292. Witness HH provided uncorroborated evidence of two Bisesero incidents : (1) that around the end of April or the beginning of May, Gérard Ntakirutimana shot and killed Esdras during an attack at Gitwe Primary School; and (2) that Gérard Ntakirutimana headed a group of attackers at Muyira Hill where he shot at Tutsi refugees in June 1994. The Appeals Chamber has already determined that, for lack of sufficient notice, Gérard Ntakirutimana could not be convicted on the basis of the killing of Esdras or the attack at Muyira Hill in June 1994[503]. Therefore, the only remaining finding is that Gérard Ntakirutimana took part in the attack near Gitwe Primary School at the end of April or the beginning of May 1994. For the reasons set out in Sect II.B.1.(b) of this Judgement, the Appeals Chamber concludes that the Trial Chamber could reasonably rely on the evidence provided by Witness HH to find Gérard Ntakirutimana guilty of genocide under the Bisesero Indictment.

(c) The Bisesero findings based solely on testimony of Witness YY

293. Gérard Ntakirutimana claims the Trial Chamber unreasonably relied on Witness YY's evidence to find that he had participated in an attack at Muyira Hill and shot and killed the wife of Nzamwita on 13 May 1994. Gérard Ntakirutimana refers to his challenges to Witness YY's credibility in the discussion of the Mugonero events[504]. For reasons given in Section II.A.1.(b)(ii) and II.B.1.(d) of this Judgement, the Appellant's challenge to this finding of the Trial Chamber is now moot.

(d) The Bisesero findings based solely on testimony of Witness GG

294. Gérard Ntakirutimana claims the Trial Chamber unreasonably relied on Witness GG's evidence to find that he took part in an attack on Tutsi refugees at Muyira

[501] *Ibid*., §§322-325.
[502] *Ibid*., §§326-331.
[503] See supra, section II.A.1.(b)(ii).
[504] *Ibid*., §164.

Hill in mid-May 1994[505]. For the reasons set out in Section II.A.1.(b)(ii) of this Judgement, the Appellant's challenge to this finding of the Trial Chamber is now moot.

(e) The Bisesero findings based solely on testimony of Witness SS

295. Gérard Ntakirutimana claims the Trial Chamber unreasonably relied on Witness SS to find that he participated in an attack at Mubuga Primary School and shot at Tutsi refugees sometime in June 1994. This finding was based solely on Witness SS's testimony. Gérard Ntakirutimana refers to his challenges to Witness SS's credibility in the discussion of the Mugonero events[506]. For the reasons set out in Section II.B.1.(c) of this Judgement, the Appeals Chamber concludes that the Trial Chamber could reasonably rely on the evidence provided by Witness SS to find Gérard Ntakirutimana guilty of genocide under the Bisesero Indictment.

(f) Attending planning meetings (Witness UU)

296. Gérard Ntakirutimana also argues that the Trial Chamber erred in relying on the evidence given by Witness UU to find that he attended meetings in Kibuye during which the attacks against the Tutsis were planned[507]. In support, the Appellant asserts a number of challenges to Witness UU's credibility[508]. As Gérard Ntakirutimana acknowledges, however, the Trial Chamber has not relied directly on this finding to support any of the convictions[509]. While the Appellant summarily asserts that this finding "affected the outcome of the case"[510], he fails to present any argument as to how this finding has influence the verdict and what impact, if any, the setting-aside of this finding would have on the Trial Chamber's verdict. Where the Appellant "fails to make submissions as to how the alleged error led to a miscarriage of justice", the Appeals Chamber need not consider the Appellant's arguments[511]. Accordingly, because the Appellant has presented no argument as to how the reversal of the Trial

[505] Appeal Brief (G. Ntakirutimana), §165.
[506] *Ibid*., §166.
[507] The Prosecution objects to the inclusion of this material in the re-filed Appeal Brief because it was not included in Gérard Ntakirutimana's original Appeal Brief, and argues that this action contravened the Order of 21 July 2003 issued by the Pre-Appeal Judge, which required Gérard Ntakirutimana to file a new brief, conforming with the 16 September 2002 Practice Direction on the Length of Briefs and Motions on Appeal. That order, the Prosecution notes, did not authorize the Appellant to include a new substantive section. The Appellant acknowledges that the newly included section contained material not present in his original brief, and does not claim that the order permitted him to do so. The Appellant, however, argues that the Prosecution suffered no prejudice because it was able to respond to the issues raised, and in fact did so. While the Appellant's action is in contravention of the Order of 21 July 2003, and the Appellant is reprimanded for no-compliance, the Appeals Chamber nevertheless agrees that the Prosecution suffered no prejudice and therefore will not disregard the Appellant's arguments on the grounds of no-compliance.
[508] Appeal Brief (G. Ntakirutimana), §167.
[509] *Ibid*.
[510] *Ibid*.
[511] *Vasiljevic* Appeal Judgement, §20.

Chamber's finding that he had attended planning meetings in Kibuye will impact upon the Trial Chamber's verdict, the Appeals Chamber will not consider his arguments[512].

III. Appeal of Elizaphan Ntakirutimana

297. The Appeals Chamber now considers the issues raised on appeal by Elizaphan Ntakirutimana.

298. In this Appeal Brief, Elizaphan Ntakirutimana contends generally that the Trial Chamber committed a number of recurring legal and factual errors in relation to the Mugonero and Bisesero Indictments which violated his right to a fair trial, thereby occasioning a miscarriage of justice and invalidating the Trial Judgement. The Appeals Chamber notes that the submissions of the Appellant are at times unclear, with alleged legal errors being in reality complaints about the Trial Chamber's factual findings. Nevertheless, the Appeals Chamber has endeavoured to consider all of the submissions presented by the Appellant.

A. The Mugonero Indictment

299. Elizaphan Ntakirutimana challenges the findings of the Trial Chamber made in paragraphs 281 to 283 of the Trial Judgement, and submits that the Trial Chamber erred in its finding that he "conveyed attackers to the Mugonero complex on the morning of 16 April 1994"[513]

300. As the Appeals Chamber found above in relation to the appeal of Gérard Ntakirutimana on the question of the sufficiency of notice, the allegation that Elizaphan Ntakirutimana conveyed attackers to the Mugonero Complex on 16 April 1994 was a material fact which the Prosecution failed to plead in the Indictment. In addition, as the Prosecution did not cure the resulting defect in the Indictment, the Appeals Chamber found the Trial Chamber to have erred in concluding that a conviction could be based on these un-pleaded facts[514].

301. In light of these findings, it is not necessary for the Appeals Chamber to consider the merits of Elizaphan Ntakirutimana's submissions on the Trial Chamber's assessment of the evidence of Prosecution Witnesses MM, FF, PP, QQ and UU for the Mugonero Indictment. Even were the Appellant's arguments meritorious, they would have no impact on the findings against him in the Mugonero Indictment. However, the submissions of the Appellant against the Trial Chamber's fact finding process for the Mugonero Indictment are considered, where relevant, in the context of the Appellant's challenges for the Bisesero findings and to the extent that they concern

[512] Many of the Appellant's challenges to the credibility of Witness UU were, in any event, considered at length by the Trial Chamber. See Trial Judgement, §§707-708, 715-716. The Trial Chamber concluded that the witness was credible, and that decision remains reasonable even in light of the Defence's submissions on Appeal.

[513] Appeal Brief (E. Ntakirutimana), pp. 4-28.

[514] Section II.A.1.(b)(i)(c) of the Judgement.

Gérard Ntakirutimana's appeal against his convictions for events in Mugonero and Bisesero.

B. Insufficiency of Evidence to Establish That Tutsi Refugees at Mugonero Complex Were Targeted Solely on the Basis of their Ethnicity

302. Elizaphan Ntakirutimana submits that the Trial Chamber erred in fact and law in finding that Tutsi refugees who were attacked at the Mugonero Complex on 16 April 2004 "were targeted solely on the basis of their ethnic group"[515]. Although the Appeals Chamber found that the Trial Chamber erred in concluding that a conviction could be based on the unpleaded fact that Elizaphan Ntakirutimana conveyed attackers to the Mugonero Complex, the Appeals Chamber shall nevertheless consider this ground of appeal as the issues raised also concern Gérard Ntakirutimana.

303. The Appellant argues that "[a] finding that the overwhelming majority of the refugees killed and wounded at Mugonero were Tutsis cannot support a finding that Tutsi refugees were targeted solely on the basis of their ethnic group"[516]. In the view of the Appeals Chamber, the finding that the Tutsi seeking refuge at Mugonero were targeted on the basis of their ethnicity has not been shown to be unreasonable. The evidence included testimonies of Witnesses MM, HH, YY, and several others indicating that most of the refugees assembled at the Mugonero Complex were of Tutsi ethnicity[517]. The Trial Chamber was entitled to find from the evidence that refugees were targeted on grounds of their ethnicity[518].

304. The Appeals Chamber need not consider whether the Trial Chamber erred in finding that the refugees were targeted "solely" for their Tutsi ethnicity because the definition of the crime of genocide does not contain such a requirement[519]. It is immaterial, as a matter of law, whether the refugees were targeted solely on the basis of their ethnicity or whether they were targeted for their ethnicity in addition to other reasons.

305. Accordingly, this ground of appeal is dismissed.

C. Bisesero Indictment

306. In relation to the Bisesero Indictment, Elizaphan Ntakirutimana submits that the Trial Chamber erred in its findings that he was present or that he committed acts on six separate occasions in Bisesero during April through June 1994. The Appellant notes that five of the six findings are based on the uncorroborated testimony of single

[515] *Ibid*., pp. 32-34 (referring to Trial Judgement, §340).
[516] *Ibid*., p. 33.
[517] See Trial Judgement, §§338-339.
[518] See *ibid*., §§334-340.
[519] See Niyitegeka Appeal Judgement, §§48-53.

witnesses[520]. The Appeals Chamber will review the submissions of the Appellant on an event by event basis.

307. As discussed above in the assessment of Gérard Ntakirutimana's submissions on sufficiency of notice, the Appeals Chamber has found that the Trial Chamber erred in convicting Elizaphan Ntakirutimana for (i) his alleged participation in a convoy of vehicles carrying armed attackers to Kabatwa Hill at the end of May 1994, and his pointing out to attackers of the whereabouts of refugees on Kabatwa and Gitwa Hills, and (ii) his alleged participation in events at Mubuga primary school in the middle of May 1994[521].

308. In remains for the Appeals Chamber to consider the Appellant's submissions on four events for which he was convicted, namely for his participation in events at (i) Nyarutovu cellule and Gitwa Hill, in the middle and second half of May 1994; (ii) Murambi Hill, in May or June 1994; (iii) Muyira Hill-Ku Cyapa, in May or June 1994; and (iv) Murambi Church, in the end of April 1994.

1. Nyarutovu Cellule and Gitwa Hill (Witness CC)

309. Elizaphan Ntakirutimana argues that the Trial Chamber erred by relying on the uncorroborated evidence of Witness CC to find that he participated in events at Nyarutovu cellule and Gitwa Hill in the middle and second half of May 1994[522].

310. In respect of Nyarutovu, the Trial Chamber found :

> … that Elizaphan Ntakirutimana brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill one day in the middle of May 1994, and that the group was searching for Tutsi refugees and chasing them. Furthermore, the Chamber finds that, at this occasion, Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers who then chased these refugees singing "Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests"[523].

311. Regarding Gitwa Hill, the Trial Chamber was satisfied beyond reasonable doubt that :

> … Elizaphan Ntakirutimana was present among armed attackers at the occasion of an attack against Tutsi refugees at Gitwa cellule, and that his car was parked nearly. Although this evidence is limited in respect of the Accused's exact role or conduct in connexion with the attack, if corroborates other sightings of the Accused in Bisesero, in the company of attackers, during the time-period relevant to the Bisesero Indictment[524].

(a) Sufficiency of notice

312. In relation to the events at Nyarutovu, Elizaphan Ntakirutimana argues that the Trial Chamber erred when it concluded that although this incident is not specif-

[520] Appeal Brief (E. Ntakirutimana), p. 36.
[521] Section II.A.1.(b).
[522] Appeal Brief (E. Ntakirutimana), pp. 37-42.
[523] Trial Judgement, § 594.
[524] Trial Judgement, § 598.

ically mentioned in the Indictment it is summarized as part of Witness CC's anticipated evidence in Annex B of the Prosecution's Pre-Trial Brief and is also described in Witness CC's witness statement of 12 June 1996[525].

313. These submissions have been discussed above in relation to the notice arguments presented by Gérard Ntakirutimana. The Appeals Chamber has concluded that the details in Annex B and the statement of Witness CC notified the Defence that the Prosecution would allege that Elizaphan Ntakirutimana transported attackers and pointed out Tutsi refugees near the Gishyita-Gisovu road. The Trial Chamber therefore committed no error in concluding that Bisesero Indictment's failure to allege these facts was cured[526].

(b) Discrepancies in the evidence

314. Elizaphan Ntakirutimana submits that the Trial Chamber erred by disregarding inconsistencies between the witness's written statement and his in-court testimony, by accepting the witness's explanations for these, and by relying on the witness's evidence despite the lack of details and despite the witness's serious allegations against ICTR investigators[527]. These arguments, in the view of the Appeals Chamber, seen also to go to the credibility of the witness.

315. In his submissions, the Appellant refers extensively to apparent discrepancies between the witness's written statement and his in-court testimony in an attempt to demonstrate error in the fact-finding process. Most of these alleged inconsistencies were put to the witness during his testimony, raised in the Defence Closing Brief and considered by the Trial Chamber in its Judgement.

316. The Appeals Chamber recalls that it will not lightly disturb findings of fact by a trial chamber, and will substitute the assessment of the trial chamber only if no reasonable trier of fact could have arrived at the same conclusion. The trial chamber has the advantage of observing witnesses in person and is, as such, better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. The Appeals Chamber emphasises that it is not a legal error per se to accept and rely on evidence that varies from prior from statements or other evidence. However, a trial chamber is bound to take into account inconsistencies and any explanations offered in respect of them when weighing the probative value of the evidence[528]. Also, as previously noted, a trial chamber may find parts of a witness's testimony credible and rely on them, while rejecting other parts as not credible.

317. The Appellant argues that the Trial Chamber erred in stating that the list in Witness CC's statement of 10 attackers whom the witness recognised during the events was exhaustive[529]. He contends that, had the witness really seen him, his name would have been included in the list, and not at the end of the statement. Accordingly to the Appellant, this suggests that the witness "was prompted by the investigator to make allegations against him"[530].

[525] *Ibid*., §590.
[526] Section II.A.1.(b).
[527] Appeal Brief (E. Ntakirutimana), pp. 38-42.
[528] See *Kupreskic et al*. Appeal Judgement, §§31, 32; *Niyitegeka* Appeal Judgement, §§95-96.
[529] Trial Judgement, §591.
[530] Appeal Brief (E. Ntakirutimana), p. 38.

318. The Appeals Chamber has reviewed the witness's evidence, including his statement of 12 June 1996, and the witness's explanations during cross-examination on the omission of Elizaphan Ntakirutimana from the list, and considers that the Trial Chamber was not unreasonable in concluding that the list was not exhaustive. The Trial Chamber's conclusion finds additional support from the fact that the witness also mentioned in his statement seeing Clément Kayishema during the events yet does not include him in the list of 10 attackers at the beginning of the statement. The Appeals Chamber finds the Appellant's allegation that the witness was improperly prompted by an investigator to make accusations to be wholly speculative and without foundation.

319. Next, the Appellant submits that the Trial Chamber should have impeached the witness as he changed his evidence at trial to fit the Prosecution's case. He adds that the Trial Chamber erred by disregarding discrepancies and by attempting to sanitize the evidence. In support, Elizaphan Ntakirutimana refers to the witness's written statement, in which the witness mentioned seeing only armed civilians with him during the attack at Nyarutovu, whereas at trial the witness testified that there were also Interahamwe and soldiers in military uniforms[531].

320. The Appeals Chamber notes that during cross-examination the witness was asked by the Appellant and the Trial Chamber about the attackers he saw with the Appellant. Questioned as to the differences between his statement and his testimony, the witness explained that at his interview with the investigators he had clearly mentioned the presence of soldiers, as well as civilians, and that the statement was therefore incorrect[532]. The Trial Chamber observed the demeanour of the witness and itself questioned the witness on the differences between his testimony and his earlier statement. The Trial Chamber addressed this apparent discrepancy in its findings, concluding that it did not affect the witness's credibility. It also note that the witness statement included a general description of attackers in Bisesero, which included soldiers, civilians and Interahamwe[533]. Apart from reiterating that there exists an inconsistency in the witness's evidence, the Appellant does not advance any argument of merit which would justify the Appeals Chamber disturbing the Trial Chamber's findings.

321. The same conclusion applies to the Appellant's submissions regarding the witness's estimates about the time at which the Bisesero attacks began during the events from April to June 1994 and on the distance between the witness's home, Ngoma Church and Muyira Hill[534]. The Trial Chamber considered the differences between the witness's testimony, statement and earlier testimony not to be material and of little importance[535]. A mere assertion of the Appellant that the Trial Chamber should have accorded more weight to these discrepancies is insufficient to meet his burden on appeal to show error on the part of the Trial Chamber.

322. In addition the Appellant argues that the Trial Chamber erred when it reasoned that "the witness described the Accused's car in a way which corresponded to the

[531] *Ibid*., pp. 38-39.
[532] T. 9 October 2001, pp. 49-51.
[533] Trial Judgement, §591.
[534] Appeal Brief (E. Ntakirutimana), pp. 40-44.
[535] Trial Judgement, §593.

description to the description by other witnesses"[536]. The Appellant suggests that the witness did not know from observation but that someone else had told him of the make and colour of the Appellant's vehicle[537]. In the view of the Appeals Chamber, this argument is without foundation and misconstrues the evidence. The Appeals Chamber notes that the witness was consistent in his evidence that the Appellant's vehicle was "whitish", white or near-white[538]. Although during cross-examination there appeared to be some discussion about dates, in the view of the Appeals Chamber, placed in proper context, this cannot be interpreted to mean that the witness had been told by another person about the Appellant's car[539].

323. The Appellant argues that the Trial Chamber erred in assessing Witness CC's identification evidence for Nyarutovu[540]. The Appeals Chamber recalls that where a finding of guilt is made on the basis if identification evidence given by a witness under apparently difficult circumstances, the Trial Chamber should provide a "reasoned opinion". As the Appeals Chamber noted in Kupreskic, a Trial Chamber should take into account a number of factors such as the duration of the observation, the presence of obstructions, light quality, whether the observation was made in daytime or at night, inconsistent or inaccurate testimony about the defendant's physical characteristics at the time of the event, misidentification or denial of the ability to identify followed by later identification of the defendant by a witness and the "clear possibility" that the witness may have been influenced by suggestions from others[541].

324. Here, the Trial Chamber considered that the observation was made in broad daylight, that it lasted for about 2 minutes from a distance of about 100 meters, that there was no evidence of persons or vegetation obstructing the witness's view, that the witness knew the Appellant since 1977, having seen him during religious gatherings, and that his testimony was coherent and consistent with his written statement[542]. In the view of the Appeals Chamber, it cannot be said that the Trial Chamber unreasonably assessed the identification evidence.

325. Consequently, the Appeals Chamber finds that the Trial Chamber was careful in its assessment of the evidence, and that all of the inconsistencies raised by the Appellant were reasonably treated by the Trial Chamber. Accordingly, the Appeals Chamber dismisses the Appellant's submissions that the witness's difficulty in remembering when and how witness statement was taken, and the lack of details in his evidence raise a reasonable doubt about all his testimony.

2. Murambi Hill (Witness SS)

326. In relation to events at Murambi Hill, the Trial Chamber found :

> The testimony of Witness SS is uncorroborated. However, he appeared consistent throughout his testimony about this event. Which was in conformity with

[536] *Ibid*., § 592.
[537] Appeal Brief (E. Ntakirutimana), p. 40.
[538] For instance, T. 9 October 2001, pp. 13, 51.
[539] T. 9 October 2001, pp. 54-55.
[540] Appeal Brief (E. Ntakirutimana), pp. 39-41.
[541] See *Kupreskic et al*. Appeal Judgement, §§ 34-40.
[542] Trial Judgement, § 594.

his statement to investigators of 18 December 2000. The fact that this statement was given more than six years after the events does not reduce his credibility. Consequently, the Chamber finds that one day in May or June 1994, Elizaphan Ntakirutimana transported armed attackers who were chasing Tutsi survivors at Murambi Hill[543].

327. Elizaphan Ntakirutimana contends that the Trial Chamber misapplied the burden of proof on the basis that the record shows that the evidence of Witness SS was contradictory and insufficient to support the finding that the Appellant "transported armed attackers who were chasing Tutsi survivors at Murambi Hill" at some point in May or June 1994.

(a) Lack of notice

328. Elizaphan Ntakirutimana submits that no mention was made of the events at Murambi Hill in indictment, the Pre-Trial Brief or the Prosecution's closing arguments, and accordingly seems to argue that the Trial Chamber erred in finding that he was put on sufficient notice of the event[544].

329. This ground of Appeal has been addressed in the discussion of the legal arguments presented by Gérard Ntakirutimana. It has been found that the Trial Chamber committed no error in concluding that the Bisesero Indictment's failure to allege that the Appellant transported attackers to the Murambi attack was cured by subsequent information communicated to the Accused[545]

(b) Insufficiency of evidence

330. Elizaphan Ntakirutimana questions the evidence of Witness SS that he saw him in his car during the event, and submits that it is insufficient to support the finding that he "transported armed attackers who were chasing Tutsi survivors at Murambi hill". He indicates that Witness SS never mentioned whether he saw him driving the vehicle or whether there was someone else in the vehicle with him. Elizaphan Ntakirutimana adds that the witness gave few details about where he stopped the vehicle, and about whether he had direct sight of him. The Appellant also submits that it would have been doubtful that the witness could have identified him at a distance of 200 meters when he turned around whilst running away from the attackers. Finally the Appellant notes that in a report by *African Rights*, the Witness SS did not mention seeing a car or attackers with the Appellant, or that he was chased by the attackers[546].

331. In making its findings, the Trial Chamber took into consideration observational conditions, the position of the witness in relation to Elizaphan Ntakirutimana when he first observed him, and the fact that he saw attackers alight from the Appellant's vehicle[547]. The Trial Chamber's assessment of the evidence is in conformity with the witness's testimony[548]. Moreover, in cross-examination, Elizaphan Ntakirutimana

[543] *Ibid*., §579.
[544] Appeal Brief (E. Ntakirutimana), pp. 48-49.
[545] Section II.A.1. (b).
[546] Appeal Brief (E. Ntakirutimana), pp. 48-49.
[547] Trial Judgement, §§575-576.
[548] T. 30 October 2001, pp. 127-133.

questioned the witness about his sighting of the Appellant's vehicle, the distance from which he saw him, whether he was crossing the road, and the presence of the attackers[549].

332. In the view of the Appeals Chamber, the Appellant has shown that the Trial Chamber erred in assessing the evidence of Witness SS. The Appellant does not directly address the findings of the Trial Chamber to show their unreasonableness, and merely repeats aspects of the evidence which he deems undermine the witness's credibility. The issue as to the distance from which the witness observed the Appellant was developed by the Appellant during cross-examination and fully considered by the Trial Chamber. It is clear from the evidence that the witness initially saw the Appellant at a distance of approximately 8 meters, and observed him again as he was running to escape the attackers who had alighted from the Appellant's car[550]. The questions as to Elizaphan Ntakirutimana driving his vehicle, and the presence of anyone else in the cabin of the vehicle, were not specifically put to the witness[551]. The fact that the witness's evidence may have been limited on the event and detailed has not been shown to undermine its reliability.

(c) Delivery of the letter

333. Elizaphan Ntakirutimana seems to submit that Witness SS's credibility is undermined as his evidence on the delivery of the 16 April letter from the pastors to the Appellant contradicts the evidence of Witnesses GG, HH, YY and MM[552].

334. The Appeals Chamber notes that the Appellant's submissions here are vague and unclear. He does not develop this argument. It is accordingly dismissed.

(d) Sighting of Gérard Ntakirutimana

335. Elizaphan Ntakirutimana submits that Witness SS's credibility was undermined when he testified that he saw Gérard Ntakirutimana in Mugonero in 1992 and 1993 when, according to the Appellant, Gérard Ntakirutimana was in the United States from January 1991 until March 1993. He adds that the evidence suggests that the witness did not know either the Appellant or Gérard Ntakirutimana, having referred to the Appellant as a "minister" in the African Rights report and that he did not live in Mugonero prior to 1994[553].

336. During the examination and cross-examination, the witness was extensively questioned on the dates of his studies at the ESI Mugonero and on when he saw Gérard Ntakirutimana. The witness indicated that he observed Gérard Ntakirutimana on a number of occasions prior to April 1994, but that he was not sure of the exact date. Although there appears to have been some confusion during the examination,

[549] T. 31 October 2001, pp. 117-124.
[550] *Ibid.*, pp. 128-133.
[551] Although the witness did testify that, "I was about to cross the road. He saw me, he stopped his vehicle, he came out, and people who were with him started running after me in an attempt to catch me", which suggests that the Appellant may have been driving his vehicle. T. 30 October 2001, p. 128.
[552] Appeal Brief (E. Ntakirutimana), pp. 48-51.
[553] *Ibid.*, p. 51.

Elizaphan Ntakirutimana has not shown that this in any way taints the witness's overall credibility or that the witness was not in Mugonero in 1993 and 1994. The fact that Gérard Ntakirutimana was in the United States until March 1993 is of little significance as, on the basis of the evidence, the witness was present in Mugonero from early 1993 until April 1994, and could therefore have seen Gérard Ntakirutimana after March 1993[554]. It should be noted that Elizaphan Ntakirutimana does not directly address this evidence in his submissions.

337. Finally, the Appeals Chamber is of the view that the witness's use of the title "minister" when speaking of the Appellant, who was a pastor, is immaterial in showing that the witness did not know the Appellant.

(e) Witness coaching

338. The Appellant submits that there are too many inconsistencies and discrepancies in the witness's prior statement to repeat in full, but that their frequency and nature reveal fabrication and coaching[555].

339. The Appellant's arguments on this point are unsubstantiated and are accordingly rejected.

3. Muyira Hill – Ku Cyapa (Witness SS)

340. With respect to events at Ku Cyapa near Muyira Hill, the Trial Chamber found, on the basis of the sole testimony of Witness SS, that :

> "… one day in May or June the Accused was seen arriving at Ku Cyapa in a vehicle followed by two buses of attackers. The Chamber is convinced that the Accused was part of a convoy which included attackers. The evidence establishes that these attackers among others participated in the killing of a large number of Tutsi. Witness SS declared : "On that day the killings were beyond comprehension, and that is the day most people were killed"[556].

(a) Lack notice

341. The Appellant argues that the Trial Chamber erred in finding that he had sufficient notice of this event since it was not mentioned in the Prosecution's Closing Brief or in any detail by the witness in his previous written statement[557].

342. The question of sufficiency of notice has been dealt with above in relation to Gérard Ntakirutimana's arguments on notice. It has been found that the failure to allege the event at Ku Cyapa with specificity in the Bisesero Indictment was cured by subsequent information communicated to the Defence by the Prosecution[558].

[554] T. 31 October 2001, pp.2-16.
[555] Appeal Brief (E. Ntakirutimana), p. 50.
[556] Trial Judgement, §661.
[557] Appeal Brief (E. Ntakirutimana), p. 51.
[558] Section II.A.1. (b).

(b) Insufficiency of evidence

343. Elizaphan Ntakirutimana contends that the Trial Chamber misapplied the burden of proof as its findings do not follow from the evidence. According to Elizaphan Ntakirutimana, the evidence of Witness SS lacks necessary details as to the road on which the witness saw the Appellant's vehicle travelling and the direction in which the vehicle was going. The Appellant adds that there is insufficient evidence to establish that the buses the witness saw not far from his vehicle were those which transported the attackers to Ku Cyapa[559].

344. From a review of the evidence, it has not been shown that the Trial Chamber was unreasonable in concluding that the Appellant was part of a convoy of attackers at Ku Cyapa. Indeed, Witness SS testified that, at about noon on day in May or June 1994, he saw the Appellant in his vehicle and the vehicle of Obed Ruzindana parking on the Gisovu-Gishyita road in the area of Ku Cyapa. The witness observed the Appellant from a distance of approximately 15 meters. He testified that he did not see "many other people" in the vehicle, and presumed that the persons he saw after having fled must have descended from the buses. Witness SS explained that he observed two green buses further behind with attackers aboard, driving up the hill towards Ku Cyapa. The witness immediately fled. He did not see Elizaphan Ntakirutimana again on that day. Witness SS stated later in the day there was a massive attack in the Bisesero region. He did not see the Appellant on this occasion[560].

345. The Trial Chamber relied on the evidence of Witness SS to convict the Elizaphan Ntakirutimana of aiding and abetting in genocide by conveying armed attackers to Bisesero[561]. The evidence of Witness SS does not establish that the Appellant participated in the attack at Bisesero, and in the view of the Appeals Chamber it is insufficient to establish that the attackers the witness saw with the Appellant were later involved in a large scale attack at Bisesero[562]. Notwithstanding, the Appeals Chamber does not find that the Trial Chamber erred when it relied on the evidence of Witness SS to the extent that, when placed in context, it was consistent with other evidence in the case that vehicles were often followed by buses with attackers.

4. Murambi Church (Witnesses YY, DD, GG and SS)

346. On the basis of the testimonies of Witnesses YY, DD, GG and SS, the Trial Chamber found :

> As for the involvement of Elizaphan Ntakirutimana in the removal of the church roof, the Chamber notes that Witness DD, GG and YY all identified him as having participated in the removal of the roof, and Witnesses DD and GG testified that he personally gave the order for the removal. Witness SS's testimony regarding his sighting of Elizaphan Ntakirutimana's vehicle supports the other witnesses' testimonies. Witnesses GG and YY testified that the church was being used by Tutsi refugees as a shelter, and Witness DD testified that he was himself seeking refuge in the church at the time. The witnesses concur that this

[559] Appeal Brief (E. Ntakirutimana), pp. 51-52.
[560] T. 30 October 2001, pp. 134-138; T. 31 October 2001, pp. 124-132.
[561] Trial Judgement, §§827-830.
[562] T. 30 October 2001, p. 138.

> incident took place between 17 April 1994 and early May 1994. Witnesses GG and YY saw the iron sheets being removed and placed in Elizaphan Ntakirutimana's car while Witness DD saw the sheeting being placed in one of the two cars. The Chamber finds that there is evidence, beyond a reasonable doubt, that sometime between 17 April and early May 1994. Elizaphan Ntakirutimana was in Murambi within the area of Bisesero, that he went to a church in Murambi where many Tutsi were seeking refuge and that he ordered attackers to destroy the roof of the church[563].

347. As for the reasons for the removal of the Church's roof, the Trial Chamber found that this act left the Tutsis unprotected from the elements and visible to attackers, and that given the presence of the attackers "those taking part in these events, including Elizaphan Ntakirutimana, could not have had peaceful intentions". It rejected other interpretations suggested by Elizaphan Ntakirutimana of the act of removal of the roof or the transportation of the individuals involved[564].

348. In relation to Elizaphan Ntakirutimana's involvement in shooting refugees at the church, the Trial Chamber concluded :

> that neither the Pre-trial Brief nor Witness YY's previous statement contains any explicit allegation that Elizaphan Ntakirutimana killed persons at Murambi Church. This was first raised by Witness YY during his testimony. Consequently, the Indictment was not cured by subsequent timely notice[565].

(a) Shooting of refugees

349. Although not convicted of the shooting of refugees at Murambi church, the Appellant contends that the Trial Chamber erred when it concluded that, despite the fact that Witness YY was the only witness to have testified about the shooting, this did "not render his account implausible, insofar as each witness observed the scene from a different vantage point and for a different length of time"[566]. The Appellant adds that the Trial Chamber's finding "questions the ability of the Trial Chamber t find facts rationally"[567].

350. Three witnesses, namely Witnesses GG, DD and YY observed the Appellant at Murambi directing people to remove the roof sheeting. Witness SS saw the Appellant's car and observed persons remove the roof. Witnesses DD, GG and SS not observe or testify about any shooting at the church. Their testimony was consistent that the Appellant was only involved in the removal of the roof.

351. Witness GG testified that that he was able to hear Elizaphan Ntakirutimana tell people to climb atop the church and remove the roofing. He testified that he was able to hear "everything they were saying"[568]. Witness DD also saw Elizaphan Ntakirutimana at the church order people to remove the metal sheeting of the roof. According to the Trial Chamber, the witness, who had an unobstructed view of the

[563] Trial Judgement, §691.
[564] Ibid., §693.
[565] Ibid., §697.
[566] Trial Judgement, §687.
[567] Appeal Brief (E. Ntakirutimana), p. 54.
[568] T. 24 September 2001, pp. 5-7.

church, "observed the entire operation". Although Witness DD testified that he left the church at the time the roof was removed, his testimony in essence is limited to the actions of Elizaphan Ntakirutimana, notably : "I saw him come up in the company of other people who came in his vehicle. He ordered them to take off the roof sheet of the church in his opinion, to prevent us from the rain. Then he took them a way". The witness was approximately 12 metres from the church at the time f his observations. He indicated that the removal taking away of the sheeting did not take long[569].

352. Witness SS, from his vantage point on a small hill overlooking Murambi church, was in a position to observe individuals remove the roof of the church, saw the Appellant's car but was not able to identify individuals[570]. Witnesses DD, GG and SS not testify to any gunfire, or that Elizaphan Ntakirutimana and other attackers shot refugees in the Church.

353. By contrast, Witness YY testified that the shooting of the refugees occurred before the removal of the roof. The Trial Chamber found that Witness YY's account was not "implausible" as each witness "observed the same scene from different vantage point and for a different length of time"[571]. Yet Witnesses DD, GG and SS who all saw the arrival of Elizaphan Ntakirutimana or of his vehicle and the removal of the roof, did not mention any shooting.

354. Witness YY first spoke of the shooting of refugees during the trial. No specific mention is made of this allegation in his previous statement, in the Indictment or in the Prosecution's Pre-Trial Brief. On the basis of the evidence, the Appeals Chamber is of the view that Witness YY's account of the shooting at the Church is irreconcilable with the evidence of Witnesses DD, GG and SS. The Trial Chamber therefore erred in reasoning that Witness YY's account was not "implausible".

355. However, the Appeals Chamber is not convinced by the Appellant's argument that this error calls into question the overall "ability of the Trial Chamber to find facts rationally", or that the whole fact-finding process is tainted. Although it is indeed unfortunate that the Trial Chamber referred to YY's account of events as not being "implausible", the Trial Chamber was nevertheless, very cautious in its assessment of the evidence and careful when making its findings. The Appeals Chamber, having reviewed extensively the evidence and findings of the Trial Chamber in assessing the Appellant's numerous grounds of appeal, considers that the Appellant's general proposition against the Trial Chamber, a proposition derived from a single finding of the Trial Chamber, about Witness YY, is devoid of merit.

(b) Removal of the roof

356. The Appellant also asserts that the evidence of Witnesses DD, YY, GG and SS is insufficient evidence that he was involved in the removal of the roof of Murambi church with the intent to facilitate the killing of the refugees in the church. He suggests that there is no basis for believing that the removal of the roof would make the church a lesser hiding place and suggests that "the walls, if anything, might make

[569] T. 23 September 2001, pp. 120-125.
[570] T. 30 October 2001, pp. 5-7;
[571] T. 23 September 2001, pp. 120-125.

it a hiding place". Elizaphan Ntakirutimana further adds that he had "the right and perhaps the duty to remove the roof, to protect church property"[572].

357. The Prosecution submits *inter alia* that the significance of the removal of the church roof cannot be viewed out of the context of frequent attacks, and that it was clearly one in a series of acts intended to worsen the conditions of the refugees, thereby weakening their resolve against further attacks[573].

358. The evidence before the Trial Chamber established beyond reasonable doubt that the Appellant and others removed the roofing of the church. The Appeals Chamber has reviewed the testimony of Witnesses DD, GG and SS, and finds that the Appellant has not shown that the evidence is insufficient to establish that he was involved in the removal of the Murambi Church roof.

359. The Appeals Chamber likewise finds no merit in argument of the Appellant that the Trial Chamber erred in when it found that the roof was removed so that the church could no longer be used as a hiding place and that the roof was removed with the intention to facilitate the killing. The Trial Chamber's finding was made not in the abstract but on the basis of a number of factors, including the context of the events, the witness's description of "approaching attackers", and that *Interahamwe* armed with machetes were aboard the Appellant's vehicle[574]. Moreover, the Appeals Chamber notes that, by the end of April 1994, killings against Tutsis had already commenced in the region. For instance, the attack at the Mugonero Complex occurred on 16 April 1994. Placed in the context of the then prevailing massacres against the Tutsi, the Trial Chamber reasonably inferred that the removal of the roof was intended to deprive the Tutsi of hiding places and to facilitate their killing.

D. Lack of intent to commit genocide

360. Elizaphan Ntakirutimana challenges the findings of the Trial Chamber that the Appellants participated in the attacks at Bisesero with the intent to commit genocide. Specific reference is made to the conclusions of the Trial Chamber in paragraphs 826 and 83 of the Trial Judgement :

> 826. In Section II.4 above, the Trial Chamber found that a large number of men, women and children, who were predominantly Tutsi, sought refuge in the area of Bisesero from April through June 1994, where there was widespread violence during that period, in the form of attacks targeting this population on an almost daily basis. Witnesses heard attackers singing songs referring to the extermination of Tutsi. The Chamber concludes that these attacks were carried out with the specific intent to destroy in whole the Tutsi population in Bisesero, for the sole reason of its ethnicity[575].
>
> 830. From his presence and participation in attacks in Bisesero, from the fact that at certain occasions, he was present when attackers he had conveyed set upon chasing Tutsi refugees nearby, singing songs about exterminating the Tutsi,

[572] Appeal Brief (E. Ntakirutimana), p. 55.
[573] Prosecution Response, §§5.280-5.286.
[574] Trial Judgement, §693.
[575] Internal reference omitted.

> Elizaphan Ntakirutimana knew that Tutsi in particular were being targeted for attack, and that by transporting armed attackers to Bisesero and pointing out Tutsi refugees to attackers, he would be assisting in the killing of Tutsi in Bisesero. The Chamber has also taken into account this act of conveying to the Mugonero Complex attackers who proceeded to kill Tutsi. Having considered all the evidence, the Chamber finds that Elizaphan Ntakirutimana had the requisite intent to commit genocide, that is, the intent to destroy, in whole, the Tutsi ethnic group.

361. According to Elizaphan Ntakirutimana, the record does not support the Trial Chamber's finding that the Appellants possessed the intent necessary to commit genocide, and contends that the Trial Chamber failed to make factual findings or provide supportive analysis of intent. Elizaphan Ntakirutimana also notes that the Trial Chamber omitted "in part" from its definition of intent, thus requiring a showing of an "intent to destroy, in whole, the Tutsi ethnic group"[576].

362. Elizaphan Ntakirutimana contends that the Trial Chamber did not make factual finding or "supportive analysis" of the Appellants' intent[577]. This contention is meritless. The Appeals Chamber notes that in paragraph 828 of the Trial Judgement, the Trial Chamber outlined the factual findings which led it to conclude, in paragraph 830, that Elizaphan Ntakirutimana had the requisite genocidal intent. Similarly, prior to finding that Gérard Ntakirutimana had the specific intent to commit genocide, the Trial Chamber recalled in detail the factual findings upon this conclusion was based[578]. Consequently, it cannot be said that the Trial Chamber failed to make and analyse factual findings in respect of the Appellants' intent relating to the genocide charge in the Bisesero Indictment.

363. Elizaphan Ntakirutimana submits that the evidence established that the Appellants did not have the intent to destroy Tutsi "solely" because of their ethnicity[579]. As stated above, the definition of the crime of genocide in Article 2 of the Statute, which mirrors the definition set out in the Genocide Convention, does not require that the intent to destroy a group be based solely on one of the enumerated grounds of nationality, ethnicity, race, or religion[580].

364. In considering whether a perpetrator had the requisite *mens rea*, regard must be had to his mode of participation in the given crime. Under the Bisesero Indictment, Elizaphan Ntakirutimana was convicted of aiding and abetting genocide while Gérard Ntakirutimana was convicted of committing genocide[581]. The requisite *mens rea* for aiding and abetting genocide is the accomplice's knowledge of the genocidal intent of the principal perpetrators[582]. From the evidence, the Trial Chamber found that the attackers in Bisesero had the specific genocidal intent[583]. Furthermore, in the view of the Appeals Chamber, it is clear that Elizaphan Ntakirutimana knew of this intent.

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[576] Appeal Brief (E. Ntakirutimana), pp. 57-59.
[577] *Ibid*., p. 58.
[578] Trial Judgement, §§832-834.
[579] Appeal Brief (E. Ntakirutimana), p. 59.
[580] See supra Section III. B. See also *Niyitegeka* Appeal Judgement, §53.
[581] See Trial Judgement, §§831, 836.
[582] See infra Section *V. D.; Krstic* Appeal Judgement, §140.
[583] Trial Judgement, §826.

The Trial Chamber found that Elizaphan Ntakirutimana was present during several attacks on refugees in Bisesero, including situations where the armed attackers sang : "Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests", and "Let us exterminate them", while chasing and killing Tutsis[584]. It is from this, as well as from his transporting the armed attackers and directing them toward fleeing Tutsi refugees that the Trial Chamber found that Elizaphan Ntakirutimana had the requisite intent to commit genocide, convicting him of aiding and abetting genocide. In the view of the Appeals Chamber, it is not necessary to consider whether the Trial Chamber correctly concluded that Elizaphan Ntakirutimana had the specific intent to commit genocide, given that it convicted him not of committing that crime, but rather of aiding and abetting genocide, a mode of criminal participation which does not require the specific intent. The Appeals Chamber finds that Elizaphan Ntakirutimana knew of the genocidal intent of the attackers whom he aided and abetted in the perpetration of genocide in Bisesero and, therefore, that he possessed the requisite *mens rea* for that crime.

365. The Appeals Chamber also finds no error in the Trial Chamber's conclusion that Gérard Ntakirutimana had the specific intent required to sustain his genocide conviction. In determining whether Gérard Ntakirutimana had the specific genocidal intent, the Trial Chamber properly considered his participation in numerous attacks on Tutsis, including his shooting and killing Tutsi individuals[585]. This finding is not undermined by the Trial Chamber's conclusion that Gérard Ntakirutimana had the specific intent to destroy the Tutsi ethnic group "in whole", rather than "in whole or in part" as Article 2 of the Statute prescribes. The record shows that Gérard Ntakirutimana possessed the requisite *mens rea* for committing the crime of genocide.

366. Accordingly, this ground of appeal is dismissed.

E. Aiding and abetting genocide

367. Elizaphan Ntakirutimana argues that aiding and abetting genocide was not included in the Genocide Convention and is not punishable under the Genocide Convention or Article 6(1) of the Statute of the Tribunal. According to the Appellant, the phrase "or otherwise aided and abetted" in Article 6(1) of the Statute relates only to common crimes, such as murder and rape, as including in Article 3 (Crimes against Humanity) and Article 4 (War Crimes) of the Statute, of which aiding and abetting is "a frequent part"[586].

368. Elizaphan Ntakirutimana notes that Article 2 of the Statute (which reproduces Articles 2 and 3 of the Genocidal Convention) includes in the acts punishable as genocide conspiracy, complicity, incitement, attempt to commit genocide and complicity in genocide, but not aiding and abetting. By contrast, neither Article 2 nor Article 4 addresses conspiracy or accessory liability, and it was thus necessary to supplement these articles with Article 6(1) of the Statute. The Appellant concludes that the Security Council had no power to enact or modify the Genocide Convention "or to create

[584] *Ibid.*, § 828.
[585] Trial Judgement, §§ 832-834.
[586] Appeal Brief (E. Ntakirutimana), p. 35.

a criminal code" by adding aiding and abetting to acts punishable under Article 2 of the Statute[587].

369. The Prosecution responds that this argument was not raised in the Notice of Appeal, is vague and not in conformity with the Practice Direction on Formal Requirements for Appeals from Judgement, and cannot be raised for time in the Appeal Brief. The Prosecution submits that the argument should be dismissed without consideration[588].

370. The Appeals Chamber notes that the Prosecution correctly points out that the present argument was not raised in the Notice of Appeal. The Practice Direction on Formal Requirements for Appeals from Judgement requires an appellant to present in the Notice of Appeal the grounds of appeal, clearly specifying

> (i) any alleged error on a question of law invalidating the decision, and/or
>
> (ii) any alleged error of fact which has occasioned a miscarriage of justice;
>
> (iii) an identification of the finding or other order, decision or ruling challenged, with specific reference to the page number and paragraph number;
>
> (iv) an identification of any other order, decision or ruling challenged, with specific reference to the date of its filing, and/or transcript page;
>
> (v) if relevant, the overall relief sought[589].

In accordance with the Practice Direction, the Appeals Chamber may dismiss submissions that do not comply with the prescribed requirements[590].

371. In addition to Elizaphan Ntakirutimana's failure to properly raise this ground of appeal in the Notice of Appeal, the Appeals Chamber notes that the present submission lacks merit. In essence, the Appellant argues that he could not have been charged and convicted of aiding and abetting genocide because aiding and abetting was not included in the Genocide Convention and is therefore not an act punishable under the Convention or under Article 6(1) of the Statute. The Appeals Chamber does not subscribe to such an interpretation of the Convention or the Statute. As recently held in the *Krstic* Appeal Judgement, the prohibited act of complicity in genocide, which is included in the Genocide Convention and in Article 2 of the Statute, encompasses aiding and abetting[591]. Moreover, Article 6(1) of the Statute expressly provides that a person "who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the Statute, shall be individually responsible for the crime". Accordingly, liability for the crime of genocide, as defined in Article 2 of the Statute, may attach on grounds of conduct characterized as aiding and abetting[592].

372. Consequently, this ground of appeal is dismissed.

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[587] *Ibid*., pp. 35-36. In support of his arguments, the Appellant refers generally to "opinions" in *Kayishema and Ruzindana* and *Akayesu*, without providing any specific references.

[588] Prosecution Response, §5.326.

[589] Practice Direction on Formal Requirements for Appeals from Judgement, §1 (c).

[590] See *ibid*., §13.

[591] *Krstic* Appeal Judgement, §§138, 139.

[592] *Ibid*., §139.

F. Lack of credibility in the Prosecution case

373. Elizaphan Ntakirutimana submits that after an analysis of all the inconsistencies, revised testimony, falsity and prejudicial motivations reviewed in the Appellants' briefs, it becomes clear that the Prosecution case was not credible. Elizaphan Ntakirutimana reiterates the legal errors that the Trial Chamber is said to have committed, and notes *inter alia* :

(i) that Witness QQ's evidence as to the number of bodies and mass graves at Mugonero and the church office is highly questionable[593];

(ii) that the Trial Chamber must deal seriously with the number of dead and body counts at Mugonero and elsewhere in Rwanda from 1994[594];

(iii) that the Trial Chamber failed to find a single witness unreliable yet unjustifiably disposed of the alibi evidence[595]; and

(iv) that the Defence had presented compelling testimony of a political campaign against the Appellants, with certain witnesses, namely YY, KK and UU, having participated in activities of the Rwandan Patriotic Front and Rwandan Patriotic Army[596].

374. Elizaphan Ntakirutimana claims that a lack of credibility on the part of all Prosecution witnesses raised a reasonable doubt as to the Trial Chamber's findings[597]. Elizaphan Ntakirutimana specifically criticizes the Trial Chamber's reliance on Prosecution Witnesses QQ[598], KK[599] and UU[600], none of whom Elizaphan Ntakirutimana considers credible. In support of these allegations, Elizaphan Ntakirutimana cites several instances of inconsistency between the testimonies. In summary, Elizaphan Ntakirutimana argues that the Prosecution's case as a whole was "not credible"[601].

375. The Appeals Chamber points out the exceedingly broad and non-specific nature of this element of the Appeal. As elsewhere in the Appeal, Elizaphan Ntakirutimana here attempts to discredit the entire trial proceedings in this case in the span of a few pages. To the extent that Elizaphan Ntakirutimana has cited specific alleged errors in credibility, the Appeals Chamber addresses them below.

376. Elizaphan Ntakirutimana alleges that Witness QQ's testimony with regards to the number killed at Mugonero was not credible[602]. He points out that there were discrepancies between QQ's pre-trial statement and his trial testimony. However, the Trial Chamber took this and other inconsistencies regarding estimates killed into account when making its findings. The Trial Chamber stated that it was not convinced by Witness QQ's estimate because the witness "was a lay person with no claimed expertise in … distinguishing and counting victims on the basis of their decomposed

[593] Appeal Brief (E. Ntakirutimana), pp. 60-61.
[594] Ibid., p. 61.
[595] Ibid.
[596] *Ibid*., pp. 61-62.
[597] *Ibid*., p. 59.
[598] *Ibid*., pp. 60-61.
[599] *Ibid*., p. 62.
[600] *Ibid*.
[601] *Ibid*., p. 59.
[602] *Ibid*., 60.

remains" and because QQ's estimates "appear to be based on the number of coffins used and, more critically, on the number of people required to lift a coffin after it had been filled[603]. The Trial Chamber nevertheless emphasized that Witness QQ's evidence did establish the existence of mass graves and a large number of skeletons at Mugonero Complex[604]. Relying on that evidence and the evidence provided by other witnesses, the Trial Chamber found that the attack of 16 April 1994 resulted in hundreds of dead and a large number of wounded, thereby establishing the allegations in paragraph 4.9 of the Indictment[605]. The Appeals Chamber cannot find any error in this finding or in the Trial Chamber's treatment of Witness QQ's evidence.

377. Elizaphan Ntakirutimana further alleges that the Trial Chamber "did not find a single Prosecution witness unreliable", but "disposed of all the alibi testimony" of the Appellants[606]. The Appeals Chamber notes that the Trial Chamber time and exercised caution in weighing witness testimony[607]. During the trial, both the Prosecution and the Defence had every opportunity to cross-examine witnesses, and the Trial Chamber took into account the totality of witness testimony, as well as challenges from both opposing parties, in assessing witness credibility. In its Judgement, the Trial Chamber extensively reviewed the testimony of each witness, and provided extended reasons when determining the reliability and credibility of individual witnesses. Thus, the Trial Chamber addressed this issue and Elizaphan Ntakirutimana raises no doubts as to the reasonability of its findings. Accordingly Elizaphan Ntakirutimana has not shown that the Trial Chamber erred in this regard.

378. Elizaphan Ntakirutimana specifically challenges the credibility of Witness KK[608]. The Appeals Chamber notes that the Trial Chamber approached Witness KK's testimony with extreme caution, going so far as to state "[the Trial Chamber] will not place great weight on Witness KK's testimony because of doubts created by the discrepancies between the testimony and his previous statement[609]. Elizaphan Ntakirutimana does no more here than indicate a discrepancy already considered by the Trial Chamber. No new element is presented and the Appellant does not raise any doubt as to the reasonability of the Trial Chamber's findings. This contention is therefore without merit.

379. Elizaphan Ntakirutimana attempts to introduce new evidence in order to discredit Witness UU[610]. The Trial Chamber recalls that there is a settled procedure for the introduction of additional evidence on appeal[611]. The procedure was not followed here. The Appeals Chamber will therefore not consider the new evidence sought to be introduced by the Appellant.

380. As to the contention that there existed a "political campaign" against the Appellants, this is addressed below[612].

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[603] Trial Judgement, n. 477.
[604] *Ibid*.
[605] Trial Judgement, § 337.
[606] Appeal Brief (E. Ntakirutimana), p. 61.
[607] See, e.g., Trial Judgement, §§ 151, 360, 421, 429, 548.
[608] Appeal Brief (E. Ntakirutimana), p. 62.
[609] Trial Judgement, § 267.
[610] Appeal Brief (E. Ntakirutimana), p. 62.
[611] ICTR Rules, Rule 115.
[612] See infra Section V.

G. Failure of the Prosecution to provide notice

381. Elizaphan Ntakirutimana asserts that, as a rule, the Prosecution failed to give the Defence notice of the acts with the Appellants were charged, and that as a result the Appellants should not have been tried for acts where notice was not provided[613]. The Appeals Chamber has already addressed this issue above[614].

H. Defence testimony raised a reasonable doubt

1. Mugonero Complex : 16 April 1994

382. Regarding the events on the morning of 16 April 1994, Elizaphan Ntakirutimana submits that the alibi of the Appellants is confirmed by the witness statement of Rachel Germaine[615]. He submits that the claims that he conveyed attackers to the Mugonero Complex have been "devastated" by the Trial Chamber's findings, concessions of the Prosecution, and the alibi evidence[616].

383. These arguments have been rendered moot in light of the Appeals Chamber's findings on the lack of notice for the allegation that Elizaphan Ntakirutimana conveyed attackers to the Mugonero Complex on 16 April 1994.

2. Gishyita : From 16 April 1994 to end of April or beginning May 1994

384. Elizaphan Ntakirutimana asserts that the Trial Chamber had no basis on which to find that the alibi witnesses fabricated their evidence so as to assist the Appellants[617]. Elizaphan Ntakirutimana refers specifically to paragraph 467 of the Judgement which reads in part as follows :

> All the alibi witnesses were friends or acquaintances of the Accused, and the Chamber believes that there was a degree of fabrication on the part of most of these witnesses in an endeavour to assist the Accused.

385. The Appeals Chamber notes that the Trial Chamber did not hold that "all eight alibi witnesses (4, 5, 6, 7, 12, 16 and 32, and Royisi Nyirahakizimana) had fabricated their evidence", as alleged by Elizaphan Ntakirutimana in his Appeal Brief[618]. Instead, the Trial Chamber noted its general view that there was "*a degree of* fabrication on the part of *most* of these witnesses…"[619]. However, this does not appear to have been the reason for finding that the alibi evidence did not create a reasonable possibility that the Appellants were not at the locations in Murambi and Bisesero where Prosecution witnesses testified to having seen them during that period. The Trial Chamber evaluated separately the testimony of each Defence witness relating to the Gishyita period of the alibi and then considered whether the evidence as a whole created an

[613] Appeal Brief (E. Ntakirutimana), pp. 63-64.
[614] See supra Sections II.A.(b) and III.C.
[615] Exhibit n° P43B.
[616] Appeal Brief (E. Ntakirutimana), pp. 64-66.
[617] *Ibid.*, pp. 69-70.
[618] *Ibid.*, p. 70.
[619] Trial Judgement, §467 (emphasis added).

alibi for the Appellants. The Trial Chamber found that the alibi witnesses' evidence did not create a reasonable possibility that the Appellants never left Gishyita during the period in question[620]. In the view of the Appeals Chamber, neither this finding nor the approach employed by the Trial Chamber to reach it has been shown to be erroneous.

3. Return to Mugonero : end of April to mid-July 1994

386. Elizaphan Ntakirutimana submits that thirteen Defence witnesses and the Appellants gave evidence in support of the alibi during the period he is said to have travelled almost daily to Bisesero to participate in attacks. He contends that the Trial Chamber disregarded Defence witnesses' evidence because it was either not significant or exaggerated, yet accepted "exaggerated, improbable and unbelievable" testimony presented by Prosecution witnesses. Elizaphan Ntakirutimana additionally contends that, in evaluating the alibi, the Trial Chamber placed undue emphasis on the need for a precise accounting of the time. In conclusion, he asserts that if Defence evidence taken with all the evidence in the case succeeds in raising a reasonable doubt as to his guilt then he must be acquitted[621].

387. With regard to alibi evidence for the period from the end of April to mid-July 1994, the Trial Chamber evaluated separately the testimony of each Defence witness and then considered whether the evidence as a whole created an alibi for the Appellants. The Trial Chamber has held that the Defence witnesses' evidence for this period did not create a reasonable possibility that the Appellants were not at locations outside Mugonero as alleged by Prosecution witnesses[622].

388. The Defence sought to establish that the daily routine of the Appellants was comprised of a rigid pattern of work and church. However, most of the thirteen witnesses, though testifying that they saw the Appellants on a frequent or daily basis, indicated in their testimonies that there were exceptions and deviations from this pattern. The Trial Chamber has found that the testimonies of the Defence witnesses drew a picture, in accordance with which the Appellants "were at their respective workplaces on weekdays, and at church on Saturday – except when they were not"[623]. This is a reasonable assessment of the record.

389. In the view of the Appeals Chamber, it has not been shown that the Trial Chamber erred in assessing whether the alibi evidence created a reasonable possibility that the Appellants were not at the locations outside Mugonero as alleged by the Prosecution witnesses or that the Trial Chamber failed to assess this evidence even-handedly.

4. Error of law by drawing an adverse inference

390. Elizaphan Ntakirutimana contends that the Trial Chamber erred in law by drawing an adverse inference from the fact that the Appellants testified at the end of

[620] *Ibid.*, §§469-480.
[621] Appeal Brief (E. Ntakirutimana), pp. 70-72.
[622] Trial Judgement, §§481-530.
[623] *Ibid.*, §519.

their trial[624]. Elizaphan Ntakirutimana submits that such inference is without foundation and necessarily implies that the Trial Chamber was of the view that the Appellants fabricated their evidence, thereby undermining their credibility. Elizaphan Ntakirutimana contends that this legal error resulted in a miscarriage of justice with respect to all the charges because the Appellants' evidence was not fairly evaluated[625].

391. In assessing evidence, a trier of fact is required to determine its overall reliability and credibility[626]. Writing about a Trial Chamber's assessment of documentary evidence tendered by an accused in support of his alibi, the Appeals Chamber in *Musema* stated the following :

> It is correct to state that the sole fact that evidence is proffered by the accused is no reason to find that it is, *ipso facto*, less reliable. Nevertheless the source of a document may be relevant to the Trial Chamber's assessment of the reliability and credibility of that document. Where such a document is tendered by an accused, a Trial Chamber may determine, for example, if the accused had the opportunity to concoct the evidence presented and whether or not she had cause to do so. This is part of the Trial Chamber's duty to assess the evidence before it[627].

392. In the present case the Trial Chamber made the following general observation :

> The Chamber also notes that the two Accused chose to testify at the very end of the case, and thus did so with the benefit of having heard the evidence presented by the other Defence witnesses. The Chamber has taken this factor into account in considering the weight to be accorded to the evidence given by the Accused[628].

393. The Appeals Chamber finds no error in such an approach. In weighing evidence, a trial chamber, must consider, *inter alia*, the context in which it was given, including, in respect of testimony, whether it was given with the benefit of having heard other evidence in the case. When an accused testifies in support of his or her alibi after having heard other alibi evidence, a trial chamber is obligated to take this into account when assessing the weight to be given to such testimony. Along this line, the ICTY Appeals Chamber stated the following during contempt proceedings against Mr. Vujin, a former counsel :

> The Appeals Chamber also considers it right to say to Mr. Vujin that he decides to testify not at the beginning but at some later stage, then the Appeals Chamber, in evaluating his evidence, would have to take into account the fact that he had listened to the testimony given by all the Defence witnesses[629].

394. Accordingly, the appeal on this point is dismissed.

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[624] Appeal Brief (E. Ntakirutimana), pp. 72-73.
[625] *Ibid.*
[626] *Musema* Appeal Judgement, § 50.
[627] *Ibid.*
[628] Trial Judgement, § 467. See also id., § 508.
[629] *Prosecutor v. Tadic*, Case n° IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, § 129 ("The Respondent had been told by the Appeals Chamber that, in evaluating his evidence if it were given after that of his own witnesses, it would take into account the fact that he had heard that evidence before giving his own"); T.9 September 1999, p. 1373.

5. Alibi of Gérard Ntakirutimana for the morning of 16 April 1994.

395. The last allegation Elizaphan Ntakirutimana makes with regards to the 16 April 1994 findings is that the Trial Chamber shifted the burden of proof in assessing Gérard Ntakirutimana's alibi for that morning. This is merely a repetition of an identical allegation made in Gérard Ntakirutimana's Appeal Brief[630]. Elizaphan Ntakirutimana does, however, add one specific allegation, namely that the Trial Chamber failed to acknowledge testimony by Prosecution Witnesses XX and GG, which, in his view, tend to provide Gérard Ntakirutimana with an alibi.

396. The Appellant does not provide sufficient detail to enable the Appeals Chamber to consider his contention that the Trial Chamber failed to acknowledge relevant testimony of Witness GG. Elizaphan Ntakirutimana's brief states that "GG has Doctor Gérard at his father's house after the whites left…"[631]. However, the transcript reference given for this quotation in the brief is for a different witness, Witness DD. As has been repeatedly stated; "In order for the Appeals Chamber to assess the appealing party's arguments on appeal, the appealing party is expected to provide precise reference to relevant transcript pages … to which the challenge is being made"[632]. Absent a specific reference, the Appeals Chamber cannot be expected to consider the given submission[633].

397. The Appellant also argues that the Trial Chamber failed to acknowledge the testimony of Witness XX that Gérard Ntakirutimana began staying at his father's house from 12 April 1994[634]. In the section dealing with the alleged denial of treatment of Tutsi patients, the Trial Chamber recalled the testimony of Witness XX that on 13, 14 and 15 April 1994 he did not see Gérard Ntakirutimana at the hospital and that he was living at his father's"[635]. The Appeals Chamber finds no error in the fact that the Trial Chamber did not expressly recall this testimony later in the Judgement when discussing Gérard Ntakirutimana's alibi for 15 and 16 April, as it is clear that the Trial Chamber was aware of and has considered Witness XX's evidence. Accordingly, this ground of appeal is dismissed.

I. Failure to consider the Appellants' Motion to Dismiss

398. The Appellants submit that the Trial Chamber erred in denying their Pre-Trial Motion to Dismiss[636]. The Motion was predicated on the following grounds : (1) that the trial would violate the fundamental rights of the Accused to present their defence and confront witnesses against them[637]; (2) that the proceedings against the Accused

[630] See Appeal Brief (G. Ntakirutimana), § 29 (a).
[631] Appeal Brief (E. Ntakiutimana), p. 74.
[632] Niyitegeka Appeal Judgement, § 10.
[633] *Ibid*.
[634] Appeal Brief (E. Ntakirutimana), pp. 73-74.
[635] Trial Judgement, § 147 citing T. 22 October 2001, pp. 97-99.
[636] Appeal Brief (E. Ntakirutimana), p. 84.
[637] Motion to Dismiss, 16 February 2001, p. 13. The Appeals Chamber notes that while the original Motion was raised as a "Motion to Dismiss or, in the Alternative, Supplemental Motion for the Production and Disclosure of Evidence and Other Discovery Materials", the Appellants allege error only with regards to the Trial Chamber's rejection of "The Accused's Motion to Dismiss". (Appeal Brief (E. Ntakirutimana), p. 84).

would violate guarantees of equal protection and prohibitions on discrimination enshrined in the Universal Declaration oh Human Rights and the International Covenant on Civil and Political Rights[638]; (3) that the proceedings would violate guarantees of independence and impartiality in criminal proceedings also guaranteed by the UDHR and the ICCPR[639]; and (4) that the Charter of the United Nations does not empower the Security Council to establish a criminal court such as the Tribunal[640].

399. The Appellants now contend that the Motion to Dismiss should be "continuously considered in light of the developing law and facts", and so should be considered anew by the Appeals Chamber despite its denial at trial[641]. However, the Appellants do not point to any area of law or specific facts that have changed significantly since trial such that renewed consideration of the Motion would be warranted. Moreover, the Appeals Chamber finds that the Trial Chamber's reasoning in the Motion was sound, and its decision to reject the Motion was in line with established jurisprudence of both the Tribunal and the ICTY. Therefore, this ground of appeal is dismissed.

IV. Common ground of Appeal on the Existence of a Political Campaign against the Appellants

400. Elizaphan Ntakirutimana and Gérard Ntakirutimana argue that the Trial Chamber erred by not ruling that physical and testimonial evidence presented at trial demonstrated that there existed a political campaign aimed at falsely incriminating them, and that such campaign created a reasonable doubt in the case of the Prosecution[642].

401. In support of this ground of appeal, the Appellants revisit the evidence that they presented at trial, and contend that this evidence proves the very existence of the political campaign. The Appellants rely on Exhibits ID41A, a film narrated by a certain Assiel Kabera, and P29, a publication by *African Rights* entitled "Charge Sheet n° 3 : Elizaphan Ntakirutimana"[643], as well as the testimony of Witnesses 9 and 31. The Appellants suggest that Assiel Kabera, a former Prefect of Kibuye, his brother Josue Kayijabo, IBUKA (a survivor's organisation in Rwanda) and *African Rights* campaigned to "vilify and secure the indictment of [Gérard Ntakirutimana and Elizaphan Ntakirutimana] on fabricated charges". They submit that this campaign led Prosecution Witnesses FF, GG, HH, KK, YY, SS, MM, DD, CC and II to make false allegations at trial, thereby calling into question their credibility[644].

[638] *Ibid*., p. 24.
[639] *Ibid*., p. 30.
[640] *Ibid*., p. 36.
[641] Appeal Brief (E. Ntakirutimana), p. 84.
[642] Id. In the Trial Judgement, the Trial Chamber found that «the arguments advanced by the Defence under this section, taken individually or collectively, fail to create a reasonable possibility that the Accused were subject to a campaign of false incrimination, having any bearing on this case". Trial Judgement, § 177.
[643] "Charge Sheet n° 3, Elizaphan Ntakirutimana, U.S. Supreme Court Supports Extradition to Arusha", report of African Rights, dated 1 February 2000 and tendered on 2 November 2001 as Exhibit P29.
[644] Appeal Brief (E. Ntakirutimana), p. 76.

A. Assessment of the Appellants' witnesses and evidence

1. Witness 9

402. The Appellants argue that Defence Witness 9 provided incontrovertible proof of the existence of a political campaign against them. The Appellants refer to Witness 9's testimony that he saw the then Prefect Assiel Kabera, Witnesses FF and GG and others attend four clesed meetings between November 1994 and March 1995 "to secure indictments against the Appellants", as well as seeing Witness FF at a public meeting during which accusations were levied against three individuals. In addition, the Appellants refer to the witness's testimony that a certain Edison Munyamulinda was allegedly beaten for failing to add his name to a list of persons who were making false accusations against Gérard Ntakirutimana. They contend that the witness's testimony is corroborated by the evidence of Witnesses QQ, and 31, and Exhibits P29 and ID41A[645].

403. The Trial Chamber assessed the evidence of Witness 9 at length in its Judgement. Regarding the closed meetings attended by Witnesses FF and GG and Kabera, it noted that Witness 9 did not personally know what had been discussed during the actual meetings, the witness having testified that he did not attend any of them[646]. In addition, it reasoned that meetings held during and after November 1994 were not relevant to the Appellants given that they had left Rwanda in July 1994 and that Witness 9 alleged that the objective of the meetings was to plan the arrest of people they did not like within the region[647]. Finally, the Trial Chamber considered the only evidence which may have suggested that the meetings were held to falsely accuse individuals, that of a confrontation between the witness and an individual – neither Witness FF nor GG – who, having come out of a bar, allegedly tried to obtain more beer by threatening the witness to "do what he had done to others", citing the name of Elizaphan Ntakirutimana[648]. The Appeals Chamber notes that Witness 9 testified that he did not know what the man intended to do and that the man never said what it was that he would do[649].

404. The Trial Chamber concluded that even these events to have occurred as described by Witness 9,

> "a vague suggestion of false accusation does not … amount to a reasonable probability that the Accused was a victim of a propaganda campaign"[650].

405. The Trial Chamber also examined Witness 9's testimony that a man was assaulted for failing to make false accusations against Gérard Ntakirutimana[651]. The Trial Chamber noted however that upon cross-examination Witness 9 testified to an

[645] *Ibid*., pp. 82-83.
[646] Trial Judgement, §762.
[647] *Ibid*., §766.
[648] *Ibid*., §761; T. 29 April 2002, pp. 86-88; T. 30 April 2002, pp. 66-69.
[649] T. 29 April 2002, p. 86; T. 30 April 2002, p.68.
[650] Trial Judgement, §766. The Appeals Chamber notes that the Trial Chamber used the words "reasonable probability" rather than "reasonable possibility". However, such word choice, when viewed contextually, appears to be a merely a typographical mistake. The standard adopted and consistently applied by the Trial Chamber is one of reasonable possibility.
[651] Trial Judgement, §§764-767.

alternative explanation for the assault on Munyamulinda, which was not related to his refusal to accuse Gérard Ntakirutimana[652]. It added that, in any case, the incident occurred sometimes in September 1994 while the meetings involving Kabera and Witnesses FF and GG not commence until November 1994[653], and that Munyamulinda was not a Prosecution witness. Further, the Trial Chamber noted that Witness 9 never stated that Munyamulinda was pressured to make "false" accusations[654]. Accordingly, the Trial Chamber found that the assault was, at most, an isolated incident and did not create a reasonable possibility of a political campaign against the Appellants. It added moreover that no connection had been shown to exist between the assault on Munyamulinda and the Prosecution's case[655].

406. In their submissions, the Appellants have merely restated evidence already heard by the Trial Chamber, and sought only to present their interpretation of the evidence without addressing the findings of the Trial Chamber. In light of the evidence, the Appeals Chamber sees no reason to disturb the findings of the Trial Chamber in relation to the evidence of Witness 9.

2. Witness 31.

407. The Appellants argue that the Trial Chamber erred in ruling that the testimony of Witness 31 did not demonstrate a reasonable possibility of the existence of an organized campaign of false incrimination[656]. They claim that Wtness 31 provided clear evidence linking Assiel Kabera to the creation of unsupported, politically motivated lists of alleged *génocidaires* that later led to their indictment[657]. Additinally, the Appellants point to Witness 31's testimony that Josue Kayijaho of IBUKA and Rakiya Omaar of *African Rights* visited the Minister of Justice shortly after the publication of the lists[658]. The Appellants contend that Witness 31's evidence provides a "direct link" between the African Rights report, Exhibit P29, the "propaganda" film, Exhibit ID41A, and the tainted oral testimony of Witness QQ that was a direct result of these exhibits, and that it corroborated Witness 9's evidence about the meetings between Witnesses FF, GG and Kabera[659].

408. The Appeals Chamber notes that, as wish much of the Appellants' appeal on the existence of a political campaign, in their submissions on Witness 31, the Appellants again do not specifically address the findings of the Trial Chamber to show their unreasonableness. Rather, they simply recall the evidence of Witness 31 and suggest conclusions which differ from those of the Trial Chamber.

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[652] T. 30 April 2002, p. 69, Witness 9 testified, "Now, coming to details, the fact that he was beaten up in public, that was not told to me because I myself was present at the spot. Now, as for what he told me regarding the reason for his beating, he told me that because the person whom he had wronged had pardoned him in public, but later on he was beaten up in public using the same pretext".

[653] T. 29 April 2002, p. 119.

[654] Trial Judgement, §767.

[655] *Ibid.*

[656] Appeal Brief (E. Ntakirutimana), p. 84.

[657] *Ibid.*, p. 83.

[658] *Ibid.*, p. 84.

[659] *Ibid.*

409. In considering the testimony of Witness 31, the Trial Chamber carefully reviewed the witness's evidence that, while working for the Rwandan Minister of Justice, Witness 31 handled files which contained lists of names received from Kabera and other persons. The Trial Chamber noted that according to the witness the lists entitled "List of *Génocidaires*" or "Lists of people who were involved in genocide", "who killed", "who raped", "who looted", "those who ate cows", and only had basis identification of individuals. It further noted from the witness's testimony that the Minister of Justice titled the document "List of Alleged *Génocidaires*", and agreed that no charges should be included on the list, as this task of a prosecutor. The Trial Chamber remarked that the witness did not mention having seen the names of the Appellants on the list and did not suggest that the lists were false accusations by Kabera or anyone else[660].

410. The Appellants have raised no new issues relating to this and fail to show that the Trial Chamber unreasonably committed an error in its findings on Witness 31. The Appeals Chamber notes that the evidence of Witness 31 does not support the Appellants' claim of the existence of a political campaign to falsely accuse them. The evidence does show that in the last quarter of 1994, the Ministry of Justice compiled a list of persons who were alleged to have committed offences during the massacres. The names of 400 persons appeared on the list, including former ministers, prefects, members of parliament and authorities. However, although Assiel Kabera provided the Ministry with details of possible suspects, the witness testified that there were many papers in addition to his on which appeared the names of possible suspects. Further, her testimony does not indicate that people on the documents had falsely accused. More importantly, the witness did not testify to seeing the names of the Appellants[661]. In view of the facts presented, therefore, and absent convincing arguments from the Appellants, the Appeals Chamber considers that the Trial Chamber's evaluation of the lists and of Kabera's relationship to them is reasonable and need not be disturbed.

411. While the Trial Chamber did not find explicitly on the topic of Josue Kayijaho and Rakiya Omaar's purported visit to the Minister of Justice, it is reasonable to assume that the Chamber took this into account it in its overall evaluation of the political campaign. The evidence shows that the meeting lasted only long enough for Kayijabo and Omaar to greet the Minister and leave[662], and Witness 31 does not testify to their having any known political motivation. The Appellants have simply reiterated their interpretation of the evidence, and do not present a valid challenge to the reasonability of the Trial Chamber's finding. The Appeals Chamber therefore rejects this element of their appeal.

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[660] T. 15 April 2002, pp. 76-94; Trial Judgement, §§769-770.

[661] *Ibid*., §771. The Trial Chamber found «There is no indication that the list from Assiel Kabera was the product of a campaign of false incrimination; there is no evidence connecting Kabera's list to the two Accused; and there is no evidence that the compilation of lists by the Rwandan Minister of Justice in late 1994, as described by Witness 31, has somehow tainted subsequent investigations by the Prosecutor of the Tribunal".

[662] T. 15 April 2002, P.111.

3. Film ID41A

412. The Appellants argues that the Trial Chamber erred in failing to find that film ID41A showed the possibility of a politically motivated campaign against them[663]. They submit that the film was vicious propaganda directed against Elizaphan Ntakirutimana[664].

413. The Trial Chamber points out that, from the evidence of the Appellants, the film was probably taken in April 1995, although Witness 9 suggested that it may have been produced after July 1995. The Trial Chamber notes that the film opens with a narration, allegedly by Assiel Kabera, stating that Elizaphan Ntakirutimana was present during the killing at the ESI Chapel. Prosecution Witnesses FF and MM are seen speaking on the film, but the content of their statements was not made available to the Trial Chamber by the Defence[665].

414. The Appellants' argument seems to be, first, that the film shows that Kabera intended to falsely incriminate Elizaphan Ntakirutimana, and, second, that Kabera's pronouncements would have had a far reaching effect in Rwandan society

> "with an oral tradition of a simple largely illiterate population, where people often do not distinguish between what they see and what they hear and believe"[666].

Yet the evidence would appear to contradict the Appellants' arguments. As the Appellants point out, neither Witness FF nor Witness MM, who appeared on the film, claimed in their witness statements or testimony that they saw either Appellant at the ESI Chapel on 16 April 1994. Although this might suggest that Kabera's statements about Elizaphan Ntakirutimana's involvement may have been untrue, it did not lead Witnesses FF and MM to subsequently incriminate Elizaphan Ntakirutimana. Additionally, as the Trial Chamber noted, Witness 9, who viewed the film prior to testifying, recalled a voice near the middle of the video stating that "Pastor Ntakirutimana had done nothing in regard to the events of 1994"[667]. The Appeals Chamber agrees with the Trial Chamber, that had this film been intended to be part of a campaign of false incrimination, it would not likely have contained exculpatory statements of this kind[668].

415. In light of the evidence, the Appeals Chamber does not view the Trial Chamber's finding that, even if Kabera made allegations against Elizaphan Ntakirutimana and asked Witness FF to speak about the attack on Mugonero, no other related evidence supports the idea that film ID41A was part of a campaign against the Appellants, or that it tainted the Prosecution's case, to be unreasonable[669]. The Appellants offer no new argument to the contrary. Their contentions on this point are thus rejected.

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[663] Appeal Brief (E. Ntakirutimana), pp. 77-80, 82-84.
[664] *Ibid*., p. 84.
[665] Trial Judgement, §§754-772.
[666] Appeal Brief (E. Ntakirutimana), p. 78; Trial Judgement, §772.
[667] Trial Judgement, §772; T. 29 April 2002, p. 156; T. 30 April 2002, pp. 96-97.
[668] Trial Judgement, §772.
[669] *Ibid*., §773.

4. African Rights booklet P29

416. The Appellants argue that the Trial Chamber erred in failing to find a reasonable possibility of an organized smear campaign from Exhibit P29, a booklet published by *African Rights*[670]. They submit that the repeated quotes by Prosecution Witnesses FF, GG, HH, II, KK, MM, SS and YY are generally extreme and inconsistent or contradictory with their trial testimony[671]. The Appellants contend that every page of the issue concerning Elizaphan Ntakirutimana contains "obvious editorial and quoted false propaganda", and urge the Appeals Chamber to read the edition with care[672]. The Appellants finally assert impropriety and collusion in the fact that many of those interviewed by African Rights later became Prosecution witnesses[673].

417. The Trial Chamber made reasonable findings on each of these issues. Noting the symptomatic nature of witness inconsistencies in Tribunal cases, the Trial Chamber maintained that the Appellants had not demonstrated how such inconsistencies, while pertaining to individual credibility, had genuine bearing on a "concerted effort to fabricate evidence against the Accused"[674]. Despite the Appellants' exhortations, the Appeals Chamber will not review the trial evidence *de novo*. Even if there were some merit in the arguments of the Appellants that the contents of the report are at times extreme and inconsistent with the witnesses' subsequent testimony at trial, this alone does not establish that the Prosecution case was tainted or that the witnesses' evidence was unreliable. In the view of the Appeals Chamber, the Trial Chamber, as fact finder, made reasonable conclusions based on the evidence presented. All of the witnesses in question who the Appellant submits formed part of the political campaign and who are quoted in the report had their evidence tested by the parties and the Trial Chamber. Additionally, the Trial Chamber found that the Appellants have failed to establish in any non-speculative way how giving an interview to African Rights prior to testify before the Tribunal indicates a campaign of deceit of the sort that would taint the Prosecution's case[675]. Accordingly, the Appeals Chamber considers that the Trial Chamber's findings in relation to Exhibit P29 are reasonable.

B. Appellants' challenges to credibility of Prosecution Witnesses

418. In addition to the argument that there existed a political campaign instigated by Assiel Kabera and others, the Appellants contend that the Trial Chamber erred in its assessment of the credibility of Prosecution witnesses. The Appellants argue that, motivated by political propaganda, Prosecution Witnesses GG, HH, KK, YY, SS, FF, MM, DD, CC and II fabricated allegations, testimony, or both[676]. The Appellants point to inconsistencies and discrepancies in the testimony of Prosecution witnesses, and submit

[670] Appeal Brief (E. Ntakirutimana), p. 79.
[671] *Ibid*.
[672] *Ibid*.
[673] *Ibid*., p. 80.
[674] Trial Judgement, § 774.
[675] *Ibid*.
[676] Appeal Brief (E. Ntakirutimana), pp. 76, 79.

that the Trial Chamber erred in failing to "make adverse credibility findings" regarding Prosecution witnesses and in relying on testimony given by such witnesses[677].

419. The Appellants allege that inconsistencies in testimony of the various witnesses are evidence of political pressure on witnesses, and thus reinforce their contention of a political campaign to falsely incriminate them. Furthermore, the Appellants point to the very identities and associations of the witnesses as evidence of their political motivations. The Appellants' theory is that the Trial Chamber erred in relying on the testimony of these witnesses, whether for their alleged political motivations, or for their inconsistent testimony (in itself evidence of a political campaign, according to the Appellants).

420. As detailed below, the Appellants generally fail to show individual discrepancies or inconsistencies in testimony prove a concerted propaganda campaign against them. While such inconsistencies may call into question the credibility of a witness's testimony, the Trial Chamber has already dealt with each of the allegations. The same can be said of links between witnesses and groups or individuals seeking indictment or prosecution of the Appellants : while probative of the credibility of a witness's testimony, and duly noted by the Trial Chamber, such alleged associations do not prove the existence of an organized political campaign against the Appellants.

421. The Appeals Chamber reviews below each of the Appellants' challenge to the credibility of said Prosecution witnesses.

1. Witness GG

422. The Appellants claim, *inter alia*, that Witness GG could not reasonably been found credible since he had long been acquainted with Assiel Kabera[678]. The Appellants, quoting from the African Rights report discussed above, allege that the Witness GG made false claims against Elizaphan Ntakirutimana because of a desire to "destroy [the Appellant Elizaphan], whom he called 'evil'"[679]. They categorize him as "early participant" in the alleged campaign, eager to have the Appellants convinced on false testimony[680]. In addition, the Appellants submit that Witness GG had attended IBUKA meetings and talked to IBUKA representatives, although the witness denied this at trial[681].

423. The Trial Chamber found that Witness GG knew Assiel Kabera and met with him in early 1995. However, since the Appellants presented no convincing evidence pertaining to the content of the meetings, the Trial Chamber accepted Witness GG's testimony that he and Kabera had not discussed the war[682]. Additionally, the Trial Chamber found only "limited significance" in the fact that *African Rights* interviewed Witness GG, nothing that in the aftermath of the genocide, many human right organizations interviewed survivors[683]. As the Appeals Chamber noted above, even if Wit-

[677] *Ibid.*, p. 31.
[678] Appeal Brief (E. Ntakirutimana), pp. 8-9.
[679] *Ibid.*, pp. 9, 81.
[680] *Ibid.*, pp. 46-47.
[681] Appeal Brief (G. Ntakirutimana), §§112-116.
[682] Trial Judgement, §237; T.25 September 2001, p. 51.
[683] Trial Judgement, §237.

ness GG's statements to *African Rights* were to be deemed questionable, this alone would not suffice to call into question his credibility. The Witness's evidence was tested at trial by the parties and the Trial Chamber. The allegations of the Appellants that the witness "wanted to destroy them" as part of a political campaign, were considered by the Trial Chamber who found no basis for such claims. In the absence of any arguments from the Appellants that differ from those presented at trial, the Appeals Chamber finds the Trial Chamber's credibility evaluation of Witness GG reasonable.

2. Witness HH

424. The Appellants claim, inter alia, that Witness HH could not have reasonably been found credible since he first denied, then admitted to being a cousin of Assiel Kabera, with whom he met while Kabera was prefect of Kibuye[684]. The Appellants cast doubt on Witness HH's credibility by stating that he listed Josea Niyibize, a brother of Kabera, as his contact person in a 2 April 1996 witness statement[685]. They suggest that the witness was intimately involved with people who were determined to destroy the Appellants, and cite a discrepancy between the *reported* contends of an *African Rights* interview with HH and his in-court testimony as evidence in this regard[686].

425. The Trial Chamber took into account Witness HH's inconsistent testimony regarding his relation to Kabera, noting the fact that Witness HH corrected himself under cross-examination to state that he was related to Kabera and had known him for a long time[687]. Recalling that Kabera had been a prominent figure as prefect of Kibuye, the Chamber found no evidence suggestion that meetings between Witness HH and Kabera had influenced HH's witness statements or testimony[688]. Furthermore, the Trial Chamber included in its analysis the fact that Witness HH listed his cousin, a brother of Kabera and alleged member of IBUKA, as contact reference for his written statement of 2 April 1996[689]. The witness denied having knowingly communicated with either IBUKA or the RPF, and the Appellants failed to raise contrary evidence at trial[690]. In regard to the Appellants' argument that Witness HH was part of a group with *African Rights* set on destroying the Appellants, the Trial Chamber stipulated that during Witness HH's testimony, neither the Prosecution nor the Defence addressed his brief statements in *African Rights*[691]. The Trial Chamber concluded its analysis by findings

> "no support for the Defence contention that Witness HH was part of a political 'campaign' to falsely convict and accuse the two Accused"[692].

[684] Appeal Brief (E. Ntakirutimana), p. 19.
[685] *Ibid.*; Appeal Brief (G. Ntakirutimana), §46.
[686] *Ibid.*; Appeal Brief (E. Ntakirutimana), pp. 19, 81.
[687] Trial Judgement, §253; T. 27 September 2001, pp. 132-134.
[688] Trial Judgement, §253.
[689] *Ibid.*
[690] *Ibid.*
[691] *Ibid.*, §254.
[692] *Ibid.*

The Appellants have raised no new arguments with regards to Witness HH's connection to a political campaign. The Appeals Chamber therefore finds the conclusions of the Trial Chamber to have been reasonable.

3. Witness KK

426. The Appellants claim, *inter alia*, that the Trial Chamber could not have reasonably found Witness KK credible due to discrepancies between statements he gave to *African Rights* and his in-court testimony[693]. Additionally, the Appellants claim impropriety in Witness KK's friendship with YY and the fact that both witnesses gave statements to *African Rights* on 17 November 1999, and gave their first statements to the Tribunal in October and November, respectively, of the same year[694]. The Appellants do not explain how these facts connect Witness KK to a political campaign.

427. The Trial Chamber extensively evaluated Witness KK's credibility and testimony[695]. It noted, generally, that the Appellants claimed the witness was not credible because of his alleged participation in a political campaign against Elizaphan Ntakirutimana[696]. The Trial Chamber also considered the question of the time at which the witness saw Elizaphan Ntakirutimana with Obed Ruzindana near the ESI Church, and found the related inconsistencies of little significance in light of the amount of time that had passed since the events[697]. Additionally, while accepting that Witness KK's testimony on this issue corroborated evidence from other witnesses, the Trial Chamber did "not place great weight on [it] because of doubts created by the discrepancies"[698]. The Appellants do not here substantiate their allegation that such inconsistencies were "[lies] to destroy Pastor Ntakirutimana"[699]. The Trial Chamber demonstrated that it took such allegations into consideration while evaluating Witness KK's credibility and came to a reasonable conclusion.

428. In regards to allegations of improper connections between Witness KK and Witness YY, while the Trial Chamber does not specifically address the issue, it does note that Witness KK and Witness YY listed each other as contact persons, and that Witness YY held public office at the local level and was therefore easy to contact[700]. While Elizaphan Ntakirutimana's Appeal Brief stresses the close relations between Witness KK and Witness YY, it fails to provide any new evidence of impropriety on the part of Witness KK. Indeed, Witness KK stated at trial that he did not talk to Witness YY concerning the investigation or the Tribunal[701]. The Appellants offers no argument to the contrary, but rather rely on reiterated facts and implications. Accordingly, the Appeals Chamber does not find the Trial Chamber's assessment of Witness

[693] Appeal Brief (E. Ntakirutimana), p. 20.
[694] *Ibid.*, p. 21.
[695] Trial Judgement, §§261-267, 544-549, 599-608.
[696] *Ibid.*, §§545, 600.
[697] *Ibid.*, §§265-266, "The Chamber is of the view that the variation in time is of little significance (8.00 instead of 7.00-7.30 a.m.), in view of the laps of time since the events".
[698] *Ibid.*, §267.
[699] Appeal Brief (E. Ntakirutimana), p. 21.
[700] Trial Judgement, §275.
[701] T. 4 October 2001, pp. 41-43.

KK's credibility unreasonable, even in light of the Appellants 'allegations of political influence or motivation.

4. Witness YY

429. The Appellants claim, inter alia, that the Trial Chamber erred in finding Witness YY credible[702]. They seem to allege collusion between Witness YY, KK and GG based on the temporal proximity with which the three witnesses gave statements to both Prosecution investigators and *African Rights*[703]. They claim that Witness YY had a politically motivated "animus and intention to destroy Pastor Ntakirutimana and Doctor Gérard" as evinced by statements to *African Rights* and that he was the leader of a second wave of political witnesses against the Appellants[704]. Finally, the Appellants cast aspersions on Witness YY, claiming he reserved his allegations against the Appellants for the last six lines of his witness statement with the intention of "holding his attack until the trial"[705].

430. The Trial Chamber took into account each of these allegations. As with Witness KK, the Appellants fail to bolster their claims linking Witnesses YY and KK or GG; their reliance on suggestion and implication creates neither a new nor a compelling argument. The Trial Chamber addressed the Appellants' claim that Witness YY started a "second wave of politically motivated witnesses"[706]. The Trial Chamber noted the Appellants' assertion that the first evidence of a political campaign took the form of the video recording ID41A[707], filmed on or around 16 April 1995. It then noted that Witness YY gave his statement on 25 October 1999, more than four and half years later[708]. The Appeals Chamber deems reasonable the Trial Chamber's conclusion on this matter : such an extend break between the alleged commencement of the campaign and the "second wave" of allegations is more indicative of the absence of an organized campaign than the existence of one[709]. With regards to Witness YY's previous statements, rather than viewing Witness YY's brief comments regarding Elizaphan Ntakirutimana and Gérard Ntakirutimana as indicia of *animus*, the Trial Chamber interpreted the last paragraph as likely evidence that Witness YY's interviewers, in conclusion, specifically asked him about the Appellants[710]. The Trial Chamber noted that were Witness YY involved in a political campaign against the Appellants, he would likely have made more damning statements about the Appellants, rather than merely describing their conduct in a cursory manner[711]. Such a conclusion is reasonable in the view of the Appeals Chamber.

[702] Appeal Brief (E. Ntakirutimana), p. 24.
[703] *Ibid*., p. 23.
[704] *Ibid*., pp. 23-24.
[705] *Ibid*., p. 25; Appeal Brief (G. Ntakirutimana), § 138.
[706] Trial Judgement, § 275.
[707] *Ibid*.
[708] *Ibid*.
[709] *Ibid.*
[710] *Ibid*.
[711] *Ibid*.

5. Witness SS

431. The Appellants claim, *inter alia*, that the Trial Chamber erred in finding Witness SS credible[712]. Gérard Ntakirutimana asserts that Witness SS's awareness of Philip Gourevitch's book[713] influenced his testimony and undermined his impartiality, making it impossible for the Trial Chamber to accept his testimony[714]. Additionally, the Appellants state that Witness SS listed a hospital co-worker, the son of Charles Ukobizaba, as his contact person; they highlight their incredulity at the witness's statement that he had not discussed the case with this man to whom they attribute "an obvious interest in securing the conviction of Gérard Ntakirutimana"[715].

432. The Trial Chamber noted the Appellants' general submission that Witness SS was of a political campaign[716]. Consequently, the Appeals Chamber deems it reasonable to assume that the Trial Chamber took the allegation into consideration when evaluating the witness's credibility, even if it did not expressly discuss the Appellants' specific allegations against Witness SS. The Appeals Chamber reiterates that in writing a reasoned opinion the Trial Chamber need not address every detail that influences its conclusion. In regard to Gourevitch's book and the letter mentioned therein, the Trial Chamber noted that Witness SS was but one of five Prosecution witnesses (Witnesses MM, YY, GG, HH and SS) who testified concerning the letter[717]. Witness SS only mentioned the book in his statement, and did not mention the book in his testimony. While the Apellants referenced the statement in their Closing Brief[718], they refrained from cross-examining the witness on this issue. The Appeals Chamber notes that the Trial Chamber found Witness SS generally credible, though it did find portions of his testimony unpersuasive[719]. While the Appellants continue to reject Witness SS's contention that he refrained from discussing the case with Charles Ukobizaba's son, the Appeals Chamber notes that the Appellants submit no evidence to contradict this assertion.

6. Witness FF

433. The Appellants claim, inter alia, that the Trial Chamber erred in finding Witness FF credible[720]. The Appellants contend that she constituted part of the second wave of witnesses organized by Kabera to falsely incriminate them[721]. The Appellants link Witness FF to Kabera and the alleged political campaign by evidence that she

[712] Appeal Brief (G. Ntakirutimana), §§119-120.
[713] Gourevitch, Philip, We Wish to Inform You that Tomorrow We Will be Killed With Our Families : Stories from Rwanda, 1998.
[714] Appeal Brief (G. ntakirutimana), §120.
[715] *Ibid.*
[716] Trial Judgement, §622.
[717] *Ibid.*, §§206-207.
[718] Defence Closing Brief, p. 158.
[719] Trial Judgement, §§392-393 (disbelieving SS's testimony that Gérard Ntakirutimana shot at him); §578 (finding SS's testimony that Elizaphan Ntakirutimana said that God ordered the killing and extermination of Tutsi).
[720] See generally Appeal Brief (G. Ntakirutimana), §§153-161.
[721] *Ibid.*, §154.

met with hi in late 1994 and 1995 and by her appearance in video recording ID41A[722]. The Appellants point to a scene in the video during which another interviewee, when asked how he knew a fact to be true pointed to Witness FF and said, "[s]he told me"[723]. Gérard Ntakirutimana claims Witness FF's testimony was "influenced or orchestrated", and points specifically to the fact that the witness's statements became increasingly detailed, in some instances implicating Gérard Ntakirutimana in court where the witness had not done so in earlier statements[724].

434. As discussed in relation to Witness YY, the Trial Chamber was unconvinced of the existence of a "second wave" of witnesses against the Appellants[725]. The Trial Chamber noted the Appellants' general contention that Witness FF participated in a political campaign[726]. However, regarding her association with Assiel Kabera, the Trial Chamber found that the witness denied discussing the genocide with him[727]. The Trial Chamber also noted that the witness avoided incriminating Gérard Ntakirutimana when she had insufficient basis to involve him and that she appeared credible in court[728].

435. With no new arguments nor a minimum showing of specific contradictory evidence from the Appellants, the Trial Chamber's credibility conclusions do no not seem unreasonable to the Appeals Chamber. Neither does the Trial Chamber's assessment of Witness FF's contribution to record ID41A. The Trial Chamber found nothing to undermine her credibility in the fact that she was interviewed as a survivor of the 16 April 1994 attack on the Mugonero Complex[729]. Furthermore, Witness FF testified to having been interviewed by a man named Raymond Rutabayira, not Assiel Kabera, and that she was unaware of anyone else in the film who made reference to her as a source of information[730]. Considering that the Appellants did not provide convincing arguments or evidence to refute this testimony, the Appeals Chamber does not find the Trial Chamber's conclusion to have been unreasonable. Similarly, the Trial Chamber's failing to find a connection between Witness FF and *African Rights* or any human rights organization[731] does not seem unreasonable.

[722] *Ibid*., §§154-155; Appeal Brief (E. Ntakirutimana), pp. 78-79, 82.
[723] Appeal Brief (G? Ntakirutimana), §155.
[724] *Ibid*., §194.
[725] The Trial Judgement, §275.
[726] *Ibid*., §§129, 537, 671.
[727] *Ibid*., §129; T. 1 October 2001, pp. 62-63 "Mr. Medvene : Didn't Assiel [sic] Kabera speak to you in 1995 about what occurred, to your knowledge, in April 1994? Witness FF : No, we did not speak about the events that took place in April 1994 … Mr. Medvene : And is it true, Madam Witness, that sometimes in 1995 Assiel [sic] Kabera asked you questions about your knowledge of the occurrences in April of 1994 while you were being videoed? Witness FF : No, I think the person to whom I spoke about these events was the sous-prefect [sic], but that sous-prefect was not from Kibuye originally".
[728] Trial Judgement, §542.
[729] *Ibid*., §129.
[730] T. 1 October 2001, pp. 68-69, 71-72.
[731] Trial Judgement, §129.

436. The Appeals Chamber notes that the Trial Chamber addressed at length the increasing detail and enlarged role of Elizaphan Ntakirutimana and Gérard Ntakirutimana presented by Witness FF in her later statements and testimony[732]. The Trial Chamber analyzed the claim in relationship to each specific event, finding the witness's testimony regarding events at the Mugonero Complex to have been credible[733]. With regards to events in Bisesero, the Trial Chamber, noting Witness FF's general consistency in placing Gérard Ntakirutimana as a participant in the shootings, specifically found that "the information about Bisesero in Witness FF's written statements and in her testimony does not indicate that she formed part of a campaign to ensure [Gérard Ntakirutimana's] conviction"[734]. The Trial Chamber reasonably reconciled inconsistencies[735]. With regards to events on Mutiti Hill, the Trial Chamber found Witness FF's testimony credible, pointing out that it was "clear and consistent [and] was not shaken under cross-examination"[736]. In light of the aforementioned explanations and in the absence of conflicting evidence or new arguments on the part of the Appellants, the Appeals Chamber does not find the Trial Chamber's evaluation of Witness FF's credibility and of the Appellants' argument that she formed part of a political campaign to have been unreasonable.

7. Witness II

437. The Appellants claim, inter alia, that the Trial Chamber erred in not concluding that testimony from Witness II provided "direct evidence of a witness being used as part of a campaign to falsely incriminate [Elizaphan and Gérard Ntakirutimana]". The Appellants point out that the witness bore striking similarities with an individual who gave a statement to African Rights on 19 November 1999[737].

[732] See generally Trial Judgement, §§127-130; footnote 160 reads "The first statement of 10 October 1995, is a general account of events at the Complex and Bisesero. The second, dated 14 November 1995, consists of responses to questions about Gérard Ntakirutimana. The third declaration of 10 April 1996 gives a description of the events at the Complex and in Bisesero. The fourth statement, signed on 21 October 1999, begins with the witness declaring that she had not been asked about rape or sexual offences in previous interviews. However, the interview provided no such information but contains another account of the Complex and Bisesero events. The fifth statement, dated 14 November 1998, relates to Alfred Musema and makes no reference to either Accused in the present case".

[733] Trial Judgement, §§128, 130.

[734] *Ibid*., §§541, 542.

[735] *Ibid*., footnote 898 reads "According to Witness FF's second statement of 14 November 1995, Gérard Ntakirutimana 'had a gun and was shooting people from the top of a hill' in the company of, among others, Mathias Ngirinshuti. The witness 'saw him several times'. It follows from her third statement of 10 April 1996 that she saw Gérard Ntakirutimana in 'several at Bisesero. He was always armed with a rifle and in company with Mathias Ngirinshuti', and she saw him in 'one attack actually shooting at people'. The fourth statement of 21 October 1999, which provides most details, refers to two Bisesero events, one in Murambi and one close to 'spring of water' near Gitwe Primary School Gitwe (including the exchange between the Accused and the refugees about him being the son of a pastor)".

[736] Trial Judgement, §673.

[737] Appeal Brief (E. Ntakirutimana), pp. 79-81.

438. The Trial Chamber addressed the issue of Witness II's credibility[738]. It noted the similarities between Witness II and the person interviewed by African Rights[739]. However, lacking the full statement given to African Rights and noting discrepancies in the witness's explanations, the Chamber concluded that evidence from Witness II did not prove beyond a reasonable doubt that Elizaphan Ntakirutimana participated in the attacks on Muyira Hill[740]. In the view of the Appeals Chamber, such a conclusion is reasonable, and the Appellants have not presented evidence in support of their argument that the witness was used as part of a political campaign to falsely accuse the Appellants.

8. Witnesses CC, DD, MM

439. The Appellants allege inconsistencies in testimony by Witnesses CC, DD and MM, and generally question their credibility[741]. It is unclear how such allegations go specifically to show the existence of a political campaign. Rather, the Appellants seem to collate Witness CC, DD and MM into a category of witnesses whose alled testimonial inconsistencies weaken the Prosecution's case, thereby providing circumstantial evidence that a campaign existed. The alleged inconsistencies were addressed in section of the Appeal dealing wholly with individuals witness credibility. The Appeals Chamber does not consider that these alleged inconsistencies provide circumstantial evidence of a political campaign against the Appellants.

V. PROSECUTION'S FIRST, SECOND AND THIRD GROUNDS OF APPEAL

440. Gérard Ntakirutimana was found guilty of genocide, under Count 1 of the Mugonero Indictment and under Count 1 of the Bisesero Indictment pursuant to Article 6 (1) of the Tribunal's Statute. Elizaphan Ntakirutimana was found guilty of aiding and abetting genocide under Count 1 of the Mugonero Indictment, though the Appeals Chamber has quashed this conviction, and under Count 1 of the Bisesero Indictment, for aiding and abetting the killing and causing of serious bodily or mental harm to Tutsi in Bisesero pursuant to Article 6 (1) of the Statute.

441. The Prosecution's first, second and third grounds of appeal[742] allege three errors of law related to the genocide convictions of Elizaphan and Gérard Ntakirutimana. The issues raised in these grounds of appeal overlap and the Prosecution has treated them together in the first part of its Appeal Brief. For the sake of clarity, the Appeals Chamber will follow the same approach.

[738] See generally Trial Judgement, §§652-655.

[739] Trial Judgement, §654; "The Chamber notes that the witness and the person interviewed by African Rights bear the same first name and surname, are both farmers from Bisesero born in the same year, and both sustained a machete wound to the left of the head. These are striking similarities".

[740] Trial Judgement, §655.

[741] Appeal Brief (E. Ntakirutimana), CC, pp. 37, 76; DD, pp. 53, 76; MM, pp. 5, 76, 79.

[742] Prosecution's Notice of Appeal, 21 March 2003.

442. First, the Prosecution alleges that the Trial Chamber erred in not applying joint criminal enterprise liability to determine the criminal responsibility of Gérard and Elizaphan Ntakirutimana[743]. Second, the Prosecution claims that the Trial Chamber erred in confining Gérard Ntakirutimana's conviction for genocide to acts of killing or serious bodily harm that he personally inflicted on Tutsi at the Mugonero Complex and Bisesero[744]. Third, the Prosecution challenges the Trial Chamber's finding at paragraph 787 (iii) of the Trial Judgement regarding the *mens rea* requirement for aiding and abetting the crime of genocide[745].

443. The Appeals Chamber will address each of the three alleged errors successively. Before considering the arguments of the Prosecution, the Appeals Chamber will consider an argument raised by both Gérard Ntakirutimana and Elizaphan Ntakirutimana that these three grounds of appeal are inadmissible.

A. Admissibility of the first three grounds of appeal

444. Gérard Ntakirutimana challenges the admissibility of the Prosecution's first three grounds of appeal arguing that the Prosecution does not claim that the errors alleged would invalidate the Trial Chamber's verdict of conviction for genocide as required by Article 24 of the Statute as well as Article 4(b)(iii) of the Practice Direction on Formal Requirements for Appeals from Judgement. Rather, he says, these grounds challenge the "bases" for this conviction[746], and are not appealable[747]. Elizaphan Ntakirutimana joins in these arguments[748].

445. In reply the Prosecution claims that with one partial exception –that is the error to the correct *mens rea* for aiding and abetting genocide- its first three grounds of appeal raise errors that do have a direct impact on the Trial Chamber's decisions as to the nature and extent of Gérard Ntakirutimana's and Elizaphan Ntakirutimana's responsibility and are *also* matters of general importance[749]. Its argument is that the Trial Chamber erred in its application of the law to the facts and therefore understated

[743] Prosecution Appeal Brief, §2.83.

[744] Prosecution amended Notice of Appeal, Grounds 1 and 2 and Prosecution Appeal Brief, §2.18.

[745] Prosecution amended Notice of Appeal, p. 3 and Prosecution Appeal Brief, §2.84.

[746] Response (G. Ntakirutimana), §§1-6.

[747] *Ibid*., §22, with refers to §2 of the Declaration of Judge Shahabuddeen in the Akayesu Appeal Judgement ("Declarartion") distinguishing an "appeal ground" from a "non-appealable issue" in that the former being "an error on a question of law invalidating the decision" while the later "may well raise an error on a question of law, but the error is not one which invalidates the decision. If the Trial Chamber committed an error in stating a proposition of law but the error did not affect the result of the decision, the error does not invalidate the decision; such an error is not an appealable ground". It further refers to paragraph 4 of the Declaration which states with respect to non-appealable issues "although the Appeal Chamber cannot proceed as if it were allowing an appeal, it may take notice of the erroneous proposition of law and state its own view as to what is the correct proposition". According to the Prosecution, Juge Shahabuddeen's concern was to exclude appeals where the error alleged "did not affect the result of the decision" at all which is not the case here (Prosecution's Reply, §1.12)

[748] Response (E. Ntakirutimana), p. 3.

[749] Prosecution Reply, §§1.2-1.4.

the nature and extent of culpability attributable to Gérard Ntakirutimana and Elizaphan Ntakirutimana[750]. The Prosecution argues that the Defence advances an unduly restrictive interpretation of Article 24 of the Statute that is unfair to all parties and is contrary to the existing jurisprudence. It argues that the phrase, "an error on a question of law invalidating the decision", is sufficiently broad to cover grounds of appeal alleging errors that invalidate an aspect of the decision that impacts upon the nature or extent of the accused's culpability[751].

446. Article 24(1) of the Statute refers only to errors of law *invalidating the decision*, that is legal errors which, if proven, affect the verdict. If the first alleged error of law (failure to apply joint criminal enterprise liability to determine the responsibility of Gérard and Elizaphan Ntakirutimana) is established and the related ground of appeal is successful, Gérard Ntakirutimana could be held responsible as a co-perpetrator of killings and infliction of serious bodily harm to members of the Tutsi group physically committed by others. Likewise, Elizaphan Ntakirutimana could be held responsible as a co-perpetrator of genocide, and not as a mere aider and abettor of genocide as found by the Trial Chamber. If the second alleged error of law (confining Gérard Ntakirutimana's conviction for genocide to the acts of killing or serious bodily harm that he personally inflicted) is established a conviction could be entered against Gérard Ntakirutimana for killings and infliction of serious bodily harm to members of the Tutsi group physically committed by others, alternatively Gérard Ntakirutimana could be held responsible for aiding and abetting the main perpetrators of genocide.

447. The Appeals Chamber is satisfied that, with the exception of the alleged error of law related to the *mens rea* for aiding and abetting genocide, the first three grounds of the Prosecution's appeal will, if successful, affect the verdict. As to the alleged error of law related to the mens rea for aiding and abetting genocide, the Appeals Chamber considers the ground to raise an issue of general importance for the case law of the tribunal and will consider it on that basis.

B. Alleged error in not applying the joint criminal enterprise doctrine to determine the responsibility of Gérard Ntakirutimana and Elizaphan Ntakirutimana

448. The Prosecution argues that the Trial Chamber erred in not applying joint criminal enterprise liability to determine the criminal responsibility of Gérard and Elizaphan Ntakirutimana for their participation in the genocide committed at Mugonero and Bisesero[752]. In making this argument the Prosecution acknowledges that it did not expressly raise this argument at trial[753], but claims that the Mugonero and Bisesero Indictments, the Prosecution's Pre-Trial Brief and the Prosecution's Closing Brief provides sufficient notice for the Prosecution to raise it on appeal[754].

[750] *Ibid*., §§1.7-1.10.

[751] *Ibid*., §§1.11-1.24. The Prosecution relies in particular on the Furundzija Appeal Judgement (§§115-121, 216 and 250-257) and the *Kupreskic et al*. Appeal Judgement (§320).

[752] Prosecution Appeal Brief, §§2.24 and 2.83.

[753] *Ibid*., §2.57.

[754] *Ibid*.

449. The Prosecution argues that it is not necessary to specify the precise mode of liability alleged against the accused in an indictment as long as it makes clear to the accused the nature and cause of the charge against him[755]. It argues that the Indictments put the Accused on notice that the case against them included allegations of participation in crimes involving a number of persons[756] and that it was clear from the Indictments that the criminal purpose alleged was to kill and wound Tutsis as part of a genocidal plan[757]. As such, it claims that the absence of an express reference to joint criminal enterprise liability in the Indictments did not create any confusion or ambiguity about the nature and cause of the charges alleged against Gérard and Elizaphan Ntakirutimana[758].

450. The Prosecution also argues that its Pre-Trial Brief, which did not specify a particular mode of responsibility, left it to the Trial Chamber's discretion to find the Accused guilty on the basis of "any action encompassed by Article 6(1) of the Statute of the Tribunal"[759]. It says that the factual allegations in the Pre-Trial Brief revealed the collective nature of the crimes with which Gérard Ntakirutimana and Elizaphan Ntakirutimana are charged and the common criminal plan Gérard and Elizaphan Ntakirutimana shared with the other attackers. It says that, taken together, the Indictments and Pre-Trial Brief were sufficient to put the accused on notice that the crimes alleged against them were collective in nature and that joint criminal enterprise liability could be applied[760].

451. At the Appeal hearing, the Prosecution stressed that there is no requirement that express modes of liability must be pleaded in an indictment and that this was clear from several Appeals Chamber's decisions such as *Aleksovski, Celebici* and more recently *Krnojelac*. In *Krnojelac*, the Appeals Chamber stated quite clearly that the Prosecution's obligation to address modes of liability is expressed as an obligation to make clear whether Article 7(1), or in the context of the ICTR Statute Article 6(1), is relied upon or whether Article 7(3) or, in the context of the ICTR Statute, Article 6(3) is relied upon[761].

452. The Prosecution also argues that it is common practice in the jurisprudence of the ICTY for accused to be found liable as participants in a joint criminal enterprise without that mode of liability being expressly pleaded in the indictment. Following this practice, it says it relied on Article 6(1) in general terms and that the reference to commission in Article 6(1) is broad enough to encompass the notion of

[755] Prosecution Appeal Brief, §2.58.

[756] *Ibid*., §2.65

[757] *Ibid*., §2.64 citing *Mugonero* Indictment, §§4.7-4.10 and 5.

[758] Prosecution Appeal Brief, §2.66. See also id., §2.77, where the Prosecution stresses that the acts to be attributed to both Accused as participants in a joint criminal enterprise are that form part of Elizaphan Ntakirutimana's conviction for aiding and abetting. That is, responsibility which arises for killing and serious bodily harm inflicted by the attackers with which both Accused acted in concert with at the Mugonero Complex and Bisesero between April and June 1994. Therefore, the Prosecution is not alleging that both Accused should be held responsible for different or new acts but, rather, that another classification of responsibility should be contemplated.

[759] Prosecution Appeal Brief, §2.69.

[760] *Ibid*., §2.73.

[761] Appeal Hearing, T. 8 July 2004, pp. 50-51.

joint criminal enterprise. It argues that this has been confirmed by the Appeals Chamber on a number of occasions, such as in the *Ojdanic* Joint Criminal Enterprise Appeal Decision[762]. Further, in its Pre-Trial Brief, it made it clear that the Trial Chamber had the authority to rely on any mode of liability, even if different to that expressly advanced by the Prosecution. It argues that the Appeals Chamber cannot allow an error in the classification of the responsibility of the Accused to stand on the basis that the Prosecution did not expressly label the joint criminal enterprise to describe their responsibility. The Trial Chamber's duty to apply the law correctly exists independently of the Prosecution's approach[763].

453. At the Appeal hearing, the Prosecution also reiterated its argument that the application of joint criminal enterprise liability by the Appeals Chamber would not result in any unfair prejudice in the relevant sense of rendering the trial unfair[764].

454. At the Appeal hearing, the Prosecution also repeated arguments made in its Appeal Brief that no prejudice would be suffered by the Accused by the application of joint criminal enterprise liability at this stage of the proceedings. It stressed that both Elizaphan Ntakirutimana and Gérard Ntakirutimana advanced a defence of alibi making it difficult to see how the defence would have been conducted differently if the Prosecution had referred specifically to joint criminal enterprise liability. In these circumstances, the Prosecution says that the onus is on the Defence to demonstrate how the Accused would be unfairly prejudiced by the application of joint criminal enterprise liability by the Appeals Chamber[765]. It argued that the *Aleksovski, Celebici* and *Krnojelac* appeal judgements support the argument that it is only where a failure to expressly plead a theory of liability causes ambiguity or impacts upon the ability of the accused to prepare a defence that a problem arises. It says that this is not the case here. The Accused made no complaint at trial of the Precaution's pleading of Article 6(1) in its entirety and they cannot now complain that the Indictments were inadequate to advise them that all such forms of liability were alleged[766].

455. In his response, Gérard Ntakirutimana argues that the failure of the Prosecution to raise joint criminal enterprise liability at trial precludes it from being raised on appeal. He submits that the Prosecution is asking the Appeals Chamber to decide the issue *de novo* on appeal and that this amounts to requesting a new trial, which is not within the scope of the appellate function[767]. Further, and contrary to the Prosecution's arguments that he had sufficient notice that a joint criminal enterprise case was being presented, Gérard Ntakirutimana argues that joint criminal enterprise liability is not specifically mentioned in the Indictments, pleadings, or the Opening and Closing Statements, and therefore that no notice was given

[762] *Ibid*., p. 51.

[763] Appeal Hearing, T. 8 July 2004, pp. 50-54. In support of its argument the Prosecution refers to the *Furundzija* Trial Judgement, §189; *Kupreskic* Trial Judgement, §746; the *Stakic* Trial Judgement; the *Semanza* Trial Judgement, §397; and the *Aleksovski* Appeal Judgement, §§171-172.

[764] Appeal Hearing, T. 8 July 2004, pp. 55-56. In support the Prosecution referred to the *Tadic* Appeal Judgement; the *Furundzija* Appeal Judgement; and the *Kayishema and Ruzindana* Trial Judgement.

[765] Prosecution Appeal Brief, §2.76

[766] Appeal Hearing, T. 8 July 2004, p. 57.

[767] Response (G. Ntakirutimana), §§29-30.

of such an argument[768]. He claims further that, as this mode of liability is rarely addressed by the ICTR, he was not on notice that joint criminal enterprise liability could be an issue[769].

456. Gérard Ntakirutimana also submits that the Indictments do not meet the standard enunciated in the *Milutinovic* Decision regarding the facts that must be pleaded with respect to allegations of individual responsibility arising from participation in a joint criminal enterprise[770]. Also, in his view, the Mugonero and Bisesero Indictments do not meet the "test for sufficiency of indictments" set out in Article 17(4) of the Statute and enunciated in the Kupreskic et al. Appeal Judgement[771]. Moreover, Gérard Ntakirutimana claims that the Prosecution's invitation, in its Pre-Trial Brief, to the Trial Chamber to choose the most appropriate form of liability under Article 6(1) of the Statute, contradicts the position it is now arguing in its Appeal Brief[772].

457. For these reasons, Gérard Ntakirutimana argues that the Defence could not have anticipated that the Prosecution intended to rely on joint criminal enterprise liability. Therefore, he says that the Prosecution is estopped from raising joint criminal enterprise liability on appeal[773]. He asserts that the Prosecution's new plea of joint criminal enterprise is prejudicial to him because his investigation, questioning of prosecution witnesses and presentation of evidence would have been different if this mode of liability had been raised at trial[774].

458. Elizaphan Ntakirutimana also argues that the Prosecution cannot seek new findings to be made in relation to a form of responsibility never alleged in the Indictments or the Pre-Trial Brief, never placed in evidence or argued in the Closing Brief. He distinguishes the present case from the *Ojdanic* Joint Criminal Enterprise Appeal Decision in which the accused had notice that he was being charged as a participant in a joint criminal enterprise. Similar to his Co-Accused, Elizaphan Ntakirutimana interprets the Prosecution's argument based on joint criminal enterprise as a request for new findings of fact that were neither suggested to nor addressed by the Trial Chamber[775].

459. In reply, the Prosecution claims that the jurisprudence of the Tribunal makes clear that specific modes of responsibility do not have to be pleaded in the indictment. It claims that the Accused acknowledged that the Prosecution's Pre-Trial Brief put

[768] *Ibid.*, §§32-33.

[769] *Ibid.*, §36. In response to the Prosecution's argument based on the Ojdanic case, Gérard Ntakirutimana contends that the Ojdanic indictment specified each of the accused participated in a joint criminal enterprise.

[770] *Ibid.*, §37 citing The Prosecution v. Milan Milutinovic et al., Case n° IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Sainovic, 27 March 2003 (Milutinovic Decision), p. 4.

[771] *Ibid.*, §38.

[772] *Ibid.*, §39. Gérard Ntakirutimana contends that having stressed in its Pre-Trial Brief that although there was no substantial difference as to the Accused's culpability under the different forms of participation the degree of such participation may be considered as a factor in determining an appropriate sentence, the Prosecution is now seeking to frame the case against the Accused pursuant to particular form of liability.

[773] *Ibid.*, §41.

[774] Response (G. Ntakirutimana), §42.

[775] Response (E. Ntakirutimana), p. 9.

them on notice that the Trial Chamber was at liberty to consider all modes of liability encompassed under Article 6(1) of the Statute[776] and questions the Defence's reason for not seeking clarification in the pre-trial or trial phases if it considered this approach to be prejudicial[777]. The Prosecution submits further that, regardless of the argument presented by the parties, the Trial Chamber has a duty to apply the law concerning the appropriate characterization of the responsibility of the Accused to the facts of the case[778]. Therefore, the two Accused have no legal basis to assume that a reference in the Indictment to superior responsibility precludes the application of joint criminal responsibility[779].

460. Applying factors identified in the *Milutinovic* Decision, the Prosecution argues that the Indictments contained the underlying material facts relating to the joint criminal enterprise, namely the timeframe, the participants, the role of the accused and the purpose of the enterprise[780]. It argues that technical defects in the pleadings will not be fatal if the material facts have been pleaded and the accused suffers no prejudice[781]. Here, the two Accused suffered no prejudice due to lack of notice because, in its closing address at trial, the Prosecution declared that both Accused "participated in one form or the other in the attacks that took place […]". This was noted by the Trial Chamber in the Judgement[782]. Additionally, Elizaphan Ntakirutimana and Gérard Ntakirutimana did not articulate what prejudice they claim to have suffered.

1. Law applicable to the alleged error

(a) Joint criminal enterprise

461. Article 6 (1) of the Statute sets out the forms of individual criminal responsibility which apply to all the crimes falling within the Indictment Tribunal's jurisdiction. It reads as follow :

> Article 6
>
> Individual criminal responsibility
>
> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

462. This provision lists the forms of criminal conduct which, provided that all other necessary conditions are satisfied, may result in an accused incurring individual criminal responsibility for one or more of the crimes provided for in the Statute. A mirror provision is found in Article 7(1) of the ICTY Statute. The ICTY Appeals Chamber has previously held that the modes of liability identified under Article 7(1)

[776] Prosecution Reply, §2.50 (citing Response (G. Ntakirutimana), §39(iii)).
[777] Id., §2.50.
[778] Id., §2.52.
[779] Id., §2.53
[780] Id., §2.54-2.55.
[781] Id., §2.56.
[782] Id., §2.59.

of the ICTY Statute include participation in a joint criminal enterprise as a form of "commission" under that Article[783].

463. In the jurisprudence of the ICTY three categories of joint criminal enterprises have been identified as having the status of customary international law[784]. The first category is a "basic" form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, posses the same criminal intention[785]. An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although cach of the participants may carry out a different role, each of them has the intent to kill. This form of joint criminal enterprise is the only one relevant to the present case and will be the focus thereafter[786].

464. The second category is a "systemic" form of joint criminal enterprise. It is a variant of the basic form, characterised by the existence of an organized system of

[783] See *Tadic* Appeal Judgement, §188 and §226, which providers that "[t]he Appeals Chamber considers that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law". To reach this finding the Appeals Chamber interpreted the Statute on the basis of its purpose as set out in the report of the United Nations Secretary-General to the Security Council, Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993. It also considered the specific characteristics of many crimes perpetrated in war. In order to determine the status of customary law in this area, it studied in detail the case law relating to many war crimes cases tried after the Second World War (§§197 et seq.). It further considered the relevant provisions of international Conventions which reflect the views of many States in legal matters (Article 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings, adopted by a consensus vote by the General Assembly in its resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998; Article 25 of the Statute of the International Criminal Court, adopted on 17 July 1998 by the Diplomatic Conference of Plenipotentiaries held in Rome)(§§221-222). Moreover, the Appeals Chamber referred to national legislation and case law to show that the notion of "common purpose", as it then referred to it, was recognised in many national systems, albeit not all of the countries had the same notion of common purpose (§§224-225). The *Tadic* Appeals Chamber used interchangeably "joint criminal enterprise", "common purpose" and "criminal enterprise", although the concept is generally referred to as "joint criminal enterprise", and this is the term used by the parties in the present appeal. See also *Ojdanic Criminal Enterprise* Appeal Decision, §20 regarding joint criminal enterprise as a form of commission.

[784] See particularly *Tadic* Appeal Judgement, §§195-226, describing the three categories of cases following a review of the relevant case-law, relating primarily to many war crimes cases tried after the Second World War. See also *Krnojelac* Appeal Judgement, §§83-84.

[785] *Tadic* Appeal Judgement, §196. See also *Krnojelac* Appeal Judgement, §84, providing that "apart from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators' joint criminal intent".

[786] For description of the second and third, respectively "systemic" and "extend" forms of joint criminal enterprise, see also *Tadic* Appeal Judgement, §§202-204 and *Vasiljevic* Appeal Judgement, §§98-99).

ill-treatment[787]. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise.

465. The third category is an "extended" form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural foreseeable consequence of executing that common purpose[788]. An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.

466. For joint criminal enterprise liability to arise an accused must act with a number of other persons. They need not be organised in a military, political or administrative structure[789]. There is no necessity for the criminal purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts[790]. The Accused's participation in the criminal enterprise need not involve commission of a specific crime under one of the provision (for example murder, extermination, torture, rape, etc), but may take the form of assistance in, or contribution to, the execution of the common purpose[791].

467. The *mens rea* differs according to the category of joint criminal enterprise under consideration. The basic form requires the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators)[792]. The systemic form

[787] *Tadic* Appeal Judgement, §§202-203. Although the participants in the joint criminal enterprises of this category tried in the cases referred to were most members of criminal organisations, the *Tadic* case did not require an individual to belong to such an organisation in order to be considered a participant in the joint criminal enterprise. The *Krnojelac* Appeal Judgement found that this "systemic" category of joint criminal enterprise may be applied to other cases and especially to serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, §89. See also *Vasiljevic* Appeal Judgement, §98.

[788] *Tadic* Appeal Judgement, §204, which held that "[c]riminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk". See also *Vasiljevic* Appeal Judgement, §99.

[789] *Tadic* Appeal Judgement, §227, referring to the *Essen Lynching* and the *Kurt Goebell* cases.

[790] *Ibid*., where the *Tadic* Appeal Chamber uses the terms "purpose", "plan", and "design" interchangeably.

[791] *Ibid*.

[792] *Tadic* Appeal Judgement, §§196 and 228. See also *Krnojelac* Appeal Judgement, §97, where the Appeals Chamber considers that, "by requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise, the Trial Chamber went beyond the criterion set by the Appeals Chamber in the *Tadic* case. Since the Trial Chamber's findings showed that the system in place at the KP Dom sought to subject non-Serb detainees to inhumane living conditions and ill-treatment on discriminatory grounds, the Trial Chamber should have examined whether or not Krnojelac knew of the system and agreed to it, without it being necessary to establish that he entered into an agreement with the guards and soldiers – the principal perpetrators of the crimes committed under the system – to commit those crimes". See also *Vasiljevic* Appeal Judgement, §101.

(which, as noted above, is a variant of the first), requires personal knowledge of the system of ill-treatment (whether proved by express testimony or as a matter of reasonable inference from the accused's position of authority), as well as the intent to further this system of ill-treatment[793]. Finally, the extended form of joint criminal enterprise, requires the intention to participate in and further the common 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 which was part of the common design 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"[794] – that is, being aware that such a crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.

468. The Appeals Chamber notes that while joint criminal enterprise liability is firmly established in the jurisprudence of the ICTY this is only the second ICTR case in which the Appeals Chamber has been called upon to address this issue[795]. Given the fact that both the ICTY and the ICTR have mirror articles identifying the modes of liability by which an individual can incur criminal responsibility, the Appeals Chamber is satisfied that the jurisprudence of the ICTY should be applied to the interpretation of Article 6(1) of the ICTR Statute.

(b) Degree of specificity required in an Indictment as to the form of responsibility pleaded

469. Article 17(4) of the Statute provides that the indictment must set out "a concise statement of the facts and the crime or crimes with the accused is charged". Likewise, Rule 47(C) of the Rules provides that the indictment shall set out not only the name and particulars of the suspect but also "a concise statement of the facts of the case".

470. As stated earlier in this Judgement[796], the Prosecution's obligation to set out a concise statement of the facts in the indictment must be interpreted in the light of the provisions of Articles 20(2), 20(4)(a) and 20(4)(b) of the Statute, which provide that in the determination of charges against him or her the accused shall be entitled to a fair hearing and, more specifically, to be informed of the nature of the charges against him or her and to have adequate time and facilities for the preparation of his or her defence. In the case law of both the ICTR and ICTY, this translates into obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proven[797]. The question of whether an indictment is pleaded with sufficient particularity

[793] *Tadic* Appeal Judgement, §§202, 220 and 228.

[794] *Ibid*., §228. See also §§204 and 220.

[795] See *Prosecutor v. André Rwamakuba*, Case n° ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004.

[796] See supra section II.A.1(b).

[797] See also *Niyitegeka* Appeal Judgement, §193 and *Kupreskic et al*. Appeal Judgement quoting the *Furundzija* Appeal Judgement, §147.

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 or her so that he or she may prepare his or her defence.

471. As the Appeals Chamber discussed above[798], the *Kupreskic at al.* Appeal Judgement addressed the degree of specificity required to be pleaded in an indictment. It stressed that it is not acceptable for the Prosecution to omit 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[799]. It also considered that a detective indictment may, in certain circumstances, cause the Appeals Chamber to reverse a conviction. The ICTY Appeals Chamber, however, did not exclude the possibility that, in a limited number of instances, a defective indictment may be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges[800]. In the *Rutaganda* case, the Appeals Chamber found that, before holding that an alleged fact is not material or that differences between the wording of the indictment and the evidence adduced are minor, a trial chamber should generally ensure that such a finding is not prejudicial to the accused[801]. An example of such prejudice would be vagueness capable of misleading the accused to the nature of the criminal conduct with which he is charged[802].

472. At the Appeal hearing, the Prosecution sought to argue that a recent decision of the Appeals Chamber in *Nyiramasuhuko and Ntahobali*[803] had expanded the *Kupreskic* holding. It claimed that, following that decision, in all circumstances a defective indictment can be cured by the provision in another form of timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. The Appeals Chamber does not accept this reading of that decision. Accordingly, the applicable law has not changed since the *Kupreskic et al.* Appeal Judgement.

(c) Did the Trial Chamber err in failing to apply joint criminal enterprise liability to the accused on the facts of the case as presented by the Prosecution?

473. While the Appeals Chamber accepts that it has been the practice of the Prosecution to merely quote the provisions of Article 6(1), and in the ICTY Article 7(1), the Prosecution has also long been advised by the Appeals Chamber that it is preferable for it not to do so. For example, the ICTY Appeals Chamber in the *Aleksovski* case stated that

> "the practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and it is preferable that the

[798] See supra section II.A.1.(b).
[799] *Kupreskic et al*. Appeal Judgement, §92.
[800] *Ibid*., §§89-114.
[801] *Rutaganda* Appeal Judgement, §303.
[802] *Ibid*., quoting the Furundzija Appeal Judgement, §61.
[803] Appeal Hearing, T. 7 July 2004, p. 71, referring to *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, case n° ICTR-97-21-AR73, Decision on the Appeals of Arsène Shalom Ntahobali and Pauline Nyiramasuhuko against the "Decision on Defence Urgent Motion to declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 2 July 2004.

> Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged"[804].

The Appeals Chamber endorses this statement.

474. In the present case, the Trial Chamber does not appear to have considered joint criminal enterprise liability at any time in determining the responsibility incurred by Gérard and Elizaphan Ntakirutimana for their participation in the massacres committed at Mugonero and Bisesero[805]. As such the Appeals Chamber does not accept that the authorities relied upon by the Prosecution lend the assistance the Prosecution claims. In the *Tadic* Appeal Judgement, the ICTY Appeals Chamber found the accused liable under the third form of joint criminal enterprise for the killing of five men from the village of Jaskici, even though neither this form of liability nor any other form of liability nor any other form of joint criminal enterprise was pleaded in the indictment[806]. However, in that case and, unlike here, the trial chamber had considered joint criminal enterprise liability[807] and, on appeal, the Prosecution was actually arguing that the trial chamber had misdirected itself as to the application of that doctrine[808]. In the *Furundzija* case, also relied upon by the Prosecution, although the indictment did not expressly include joint criminal enterprise or even co-perpetration as to the charge of torture, the Prosecution pleaded at trial that liability pursuant to Article 7 (1) of the Statute can be established by showing that the accused had the intent to participate in the crime, that his acts contributed to its commission and that such contribution did nit necessarily require participation in the physical commission of the crime. The *Furundzija* Trial Chamber found that two types of liability for criminal participation

> "appear to have crystallized in international law – co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other"[809]

and found that Furundzija was responsible as a co-perpetrator[810]. This was upheld by the ICTY Appeals Chamber[811]. Further, the Appeals Chambers notes that in both of these cases the defence does not appear to have raised the issue of lack of notice before the Trial Chamber or the Appeals Chamber.

475. More recently, in the *Krnojelac* Appeal Judgement, where the Prosecution was specifically challenging the trial chamber's conclusion that the accused could not be held liable under the third form of joint criminal enterprise set out in the *Tadic* Appeal Judgement with respect to any of the crimes alleged unless an "extend" form of joint

[804] *Aleksovski* Appeal Judgement, n. 319.

[805] The only express reference to join criminal enterprises is to be found in the Prosecution's Pre-Trial Brief (§37), and is repeated in the Prosecution's closing brief. The Prosecution submits under the section "Requisite *mens rea* under Article 6(1)" that the intent can be direct or indirect and that for a joint criminal enterprise, the required *mens rea* is satisfied when each co-participant is able to predict the result.

[806] *Tadic* Appeal Judgement, §§230-232.

[807] *Tadic* Trial Judgement, §§681-692.

[808] *Tadic* Appeal Judgement, §§172-173.

[809] *Furundzija* Trial Judgement, §216.

[810] *Ibid*., §§268, 269.

[811] *Furundzija* Appeal Judgement, §§115-121.

criminal enterprise was pleaded expressly in the indictment, the ICTY Appeals Chamber held that :

> […] The Appeals Chamber reiterates that Article 18(4) of the Statute requires that the crime or crimes charged in the indictment and the alleged facts be set out concisely in the indictment. With respect to the nature of the liability incurred, the Appeals Chamber holds that it is vital for the indictment to specify at least on what legal basis of the Statute an individual is being charged (Article 7(1) under 7(3)). Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial. Likewise, when the Prosecution charges the "commission" of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether the term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both. The Appeals Chamber also considers that it is preferable for an indictment alleging the accused's responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic and extended) of joint criminal enterprise envisaged. However, this does not, in principle, prevent the Prosecution from pleading elsewhere than in the indictment – for instance in a pre-trial brief – the legal theory which it believes best demonstrates that the crime or crimes alleged are imputable to the accused in law in the light of the facts alleged. This option is, however, limited by the need to guarantee the accused a fair trial.
>
> […]
>
> The Appeals Chamber observes that paragraph 86 of the Judgement, cited in paragraph 137 above, shows that the Trial Chamber reached the conclusion it did precisely because the Prosecution failed to amend the Indictment after the Chamber had unambiguously interpreted the second amended indictment as not pleading an extended form of joint criminal enterprise. Given these circumstances, the Trial Chamber decided "in the exercise of its discretion" that it would not be fair to the Accused to allow the Prosecution to rely upon this extended form of joint criminal enterprise to establish his liability.
>
> The Appeals Chamber further notes that, while the Prosecution's Pre-Trial Brief of 16 October 2000, that is subsequent to the decision of 11 May 2000, pleads an extended form of joint criminal enterprise for the first time, the Indictment is silent on the matter.
>
> It must be noted that these circumstances left the Defence in some uncertainty as to the Prosecution's argument. Therefore, even though it is apparent from Krnojelac's Final Trial Brief that he did take the three forms of joint criminal enterprise described in the *Tadic* Appeals Judgement into consideration before concluding that he had not taken part in a joint criminal enterprise, the Appeals Chamber holds that, in view of the persistent ambiguity surrounding the issue of what exactly the Prosecution argument was, the Trial Chamber had good

> grounds for refusing, in all fairness, to consider an extended form of liability with respect to Krnojelac, (footnotes omitted)[812].

476. Thus, the Appeals Chamber is satisfied that the present case is distinguishable from the authorities relied upon by the Prosecution, in that in those cases joint criminal enterprise liability was a mode of liability considered at trial. Nevertheless, for the sake of completeness, the Appeals Chamber will consider whether the Accused had sufficient notice that that mode of liability was being alleged.

477. The Prosecution acknowledges that it submitted in its Closing Brief that Elizaphan Ntakirutimana's responsibility regarding the Mugonero Indictment was only for aiding and abetting the attackers at the Mugonero Complex[813]. The Prosecution has waived the right to allege on appeal that the Trial Chamber erred in omitting to consider joint criminal enterprise liability when determining his criminal responsibility with respect to the events under the Mugonero Indictment. In following discussion, the Appeals Chamber will limit its review of the content of the indictments and related parts of the Pre-Trial Brief in order to determine whether Gérard Ntakirutimana and Elizaphan Ntakirutimana had sufficient notice from these sources that the case alleged against them included criminal responsibility as participants in a joint criminal enterprise. For Elizaphan Ntakirutimana, this review shall be limited to events alleged in the Mugonero Indictment.

(d) The contents of the Indictments and the Pre-Trial Brief did not put the Trial Chamber and the Accused on notice that Elizaphan and Gérard Ntakirutimana were also charged as co-perpetrators of a joint criminal enterprise to commit genocide

478. Gérard and Elizaphan Ntakirutimana were charged as follows under Count 1A of the Mugonero Indictment :

> For all the acts outlined in the paragraphs specified in each of the counts, the accused persons named herein, either planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation and execution of the acts, or knew or had reason to know that persons acting under their authority and control had committed or were about to commit the said acts and they failed to take necessary and reasonable measures to prevent the said illegal acts or punish the perpetrators thereof.
>
> Count 1A : By their acts in relation to the events referred to in paragraphs 4.4-4.10 above, Elizaphan Ntakirutimana, Gérard Ntakirutimana and Charles Sikubwabo are individually responsible for the crimes alleged below, pursuant to Article 6(1) of the Statute of the Tribunal.
>
> By their acts in relation to the events referred to in paragraphs 4.4-4.12 above, Gérard Ntakirutimana and Charles Sikubwabo are individually responsible for the crimes alleged below, pursuant to Article 6(3) of the Statute of the Tribunal.

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[812] *Krnojelac* Appeals Judgement, §§138-144.

[813] Prosecution Appeal Brief, §2.81, referring to its Closing Brief, p. 219. Regarding the Bisesero Indictment, the Prosecution argues that it "made a broader submission, namely that Elizaphan Ntakirutimana acted with intent to destroy the Tutsi group […] which resulted in the death of thousands", thereby implying that such submission encompasses joint criminal enterprise liability (Prosecution Appeal Brief, §2.82, referring to its Closing Brief, p. 227).

> Elizaphan Ntakirutimana, Gérard Ntakirutimana and Charles Sikubwabo, during the month of April 1994, in Gishyita commune, Kibuye Prefecture, in the territory of Rwanda, are responsible for the killings and causing of serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, an ethnic or racial group as such, and have thereby committed GENOCIDE in violation of Article 2(3)(a) and punishable in reference to Article 22 and 23 of the Statute of the Tribunal.

Under Count 1 of the Bisesero Indictment they were charged as follows :

> By their acts in relation to the events referred to above, each of the accused are individually responsible for the crimes alleged below pursuant to Article 6(1) of the Tribunal Statute.
>
> Count 1 : Elizaphan Ntakirutimana and Gérard Ntakirutimana during the months of April through June 1994, in the area known as Bisesero, in Gisovu communes, Kibuye Prefecture, in the Territory of Rwanda, are responsible for the killings and causing of serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, an ethnic or racial group as such, and have thereby committed GENOCIDE in violation of Article 2(3)(a) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal;

479. Review of the Indictments reveals that no express reference was made by the Prosecution to joint criminal enterprise, common plan or purpose –or even to the fact that it intended to charge the Accused for co-perpetration of genocide, *i.e*, not only for physically committing genocide but also for assisting those who physically committed it while sharing the same genocidal intent. The only express reference to joint criminal enterprise is to be found in the Prosecution's Pre-Trial Brief (§ 37) and is repeated in the Prosecution's Closing Brief (page 188). Interesting however, this reference appears under the section "Requisite *Mens Rea* under Article 6(1)" and illustrates the Prosecution's submission that all forms of criminal participation under Article 6(1) may be performed with direct or indirect intent (*dolus eventualis*)[814]. In the Closing Brief, the Prosecution states that

> "for a joint criminal enterprise, the Appeals Chamber has found that the required *mens rea* for each co-participant is satisfied when a number of the group is able to predict the result"[815].

Although the Pre-Trial and Closing Briefs are silent as to what form of joint criminal enterprise it refers to, the Appeals Chamber understands that it can only be the third one – that is the extended form of joint criminal enterprise. In the Appeals Chamber's view, the mere reference by the Prosecution to the joint criminal enterprise illustrating the "*dolus eventualis*" doctrine in its Pre-Trial and Closing Briefs cannot be understood as an unambiguous pleading of participation in the first form of joint criminal enterprise which is the form the Prosecution advances on this appeal.

480. The Appeals Chamber notes that further the Prosecution simply reproduced the text of Article 6(1) and part of Article 6(3) of the Statute in paragraph 5 of the

[814] Pre-Trial Brief, § 36; Closing Brief, p. 187.
[815] Closing Brief, p. 188.

Mugonero Indictment, while paragraph 5 of the Bisesero Indictment only referred to Article 6(1) without even using the word "committing".

481. Both Indictments alleged acts and conduct not limited to killings and causing harm to the Tutsi victims, but included for Gérard Ntakirutimana : separating Tutsi patients from non-Tutsi patients[816], procuring of arms for the attacks[817], searching Tutsi survivors[818] and conveying attackers[819]; and for Elizaphan Ntakirutimana : refusing to protect them after receiving Pastor Sehibe's letter[820], searching for Tutsi survivors[821], conveying attackers to the killing site[822], being present at killing sites, pursuing survivors and inciting attackers to perpetrate killings[823]. The Indictments also charged Gérard Ntakirutimana and Elizaphan Ntakirutimana for planning, instigating genocide as well as aiding and abetting genocide, complicity in genocide and conspiracy to commit genocide. In this context it is not obvious that reference to the above-mentioned acts in the Indictments were intended to be the material facts underpinnings a responsibility for co-perpetration in a joint criminal enterprise to commit genocide. In any event, the Appeals Chamber is of the view that the wording used by the Prosecution was ambiguous.

482. Additionally, and contrary to the *Tadic* and *Furundzija* cases relied upon by the Prosecution, the Trial Chamber obviously did not understand the Indictments to mean that the Accused committed genocide by way of participation in a joint criminal enterprise. As such, the Appeals Chamber considers that the Prosecution did not plead joint criminal enterprise liability, or even its various elements, with sufficient clarity in the Indictments. Further, the Prosecution did not put the Trial Chamber and the Defence on notice that the mode of liability, which it now believes best describes the criminal liability of Gérard and Elizaphan Ntakirutimana, was as participants in a joint criminal enterprise. On the contrary, the Prosecution expressly limited the scope of "committing" to direct commission by the Accused or their agents. In these circumstances, the Appeals Chamber is of the view that the Prosecution left the Trial Chamber and the Defence in some uncertainty as to the case it was advancing at trial.

483. The Appeals Chamber has also reviewed the Prosecution's Closing Brief, which describes the elements of the various forms of liability envisaged under Article 6(1) of the Statute[824]. From that review the Appeals Chamber concludes that the Prosecution only alleged commission by the Accused through personal perpetration of all elements of the *actus reus* of the crime or through use of an agent to perform the relevant conduct[825]. The Appeals Chamber finds that this pleading precludes the Pros-

[816] Pre-Trial Brief, §12; Bisesero Indictment, §4.6; Mugonero Indictment, §4.6.

[817] Pre-Trial Brief, §11.

[818] Mugonero Indictment, §4.8; see also Bisesero Indictment, §§4.9 and 4.15 for a similar account of the facts.

[819] Pre-Trial Brief, §16; Bisesero Indictment, §4.15; Mugonero Indictment, §4.8.

[820] Bisesero Indictment? §4.5 and Pre-Trial Brief, §§10, 13.

[821] Bisesero Indictment, §§4.8, 4.9.

[822] Pre-Trial Brief, §§16, 20-21; Bisesero Indictment, §4.15.

[823] Pre-Trial Brief, §§15-16 and 20-21; Bisesero Indictment, §4.15.

[824] Prosecution's Closing Brief, pp. 191-202.

[825] The relevant part of the Prosecution's Closing Brief reads as follows : "The elements of participation through 'commission' through individual perpetration are as follows : 1. *Actus reus* : The accused performed all elements of the *actus reus* of the crime. 2. *Mens rea* : The accused

ecution from relying on joint criminal enterprise liability on appeal. In any case, having reviewed the content of the Indictments and the Pre-Trial Brief, the Appeals Chamber is satisfied that it was too ambiguous to put the Trial Chamber or Elizaphan and Gérard Ntakirutimana on notice that they were charged for their participation in the first form of joint criminal enterprise.

484. In view of the persistent ambiguity surrounding the issue of what exact theory of responsibility the Prosecution was pleading, the Prosecution has not established that the Trial Chamber erred in omitting to consider whether the liability of the Accused was incurred for their participation in a joint criminal enterprise of genocide. This ground of appeal is dismissed.

485. The Appeals Chamber will now turn to the second error alleged by the Prosecution in relation to Gérard Ntakirutimana's conviction for genocide.

C. Alleged error in confining Gérard Ntakirutimana's conviction for genocide to the acts of killing or serious bodily harm that he personally inflicted on Tutsi

486. The Prosecution argues that the Trial Chamber erred in confining Gérard Ntakirutimana's conviction for genocide to the acts of killing or serious bodily harm that he personally inflicted on Tutsis at the Mugonero Complex and in Bisesero. In doing so, the Prosecution claim that the Trial Chamber ignored its prior factual findings regarding the other acts he performed in furtherance of the genocidal campaign[826]. In support of this ground of appeal the Prosecution lists the Trial Chamber's findings regarding Gérard Ntakirutimana's participation in the 16 April 1994 attack on the Mugonero Complex and in Bisesero between April and June 1994[827].

487. The Prosecution says that, despite these factual findings, the Trial Chamber referred in its legal findings only to "killing Charles Ukobizaba and shooting at the refugees" at the Mugonero Complex as the basis of Gérard Ntakirutimana's conviction

had all elements of the mens rea of the crime, or was aware of the substantial likelihood that a crime would occur as an adequate consequence of his conduct. This is the most straightforward form of criminal participation, e.g. for wilful killing, the specific *actus reus* is 'conduct resulting in the death of the victim in the sense that the conduct is substantial cause of the death of the victim'….The conduct of the accused will satisfy the *actus reus* for wilful killing if it substantially contributed to the victim's death. (…) An accused could be regarded as having personally performed the elements of the *actus reus*, even though the accused used an agent to perform the relevant conduct [here footnote 1500 of the Closing Brief refers to perpetration by means or intermediate perpetrations as well as commission through another person (as per Article 25(3) of the Rome Statute)]. The Appeals Chamber has clarified in the *Celebici* Judgement that in the case of 'primary or direct responsibility, where the accused himself commits the relevant act or omission, the qualification that his participation must directly and substantially affect the commission of the offence' is an unnecessary one. That particular rather applies to lesser degrees of directness of participation which will ordinarily give rise to accomplice liability (Prosecution's Closing Brief, pp. 197-198).

[826] Prosecution Amended Notice of Appeal, Grounds 1 and 2 and Prosecution Appeal Brief, §§2.15.

[827] Prosecution Appeal Brief, §§2.15-2.16, 2.18.

for genocide pursuant to the Mugonero Indictment. Similarly, his conviction under the Bisesero Indictment was limited to his role in the killing of Esdras and the wife of Nzamwita, as well as the harm caused to the Tutsi refugees that he shot at during the attacks at Bisesero[828]. Therefore, in the Prosecution's submission, the Trial Chamber erred in law in basing Gérard Ntakirutimana's liability for genocide on acts that he personally carried out and ignored its prior factual findings regarding other acts in furtherance of the genocidal campaign[829].

488. In response, Gérard Ntakirutimana claims that the Prosecution does not accurately present the Trial Chamber's findings. He argues that the Prosecution's position is based on misstatements of or omissions from the Trial Chamber's findings[830]. As an alternative argument, he argues that the evidence relating to his participation in preparatory acts is from witnesses whose credibility is questionable (Witness UU's testimony)[831]. Gérard Ntakirutimana secondly argues that, if accurately presented, these findings do not support the conclusion that he is guilty. He claims that in order to satisfy the argument of the Prosecution new findings are necessary and argues that making new findings is not the function of the Appeals Chamber[832].

489. In reply, the Prosecution maintains its argument in relation to the Trial Chamber's erroneous omission from his criminal responsibility a range of acts that Gérard Ntakirutimana performed to facilitate the killings and injuries inflicted by other attackers at Mugonero and Bisesero[833]. It also addresses Gérard Ntakirutimana's attackers on Witness UU's credibility[834].

490. From the Trial Judgement it is apparent to the Appeals Chamber that the Trial Chamber having found that Gérard Ntakirutimana physically committed genocide by killing and causing harm to Tutsi refugees did not go on to consider whether the acts of assistance it found to be established also constituted a basis for a conviction of genocide either as a co-perpetration or as an aider and abettor. Indeed, the Trial Chamber expressly found that the alternative Count 1B of the Mugonero Indictment and Count 2 of the Bisesero Indictment for complicity to commit genocide ceased to apply to both Accused in light of its findings in relation to the Count 1A of the Mugonero Indictment and Count 2 of the Bisesero Indictment for genocide.

491. The Trial Chamber found 1) in relation to the Mugonero Indictment that, in addition to killing Charles Ukobizaba and shooting at Tutsi refugees at the Complex, Gérard Ntakirutimana's participation in the attacks included procuring ammunition and gendarmes for the attack on the Complex[835] and participating in the attack on Witness SS[836]; and 2) in relation to the Bisesero Indictment that, in addition to killing Esdras and wife of Nzamwita, pursuing and shooting at the refugees, he transported attackers at Kidashya[837], head-

[828] *Ibid.*, §2.17.
[829] *Ibid.*, §2.18.
[830] Response (G. Ntakirutimana), §66(i)-(vii).
[831] *Ibid.*, §65.
[832] *Ibid.*, §28.
[833] Prosecution Reply Brief, §§1.7-1.9.
[834] *Ibid.*, §§2.65-2.92.
[835] Trial Judgement, section II.3.7.3.
[836] *Ibid.*, section II.4.11.3.
[837] *Ibid.*, section II.4.21.3.

ed a group of armed attackers at Muyira Hill in June 1994[838], was at Mutiti Hill in June 1994 with *Interahamwe* where they shot at refugees in a forest by a church[839], and participated in attacks in Bisesero during the period April to June 1994[840]. The Trial Chamber only considered the above acts and conduct of Gérard Ntakirutimana other than killing and shooting at Tutsi in order to determine that he had the requisite intent to destroy, in whole or in part, the Tutsi ethnic group[841]. The wording used by the Trial Chamber at paragraphs 794-795 and 835-836 of the Judgement shows that the Trial Chamber limited its finding of guilt of genocide to the killings and harm that Gérard Ntakirutimana had personally inflicted :

> 794. The Chamber finds that in killing Charles Ukobizaba and shooting at the refugees, Gérard Ntakirutimana is individually criminally responsible for the death of Charles Ukobizaba, pursuant to Article 6(1) of the Statute.
>
> 795. Accordingly, the Chamber finds that Gérard Ntakirutimana is guilty of genocide as charged in Count 1A of the Mugonero Indictment.
>
> 835. In shooting at the refugees and participating in the attacks, Gérard Ntakirutimana is individually criminally responsible for the death of Esdras and the wife of Nzamwita and the harm caused to these Tutsi refugees, pursuant to Article 6(1) of the Statute.
>
> 836. Accordingly, the Chamber finds that Gérard Ntakirutimana is guilty of genocide as charged in Count 1 of the Bisesero Indictment.

492. In doing so, the Trial Chamber omitted to determine Gérard Ntakirutimana's liability as to the killings and harm inflected by others to Tutsi, although he was clearly charged under Count 1 of the Bisesero Indictment and Count 1A of the Mugonero Indictment for acts and conducts not limited to killing and causing serious bodily harm but also including acts of assistance to others who physically committed genocide. This, in the Appeals Chamber's view, constitutes an error on the part of the Trial Chamber.

493. As the Appeals Chamber has already determined that the Prosecution should not be allowed to plead joint criminal enterprise for the first time on appeal, the issue to be determined is whether the Trial Chamber's findings, which have not been reversed on appeal, support a conviction for aiding and abetting genocide. Before doing so it is necessary to turn to the third error alleged by the Prosecution in relation to the genocide conviction of Elizaphan Ntakirutimana regarding the *mens rea* required for aiding and abetting genocide.

D. Alleged error in defining the mens rea requirement for aiding and abetting genocide

494. The Prosecution submits that the Trial Chamber erred in finding that aiding and abetting genocide, within the meaning of Article 6(1) of the Statute, requires

[838] *Ibid*., section II.4.21.3.
[839] *Ibid*., section II.4.22.3.
[840] *Ibid*., section II.4.24.3.
[841] *Ibid*., §§793, 834.

proof that the accused "had the intent to destroy, in whole or in part, an ethnic or racial group, as such"[842].

495. According to the Prosecution, the test adopted by the Trial Chamber is drawn from the *Akayesu* Trial Judgement, which has generally not been followed by other cases before the ICTR or the ICTY. It argues that the *Akayesu* test has been expressly rejected by the *Semanza* Trial Chamber and that, in light of ICTR and ICTY jurisprudence, the proper *mens rea* for aiding and abetting genocide under Article 6(1) of the Statute is "knowledge", not intent[843]. The Prosecution further contends that the Trial Chamber's adoption of this *mens rea* requirement for aiding and abetting pursuant to Article 6(1) of the Statute contradicts the one it applied for complicity to commit genocide under Article 2(3)(e) of the Statute, which includes aiding and abetting, since it found that the *mens rea* standard for complicity in genocide is knowledge[844]. Furthermore, it points out that a survey of the International Law Commission's work and of domestic legislation on the crime of genocide confirms that "knowledge" is the *mens rea* for aiding and abetting irrespective of the underlying offence of the perpetrator[845]. The Prosecution also points out that, because no distinction is made in the language of Article 6(1) of the Statute between genocide and other crimes within its jurisdiction, the specific intent requirement of Article 2(2) should not disturb the general application of Article 6(1) regarding genocide[846].

496. In response, Gérard Ntakirutimana argues that adoption of the Prosecution's theory on *mens rea* for aiding and abetting would have the adverse effect of significantly lowering the threshold of liability for genocide, extermination and murder, and thereby potentially prejudice future litigants by affecting convictions[847]. Elizaphan Ntakirutimana contends further that the Security Council does not have the power to add "aiding and abetting" to the list of acts punishable under Article 2[848].

497. In its Reply, the Prosecution submits that neither Elizaphan nor Gérard Ntakirutimana analyses the mens rea standard for aiding and abetting genocide. In response to Gérard Ntakirutimana's assertion that the Prosecution's "knowledge" standard would lower the threshold of liability for genocide, the Prosecution argues that the Accused ignores ICTY jurisprudence; "knowledge" has already been adopted by the ICTY for serious crimes (such as persecution)[849]. Contrary to the Accused's suggestion, this standard does not extinguish the specific intent requirement of genocide. To convict an accused of aiding and abetting genocide based on the "knowledge" standard, the Prosecution must prove that those who physically carried out crimes acted with the specific intent to commit genocide[850].

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[842] Prosecution Amended Notice of Appeal, p. 3 and Prosecution Appeal Brief, §§2.13, 2.84.

[843] Prosecution Appeal Brief, §§2.90, 2.92, 2.103. The Prosecution also relies on the *Ojdanic Joint Criminal Enterprise* Appeal Decision, §20 (Prosecution Appeal Brief, §2.104) as well as on the *Kvocka* Trial Judgement and the *Furundzija* Trial Judgement (Prosecution Appeal Brief, §§2.106-2.108).

[844] Prosecution Appeal Brief, §§2.100-2.102.

[845] *Ibid*., §2.110.

[846] *Ibid*., §2.111.

[847] Response (G. Ntakirutimana), §17.

[848] Response (E. Ntakirutimana), p. 8.

[849] Prosecution Reply, §2.12.

[850] *Ibid*.

498. At the Appeal hearing the Prosecution argued that the term complicity as included in the Genocide Convention included the term "aiding". It claimed that this was clear from the report of the *ad hoc* Committee on genocide. It argued that this understanding was consistent with both civil and common law domestic jurisdictions and was reflected in the jurisprudence of the Tribunal. The Prosecution referred to the recent *Krstic* Appeal Judgement which it says clearly establishes that aiding and abetting requires a knowledge standard[851].

499. In its Judgement, the Trial Chamber followed the approach adopted by the *Akayesu* Trial Chamber that the *dolus specialis* required for genocide was required for each mode of participation under Article 6(1) of the Statute, including aiding and abetting. Surprisingly, when considering the *mens rea* requirement for complicity under Article 2(3)(e) of the Statute, the Trial Chamber in Akayesu considered that it

> "implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly"[852].

"Knowingly" in the context of genocide means knowledge of the principal offender's genocidal intent. The Trial Chamber in *Akayesu* summarized its position as follows :

> In conclusion, the Chamber is of the opinion that an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such[853].

The Trial Chamber in *Semanza* took a similar approach holding that :

> "In case involving a form of accomplice liability, the mens rea requirement will be satisfied where an individual acts intentionally and with the awareness that he is influencing or assisting the principal perpetrator to commit the crime. The accused need not necessarily share the *mens rea* of the principal perpetrator : the accused must be aware, however, of the essential elements of the principal's crime including the *mens rea"*[854].

500. The ICTY Appeals Chamber has explained, on several occasions, that an individual who aids and abets other individuals committing a specific intent offence may be held responsible if he assists the commission of the crime knowing the intent the

[851] Appeal Hearing, T. 8 July 2004, p. 68.

[852] *Akayesu* Trial Judgement, §538.

[853] *Ibid*., §545. See also §540. As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide. Therefore, the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.

[854] *Semanza* Trial Judgement, §388 (references omitted). See also id., §395.

intent behind the crime[855]. More recently, as the Prosecution argued at the Appeals hearing, in the *Krstic* case the ICTY Appeals Chamber considered that the same principle applies to the Statute's prohibition of genocide and that

> "[t]he conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal"[856].

In reaching this conclusion, the *Krstic* Appeals Chamber derived aiding and abetting as a mode of liability from Article 7(1) of the ICTY Statute, but also considered that aiding and abetting constitutes a form of complicity, suggesting that complicity under Article 2 of the ICTR Statute and Article 4 of the ICTY Statute would also encompass aiding and abetting, based on the same *mens rea*, while other forms of complicity may require proof of specific intent.

501. The Appeals Chamber endorses this view and finds that a conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of this Tribunal. Accordingly, the Trial Chamber erred in determining that the mens rea for aiding and abetting genocide requires intent to commit genocide. It is not disputed that the above-mentioned error did not invalidate the Trial Chamber's verdict in the present case.

502. It is now possible to go back to the Prosecution's allegation that the Trial Chamber erred in confining Gérard Ntakirutimana's conviction for genocide to the acts of killing or serious bodily harm that he personally inflicted on Tutsi at the Mugonero Complex and Bisesero. The issue before the Appeals Chamber is whether the Trial Chamber's findings which have not been reversed on appeal support a conviction for aiding and abetting genocide.

503. In the part of the Judgement dealing with Gérard Ntakirutimana's legal errors the Appeals Chamber has upheld a number of his grounds of appeal arguing that he

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[855] See *Krnojelac* Appeal Judgement, § 52 (" the aider and abetter in persecution, an offence with a specific intent, must be aware … of the discriminatory intent of the perpetrators of that crime", but "need not th[at] intent"); *Vasiljevic* Appeal Judgement, § 142 ("In order to convict [the accused] for aiding and abetting the crime of persecution, the Appeals Chamber must establish that [he] had knowledge that the principal perpetrators of the joint criminal enterprise intended to commit the underlying crimes, and by their acts they intended to discriminate…"); see also *Tadic* Appeal Judgement, § 229 ("In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal".).

[856] *Krstic* Appeal Judgement, § 140. It must be stressed that, in the *Krstic* case, the Appeals Chamber has considered at paragraph 134 of the Judgement that "As has been demonstrated, all that the evidence can establish is that Krstic was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstic possessed the genocidal intent. Krstic, therefore, is not guilty of genocide as a principal perpetrator".

and Elizaphan Ntakirutimana were given insufficient notice of the material facts of the Prosecution's case and that the Trial Chamber erred in basing a conviction on those material facts.

504. As a result of the errors committed by the Trial Chamber, the Appeals Chamber has quashed the findings of the Trial Chamber supporting Gérard Ntakirutimana's convictions under the Bisesero Indictment that :

> "on or about 18 April 1994 Gérard Ntakirutimana was with *Interahamwe* in Murambi Hill pursuing and attacking Tutsi refugees"

and

> "in the last part of April or possibly in May, Gérard Ntakirutimana was with attackers in Gitwe Hill where he shot at refugees"[857];
>
> "sometime between April and June 1994, Gérard Ntakirutimana was in Kidashya Hill transporting armed attackers, and he participated in chasing and shooting at Tutsi refugees in the hills"[858];
>
> "sometime in June 1994, Gérard Ntakirutimana was in an attack at Mutiti Hill with *Interahamwe*, where they shot at refugees"[859];
>
> "one day in June 1994, Gérard Ntakirutimana headed a group of armed attackers at Muyira Hill. He carried a gun and shot at refugees"[860];
>
> "sometime in mid-May 1994, at Muyira Hill, Gérard Ntakirutimana took part in an attack on Tutsi refugees"[861];

"Gérard Ntakirutimana participated in the attack against Tutsi refugees at Muyira Hill on 13 May 1994 and that he shot and killed the wife of one Nzamwita, a Tutsi civilian"[862];

and that Gérard Ntakirutimana killed a person named "Esdras" during an attack at Gitwe Hill at the end of April or the beginning of May 1994[863].

505. The following factual findings made by the Trial Chamber concerning Gérard Ntakirutimana in relation to two separate events under the Bisesero Indictment are upheld namely : that Gérard Ntakirutimana participated in an attack at Gitwe Hill, near Gitwe Primary School, at the end of April or beginning of May 1994, where he pursued and shot at Tutsi refugees (a finding based on the testimony of HH)[864]; and that Gérard Ntakirutimana participated in an attack at Mubuga Primary School in June 1994 and shot at Tutsi refugees (finding based on the testimony of SS)[865].

506. Additionally, the Trial Chamber's factual finding concerning Gérard Ntakirutimana's involvement in relation to two separate events under the Mugonero Indictment are upheld, namely that whilst participating in the attack at the Mugonero Complex, Gérard Ntakirutimana killed Charles Ukobizaba by shooting him in the chest,

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[857] Trial Judgement, §543, see also id., §832 (i)-(ii).
[858] *Ibid*., §§832 (vi), see also id., §586.
[859] *Ibid*., §§832 (ix), see also id., §647.
[860] *Ibid*., §668; see also id., §832 (viii).
[861] Trial Judgement, §832(v), see also id., §§635-636.
[862] *Ibid*., §§642, see also id., §832(iv).
[863] *Ibid*., §832(iii), see also id., §559.
[864] *Ibid*., §§552-559, 832(iii).
[865] *Ibid*., §§628, 832(viii).

from a short distance, in Mugonero Hospital courtyard around midday on 16 April 1994[866], and that Gérard Ntakirutimana attended a meeting with the commander of the Kibuye gendarmerie camp and Obed Ruzindana in Kibuye town on the attack on Mugonero complex on 16 April 1994[867].

507. Under the Bisesero Indictment, the factual findings supporting Gérard Ntakirutimana's conviction for aiding and abetting genocide consist of pursuing Tutsi refugees at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994, and participation in an attack at Mubuga Primary Scholl in June 1994 and shooting at Tutsi refugees; under the Mugonero Indictment, a conviction of aiding and abetting genocide is supported by the procurement of gendarmes and ammunition for the attack on Mugonero Complex on 16 April 1994.

508. As established above, intent to commit genocide is not required for an accused to be found guilty for aiding and abetting genocide. However, a finding by the Trial Chamber the accused had the intent to commit genocide and did so by killing and causing harm to members of the group does not per se prevent a finding that he also knowingly aided and abetted other perpetrators of genocide. Accordingly to establish that Gérard Ntakirutimana aided and abetted genocide requires proof that (i) by his acts and conduct Gérard Ntakirutimana assisted, encouraged or lent moral support to the perpetration of genocide by others which had a substantial effect upon the perpetration of that crime, and (ii) Gérard Ntakirutimana knew that the above acts and conduct assisted the commission of genocide by others.

509. It is clear from the Trial Chamber's findings at paragraphs 785 and 826 of the Trial Judgement that it found that the attacks were carried out with intent to destroy, in its whole, the Tutsi population at the Mugonero Complex and in Bisesero. It results further from the Trial Chamber findings at paragraphs 793 and 834 that it found that by his conduct and participation in the attacks Gérard Ntakirutimana had the intent to destroy, in whole, the Tutsi ethnic group. The only reasonable inference from the circumstances described by the Trial Chamber to support the above findings is that Gérard Ntakirutimana had knowledge that his acts and conduct had a substantial effect upon the commission of genocide by others. Accordingly, the Appeals Chamber finds that by the other acts of assistance identified by the Trial Chamber Gérard Ntakirutimana incurred criminal responsibility as an aider and abetter to genocide.

VI. Prosecution's Fourth Ground of Appeal (Extermination)

510. Elizaphan Ntakirutimana and Gérard Ntakirutimana were found not guilty by the Trial Chamber of a crime against humanity (extension) under Count 4 of the Mugonero Indictment and Count 5 of the Bisesero Indictment[868]. Count 4 alleges the

[866] *Ibid*., §§384, 791.

[867] *Ibid*., §§186, 791. Gérard Ntakirutimana's conviction for committing genocide stands in relating to the killing of Charles Ukobizaba in Mugonero Hospital courtyard around midday on 16 April 1994 as well as shooting at refugees at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994 and at Muguba primary school in June 1994.

[868] Trial Judgement, §§814, 852.

massacre of civilians during the month of April 1994 in Gishyita commune, Kibuye Prefecture, and Count 5 alleges the extermination of civilians during the months of April through June 1994 in the area known as Bisesero, in Gishyita and Gisovu communes, Kibuye Prefecture.

511. The Prosecution appeals the acquittals under these two counts.

A. Alleged error for requiring that victims be named or described persons

512. In its appeals, the Prosecution argues that the Trial Chamber erred in law at paragraphs 813 and 851 of the Trial Judgement when, in addition to the element of mass killing or mass destruction, it held that "victims be named or described persons" in order to impute liability for extermination. The Prosecution argues that this element does not exist in customary international law[869], and that the ICTR jurisprudence does not establish that "killing certain named or described persons" is an element under Article 3(b)[870]. Furthermore, it argues that the Trial Chamber's addition of the requirement that victims be named or identified could lead to undesirable consequences, such as rendering many prosecutions impossible when mass graves are discovered years after the killings are perpetrated and identification of victims is difficult[871]. In the alternative, the Prosecution argues that the Trial Chamber erred in law in paragraphs 814 and 852 of the Trial Judgement by interpreting this requirement too narrowly to the facts of the case and inconsistently with the Tribunal's case law[872]. It argues that the victims at the Mugonero Complex and in Bisesero were adequately described according to the case law of the International Tribunal[873]. At the Appeal hearing the Prosecution argued that, had the Trial Chamber not included the element of killing certain named or described persons, or given the narrow interpretation that it gave to this element, the Trial Chamber would have come to the inescapable conclusion that the mass element required for the crime of extermination was established. The Prosecution argued that the mass element was met because at the Mugonero Complex, hundreds of people were killed, and in Bisesero, thousands of people were killed[874].

513. In response, Gérard Ntakirutimana argues that the Trial Chamber's acquittal on the charge of extermination reflects a lack of evidence regarding the killing of a large number of individuals as a result of the Accused's actions[875]. Therefore, the additional definitional element is irrelevant to Trial Chamber's decision. He argues that the requirement that victims be "named or described" serves as proof that a certain number of people actually died as a result of the Accused's conduct. However, if the Appeals Chamber admits that such element is not a component of the crime

[869] Prosecution Appeal Brief, §§3.17-3.18, 3.20, 3.22.
[870] *Ibid*., §§3.24-3.33.
[871] *Ibid*., §3.16.
[872] *Ibid*., §§3.37-3.46.
[873] Prosecution Appeal Brief, §3.47.
[874] Appeal Hearing, T. 8 July 2004, p. 71.
[875] Response (G. Ntakirutimana), §80.

of extermination; the matter must be remitted to the Trial Chamber for a new determination[876].

514. In its Judgement the Trial Chamber made the following legal findings :

> The Chamber found above the killing of only one named or described individual, that is, Charles Ukobizaba. The Chamber is not persuaded that the element of "mass destruction" or "the taking of a large number of lives" has been established in relation to the Accused, or that the Accused were responsible for the mass killing of named or described individuals. There is insufficient evidence as to a large number of individuals killed as a result of the Accused's actions. Therefore, the Chamber is not satisfied that Elizaphan Ntakirutimana or Gérard Ntakirutimana planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation and execution of a crime against humanity (extermination). Accordingly, the Chamber finds that Elizaphan Ntakirutimana and Gérard Ntakirutimana are not guilty of a crime against humanity (extermination) as charged in Count 4 of the Mugonero Indictment[877].
>
> […]
>
> The Chamber found above the killing of only two named or described individuals, that is, the killing of Esdras and the wife of Nzamwita, by Gérard Ntakirutimana. The Chamber is not persuaded that the element of "mass destruction" or "the taking of a large number of lives" has been established in relation to the Accused, or that the Accused were responsible for the mass killing of named or described individuals. There is insufficient evidence as to a large number of individuals killed as a result of the Accused's actions. The Chamber is not satisfied that Elizaphan Ntakirutimana or Gérard Ntakirutimana planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation and execution of a crime against humanity (extermination). Accordingly, the Chamber finds that Elizaphan Ntakirutimana and Gérard Ntakirutimana are not guilty of a crime against humanity (extermination) as charged in Count 5 of the Bisesero Indictment[878].

515. The acquittal on the charge of personal commission of extermination was motivated by the fact that the Trial Chamber was not convinced, on the evidence, that Elizaphan Ntakirutimana personally killed anyone and that Gérard Ntakirutimana personally killed more than one victim at Mugonero and more than two victims at Bisesero. The basis for their further acquittal on the charge of planning, instigating, ordering or otherwise aiding and abetting in the planning preparation and execution of the crime of extermination is less clear. In light of the Trial Chamber's other findings[879], it is conceivable that the Trial Chamber reached this conclusion considering that the requirement that the mass killing be of named or described individuals was not met.

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[876] *Ibid*., § 83.

[877] Trial Judgement, § 814.

[878] Trial Judgement, § 852.

[879] See in particular, Trial Judgement, §§ 785, 788-790, which establish that Elizaphan Ntakirutimana was guilty of aiding and abetting genocide for the killings of hundreds of Tutsi identified at the Mugonero Complex.

516. In its Judgement, the Trial Chamber followed the Akayesu Trial Judgement in defining extermination as "a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction, which is not required for murder"[880]. The Appeals Chamber agrees with the Trial Chamber that the crime of extermination is the act of killing on a large scale[881]. The expression "on a large scale" or "large number" do not, however, suggest a numerical minimum[882]. As a crime against humanity, for the purposes of the ICTR Statute, the act of killing must occur within the context of a widespread or systematic attack[883] against the civilian population for national, political, ethnic, racial or religious grounds.

517. In finding that an element of the crime of extermination was the "killing of certain named or described persons"[884] the Trial Chamber purported to be followed the *Akayesu* Trial Judgement[885], which it found had since been followed in *Rutaganda* and *Musema*[886]. More recently, this element was also stated in the *Niyitegeka* Trial Judgement[887]. In other judgements issued by ICTR Trial Chambers "certain named or described persons" has not been considered to be an element of the crime of extermination[888]. Further, none of the judgements of the ICTY which have considered the charge of extermination has identified killing "certain named or described persons" to be an element of the crime of extermination[889].

518. The Appeals Chamber agrees with the Prosecution that customary international law does not consider a precise description or designation by name of victims to be

[880] Trial Judgement, §813 citing *Akayesu* Trial Judgement, §591. This position has been endorsed in all the ICTR Trial Judgements : *Kayishema and Ruzindana* Trial Judgement, §142; *Rutaganda* Trial Judgement, §82; *Musema* Trial Judgement, §217; *Bagilishema* Trial Judgement, §86; *Semanza* Trial Judgement, §340; *Niyitegeka* Trial Judgement, §450; *Kajelijeli* Trial Judgement, §890; Media Trial Judgement, §1044; *Kamuhanda* Trial Judgement, §691. See also, ICTY, *Krstic* Trial Judgement, §503; *Vasiljevic* Trial Judgement, §227; *Stakic* Trial Judgement, §639.

[881] Trial Judgement, §813 citing *Vasiljevic* Trial Judgement, §232.

[882] *Kayishema and Ruzindana* Trial Judgement, §145; *Bagilishema* Trial Judgement, §87; *Kajelijeli* Trial Judgement, §891; *Media* Trial Judgement, §1044; *Kamuhanda* Trial Judgement, §692.

[883] While the English version of the ICTR Statute reads "widespread or systematic", the French version of Article 3 reads "généralisée et systématique", the French version containing error in the translation of the English text.

[884] Trial Judgement, §813 citing *Akayesu* Trial Judgement, §592.

[885] *Akayesu* Trial Judgement, §592.

[886] Trial Judgement, n. 1154. It must be noted that this definition was not challenged on appeal in *Rutaganda and Musema*.

[887] *Niyitegeka* Trial Judgement, §450.

[888] *Kayishema and Ruzindana* Trial Judgement, §§142-147; *Bagilishema* Trial Judgement, §89; *Semanza* Trial Judgement, §§340-463; Kajelijeli Trial Judgement, §§891-893; Media Trial Judgement, §1044; *Kamuhanda* Trial Judgement, §§691-695.

[889] *Krstic* Trial Judgement, §§495-505; *Vasiljevic* Trial Judgement, §§216-233; *Stakic* Trial Judgement, §§638-661. Although the definition in the *Akayesu* Judgement is mentioned in the Krstic Judgement, it should be noted, however, that the Trial Chamber in *Krstic* did not endorse this definition and preferred to make its own assessment to determine the underlying elements of extermination. It seems, moreover, that the Trial Chamber in *Krstic* decided on the need for identification of the victims (§499) as a mere requirement of identification of the victims as civilians.

an element of the crime of extermination. There is no mention of such an element in Article 6(c) of the Statute of the Nuremberg International Military Tribunal, nor was extermination interpreted by that Tribunal as requiring proof of such an element in judgements rendered. The International Law Commission Draft Code of Crimes against the Peace and Security of Mankind also does not consider a precise description or designation of the victims by name to be an element of the crime of extermination :

> "Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act used to carry out the offence of extermination involves an element of mass destruction which is not required for murder. […] In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group of individuals who do not share any common characteristics are killed […]"[890]

519. Incidentally, that the victims be "certain named or described persons" is not identified as an element of the extermination under Article 7(1)(b) of the Statute of the International Criminal Court[891].

520. In the *Rutaganda*, *Musema* and *Niyitegeka* Trial Judgements, from which the Trial Chamber purported to derive this element, the majority of victims were identified by the Trial Chamber as civilians of Tutsi origin, without designating them by name or describing them with greater precision[892]. The interpretation they placed upon the requirement that the victims be "certain named or described persons" was met by the identification of civilians of a particular origin. In these cases, the requirement to designate the victims by name or to give a precise description of the victims killed was not extended to embrace the literal meaning, but seems rather to have been understood as expressing the fact that all crimes against humanity under the ambit of the ICTR Statute must be committed because of a victim belonging to a national, political, ethnic, racial or religious group.

521. It is not an element of the crime of extermination that a precise identification of "certain named or described persons" be established. It is sufficient that the Prosecution satisfy the Trial Chamber that mass killings occurred. In this case that element was satisfied by the Trial Chamber's findings that hundreds of people were killed at the Mugonero Complex and that thousands of people were killed in Bisesero. To require greater identification of those victims would, as the Prosecution argued,

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[890] Commentaries on the ILC Draft Code of Crimes against the Peace and Security of Mankind, *Report of the International Law Commission on the work of its 48th session, 6 May-26 July 1996*, Official Documents of the United Nations General Assembly's 51st session, Supplement n° 10 (A/51/10), Article 18, p. 118.

[891] Report of the Preparatory Commission for the International Criminal Court, Finalized draft text of the Elements of Crimes, PCNICC/2000/1/Add.2, 2 November 2000. The Appeals Chamber notes that with respect to the state of customary international law in 1994, the time at which the crimes were committed, the legal instruments coming into effect after that date are of less legal significance.

[892] *Rutaganda* Trial Judgement, §416; *Musema* Trial Judgement, §949; *Niyitegeka* Trial Judgement, §454.

increase the burden of proof to such an extent that it hinders a large number of prosecutions for extermination.

522. Accordingly, the Appeals Chamber finds that the crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death, and that the accused intended by his acts or omissions this result. Applying this definition, the Trial Chamber erred in law by interpreting the requirement of "killing of certain named or described persons" to be an element of the crime of extermination.

523. The Prosecution argues that the Trial Chamber's legal error led to acquittal of Elizaphan Ntakirutimana and Gérard Ntakirutimana on the charges of extermination. The Trial Chamber concluded that

> "[t]here is insufficient evidence as to a large number of individuals killed as a result of the Accused's actions"

to establish the criminal liability of the Accused pursuant to Article 6(1) of the Tribunal's Statute. The issue to be examined next by the Appeals Chamber is whether this factual conclusion reached by the Trial Chamber was based upon its legal error that an element of the crime of extermination is that the victims must be "named or described persons".

B. Alleged error for failing to consider that the Accused participated in a joint criminal enterprise or aided and abetted the crime of extermination

524. On appeal, the Prosecution argues that both Elizaphan Ntakirutimana and Gérard Ntakirutimana should be found guilty of extermination as participants in a joint criminal enterprise to exterminate predominantly Tutsi civilians who had sought refuge at the Mugonero Complex and in Bisesero[893]. Alternatively, the Prosecution argues that Gérard Ntakirutimana and Elizaphan Ntakirutimana should be found guilty as aiders and abettors of extermination[894]. In its Notice of Appeal, the Prosecution did not advance the ground that the Accused acted as participants in a joint criminal enterprise to exterminate. This ground of appeal was developed in the Prosecution Appeal Brief and argued at the Appeal hearing[895]. The Appeals Chamber has already rejected the Prosecution's argument that this mode of liability should have been considered by the Trial Chamber in relation to the crime of genocide and those same considerations apply here. Moreover, the Prosecution's failure to specify this ground of appeal in its Notice of Appeal is not rectified by the Prosecution's development of that argument in its Appeal Brief. Upon this basis, the Appeals Chamber considers that it has not been properly seized of this ground of appeal, and will therefore limit its consideration to other forms of individual criminal liability, namely direct commission and aiding and abetting the commission of the crime of extermination.

[893] Prosecution Appeal Brief, §§3.57-3.58; Appeal Hearing, T. 8 July 2004, p. 79.
[894] Prosecution Appeal Brief, §3.59.
[895] Prosecution Amended Notice of Appeal, Ground 5, pp. 3-4.

525. In support of its argument that the Trial Chamber erred in finding that Elizaphan Ntakirutimana and Gérard Ntakirutimana were not responsible for the taking of a large number of lives, and that the element of mass destruction had not been met, the Prosecution points to the factual finding made by the Trial Chamber. The Trial Chamber found that, on 16 April 1994, a massacre occurred at the Mugonero Complex, which "claimed hundreds of lives"[896]. It also found that, from April to June 1994, there were widespread attacks in Bisesero and that Gérard Ntakirutimana and Elizaphan Ntakirutimana intentionally participated in them[897]. On 13 May 1994, Gérard Ntakirutimana was found to have participated in the attack on Muyira Hill. This attack, the Prosecution argues, was considered to constitute extermination in the *Kayishema and Ruzindana*, *Musema* and *Niyitegeka* Trial Judgements[898].

526. The Prosecution argues that the Trial Chamber erroneously removes from its consideration the large number of persons whose killings were aided and abetted by the two Accused[899]. The Trial Chamber found that Elizaphan Ntakirutimana was guilty of aiding and abetting genocide for the killings of hundreds of Tutsi identified at the Mugonero Complex[900] but that he was not liable for extermination because there was insufficient evidence as to the large number of persons killed as a result of his actions[901]. According to the Prosecution, these findings are irreconcilable and the Trial Chamber erred in failing to consider that Elizaphan Ntakirutimana's intentional aiding and abetting of massacres satisfies the mass destruction element of extermination[902]. In addition, the Prosecution argues that the Trial Chamber found that Gérard Ntakirutimana provided assistance and participated in the attack at the Mugonero Complex with the requisite genocidal intent. That attack resulted in killings committed in addition to those that Gérard Ntakirutimana personally committed. Because Gérard Ntakirutimana substantially assisted in killings, the Prosecution argues that the mass destruction element was proven and a conviction for extermination should have been entered[903].

527. It clearly appears from the Mugonero and Bisesero Indictments, from the Prosecution's Pre-Trial Brief[904] and from the Prosecution's Closing Brief[905], that the individual criminal responsibility of Elizaphan Ntakirutimana and Gérard Ntakirutimana was founded on Article 6(1) of the Statute of the Tribunal[906]. Consequently, the form of responsibility pleaded by the Prosecution for both Accused embraces "having either planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Article 2 to 4" of the Statute"[907].

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[896] Prosecution Appeal Brief, §3.8 citing Trial Judgement, §785.
[897] Prosecution Appeal Brief, §3.8 citing Trial Judgement, §§446, 447.
[898] Prosecution Appeal Brief, §49 citing *Niyitegeka* Trial Judgement, §§451, 413.
[899] Prosecution Reply, §3.12.
[900] Prosecution Reply, §3.13 citing Trial Judgement, §§788-790.
[901] *Ibid*., §3.13.
[902] *Ibid*., §§3.13, 3.14.
[903] *Ibid*., §3.14
[904] Prosecution's Pre-Trial Brief, §§23-39.
[905] Prosecution's Closing Brief, §§1085, 1086, 1088, 1109, 1112.
[906] Gérard Ntakirutimana was also prosecuted pursuant to Article 6(3) of the Statute of the Tribunal.
[907] Prosecution's Closing Brief, §1112.

528. As mentioned earlier, the Trial Chamber acquitted the Accused on the charge of personal commission of extermination because it was not convinced, on the evidence, that Elizaphan Ntakirutimana personally killed anyone or that Gérard Ntakirutimana personally killed more than one victim at Mugonero and more than two victims at Bisesero. Why the Trial Chamber failed to consider whether the acts of aiding abetting which supported the conviction for genocide could also form the basis for a conviction for aiding and abetting the crime of extermination is unclear.

529. One possibility is that the Trial Chamber pronounced these acquittals based solely on its legal error that an element of the crime of extermination required proof that the Accused were responsible for the mass killing of precisely "named or described individuals". The second possibility is that, when the Trial Chamber stated that "there is insufficient evidence as to a large number of individuals killed as a result of the Accused's actions", it meant that aiding and abetting the crime of extermination requires that the acts of assistance provided by the Accused to the main perpetrators effectively resulted in the killing of a large number of people. This interpretation of aiding and abetting would also constitute a legal error.

530. The *actus reus* for aiding and abetting the crime of extermination is that the accused carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of that crime. This support must have a substantial effect upon the perpetration of the crime. The requisite *mens rea* is knowledge that the acts performed by the aider and abettor assist the commission of the crime of extermination committed by the principal. If it is established that the accused provided a weapon to one principal, knowing that the principal will use that weapon to take part with others in a mass killing, as part of a widespread and systematic attack against the civilian population, and if the mass killing in question occurs, the fact that the weapon procured by the accused "only" killed a limited number of persons is irrelevant to determining the accused's responsibility as an aider and abettor of the crime of extermination.

531. The Appeals Chamber will next determine whether the above error invalidates the verdict. As already stated, the Appeals Chamber has quashed a number of the Trial Chamber's factual findings for lack of notice[908]. Accordingly, the Appeals Chamber must determine whether the remaining factual findings are sufficient to support a finding of criminal responsibility of the Accused for the crime of extermination.

532. With respect to Elizaphan Ntakirutimana, the remaining findings are : one day in May or June 1994, he transported armed attackers who were chasing Tutsi survivors at Murambi Hill[909]; one day in the middle of May 1994, he brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill, and the group was searching for Tutsi refugees and chasing them; on this occasion, Elizaphan Ntakirutimana pointed out the fleeing to the attackers, who then chased these refugees singing "Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests"[910], one day on May or June 1994 Elizaphan Ntakirutimana was seen arriving at Ku Cyapa in a vehicle followed by two buses of attackers, and he was

[908] Supra, section II.A.1.(b).
[909] Trial Judgement, §579.
[910] *Ibid*., §594.

part of a convoy which included attackers[911]; and sometime between 17 April and early My 1994, Elizaphan Ntakirutimana was in Murambi within the area of Bisesero, and he went to a church in Murambi where many Tutsi were seeking refuge and ordered attackers to destroy the roof of the church[912].

533. These findings are sufficient to sustain the Trial Chamber's finding of criminal responsibility on the part of Elizaphan Ntakirutimana for aiding and abetting the crime of genocide. The Appeals Chamber is satisfied that in carrying out these acts Elizaphan Ntakirutimana assisted, encouraged or lent moral support to the perpetration of genocide by others, and that his acts had a substantial effect upon the perpetration of that crime, and that he knew that these acts and conduct assisted the commission of genocide by others.

534. The Appeals Chamber finds that in carrying out these acts of participation Elizaphan Ntakirutimana knew that the intent of the actual perpetrators was the extermination of the Tutsi refugees and that he was making a substantial contribution to the acts of mass killing of the Tutsi victims that occurred at Murambi. Accordingly, the Appeals Chamber holds that these factual findings support the mass killing element of the crime of extermination, that Elizaphan Ntakirutimana had the required *mens rea* for aiding and abetting extermination and accordingly finds that Elizaphan Ntakirutimana incurred individual criminal responsibility for aiding and abetting the extermination of the Tutsi as a crime against humanity.

535. With respect to Gérard Ntakirutimana, the remaining factual findings under the Bisesero Indictment are his participation in an attack at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994, where he pursued and shot at Tutsi refugees[913]; and his participation in an attack at Mubuga Primary School in June 1994, where he shot at Tutsi refugees[914]. In relation to the Mugonero Indictment the remaining factual findings are his killing of Charles Ukobizaba by shooting him in the chest, from a short distance, in Mugonero Hospital courtyard around midday on 16 April 1994 during an attack at the Mugonero Complex[915]; and his attendance at a meeting with the commander of the Kibuye gendarmerie camp and Obed Ruzindana in Kibuye town on the afternoon of 15 April 1994 and his procurement of gendarmes and ammunition for the attack on Mugonero Complex on 16 April 1994[916].

536. The Appeals Chamber has already determined that the factual findings supporting Gérard Ntakirutimana's conviction for aiding and abetting genocide consist of pursuing Tutsi refugees at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994, and participating in an attack at Mubuga Primary School in June 1994, where he shot at Tutsi refugees, under the Bisesero Indictment, and procuring gendarmes and ammunition for the attack on Mugonero Complex on 16 April 1994, under the Mugonero Indictment.

[911] *Ibid*., §661.
[912] *Ibid*., §691.
[913] *Ibid*., §§552-559, 832(iii).
[914] *Ibid*., §§628, 832(vii).
[915] *Ibid*., §§384, 791.
[916] *Ibid*., §§186 and 791.

537. The Appeals Chamber finds that in carrying out these acts Gérard Ntakirutimana knew that the intention of the other participants was the extermination of the Tutsi refugees and that by his acts and conduct he was making a substantial contribution to the acts of mass killing of the Tutsi victims that occurred at Gitwe Hill, Mubuga Primary School and at the Mugonero Complex. The Appeals Chamber holds that these factual findings support the mass killing element of the crime of extermination, that Gérard Ntakirutimana had the required *mens rea* for aiding and abetting extermination, and accordingly finds that Gérard Ntakirutimana incurred individual criminal responsibility for aiding and abetting the extermination of the Tutsi as a crime against humanity. The Appeals Chamber is satisfied that Gérard Ntakirutimana shared the intent to exterminate. However, as pleaded in the Indictment, the actions of Gérard Ntakirutimana alone do not satisfy the mass scale killing element for the Appeals Chamber to be able to enter a conviction for extermination[917].

C. Additional issues raised by the Accused in relation to the Prosecution fourth ground of appeal

538. Elizaphan and Gérard Ntakirutimana argued that extermination charges are reserved for persons exercising power and authority or who otherwise had the capacity to be instrumental in the large scale killings[918]. The Accused noted that the Trial Chamber rejected charges under Article 6(3) of the Statute because it found that Gérard Ntakirutimana had no effective control over any persons during the applicable period[919].

539. The argument put forward by both Elizaphan Ntakirutimana and Gérard Ntakirutimana stems from an erroneous interpretation of the *Vasiljevic* Trial Judgement. In that case, Trial Chamber II of ICTY did not consider that the accused had to be in a position of authority for the crime of extermination[920]. The paragraph of the *Vasiljevic* Trial Judgement on which they rely is a simple outline of the policy for the crime of extermination as practised by tribunals after World War II, and has no impact on the definition of the crime[921]. There was no finding in *Vasiljevic* that extermination charges are reserved for persons exercising power and authority or who otherwise had the capacity to be instrumental in the killings of large numbers. As Elizaphan Ntakirutimana and Gérard Ntakirutimana have identified no other authority in support their argument that the crime of extermination should be reserved for this category of individuals alone, and authorities of this Tribunal and that of the ICTY have established otherwise, this ground of appeal is dismissed as unfounded.

540. Elizaphan Ntakirutimana and Gérard Ntakirutimana also argue that cumulative convictions for genocide and extermination based on the same facts are prohibited[922].

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[917] *Ibid*., §524.

[918] Response (G. Ntakirutimana), §84 citing *Vasiljevic* Trial Judgement, §222; Response (E. Ntakirutimana), p. 16.

[919] Trial Judgement, §§819-822.

[920] *Vasiljevic* Trial Judgement, §229.

[921] *Ibid*., §222.

[922] Response (G. Ntakirutimana), §86; Response (E. Ntakirutimana), p. 16.

Gérard Ntakirutimana argues that the *Krstic* Trial Judgement establishes that when facts support a conviction for both extermination and genocide, the verdict of genocide should be upheld because it is more specific[923]. Gérard Ntakirutimana further submits that an extermination conviction, as well as convictions for the murder of Charles Ukobizaba, Esdras and Nzmwita's wife, would be impermissibly cumulative on the basis of the *Rutaganda* Trial Judgement. Gérard Ntakirutimana argues, therefore, that if a conviction for extermination is entered, the murder conviction should be vacated[924]. As the Appeals Chamber has already reversed Gérard Ntakirutimana's conviction for the murders of Esdras and Nzamwita's wife it will only consider the above argument in relation to the murder of Charles Ukobizaba.

541. In response the Prosecution argues that, in *Musema*, the Appeals Chamber found that convictions for both genocide and extermination based on the same conduct are permissible[925]. Furthermore, the Prosecution argues that *Musema* overruled the *Krstic* Trial Judgement because *Musema* was rendered later[926]. However, the Prosecution agrees with Gérard Ntakirutimana that an extermination conviction cannot stand cumulatively with the murder conviction if they emanate from the same events because murder is subsumed within the crime of extermination.

542. Following the principles established in *Celebici,* the Appeals Chamber in *Musema* held that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other[927]. An element is materially distinct from another if it requires proof of a fact not required by the other[928]. Applying this principle, the *Musema* Appeals Chamber held that the crime of genocide under Article 2 of the Statute and the crime of extermination under Article 3 of the Statute each contained a materially distinct element not required by the other. The materially distinct element of genocide is the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The materially distinct element of extermination, as a crime against humanity, is the requirement that the crime was committed as part of a widespread or systematic attack against a civilian population[929]. Upon this basis, the Appeals Chamber held that convictions for genocide and extermination as a crime against humanity, based on the same facts, are permissible[930]. This conclusion has recently been confirmed by the ICTY Appeals Chamber in the *Krstic* case[931]. Conviction for murder as a crime against humanity and conviction for extermination as a crime against humanity, based on the same set of

[923] Response (G. Ntakirutimana), §§87-89.
[924] *Ibid*., §96.
[925] Prosecution Reply, §3.24, citing *The Prosecutor v. Laurent Semanza*, Case n° ICTR-97-20-A, Decision of the Appeals Chamber, 31 May 2000, §92.
[926] Prosecution Reply, §3.25.
[927] *Musema* Appeal Judgement, §§358-370.
[928] *Celebici* Appeal Judgement, §412. The standard was clarified in the *Kunarac et al*. Appeal Judgement, §168. See also *Vasiljevic* Appeal Judgement, §§135, 146; *Krstic* Appeal Judgement, §218.
[929] *Musema* Appeal Judgement, §366.
[930] *Musema* Appeal Judgement, §370.
[931] *Krstic* Appeal Judgement, §§219-227.

facts, however, cannot be cumulative[932]. Murder as crime against humanity does not contain a materially distinct element from extermination as a crime against humanity; each involves killing within the context of a widespread or systematic attack against the civilian population, and the only element that distinguishes these offences is the requirement of the offence of extermination that the killings occur on a mass scale.

VII. PROSECUTION'S FIFTH GROUND OF APPEAL : MURDER (MURDER AS A CRIME AGAINST HUMANITY)

543. The Accused were charged with the crime of murder as a crime against humanity under Count 3 of the Mugonero Indictment and Count 4 of the Bisesero Indictment. The Trial Chamber acquitted Elizaphan Ntakirutimana for these counts[933]; Gérard Ntakirutimana was found guilty of the murders of Charles Ukobizaba, Esdras and the wife of Nzamwita[934]. Count 3 of the Mugonero Indictment alleged the massacre of civilians during the month of April 1994 in Gishyita commune, Kibuye Prefecture, and Count 4 of the Bisesero Indictment alleged the massacre of civilians during the months of April through June 1994 in the area known as Bisesero, in Gishyita and Gisovu communes, Kibuye Prefecture.

544. The Prosecution contends that the Trial Chamber erred in law in its determination of the elements required for murder as a crime against humanity as applied to both the Mugonero Indictment and the Bisesero Indictment. Specifically, it alleges that the Trial Chamber erred in paragraphs 803 (Mugonero) and 843 (Bisesero) in finding that one of the elements of the crime of murder (crime against humanity) is that the perpetrators personally killed the victim(s)[935]. According to the Prosecution, this error invalidates the Judgement when the Trial Chamber did not find Elizaphan Ntakirutimana and Gérard Ntakirutimana guilty of murder as a crime against humanity for their participation in the hundreds of killings at the Mugonero Complex and the thousands of killings in Bisesero[936]. The Prosecution requests that the Appeals Chamber reverse the verdict and enter conviction for Gérard Ntakirutimana and Elizaphan Ntakirutimana based on Count 3 of the Mugonero Indictment and Count 4 of the Bisesero Indictment[937]. This request is submitted, however, in the event that the Appeals Chamber does not convict Gérard Ntakirutimana and Elizaphan Ntakirutimana of extermination[938].

545. At the Appeals hearing the Prosecution requested that the Appeals Chamber, even if it granted the Prosecution's fourth ground of appeal, clarify the law with respect to the material element of murder as a crime against humanity by including a finding in the Judgement that it is not a requirement for responsibility under Article 3(a) of the Statute that the accused personally commits the killing. Having found that

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[932] See *Kayishema and Ruzindana* Trial Judgement, §§647-650; *Rutaganda* Trial Judgement, §422; *Musema* Trial Judgement, §957; *Semanza* Trial Judgement, §§500-505.

[933] Trial Judgement, §§805, 844.

[934] *Ibid*., §§809-810 and 848-849.

[935] Prosecution Amended Notice of Appeal, p. 4.

[936] *Ibid*., pp. 4-5.

[937] *Ibid*., p. 5.

[938] *Ibid*.

the Trial Chamber erred in relation to the elements of the crime of extermination, the Appeals Chamber clarifies the law on the material element of murder as a crime against humanity.

546. Murder as a crime against humanity under Article 3(a) does not require the Prosecution to establish that the accused personally committed the killing. Personal commission is only one of the modes of liability identified under Article 6(1) of the ICTR Statute. All modes of liability under that Article are applicable to the crimes defined in Articles 2 to 4 of the Statute. Similarly, an accused can also be convicted of a crime defined in Articles 2 to 4 of the Statute on the basis of his responsibility as a superior according to Article 6(3) of the ICTR Statute.

VIII. SENTENCE

547. In Section II.A.1. above, the Appeals Chamber has upheld a number of Gérard Ntakirutimana's grounds of appeal that he and Elizaphan Ntakirutimana were given insufficient notice of the material facts of the Prosecution's case and that the Trial Chamber erred in basing a conviction on those material facts. In Section VI.B and VII., the Appeals Chamber has also upheld the Prosecution's appeal in relation to the elements of extermination as a crime against humanity and confirmed that the mens rea for aiding and abetting genocide is knowledge of the perpetrator's genocidal intent. The Appeals Chamber now considers how those errors impact upon the criminal responsibility and sentences of Elizaphan Ntakirutimana and Gérard Ntakirutimana. The Appeals Chamber will also assess the merits of the Prosecution's sixth ground of appeal against the Trial Chamber's determination of the sentence to be applied to Elizaphan Ntakirutimana and Gérard Ntakirutimana.

A. Prosecution's sixth ground of appeal

548. Pursuant to Article 23 of the Statute, in determining the terms of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of Rwanda. The Prosecution argues that, although the Trial Chamber did refer to the relevant Rwandan legislation on sentences practices, it did so not for the purpose of determining the general sentencing practices in Rwanda, but rather in support of a principle of gradation discussed in the Trial Judgement. The Prosecution submits that under the general sentencing practice in Rwanda both Elizaphan Ntakirutimana and Gérard Ntakirutimana would have received more severe terms of imprisonment, namely mandatory life sentences[939].

549. It is established jurisprudence that the imposition of a sentence is a decision which falls to the Trial Chamber has considerable discretion when determining a sen-

[939] Prosecution Appeal Brief, §§5.4-5.15. Referring to the Rwandan Organic Law n° 8/96 on the Organisation of Prosecutions for Offices constituting Genocide or Crimes Against Humanity committed since 1 October 1990 and the Rwandan Penal Code of 18 August 1977.

tence and the Appeals Chamber will not intervene unless there has been a discernible error in the exercise of the Trial Chamber's discretion[940].

550. In its discussion, the Trial Chamber did indeed refer to the principle of gradation of sentences, nothing that harsher penalties may be imposed on individuals who committed crimes with "especial zeal or sadism" and that the sentences

> "consequently stigmatize those crimes at a level that corresponds to their overall magnitude and reflects the extent of the suffering inflicted upon the victims"[941].

It also noted that this principle could be found in the relevant dispositions of the Rwandan Criminal Code and the practices of Rwandan courts in respect of sentencing[942]. However, it cannot be said, as the Prosecution suggests, that by invoking such a principle, the Trial Chamber minimised the crimes committed and the conduct of the conduct of the Accused. Quite the reverse.

551. The Trial Chamber concluded that this principle would allow for imposition of

> "the highest sentence if the circumstances of the case, after assessment of any individual and mitigating factors, are deemed to require it"[943].

The Trial Chamber added that by the same token not all persons convicted of genocide must be given the highest sentence[944]. The Appeals Chamber understands this to mean that the Trial Chamber could likewise impose a lesser sentence if justified after an assessment of any individual and mitigating factors. The Trial Chamber was therefore positing that the appropriate sentence to be applied to the Accused depended largely on the circumstances of the case, including consideration of mitigating and aggravating factors. This approach is in conformity with Rule 101(A) of the Rules, and within the discretion of the Trial Chamber.

552. The Trial Chamber reached its decision on sentence only after having discussed relevant mitigating and aggravating factors, and after having noted the Prosecution's submission that both Accused would have received death sentences in Rwanda as they fell under Category I of Rwanda's Organic Law[945]. The Appeals Chambers is therefore not persuaded by the Prosecution's argument that by recalling the principle of gradation of sentence, the Trial Chamber committed a discernible error.

553. The Prosecution also submits that the sentences given to Gérard and Elizaphan Ntakirutimana are in disparity with the Tribunal's sentencing practice in genocide cases and are manifestly disproportionate to the crimes. The Prosecution requests that the Appeals Chamber increase the sentence of Elizaphan Ntakirutimana to 20 years' imprisonment, and that of Gérard Ntakirutimana to life imprisonment[946]. Given that the Appeals Chamber has quashed a number of convictions for each Accused, the submissions of the Prosecution in this regard are now moot.

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[940] *Vasiljevic* Appeal Judgement, §9; *Krstic* Appeal Judgement, §§241-242.
[941] Trial Judgement, §884.
[942] *Ibid*., §885.
[943] *Ibid*., §886.
[944] *Ibid*.
[945] *Ibid*., §890.
[946] Prosecution's Appeal Brief, §§5.16-5.53.

B. Convictions and sentences for Gérard Ntakirutimana

554. Gérard Ntakirutimana was sentenced to 25 years' imprisonment. He was arrested on 29 October 1996 in the Ivory Coast and transferred to the Tribunal on 30 November 1996. He has since his transfer been detained in the United Nations Detention Facilities in Arusha, Tanzania.

555. As a result of the errors committed by the Trial Chamber, the following Trial Chamber findings supporting Gérard Ntakirutimana's convictions under the Bisesero Indictment have been quashed :

(i) "on or about 18 April 1994 Gérard Ntakirutimana was with Interahamwe in Murambi Hill pursuing and attacking Tutsi refugees" and "in the last part of April or possibly in May, Gérard Ntakirutimana was with attackers in Gitwe Hill where he shot at refugees"[947];

(ii) "sometime between April and June 1994, Gérard Ntakirutimana was in Kidashya Hill transporting armed attackers, and he participated in chasing and shooting at Tutsi refugees in the hills"[948];

(iii) "Gérard Ntakirutimana participated in an attack at Mutiti Hill, where he shot at refugees"[949];

(iv) "one day in June 1994, Gérard Ntakirutimana headed a group of armed attackers at Muyira Hill. He carried a gun and shot at refugees"[950];

(v) "sometime in mid-May 1994, at Muyira Hill, Gérard Ntakirutimana took part in an attack on Tutsi refugees"[951];

(vi) "Gérard Ntakirutimana participated in the attack against Tutsi refugees at Muyira Hill on 13 May 1994 and [] he shot and killed the wife of one Nzamwita, a Tutsi civilian"[952];

(vii) "Gérard Ntakirutimana killed a person named 'Esdras' during an attack at Gitwe Hill at the end of April or the beginning of May 1994"[953];

556. The following factual findings made by the Trial Chamber concerning Gérard Ntakirutimana in relation to two separate events under the Bisesero Indictment are upheld :

(i) Gérard Ntakirutimana participated in an attack at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994 where he pursued and shot at Tutsi refugees"[954];

(ii) Gérard Ntakirutimana participated in an attack at Mubuga Primary School in June 1994 and shot at Tutsi refugees"[955].

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[947] Trial Judgement, §543; see also id., §§832(i)-(ii).
[948] *Ibid*., §586; see also id., §832(vi).
[949] *Ibid*., §674; see also id., §832(ix).
[950] *Ibid*., §668; see also id., §832(viii).
[951] *Ibid*., §832(v); see also id., §635.
[952] *Ibid*., §642; see also id., §832(iv).
[953] *Ibid*., §§559, 832(iii).
[954] *Ibid*., §§552-559, 832(iii).
[955] *Ibid*., §§628, 832(vii).

557. Additionally, the Trial Chamber's factual findings concerning Gérard Ntakirutimana's involvement in relation to two separate events under the Mugonero Indictment are upheld, namely :

(i) Gérard Ntakirutimana killed Charles Ukobizaba by shooting him in the chest, from a short distance, in Mugonero Hospital courtyard around midday on 16 April 1994[956];

(ii) Gérard Ntakirutimana attended a meeting with the commander of the Kibuye gendarmerie camp and Obed Ruzindana in Kibuye town on the afternoon of 15 April 1994 and he procured gendarmes and ammunition for the attack on Mugonero Complex on 16 April 1994[957].

558. Also as found above, the Trial Chamber erred in law in considering that an element of the crime of extermination is that the victims must be "named or described persons". Considering the impact of the error in question on the verdict, the Appeals Chamber found that in carrying out the acts supporting his conviction for genocide and aiding and abetting genocide, Gérard Ntakirutimana knew that the intention of the other participants was the extermination of the Tutsi refugees and that by his acts and conducts he was making a substantial contribution to the acts of mass killing of the Tutsi victims that occurred at Gitwe Hill, Mubuga Hill and at the Mugonero Complex. Therefore, Gérard Ntakirutimana incurs individual criminal responsibility for aiding and abetting extermination of Tutsi as a crime against humanity.

559. The Appeals Chamber therefore upholds the Trial Chamber's conviction of Gérard Ntakirutimana for Genocide, for his participation to the attack at the Mugonero Complex during which he killed Charles Ukobizaba, as charged in Count 1A of the Mugonero Indictment, and the conviction for murder as a crime against humanity under Count 3 of the Mugonero Indictment. For reasons explained in Section VI of the present Judgement, for his procurement of gendarmes and ammunition for the attack on the Mugonero Complex on 16 April 1994, the Appeals Chamber enters a conviction of aiding and abetting extermination under Count 4 of the Mugonero Indictment. Furthermore, the Appeals Chamber enters a conviction for aiding and abetting genocide on the basis of his procurement of gendarmes and ammunition for the attack on Mugonero Complex on 16 April 1994, as charged under Count 1A of the Mugonero Indictment[958].

560. In relation to the Bisesero Indictment, there are no remaining findings that Gérard Ntakirutimana killed or injured individuals during the attacks at Gitwe Hill and Mubuga Primary School. In light of the fact that the Appeals Chamber found that the Prosecution could not rely on the doctrine of joint criminal enterprise in this case, a conviction for genocide cannot be entered for Gérard Ntakirutimana's participation in the abovementioned attacks. However, convictions for aiding and abetting genocide, as charged under Count1 of the Bisesero Indictment, and aiding and abetting extermination as a crime against humanity, as charged under Count 5 of the Bisesero Indictment, are warranted here[959]. Accordingly, in addition to the convictions upheld above, Gérard Ntakirutimana is also guilty of the following :

[956] *Ibid*., §§384, 791.
[957] *Ibid*., §§186, 791.
[958] See *supra* §500.
[959] *Ibid*.

(i) aiding and abetting genocide for his participation in the attack at Gitwe Hill, near Gitwe Primary School, at the end of April or beginning of May 1994, and in the attack at Mubuga Primary School in June 1994;

(ii) aiding and abetting a crime against humanity (extermination) for his participation in the attack at Gitwe Hill, near Gitwe Primary School, at the end of April or beginning of May 1994, and in the attack at Mubuga Primary School in June 1994.

561. Gérard Ntakirutimana's conviction for murder as a crime against humanity under Count 4 of the Bisesero Indictment is quashed.

562. The Appeals Chamber recalls that a penalty must reflect the totality of the crimes committed by a person and be proportionate to both the seriousness of the crimes committed and the degree of participation of the person convicted[960]. In the view of the Appeals Chamber, Gérard Ntakirutimana's convictions for his participation in attacks at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994 and at Mubuga Primary School in June 1994, where he pursued and shot at Tutsi refugees, his killing of Charles Ukobizaba by shooting him in the chest, from a short distance, in Mugonero Hospital courtyard around midday on 16 April 1994, and his procurement of gendarmes and ammunition for the attack on the Mugonero Complex, are, taken as a whole, extremely grave. The Trial Chamber's finding that Gérard Ntakirutimana committed these crimes with intent to destroy in whole or in part the Tutsi group is still applicable[961]. So is the Trial Chamber's finding that these acts were committed with the knowledge that they were part of a widespread and systematic attack against the civilian Tutsi population[962].

563. The Appeals Chamber has also considered the mitigating and aggravating factors discussed by the Trial Chamber, and concurs with the Trial Chamber that the aggravating factors outweigh the mitigating factors in Gérard Ntakirutimana's case[963]. In particular, the Appeals Chamber has considered the following aggravating factors, namely that Gérard Ntakirutimana (i) abused his personal position in the community to commit the crimes, (ii) personally shot at Tutsi refugees, including Charles Ukobizaba, and (iii) participated in attacks at the Mugonero Complex, where he was a doctor, as well as in other safe havens in which refugees had sought shelter.

564. The Appeals Chamber finds that the revision of the verdict in respect of both the acquittals and the new convictions does not affect the validity of the elements which form the basis of the sentence of 25 years' imprisonment imposed by the Trial Chamber. Accordingly, the Appeals Chamber maintains the sentence of 25 years' imprisonment handed down by the Trial Chamber.

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[960] *Rutaganda* Appeal Judgement, §591; *Vasiljevic* Appeal Judgement, §156, referring to *Furundzija* Appeal Judgement, §249; *Aleksovski* Appeal Judgement, §182; *Kupreskic et al.* Appeal Judgement, §852.

[961] Trial Judgement, §§793, 834.

[962] *Ibid.*, §§808, 848.

[963] *Ibid.*, §§908-913.

C. Convictions and sentence for Elizaphan Ntakirutimana

565. Elizaphan Ntakirutimana was sentenced to ten years' imprisonment. He was arrested at the request of the Tribunal on 29 September 1996 and initially detained in Texas, USA. Having petitioned against his arrest and transfer to the International Tribunal, he was released on 17 December 1997 by a US Magistrate on constitutional grounds[964]. The US State Department petitioned against that decision, and he was ultimately re-arrested on 26 February 1998 and transferred to the United Nations Detention Facilities in Arusha on 24 March 2000.

566. As a result of the errors committed by the Trial Chamber in basing convictions on unpleaded material facts, Elizaphan Ntakirutimana's conviction under the Mugonero Indictment, for conveying attackers to the Mugonero Complex is quashed[965], and under the Bisesero Indictment, his convictions for his participation in a convoy of vehicles carrying attackers to Kabatwa Hill, where he pointed out Tutsi refugees at Gitwa Hill, and for transporting attackers to and being present at an attack at Mubuga Primary School in mid-May, under the Bisesero Indictment are quashed. Elizaphan Ntakirutimana remains guilty in relation to four separate events under the Bisesero Indictment, namely :

> (i) "one day in May or June 1994, he transported armed attackers who were chasing Tutsi survivors at Murambi Hill"[966];
>
> (ii) "one day in the middle of May 1994, he brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill, and the group was searching for Tutsi refugees and chasing them. Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers who then chased these refugees singing : 'Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests'"[967];
>
> (iii) "one day in May or June 1994, he arrived at Ku Cyapa in vehicle followed by two buses of attackers and he was part of a convoy, which included attackers"[968]; and
>
> (iv) "sometime between 17 April and early May 1994, he conveyed attackers to Murambi Church and ordered the removal of the church roof so that it could no longer be used as a hiding place for the Tutsi, and in so doing, he facilitated the hunting down and the killing of the Tutsi refugees hiding in Murambi Church in Bisesero"[969].

567. The Appeals Chamber finds that the Trial Chamber's conviction of Elizaphan Ntakirutimana for genocide for having aided and abetted in the killing and causing serious bodily or mental harm to Tutsi in Bisesero stands in relation to these remaining findings. The Trial Chamber's finding that Elizaphan Ntakirutimana had the req-

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[964] In the Matter of Surrender of Elizaphan Ntakirutimana, U.S. Dist. C. Southern Dist. Of TX, Laredo Div., Misc. n° L-96-5 (Dec. 17, 1997).

[965] Trial Judgement, §788.

[966] *Ibid.*, §828(v).

[967] *Ibid.*, §828(ii).

[968] *Ibid.*, §828(vi).

[969] *Ibid.*, §828(i).

uisite intent to commit genocide is undisturbed despite the quashing of a number of convictions[970].

568. Also as found above, the Trial Chamber erred in law in considering that an element of the crime of extermination is that the victims must be "named or described persons". In carrying out the acts supporting his conviction for aiding and abetting genocide, Elizaphan Ntakirutimana knew that the intent of the actual perpetrators was the extermination of the Tutsi refugees and that he was making a substantial contribution to the acts of mass killing of the Tutsi victims that occurred at Murambi Hill and Nyarutovu Hill. Elizaphan Ntakirutimana also incurs individual criminal responsibility for aiding and abetting the extermination of the Tutsi as a crime against humanity.

569. In the view of the Appeals Chamber, the remaining convictions against Elizaphan Ntakirutimana are of a serious nature. By these acts, in particular transporting and encouraging attackers, Elizaphan Ntakirutimana knowingly participated in the massacres of Tutsi in Bisesero. Although his convictions under the Mugonero Indictment have been quashed, the remaining proven facts establish that Elizaphan Ntakirutimana also had the intent to commit genocide. Despite the seriousness of these acts, the Appeals Chamber agrees that special consideration should be given to his individual and mitigating circumstances, notably his age and his state of health, as discussed by the Trial Chamber[971].

570. Consequently, the Appeals Chamber finds that the revision of the verdict in respect of both the acquittals and the new convictions does not affect the validity of the elements which form the basis of the sentence of ten years' imprisonment imposed by the Trial Chamber. This sentence is maintained.

IX. Disposition

For the foregoing reasons,

THE APPEALS CHAMBER

PURSUANT to Article 24 of the Statute and Rule 118 of the Rules;

NOTING the written submissions of the parties and their oral arguments presented at the hearings on 7, 8 and 9 July 2004;

SITTING in an open session;

With respect to Elizaphan Ntakirutimana,

QUASHES the conviction for aiding and abetting genocide under Count 1A of the Mugonero Indictment;

AFFIRMS the conviction for aiding and abetting genocide under Count 1 of the Bisesero Indictment;

REVERSES the acquittal for extermination as a crime against humanity under Count 5 of the Bisesero Indictment;

[970] *Ibid.*, §830.
[971] *Ibid.*, §§895-898.

ENTERS a conviction for aiding and abetting extermination as a crime against humanity under Count 5 of the Bisesero Indictment;

DISMISSES the Defence and Prosecution appeals concerning Elizaphan Ntakirutimana in all other respects;

AFFIRMS the sentence of 10 years' imprisonment handed down, subject to credit being given under Rule 101 (D) of the Rules for the period already spent in detention;

With respect to Gérard Ntakirutimana,

QUASHES the conviction for murder as a crime against humanity under Count 4 of the Bisesero Indictment;

AFFIRMS the conviction for committing genocide under Count 1A of the Mugonero Indictment, in relation to the killing of Charles Ukobizaba;

ENTERS a conviction for aiding and abetting genocide under Count 1A of the Mugonero Indictment, for the procurement of gendarmes and ammunition for the attack on the Mugonero Complex;

AFFIRMS the conviction for genocide under Count 1 of the Bisesero Indictment, but finds that his responsibility was that of an aider and abettor;

AFFIRMS the conviction for murder as a crime against humanity under Count 3 of Mugonero Indictment, in relation to the killing of Charles Ukobizaba;

ENTERS a conviction for aiding and abetting extermination as a crime against humanity under Count 4 of the Mugonero Indictment, for the procurement of gendarmes and ammunition for the attack on the Mugonero Complex;

ENTERS a conviction for aiding and abetting extermination as a crime against humanity under Count 5 of the Bisesero Indictment;

DISMISSES the Defence and Prosecution appeals concerning Gérard Ntakirutimana in all other respects;

AFFIRMS the sentence of 25 years' imprisonment handed down, subject to credit being given under Rule 101 (D) of the Rules for the period already spent in detention;

RULES that this Judgement shall be enforced immediately pursuant to Rule 119 of the Rules;

ORDERS, in accordance with Rules 103 (B) and 107 of the Rules of Procedure and Evidence, that Gérard Ntakirutimana and Elizaphan Ntakirutimana are to remain in the custody of the Tribunal pending the finalisation of arrangements for their transfer to the State where sentences will be served.

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

Signed on the 9th day of December 2004, at The Hague, The Netherlands, and issued on the 13th day of December 2004 at Arusha, Tanzania.

[Signed] : Theodor Meron; Florence Ndepele Mwachande Mumba; Mehmet Güney; Wolfgang Schomburg; Ines Monica Weinberg de Roca

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The Prosecutor v. Joseph NZABIRINDA

Case N° ICTR-2001-77

Case History

- Name : NZABIRINDA
- First Name : Joseph (surnamed "Biroto")
- Date of Birth : 1957
- Sex : male
- Nationality : Rwandan
- Former Official Function : Former employee of Ngoma *commune* as *Encadreur* of the youths
- Date of Indictment's Confirmation : 13 December 2001
- Counts : Genocide; or alternatively complicity in the genocide; Extermination as crimes against humanity and Rape as crimes against humanity
- Date and Place of Arrest : 21 December 2001, Brussels, Belgium
- Date of Transfer : 21 March 2002
- Date of Initial Appearance : 27 March 2002
- Pleading : Guilty
- Date Trial Began : 14 December 2006
- Date and content of the Sentence : 23 February 2007, 7 years of imprisonment

Le Procureur c. Joseph NZABIRINDA

Affaire N° ICTR-2001-77

Fiche technique

- Nom : NZABIRINDA
- Prénom : Joseph (surnommé "Biroto")
- Date de naissance : 1957
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : employé de la commune de Ngoma en tant qu'encadreur de la jeunesse
- Date de la confirmation de l'acte d'accusation : 13 décembre 2001
- Chefs d'accusation : génocide; ou alternativement complicité de génocide; crime contre l'humanité (extermination et viol)
- Date et lieu de l'arrestation : 21 décembre 2001, Bruxelles, Belgique
- Date du transfert : 21 mars 2002
- Date de la comparution initiale : 27 March 2002
- Précision sur le plaidoyer : coupable
- Date du début du procès : 14 décembre 2006
- Date et contenu du prononcé de la peine : 23 février 2007, 7 ans de prison

Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et témoins 6 mai 2004 (ICTR-2001-77-I)

(Original : Français)

Chambre de première instance II

Juge : Arlette Ramaroson

Mesures de protection des victimes et témoins, menace réelle pour leur propre sécurité ou celle de leur famille, crainte objectivement justifiée – déclarations de témoins, communication progressive, circonstances exceptionnelles – non divulgation d'identité au public, audience à huit clos – jurisprudence, TPIY – Section d'aide aux victimes et aux témoins – requête acceptée en partie

Instruments internationaux cités : Statut, art. 19, 20, 21 – Règlement de procédure et de preuve, art. 53, 66 (A) (ii), 69, 73, 75

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance II, Le Procureur contre Juvénal Kajelijli, Décision relative à la requête du Procureur en prescription de mesures de protection en faveur des témoins, 6 juillet 2000 (ICTR-98-44-I, Recueil 2000, p. 701) – Chambre de première instance I, Le Procureur c. Athanase Seromba, Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins, 30 juin 2003 (ICTR-2001-66-I, Recueil 2003, p. 3991) – Chambre de première instance, le Procureur c. Jean Baptiste Gatete, Decision on Prosecution Request for Protection of Witness, 11 février 2004 (ICTR-2000-61, Recueil 2004, p. X)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

LA JUGE ARLETTE RAMAROSON, siégeant en qualité de juge unique désignée conformément à l'article 73 (A) du Règlement de procédure et de preuve (le «Règlement») au nom de la Chambre de première instance II (la «Chambre»), composée également des juges William H. Sekule et Asoka de Zoysa Gunawardana,

AYANT ÉTÉ SAISI de la «requête du Procureur en prescription de mesures de protection des victimes et des témoins», y compris les annexes déposées le 14 mai 2002 (la «requête») et l'«additif à la requête du Procureur en prescription de mesures de protection des victimes et des témoins» déposé le 10 septembre 2002 (l'«additif»),

PRENANT ACTE de ce que la défense de Nzabirinda n'a pas répondu à la requête,

CONSIDÉRANT que la Chambre statuera sur la seule base des mémoires déposés par les parties conformément à l'article 73 du Règlement,

ARGUMENTS DES PARTIES

1. ATTENDU QUE la présente requête est formée en vertu de l'article 21 du Statut du Tribunal (le «Statut») et des articles 69 et 75 du Règlement en vue d'obtenir les

mesures de protection des victimes et des témoins sollicitées dans la requête et dans l'additif à cette requête. En application de l'article 21 du Statut, des mesures de protection des victimes et des témoins sont prévues dans le Règlement du Tribunal notamment aux articles 69 et 75. Notant qu'aucune réponse n'a été reçue de la Défense.

2. ATTENDU QUE le Procureur affirme que les victimes et les témoins à charge potentiels résidant au Rwanda et dans d'autres pays du continent africain risquent réellement et fortement d'être menacés, attaqués ou tués si leur identité était divulguée. Le Procureur demande l'autorisation de retarder la communication des noms des témoins et des parties, ainsi que des déclarations susceptibles de révéler leur identité et ce, dans la limite du délai fixé avant la date de la déposition de chaque témoin, conformément à la procédure de communication connue sous le terme de «communication progressive», dérogeant à l'obligation prévue à l'article 66 (A) (ii) du Règlement. Le Procureur soumet que la communication progressive, soit 21 jours avant la déposition de chaque témoin, est considérée comme une «pratique courante au Tribunal»[1].

APRÈS EN AVOIR DÉLIBÉRÉ

3. L'article 66 (A) (ii) du Règlement prévoit, entre autres mesures, que, sous réserve des dispositions des articles 53 et 69 du Règlement, le Procureur communique à la défense au plus tard 60 jours avant la date fixée pour le début du procès, copies des déclarations de tous les témoins que le Procureur entend appeler à la barre.

4. L'article 69 du Règlement précise entre autres que, dans des circonstances exceptionnelles, chacune des deux parties peut demander à la Chambre de première instance d'ordonner la non divulgation de l'identité d'une victime ou d'un témoin pour empêcher qu'il ne coure un danger ou des risques, et ce, jusqu'au moment où la Chambre en décidera autrement.

5. La jurisprudence établie du Tribunal de céans et du Tribunal pénal international pour l'ex-Yougoslavie (le «TPIY») prévoit que les témoins pour lesquels les mesures de protection sont demandées doivent encourir une menace réelle pour leur propre sécurité ou celle de leur famille, et que leur crainte doit être objectivement justifiée. La Chambre note que le Procureur a produit des documents qui tendent à établir des menaces pour des témoins potentiels résidant au Rwanda et dans d'autres pays d'Afrique[2]. Elle est convaincue que la situation décrite dans ces documents tend à

[1] Voir Requête, par. 9 et 10, ainsi que l'additif.

[2] Voir les annexes à la requête : A) Déclaration sous serment du commandant Maxwell Nkole, datée du 17 avril 2002; B) Article de l'agence de presse *Hirondelle* daté du 25 mars 2002; C) Article intitulé «Les tueurs *Interahamwe* lancent de nouvelles attaques au Rwanda» daté du 7 juin 2001 [version originale anglaise «*Interahamwe Killers Launch New Attacks on Rwanda*»]; D) Article du New York Times intitulé «Les Hutus attaquent à partir du Congo» et daté du 23 mai 2001 [version originale anglaise : «*Hutus Attack from Congo*»]; E) Dépêche de l'agence Reuters intitulée «Assassinat d'un Conseiller du Président rwandais» et publiée par CNN sur son site Web en date du 6 mars 2000 [version originale anglaise : «*Rwandan Presidential Adviser Murdered*»]; F) Article du quotidien électronique Daily Mail and Guardian daté du 29 décembre 1999; G) Article de BBC News Online intitulé «Les *Interahamwe* : une menace militaire de taille» et daté du 2 mars 1999 [version originale anglaise : «*Interahamwe : A Serious Military Threat*»]; H) Neuf articles de journaux datés des mois de novembre et décembre 1997 et août 2001; I) Document du *US Institute of Peace* intitulé «Reconstruction après le génocide : À la recherche

établir qu'il y a une menace réelle et justifiée et que divulguer le fait que ces témoins potentiels vont déposer au procès en cours au Tribunal constituerait une menace pour leur sécurité. En conséquence, des circonstances exceptionnelles ont été établies qui nécessitent que la communication de l'identité des témoins à la défense soit retardée et la divulgation de cette identité interdite au public.

6. En vertu de l'article 75 du Règlement, un juge ou une Chambre peut, de sa propre initiative ou à la demande d'une des parties, ou de la victime ou du témoin intéressé, ou de la Section d'aide aux victimes et aux témoins, ordonner des mesures appropriées pour protéger la vie privée et la sécurité des victimes ou des témoins, à condition toutefois que ces mesures ne portent pas atteinte aux droits de l'accusé. Ces mesures comprennent, sans s'y limiter, la non divulgation au public du nom du témoin ou de toute autre information permettant de révéler son identité et la tenue d'audience à huis clos. Néanmoins, aux termes de l'article 69 du Règlement, le Procureur est tenu de communiquer «suffisamment à temps» cette information à la défense «pour accorder […] à la défense le temps nécessaire à [s]a préparation». En même temps, la Chambre relève qu'alors que l'article 19 du Statut prescrit à la Chambre de première instance de veiller à ce que «le procès soit équitable et rapide et à ce que l'instance se déroule conformément au Règlement de procédure et de preuve, les droits de l'accusé étant pleinement respectés et la protection des victimes et des témoins dûment assurée», l'article 20 (4) (e) consacre le droit de l'accusé «d' interroger ou de faire interroger les témoins à charge et à obtenir la comparution et l'interrogatoire des témoins à décharge dans les mêmes conditions que les témoins à charge».

7. La Chambre relève que, suivant les dispositions du paragraphe (C) de l'article 69 du Règlement, «sous réserve de l'article 75, l'identité des victimes ou des témoins doit être divulguée dans des délais prescrits par la Chambre de première instance, pour accorder au Procureur et à la défense le temps nécessaire à leur préparation». En vertu de cette disposition, elle détermine d'une manière discrétionnaire si elle doit ordonner la communication progressive des pièces, comme le demande le Procureur, ou toute autre forme de communication. Dans l'examen de la mesure de communication à la défense des informations propres à révéler l'identité des témoins à charge, la Chambre tient compte des dispositions des articles 19, 20 et 21 du Statut, ainsi que celles des articles 69 et 75 du Règlement visés plus haut. De plus, elle rappelle que dans l'affaire *Le Procureur c. Gatete*, la Chambre de première instance I a estimé que :

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de la paix au Rwanda et au Burundi» et daté du 15 septembre 1999 [version originale anglaise : «*Postgenocidal Reconstruction : Building Peace in Rwanda and Burundi*»]; J) Divers rapports d'Amnesty International des années 2001, 2000, 1999 et 1998; K) *Rapport du Haut Commissaire des Nations Unies aux droits de l'homme sur l'Opération sur le terrain pour les droits de l'homme au Rwanda*, daté du 11 septembre 1998 (côte A/53/1998); L) Article de presse transmis par Remi Abdulrahman, Chef de la Section de la sécurité du TPIR à Kigali, et daté du 14 août 2001; M) *Rapport de situation de l'Opération sur le terrain pour les droits de l'homme au Rwanda*, daté du 27 février 1997 [version originale anglaise : *HRFOR Status Report*]; N) Bulletins quotidiens d'information du Réseau régional intégré d'information pour l'Afrique centrale et orientale, datés des mois de mai et juin 1998.

[t]he vulnerability of the witness or witnesses and the nature of the threat in the particular case must be weighed against the impact of the particular period of non-disclosure on the ability of the Defence to prepare [and that because the case] involves a single Accused, the Chamber expects the Prosecution case to be short in comparison with some of the larger cases before the Tribunal in which rolling disclosure has been ordered." The aforementioned Chamber accordingly ordered "full disclosure twenty-one days prior to the commencement of the trial.[3]

8. En l'espèce, la Chambre relève que Nzabirinda est le seul accusé et que par conséquent la présentation des moyens à charge ne sera pas longue au point de mettre en cause la sécurité des témoins même si la Chambre ordonnait que les pièces soient entièrement communiquées avant l'ouverture du procès. En conséquence, la Chambre ordonne la communication complète à la défense des éléments d'information permettant d'identifier les témoins à charge et ce, 21 jours avant le début du procès.

9. S'agissant des autres mesures sollicitées par le Procureur dans sa requête, la Chambre note que ces demandes sont pour l'essentiel identiques à celles ordonnées dans des affaires précédentes.[4] Par conséquent, elle fait droit à ces mesures dans les termes utilisés dans les ordonnances précédentes.

PAR CES MOTIFS,

LA CHAMBRE ORDONNE CE QUI SUIT :

10. Les nom, adresse et autres indications permettant d'identifier tous les témoins à charge désignés ci-après seront gardés sous scellés au Greffe et ne figureront dans aucun dossier non confidentiel du Tribunal. Il sera attribué aux témoins les pseudonymes ci-après : FBE, FBF, FBG, FBH, FBI, FBJ, FBK, FBN, FBO, FBP, FBQ, FBR, FBS, FBT et FBU et seront également attribués des pseudonymes qui seront utilisés durant toute la procédure aux autres témoins supplémentaires. Ces pseudonymes seront utilisés pour désigner les témoins à charge au cours de la procédure devant le Tribunal, dans les communications et discussions entre les parties au procès, ainsi que par le public ;

11. Les nom, adresse et autres indications permettant d'identifier tous les témoins à charge visés dans l'ordonnance ci-dessus ne seront communiqués qu'au Greffe conformément à la procédure établie et aux seules fins de la mise en place des mesures de protection ordonnées en faveur de ces personnes ;

12. Il est interdit que soient divulgués au public et aux médias les nom et adresse de ces témoins, le lieu où ils se trouvent et toutes autres indications permettant de les identifier et figurant dans les pièces justificatives, ainsi que toutes autres informations figurant dans les dossiers déposés au Greffe, ou toute autre indication susceptible de révéler l'identité de ces témoins à charge et ce, même après la fin du procès ;

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[3] Voir décision intitulée, *Decision on Prosecution Request for Protection of Witness*, le Procureur c. Gatete, datée du 11 février 2004, par. 6 et 7. Voir également *Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins*, le Procureur c. Seromba, datée du 30 juin 2003.

[4] Voir *Décision relative à la requête du Procureur en prescription de mesures de protection en faveur des témoins*, le Procureur contre Kajelijli datée du 6 juillet 2000 ainsi que la décision intitulée, *Decision on Prosecution Request for Protection of Witness*, le Procureur c. Gatete, datée du 11 février 2004.

13. Il est interdit à la défense et à l'accusé de communiquer, discuter ou révéler tout document ou toute information contenue dans tout document, ou toute autre information susceptible de révéler l'identité ou permettant d'identifier ces témoins à charge, et ce, à quiconque ou à toute entité autre que l'accusé, le conseil commis d'office ou toutes personnes membres de l'équipe de la défense;

14. La défense communiquera au Greffe la qualité de tous les membres de l'équipe de la défense qui ont accès à toute information relative à l'identité des témoins, informera par écrit le Greffe de tout changement intervenant dans la composition de l'équipe de la défense et veillera à ce que tout membre de celle-ci appelé à quitter l'équipe de la défense restitue tous les documents et toutes les informations en sa possession dès lors que ceux-ci sont de nature à révéler l'identité des témoins protégés;

15. Il est interdit de photographier, de procéder à des enregistrements sonores ou vidéo et de faire des croquis de tout témoin à charge en tout lieu et en tout temps, sans l'autorisation de la Chambre de première instance;

16. Le Procureur est autorisé à ne pas divulguer à la défense les renseignements de nature à révéler l'identité des témoins et à supprimer provisoirement leur nom, adresse, le lieu où ils se trouvent et les autres indications apparaissant dans les déclarations de témoins ou les autres pièces communiquées à la défense;

17. Les indications de nature à permettre d'identifier le témoin qui n'ont pas été communiquées par le Procureur conformément à la présente ordonnance devront être communiquées à la défense au plus tard 21 jours avant l'ouverture du procès.

18. L'accusé ou son conseil doit informer le Procureur avant de prendre tout contact avec des témoins à charge. Après avoir obtenu le consentement de la personne protégée, ou de ses parents ou de son tuteur, si l'intéressé est âgé de moins de 18 ans, le Procureur prendra les dispositions nécessaires pour faciliter cette prise de contact;

19. Il est interdit à la défense d'entreprendre de son propre chef de vérifier l'identité d'un témoin protégé ou d'encourager quiconque à le faire;

Arusha, le 6 mai 2004

[Signé] : Arlette Ramaroson

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Décision sur la requête de Joseph Nzabirinda en annulation de la décision du Greffier en Chef de retenir les sommes qui lui sont dues pour participation aux frais de sa défense 28 septembre 2004 (TPIR-2001-77-I)

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente; William H. Sekule; Solomy B. Bossa

Rétention de sommes dues pour participation aux frais de défense – décision du Greffier, révision, compétence du Président – administration et service du Tribunal, attributions normales du Greffe – sanction pécuniaire – désignation de conseil – incompétence de la Chambre – requête rejetée

Instruments internationaux cités : Statut, art. 20 (3) – Règlement de procédure et de preuve, art. 5, 33 (A) – Directive relative à la commission d'office des conseils de la défense, 4, 10, 18 – Déclaration universelle des droits de l'homme du 10 décembre 1948 – Convention Européenne de sauvegarde des Droits de l'Homme et des Libertés Fondamentales, art. 6 – Pacte International relatif aux droits civils et politiques, art. 14 (2)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (ci-après le «Tribunal»),

SIÉGEANT en la Chambre de première instance II composée de la Juge Arlette Ramaroson, Présidente, du Juge William H. Sekule et de la Juge Solomy B. Bossa (la «Chambre»);

ÉTANT SAISI de la «Requête de Joseph Nzabirinda en annulation de la décision du Greffier en Tribunal de retenir les sommes dues à Monsieur Nzabirinda pour participation aux frais de sa défense», déposée le 19 août 2003 (la «Requête»);

VU la «Registrar's Response to Joseph Nzabirinda's Motion to Annul the Registrar's Decision to Withhold Amounts Owed Him in Order to Defray in Part the Cost of his Defence», déposée le 25 août 2003 (la "Réponse du Greffier");

VU la «Prosecutor's Reply to Nzabirinda's Request to Annul the Registrar's Decision», déposée le 26 août 2003 (la «Réponse du Procureur»);

VU la décision du Greffier en date du 22 mai 2002 (la «Décision»);

VU le Statut du Tribunal pénal international pour le Rwanda et le Règlement de procédure et de preuve (le «Règlement»),

STATUANT uniquement sur la base des mémoires écrits déposés par les parties;

SOUMISSIONS DES PARTIES

La défense

1. La défense prétend que la décision du Greffier signifiée à l'accusé le 29 mai 2002 constitue à son encontre une sanction financière infligée à une personne présumée innocente. En effet, selon la défense, le refus par le Greffier de payer ses factures impayées en sa qualité d'ancien enquêteur au titre de contribution financière à sa défense dans le cadre du programme d'assistance judiciaire du Tribunal est contraire aux prescriptions légales en vigueur[1].

2. La défense affirme qu'en vertu de sa plénitude de juridiction et de l'autorité exclusive qu'il a sur les détenus, seul le Tribunal de céans a compétence pour infliger une sanction pécuniaire à un détenu et est pleinement compétent pour apprécier la validité de la décision prise par le Greffier en Chef et par conséquent, annuler cette décision.

3. La défense souligne en outre qu'aucune disposition de la Directive relative à la commission d'office des conseils de la défense ne permet au Greffier de retirer, même partiellement, le bénéfice de la commission d'office d'un conseil sans qu'il soit préalablement constaté que le détenu ne satisfait plus aux conditions de l'article 4 de ladite directive. La défense réitère que jusqu'à ce jour son statut d'indigent n'a pas changé.

4. La défense allègue que le Greffier a violé le principe du contradictoire en prenant unilatéralement la décision litigieuse sans que l'accusé soit entendu et ait été mis en mesure de faire valoir ses moyens de défense. La défense prétend qu'un conseil à titre provisoire aurait dû être désigné pour assurer la défense de Nzabiranda et faire valoir son point de vue sur la question.

Le Greffe

5. Dans sa réponse, le Greffe allègue que la requête est irrecevable, étant donné qu'elle devrait être déposée non pas devant une Chambre de première instance, mais devant le Président du Tribunal, ainsi qu'il appert de l'article 33 (A) du Règlement. Par ailleurs, en rendant ladite décision, le Greffe a usé de son pouvoir légal que lui confèrent le Statut, le Règlement et la Directive.

6. Le Greffe conteste énergiquement les allégations de la défense qui prétend que la décision litigieuse était rendue pour servir de sanction financière infligée à l'accusé présentement présumé innocent. Le Greffe précise qu'il n'était jamais question de culpabilité ou d'innocence de l'accusé quand la décision a été prise, mais seulement de faire contribuer partiellement et équitablement l'accusé aux frais engagés pour sa défense. Le Greffe persiste qu'il était en droit d'avoir agi ainsi conformément aux dispositions des articles 10 et 18 de la Directive.

[1] La défense énumère l'article 20-3 du Statut du Tribunal; l'article 11-1 de la Déclaration Universelle des Droits de l'Homme du 10 décembre 1948; l'article 6 de la Convention Européenne de sauvegarde des Droits de l'Homme et des Libertés Fondamentales; l'article 14-2 du Pacte International relatif aux droits civils et politiques et enfin l'article 5 du Règlement.

Le Procureur

7. Le Procureur allègue que l'objet de la présente requête est de demander la révision d'une décision rendue par le Greffe; il s'agit d' une matière qui relève exclusivement de la compétence du Président du Tribunal et qui devrait être ainsi portée devant lui. Par ailleurs, le Procureur demande à ce que la requête soit déclarée irrecevable du fait de son dépôt tardif alors qu'aucune explication n'ait été donnée par la défense sur ce point.

APRÈS EN AVOIR DÉLIBÉRÉ

8. La Chambre rappelle les dispositions de l'article 33 (A) du Règlement qui prévoit que : «Le Greffier apporte son concours aux Chambres et lors des réunions plénières du Tribunal, ainsi qu'aux juges et au Procureur dans l'exercice de leurs fonctions. Sous l'autorité du Président, il est responsable de l'administration et du service du Tribunal et est chargé de toute communication émanant du Tribunal ou adressée à celui-ci.»

9. La Chambre note en particulier les arguments de la défense qui prétend qu'en vertu de sa plénitude de juridiction et de l'autorité exclusive qu'il a sur les détenus, seul le Tribunal de céans a compétence pour infliger une sanction pécuniaire à un détenu et est pleinement compétent pour apprécier la validité de la décision prise par le Greffier en chef.

10. La Chambre fait observer que la révision ou plus précisément l'annulation sollicitée par la défense porte sur une décision rendue par le Greffier et dont la teneur, selon l'opinion de la Chambre, entre dans le cadre des attributions normales du Greffe qui traitent de l'administration et du service du Tribunal telles qu'elles sont définies par l'article 33 (A) sus cité. En effet, la Chambre considère que la décision prise par le Greffier dans le présent cas d'espèce fait partie de la procédure administrative prévue pour la désignation d'un conseil et dont l'éventuelle révision relève de la compétence du Président. De ce qui précède et contrairement aux prétentions de la défense, la Chambre estime que le Président du Tribunal demeure la seule autorité habilitée à donner suite à la présente requête et à statuer sur tous les points de droit et/ou de fait qui y sont soulevés.

11. La Chambre se déclare ainsi incompétente pour connaître de l'affaire et renvoie la Défense à se pourvoir à ce qu'elle en avisera.

PAR CES MOTIFS, LA CHAMBRE

SE DECLARE incompétente et,

REJETTE la requête en l'état

RENVOIE la défense à se pourvoir à ce qu'elle en avisera.

Arusha, le 28 septembre 2004

[Signé] : Arlette Ramaroson; William H. Sekule; Solomy B. Bossa

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Order of the Presiding Judge Assigning Judges to an Interlocutory Appeal Before the Appeals Chamber 11 November 2004 (ICTR-2001-77-A-R72)

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

Composition of the Appeals Chamber

International instruments cited : Statute, art. 11 (3) – Document IT/222 of the International Criminal Tribunal for the former Yugoslavia, dated 17 November 2003

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Declaration d'appel" filed by counsel for Joseph Nzabirinda on 27 October 2004;

CONSIDERING the composition of the Appeals Chamber of the International Tribunal set out in Document IT/222 of the International Criminal Tribunal for the former Yugoslavia, dated 17 November 2003;

NOTING Article 11 (3) of the Statute of the International Tribunal;

ORDER that, in the case of *Joseph Nzabirinda v. The Prosecutor,* Case N° ICTR-2001-77-A, the Appeals Chamber be composed as follows :

Judge Florence Mumba
Judge Mehmet Güney
Judge Fausto Pocar
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

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

Done this 11th day of November 2004, at The Hague, The Netherlands

[Signed] : Theodor Meron

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The Prosecutor v. Tharcisse RENZAHO

Case N° ICTR-97-31

Case History

- Name : RENZAHO
- First name : Tharcisse
- Date of birth : 1944
- Sex : male
- Nationality : Rwandan
- Former Official Function : *Préfet* of Kigali
- Date of Indictment's Confirmation : 19 June 1996
- Counts : Genocide, Complicity in the genocide, Murder as crime against humanity
- Date of amended indictment : 11 November 2002

- Date and Place of Arrest : 29 September 2002, Democratic Republic of Congo
- Date of Transfer : 30 September 2002
- Date of initial appearance : 21 November 2002
- Pleading : Non guilty
- Date Trial Began : 8 January 2007

Le Procureur c. Tharcisse RENZAHO

Affaire N° ICTR-97-31

Fiche technique

- Nom : RENZAHO
- Prénom : Tharcisse
- Date de naissance : 1944
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : Préfet de Kigali
- Date de la confirmation de l'acte d'accusation : 19 juin 1996
- Chefs d'accusation : génocide, complicité dans le génocide, meurtre comme crime contre l'humanité
- Date des modifications subséquentes portées à l'acte d'accusation : 11 novembre 2002
- Date et lieu de l'arrestation : 29 septembre 2002, République démocratique du Congo
- Date du transfert : 30 septembre 2002
- Date de la comparution initiale : 21 novembre 2002
- Précision sur le plaidoyer : Non coupable
- Date du début du procès : 8 janvier 2007

Decision on Tharcisse Renzaho's Motion for his Immediate Release on Grounds of Violations of his Rights Under Article 20 of the Statute and Rule 40 (D) of the Rules 25 August 2004 (ICTR-97-31-1)

(Original : English)

Trial Chamber II

Judges : Arlette Ramaroson, Presiding; William H. Sekule; Solomy B. Bossa

Tharcisse Renzaho – Suspect provisionally detained pursuant to art. 40 bis*, issue of an indictment within 90 days of the transfer of the suspect to the Tribunal's Detention Unit – extension of provisional detention – Democratic Republic of Congo – indictment read in French to the accused during his initial appearance, original in English, official copy of French translation – motion denied*

International instruments cited : Statute, art. 20 – Rules of procedure and evidence, art. 33 (B), 40 (D), 40 bis, 53 bis (A), 73 (A) – United Nations International Convention on Civil and Political Rights, art. 14 (3) – European Convention on Human Rights, art. 5 (2), 6 (3)

International cases cited :

I.C.T.R. : The Prosecutor v. Tharcisse Renzaho*, Order for Transfer and Provisional Detention (In Accordance with Rule 40* bis*), 16 July 1997 (ICTR-97-31-DP,* Reports 1995-1997*, p. 714) – Trial Chamber,* The Prosecutor v. Simeon Nchamihigo*, Decision un the Defence Motion for the Release of the Accused. Rule 40* bis*, 72 and 73 of the Rules (ICTR-2001-76-11,* Reports 2002*, p. X)* – The Prosecutor v. Tharcisse Renzaho*, Order for the Transfer and Provisional Detention (Rule 40* bis*), 27 September 2002 (ICTR-97-31-1,* Reports 2002*, p. X) – Trial Chamber,* The Prosecutor v. Tharcisse Renzaho*, Decision on the Prosecution Request for Extension of the Suspect's Detention; Rule 40* bis *(F) of the Rules, 4 November 2002 (ICTR-97-31-1,* Reports 2002*, p. X)*

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

SITTING as Trial Chamber II composed of Judge Arlette Ramaroson, presiding, Judge William H. Sekule and Judge Solomy B. Bossa (the "Chamber");

BEING SEIZED of the "Requête article 40 paragraphe D du Règlement de preuve et de procédure," filed on 28 April 2003 (the "Motion");

CONSIDERING "The Prosecutor's Response to the Defence Motion Under Rule 40 *bis* of the Rules of Procedure and Evidence," filed on 8 May 2003 (the "Prosecutor's Response");

AND the "Registry's Submission Under Rule 33 (B) of the Rules on *Requête article 40 paragraphe D du Règlement de preuve et de procédure*," filed on 26 May 2003

(the "Registry's Submissions"); AND "The Prosecutor's Further Response to the Defence Motion Under Article 40 (D)," filed on 28 May 2003 (the "Prosecution's Further Reply"); AND "Réplique à la deuxième réponse du Procureur à la requête de la défence en vertu de l'article 40 paragraphe D du Règlement de procédure et de preuve," filed on 17 July 2003 (the "Defence Reply to the Prosecution's Further Reply");

CONSIDERING the Statute of the Tribunal (the "Statute"), in particular Article 20 (4), and the Rules of Procedure and Evidence (the "Rules"), specifically Rules 40 (D), 40 *bis* and 53 *bis* (A);

NOW DECIDES the matter, pursuant to Rule 73 (A), on the basis of the written briefs filed by the Parties.

BACKGROUND

1. On 16 July 1997, Judge Laity Kama issued an Order, pursuant to Rule 40 *bis* for the provisional detention and transfer of Tharcisse Renzaho to the Seat of the Tribunal for a maximum period of thirty days[1].

2. On 27 September 2002, Judge Andrésia Vaz issued an Order, pursuant to Rule 40 *bis*, for the transfer and provisional detention of Tharcisse Renzaho for a maximum period of 30 days, following the Prosecution's request of 26 September 2002 that the authorities of the Democratic Republic of Congo arrest and detain Tharcisse Renzaho[2].

3. On 29 September 2002, Tharcisse Renzaho was transferred to the Seat of the Tribunal.

4. On 3 October 2002, Tharcisse Renzaho was brought before Judge Andrésia Vaz in conformity with Rule 40 *bis* (J) of the Rules. At this hearing, it was explained to him *inter alia* that, "Pursuant to Article 40 *bis* of the Rules, your detention cannot exceed 30 days beginning with the day following your transfer to the detention, and, during this time, the Prosecutor must issue an indictment […] And the Trial Chamber will have to confirm your indictment. If there are any difficulties with respect to this investigation, a Judge from the Trial Chamber may, following a request made by the Prosecutor and following an *inter partes* hearing, and before the end of the period of detention, decide to extend the provisional detention for a further period not exceeding 30 days. The total period of provisional detention cannot go beyond 90 days."[3]

5. On 25 October 2002, an Indictment, in English, dated 23 October 2002 together with the supporting material, was filed with the Registry.

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[1] *Prosecutor v. Renzaho* (ICTR-97-3 1-1) "Order for Transfer and Provisional Detention (In Accordance with Rule 40 bis)" of 16 July 1997.

[2] *Prosecutor v. Renzaho* (ICTR-97-3 1-1) "Order for the Transfer and Provisional Detention (Rule 40 *bis*)" of 27 September 2002 (the "Order for the transfer and Provisional Detention of 27 September 2002").

[3] T. of 3 October 2002, p. 6.

6. On 28 October 2002, that is to Say one day before the expiration of the 30 days following Tharcisse Renzaho's transfer to the Seat of the Tribunal, the Prosecution filed an extremely urgent motion for extension of Tharcisse Renzaho's provisional detention under Rule 40 *bis* (F). On 29 October 2002, the Prosecution's extremely urgent motion was heard by Judge Erik Mose who granted an extension. A written Decision was issued on 4 November 2002 by Judge Erik Mose ordering pursuant to Rule 40 *bis* (F) the extension of the provisional detention of Tharcisse Renzaho for an additional period of, "21 days expiring on Tuesday, 19 November 2002, pending confirmation of his indictment."[4]

7. On 15 November 2002, Judge Winston Churchill Matanzima Maqutu confirmed the Indictment against the Accused.

8. On 21 November 2002, Tharcisse Renzaho (hereinafter referred to as the "Accused") made an initial appearance before Judge Navanethem Pillay where he informed the Court that he had been served with the Indictment on 19 November 2002 in English and in French, the French version being an unofficial translation[5]. The Prosecution informed the Chamber that a harmonized French Indictment would be filed with the Registry as soon as possible[6]. In the meantime, during the initial appearance, the version of the Indictment with the unofficial French translation was read to the Accused in French, and he told the Chamber that he understood the Indictment and pleaded not guilty to the three charges therein contained[7].

9. On 29 November 2002, an official copy of the French Indictment was filed with the Registry.

SUBMISSIONS

The Defence Submissions

10. The Defence requests the immediate release of the Accused on grounds that the Prosecution has violated the Accused's rights enshrined under Article 20 (4) of the Statute, Rules 40 (D) and 53 *bis* (A) of the Rules, Article 14 (3) of the United Nations International Convention on Civil and Political Rights (the "ICCPR"), and Articles 5 (2) and 6 (3) of the European Convention on Human Rights (the "ECHR").

11. The Defence submits that that the Accused was transferred to the Seat of the Tribunal on 29 September 2002, and, that he should have received the Indictment against him within 20 days following his transfer to the Seat of the Tribunal, that is to Say, by 19 October 2002. The Defence submits that the Accused was not so notified. Rather he received the Indictment against him dated 11 November 2002, on 19 November 2002. The Defence submits that filing the said Indictment outside the 20-day time frame provided under Rule 40 (D) resulted in the violation of the rights of

[4] *Prosecutor v. Renzaho*, Case N° ICTR-97-3 1-1, "Decision on the Prosecution Request for Extension of the Suspect's Detention; Rule 40 *bis* (F) of the Rules," 4 November 2002.

[5] T. of 21 November 2002, p. 3.

[6] T. of 21 November 2002, p. 6.

[7] T. of 2 1 November 2002, p. 18.

the Accused. Consequently, the Defence argues that the Tribunal should order his immediate release.

12. The Defence further submits that in the Order for Transfer and Provisional Detention under Rule 40 *bis* of 27 September 2002, the Prosecution was specifically requested to file the Indictment against the Accused within 30 days following his transfer to the Seat of the Tribunal. According to the Defence, at a hearing of 22 October 2002, the Tribunal was not aware of the Indictment against the Accused. The Indictment against him, dated 11 November 2002, was received on 19 November 2002. This Indictment was later modified on 12 December 2002. The Defence argues that the Prosecution was unable to meet the deadlines to present the Accused with the Indictment against him.

13. Furthermore, the Defence submits that the Accused's rights under Article 20 (4) (a) of the Statute and Rule 53 *bis* (A) of the Rules were violated because he was not informed promptly and in detail, in a language which he understands, of the nature and cause of the charge against him, nor was he served with the Indictment when he was taken into custody or as soon as possible thereafter.

The Prosecution Submissions

14. The Prosecution requests that the Chamber reject the relief sought by the Defence in its Motion because it is without merit.

15. The Prosecution submits that the Accused has already made his initial appearance and has formally pleaded to the charges against him and therefore is no longer being held provisionally under Rule 40 *bis*.

16. The Prosecution submits that the Accused's rights under the ICCPR have not been violated because the Indictment and Supporting Material were served upon him in a timely manner as required by the Rules.

The Registry's Submissions

17. The Registry submits its observations on this matter pursuant to Rule 33 (B) of the Rules. The Registry notes written complaints dated 31 March 2003 from Counsel for Renzaho, Mr. François Cantier, that *inter alia* the Indictment of 23 October 2002 against the Accused had not then been served upon the Accused or his Counsel.

18. The Registry submits that, by electronic mail dated 15 April 2003, it notified the Defence that the Indictment of 23 October 2002 was an unofficial document and therefore could not be communicated to the Accused and his counsel, as such. The Defence acknowledged receipt of this electronic mail.

19. The Registry submits that there was no legal obligation, under the Statute, the Rules or the jurisprudence of the Tribunal for disclosure of the Indictment of 23 October 2002 to the Defence. The Registry submits that this indictment became moot as a result of the amended Indictment dated 11 November 2002, which was filed by the Prosecution during the confirmation process before a Judge of the Tribunal.

The Defence Reply

20. The Defence maintains that its Motion is based on Rule 40 (D) of the Rules, not on Rule 40 *bis* as the Prosecutor submits. The Defence notes that the procedure under Rule 40 (D) is conducted in an *ex parte* hearing where the Accused has no opportunity to contest his denial of liberty. The Defence recalls the Decision of 8 October 2001 rendered by Trial Chamber I, in the case of *Nchamihigo*. In that Decision, the Chamber observed that, "[…] the process being *ex parte* does not prevent the individual concerned, once a suspect or an accused, as in the instant case, from subsequently challenging its legality as applied to him."[8]

21. The Defence recalls that the Accused was transferred to the Seat of the Tribunal on 29 September 2002 and that, when he was brought before the Tribunal on 3 October 2002, Judge Vaz observed that, pursuant to Rule 40 (D), the Prosecution had 20 days within which to submit an Indictment against him. The Prosecution did not present a confirmed Indictment against the Accused within the prescribed period. Rather the Prosecution filed an Indictment against him on 23 October 2003. Accordingly, by strict application of the provisions of Rule 40 (D) of the Rules, the Defence argues the rights of the Accused have been violated, so he should be released.

The Prosecution Further Reply

22. The Prosecution reiterates the requests made in its Response and submits that the Accused was arrested pursuant to Rule 40 *bis* and not pursuant to Rule 40 (D).

The Defence Reply to the Prosecution Further Reply

23. The Defence argues that the Prosecution in its Response at paragraph 2, submitted that the Accused was arrested pursuant to Rule 40. Therefore, the Prosecution cannot now submit that the Accused was not arrested pursuant to Rule 40. The Defence further submits that, during the hearing of 3 October 2002, Judge Vaz reminded the Prosecution that, pursuant to Rule 40 (D), it had 20 days following the transfer of the Accused to the Seat of the Tribunal to file an Indictment against the Accused.

24. The Defence therefore requests that, in strict application of Rule 40 (D), the Chamber order the immediate release of the Accused.

[8] See *Prosecutor v. Nchamihigo* [Case N° ICTR-2001-76-11 at para. 5 of "Decision un the Defence Motion for the Release of the Accused Rule 40 *bis*. 72 and 73 of the Rules," English translation filed on 30 May 2002.

Regarding Violations of Rule 40 *bis*

25. The Chamber notes that, under Rule 40 *bis*, a Judge may order the transfer and provisional detention of a suspect to the Detention Unit of the Tribunal once certain conditions are met, including the Prosecution's request that a State arrest the suspect and place him in custody, in accordance with Rule 40, or detention of the suspect by the State.

26. The Chamber recalls the Appeals Chamber's Decision of 3 November 1999 in the case of *Barayagwiza* which affirmed the important differences between Rule 40 and Rule 40 *bis* which both apply to the provisional detention of suspects[9]. In that Decision, the Appeals Chamber noted for example that when a suspect is provisionally detained under Rule 40, the Prosecutor is mandated to issue an indictment within 20 days of the transfer of the suspect to the Tribunal's Detention Unit. However, when a suspect is provisionally detained under Rule 40 *bis*, the Prosecution has a maximum of 90 days of the transfer of the suspect to the Tribunal's Detention Unit, within which to issue an indictment.

27. The Chamber notes that, contrary to the submissions of the Defence, the Accused was transferred and provisionally detained pursuant to Rule 40 bis and not Rule 40 (D). This is very clear from both the title and the contents of the Order of Judge Vaz dated 27 September 2002[10]. In that Order Judge Vaz indicated that the suspect was to be provisionally detained for a period not exceeding 30 days and that the Prosecution was to file an indictment against him before the expiration of the 30 day period. Therefore, the rights of the Accused regarding his arrest, transfer and detention were governed under the provisions of Rule 40 *bis*.

28. The Chamber recalls that, on 28 October 2002, one day before the expiration of the 30 days following the transfer of the Accused to the Seat of the Tribunal, the Prosecution filed an extremely urgent motion under Rule 40 *bis* (F), for extension of his provisional detention. On 29 October 2002, the Prosecution's extremely urgent motion was heard and Judge Erik Mose granted an extension. A written Decision, issued on 4 November 2002 followed, in which Judge Erik Mose ordered, pursuant to Rule 40 *bis* (F), the extension of the provisional detention of for an additional period of "21 days expiring on Tuesday 19 November 2002, pending confirmation of his indictment." The Chamber notes that the Indictment against the Accused was confirmed on 15 November 2002, before the expiration of said additional time.

29. Accordingly, the Chamber finds that there has not been any violation of the provisions of Rule 40 *bis* of the Rules and, accordingly, denies the Defence Motion on this ground. Given this finding, it is not necessary to enter upon further discussions regarding why the Accused may still not be entitled to the relief he seeks in this motion had he been transferred or provisionally detained under Rule 40.

[9] See para. 47 of the *Barayagwiza* Appeal Charnber Decision of 3 November 1999.

[10] See also the Order for the Transfer and Provisional Detention made by Judge Kama on 16 July 1997.

Regarding Violations of Article 20 (4) (a) and Rule 53 *bis* (A)

30. The Chamber recalls the provisions of Article 20 (4) (a) saying,

> "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality : to be informed promptly and in a language he or she understands of the nature and cause of the charges against him or her."

Rule 53 *bis* (A) provides,

> "Service of the indictment shall be effected personally on the accused at the time the accused is taken into the custody of the Tribunal or as soon as possible thereafter."

31. The Chamber notes that, prior to the confirmation of the Indictment against the Accused, he was a suspect who was provisionally detained at the Tribunal. A careful review of the chronology of events outlined at paragraphs 1-9 of this Decision indicates that the Indictment against the Accused was confirmed by Judge Winston Churchill Matanzima Maqutu on 15 November 2002, that it was served on the Accused on 19 November 2002 and that he made his initial appearance before Judge Navanethem Pillay on 21 November 2002. During his initial appearance, the Indictment was read to the Accused in French, and he told the Chamber that he understood. He then pleaded not guilty to the three charges against him.

32. In the Chamber's opinion, the Accused rights under both Article 20 (4) (a) of the Statute and Rule 53 *bis* (A) of the Rules were not violated. The Chamber notes that during his initial appearance it was pointed out that the original Indictment was in English and that the French version available was an unofficial translation containing typographical and numbering errors as noted by Judge Navenethem Pillay[11]. Further, the Prosecution informed the Chamber that it would harmonize the unofficial French translation of the Indictment with the English original as soon as possible. On 29 November 2002, an official copy of the French translation of the Indictment was filed with the Registry. Accordingly, the Chamber is satisfied that the Accused was promptly served with the Indictment against him in a language he understood and denies the Defence request in that respect.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion in its entirety.

Arusha, 25 August 2004

[Signed] : Arlette Ramaroson; William H. Sekule; Solomy B. Bossa

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[11] Transcript of 21 November 2002, pp 21, 22.

Amended Indictment
20 September 2004 (ICTR-97-31-1)

(Original : Not Specified)

I. The Prosecutor of the United Nations International Criminal Tribunal for Rwanda, pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda (the "Statute") charges :

Tharcisse RENZAHO

With :

Count I - GENOCIDE, pursuant to Articles 2 (3) (a), 6 (1) and 6 (3) of the Statute, or in the alternative,

Count II - COMPLICITY IN GENOCIDE, pursuant to Articles 2 (3) (e), 6 (1) and 6 (3) of the Statute;

Count III - MURDER as a CRIME AGAINST HUMANITY, pursuant to Articles 3 (a), 6 (1) and 6 (3) of the Statute;

Count IV - RAPE as a CRIME AGAINST HUMANITY, pursuant to Articles 3 (g) and 6 (3) of the Statute;

Count V - MURDER as a VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS OF 1949 and Additional Protocol II of 1977, as incorporated pursuant to Articles 4 (a), 6 (1) and 6 (3) of the Statute; and

Count VI - RAPE as a VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS OF 1949 and Additional Protocol II of 1977, as incorporated pursuant to Articles 4 (e) and 6 (3) of the Statute.

II. THE ACCUSED

1. Tharcisse RENZAHO was born in 1944 in Gaseta Secteur, Kigarama Commune, Kibungo *Préfecture*, Republic of Rwanda.

2. Tharcisse RENZAHO was at all times referred to in this indictment :

(A) A senior public official who,

(i) was *Préfet* of Kigali ville;

(ii) was Chairman of the Civil Defense Committee for Kigali ville; and

Acte d'accusation modifié 20 septembre 2004 (ICTR-97-31-I)

(Original : Anglais)

I. Le Procureur du Tribunal pénal international pour le Rwanda, agissant en vertu des pouvoirs que lui confère l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le «Statut»), accuse

Tharcisse RENZAHO

des crimes énumérés ci-après :

PREMIER CHEF D'ACCUSATION – GÉNOCIDE, en application de l'article 2 (3) (a) et de l'article 6, paragraphes 1 et 3, du Statut; ou à titre subsidiaire,

DEUXIÈME CHEF D'ACCUSATION – COMPLICITÉ DANS LE GÉNOCIDE, en application de l'article 2 (3) (e) et de l'article 6, paragraphes 1 et 3, du Statut;

TROISIÈME CHEF D'ACCUSATION – ASSASSINAT constitutif de CRIME CONTRE L'HUMANITÉ, en application de l'article 3 (a) et de l'article 6, paragraphes 1 et 3, du Statut;

QUATRIÈME CHEF D'ACCUSATION – VIOL constitutif de CRIME CONTRE L'HUMANITÉ, en application de l'article 3 (g) et de l'article 6, paragraphe 3, du Statut

CINQUIÈME CHEF D'ACCUSATION – MEURTRE constitutif de VIOLATION DE L'ARTICLE 3 COMMUN AUX CONVENTIONS DE GENÈVE DE 1949 ET DU PROTOCOLE ADDITIONNEL II DE 1977, en application de l'article 4 (a) et de l'article 6, paragraphes 1 et 3, du Statut;

SIXIÈME CHEF D'ACCUSATION – VIOL constitutif de VIOLATION DE L'ARTICLE 3 COMMUN AUX CONVENTIONS DE GENÈVE DE 1949 ET DU PROTOCOLE ADDITIONNEL II DE 1977, en application des articles 4 (e) et 6 (3) du Statut.

II. L'ACCUSÉ

1. Tharcisse RENZAHO est né en 1944 dans le secteur de Gaseta, commune de Kigarama, préfecture de Kibungo (République rwandaise).

2. Durant toute la période visée dans le présent acte d'accusation, Tharcisse Renzaho était :

A) Haut fonctionnaire :

i) Exerçant les fonctions de préfet de Kigali-ville;

ii) Exerçant les fonctions de président du comité de défense civile de Kigali-Ville;

(iii) consequently had *de jure* and *de facto* control over *bourgmestres*, *conseillers de secteur*, *responsables de cellule*, *nyumbakumi* (ten-house leasers), administrative personnel, gendarmes, communal police, *Interahamwe*, militias, and armed civilians in that he could order such persons to commit or to refrain from committing unlawful acts and could discipline or punish them for unlawful acts or omissions.

(B) A Colonel in the Forces Armees Rwandaises ("FAR") and as such was a senior military official who had *de jure* and *de facto* control over all armed forces who were under his command in that he could order such persons to commit or to refrain from committing unlawful acts and could discipline or punish them for unlawful acts or omissions.

(C) A member of the crisis committee set up on the night of 6 April 1994 composed of senior military officers, including Major-General Augustin Ndindiliyimana – Chairman, Colonel Marcel Gatsinzi, Colonel Leonidas Rusatira, Colonel Balthazar Ndengeyinka, Colonel Felicien Muberuka, Colonel Joseph Murasampongo and Lt. Colonel Ephrem Rwabalinda and as such was a senior military official who had *de jure* and *de facto* control over all armed forces who were under his command in that he could order such persons to commit or to refrain from committing unlawful acts and could discipline or punish them for unlawful acts or omissions.

(D) A "combatant" pursuant to Articles 1 and 2 of Protocol II Additional to Geneva Conventions of 12 August 1949.

(E) By virtue of his rank, office and links with prominent figures in the community, and his role as *de facto* Minister of the Interior in Kigali *Préfecture*, any person wishing to leave Kigali *ville* needed an authorization signed by him and therefore his authorization necessarily had influence in other *préfectures*.

III. Charges and concise statement of facts

3. At all times referred to in this indictment there existed in Rwanda a minority racial or ethnic group known as Tutsis, officially identified as such by the government of Rwanda. The majority of the population of Rwanda was comprised of a racial or ethnic group known as the Hutus, also officially identified as such by the government of Rwanda.

4. Between 6 April 1994 and 17 July 1994, throughout Rwanda, and in Kigali in particular, *Interahamwe* militias, soldiers of the FAR and armed civilians targeted and attacked the civilian population based on ethnic or racial identification as Tutsi, or perceived sympathies to the Tutsi. During the attacks some Rwandan citizens killed or caused serious bodily or mental ham to persons perceived to be Tutsi. As a result of these attacks, large numbers of ethnically or racially identified Tutsi were killed.

iii) Exerçant par conséquent un contrôle de droit comme de fait sur les bourgmestres, les conseillers de secteur, les responsables de cellule, les *nyumbakumi* (chefs de chaque ensemble de dix maisons), le personnel administratif, les gendarmes, les agents de la police communale, les *Interahamwe*, les miliciens et les civils armés, en ce qu'il pouvait ordonner à ces personnes de commettre ou de s'abstenir de commettre des actes illégaux et les discipliner ou les punir de leurs actes ou omissions contraires à la loi.

B) Colonel au sein des Forces armées rwandaises (ci-après les «FAR») et, à ce titre, un haut responsable militaire exerçant un contrôle de droit comme de fait sur toutes les forces armées placées sous son commandement, en ce qu'il pouvait ordonner à ces personnes de commettre ou de s'abstenir de commettre des actes illégaux et les discipliner ou les punir de leurs actes ou omissions contraires à la loi.

C) Membre du comité de crise créé dans la nuit du 6 avril 1994, qui était composé d'officiers militaires supérieurs, notamment du général-major Augustin Ndindiliyimana (Président), du colonel Marcel Gatsinzi, du colonel Léonidas Rusatira, du colonel Balthazar Ndengeyinka, du colonel Félicien Muberuka, du colonel Joseph Murasampongo et du lieutenant-colonel Ephrem Rwabalinda, et, à ce titre, un haut responsable militaire exerçant un contrôle de droit comme de fait sur toutes les forces armées placées sous son autorité, en ce qu'il pouvait ordonner à ces personnes de commettre ou de s'abstenir de commettre des actes illégaux et les discipliner ou les punir de leurs actes ou omissions contraires à la loi.

D) «Combattant» au sens des articles 1 et 2 du Protocole additionnel II aux Conventions de Genève du 12 août 1949.

E) En raison de son rang, de son poste et des relations qu'il entretenait avec d'éminentes personnalités de la communauté, ainsi que du rôle de Ministre de l'intérieur de fait qu'il jouait dans la préfecture de Kigali, toute personne désireuse de quitter Kigali-ville devait avoir une autorisation signée de lui et, de ce fait, son autorisation avait nécessairement une influence dans d'autres préfectures.

III. ACCUSATIONS : RELATION CONCISE DES FAITS

3. Durant toute la période visée dans le présent acte d'accusation, il existait au Rwanda un groupe racial ou ethnique minoritaire connu sous le nom de «groupe tutsi» et officiellement identifié comme tel par les pouvoirs publics rwandais. La majorité de la population rwandaise était constituée d'un groupe racial ou ethnique connu sous le nom de «groupe hutu», lui aussi officiellement identifié comme tel par les pouvoirs publics rwandais.

4. Entre le 6 avril et le 17 juillet 1994, sur l'ensemble du territoire rwandais et à Kigali en particulier, des miliciens *Interahamwe*, des militaires des FAR et des civils armés ont pris pour cible et attaqué la population civile identifiée comme appartenant au groupe ethnique ou racial tutsi ou considérée comme des personnes sympathisant avec les Tutsis. Au cours des attaques, certains citoyens rwandais ont tué des personnes soupçonnées d'appartenir au groupe ethnique tutsi ou porté gravement atteinte àleur intégrité physique ou mentale. Ces attaques ont entraîné la mort d'un grand nombre de personnes identifiées comme membres du groupe ethnique ou racial tutsi.

5. During the period of 7 April 1994 through 17 July 1994, there existed a non international armed conflict throughout Rwanda, particularly in Kigali-*ville préfecture*. The belligerents in said non-international armed conflict were the FAR and the Rwandan Patriotic Front ("RPF"). During the relevant period of 7 April 1994 through 4 July 1994, the FAR occupied portions of Kigali-*ville*, trained and armed the *Interahamwe*; and were supported in the conflict by the *Interaharnwe*, the gendarmerie and *préfectural* communal police. During this period, the RPF occupied the eastern stretches of Kacyiru and parts of Kicukiro *communes*.

Count 1 : Genocide

The Prosecutor of the International Criminal Tribunal for Rwanda charges Tharcisse Renzaho with GENOCIDE, a crime stipulated in Article 2 (3) (b) of the Statute, in that on or between the dates of 7 April 1994 and 17 July 1994 throughout Rwanda, particularly in Kigali-*ville Préfecture*, Tharcisse Renzaho was responsible for killing or causing serious bodily or mental harm to members of the Tutsi racial or ethnic group, including acts of sexual violence, with intent to destroy, in whole or in part, a racial or ethnic group, as such, as outlined in paragraphs 6 through 48.

Alternatively,

Count II : Complicity in genocide

The Prosecutor of the International Criminal Tribunal for Rwanda charges Tharcisse Renzaho with COMPLICITY IN GENOCIDE, a crime stipulated in Article 2 (3) (e) of the Statute, in that on or between the dates of 7 April 1994 and 17 July 1994 throughout Rwanda, particularly in Kigali-*ville Préfecture*, Tharcisse Renzaho was responsible for killing or causing serious bodily or mental harm to members of the Tutsi racial or ethnic group, including acts of sexual violence, with intent to destroy, in whole or in part, a racial or ethnic group, as such, or with knowledge that other people intended to destroy, in whole or in part, the Tutsi racial or ethnic group, as such, and that his assistance would contribute to the crime of genocide, as outlined in paragraphs 6 through 48.

CONCISE STATEMENT OF FACTS FOR COUNTS 1 AND II

Individual Criminal Responsibility

6. Pursuant to Section 6 (1) of the Statute, the accused, Tharcisse Renzaho, is individually responsible for the crimes of genocide or complicity in genocide because he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of these crimes. With respect to the commission of those crimes, Tharcisse Renzaho ordered those over whom he had command respon-

5. Durant la période allant du 7 avril au 17 juillet 1994, un conflit armé ne présentant pas un caractère international se déroulait sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Kigali-ville. Il opposait les FAR au Front patriotique rwandais («FPR»). Au cours de la période allant du 7 avril au 4 juillet 1994 qui rentre dans l'intervalle susmentionné, les FAR ont occupé des parties de Kigali-ville, entraîné et armé les *Interahamwe* et mené la guerre avec l'appui des *Interahamwe*, de la gendarmerie et de la police communale de la préfecture. A cette époque, le FPR occupait les parties orientales de la commune de Kacyiru et certaines localités de la commune de Kicukiro.

Premier chef d'accusation : Génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Tharcisse Renzaho de GÉNOCIDE, crime prévu à l'article 2 (3) (a) du Statut, en ce que les 7 avril et 17 juillet 1994 ou entre ces dates, sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Kigali-ville, Tharcisse Renzaho a été responsable du meurtre de membres du groupe racial ou ethnique tutsi ou d'atteintes graves à leur intégrité physique ou mentale, y compris d'actes de violence sexuelle, commis dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique comme tel, ainsi qu'il est exposé aux paragraphes 6 à 48.

A titre subsidiaire,

Deuxième chef d'accusation : Complicité dans le génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Tharcisse Renzaho de COMPLICITÉ DANS LE GÉNOCIDE, crime prévu à l'article 2 (3) (e) du Statut, en ce que les 7 avril et 17 juillet 1994 ou entre ces dates, sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Kigali-ville, Tharcisse Renzaho a été responsable du meurtre de membres du groupe racial ou ethnique tutsi ou d'atteintes graves à leur intégrité physique ou mentale, y compris d'actes de violence sexuelle, commis dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique comme tel ou en sachant que d'autres personnes avaient l'intention de détruire en tout ou en partie le groupe racial ou ethnique tutsi comme tel et que son aide contribuerait à la perpétration du crime de génocide, ainsi qu'il est exposé aux paragraphes 6 à 48.

RELATION CONCISE DES FAITS RELATIFS AUX PREMIER ET DEUXIÈME CHEFS D'ACCUSATION

Responsabilité pénale individuelle

6. En application de l'article 6 (1) du Statut, l'accusé Tharcisse Renzaho est individuellement responsable du crime de génocide ou de celui de complicité dans le génocide pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ces crimes. S'agissant de la commission desdits crimes, Tharcisse Renzaho a non seulement usé de ses fonc-

sibility and control as a result of his position and authority described in paragraph 2 and he instigated and aided and abetted those over whom he did not have command responsibility and control. In addition, the accused wilfully and knowingly participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was the commission of genocide against the Tutsi racial or ethnic group and persons identified as Tutsi or presumed to support the Tutsi in Kigali *Préfecture* as well as throughout Rwanda. To fulfill this criminal purpose, the accused acted with leaders and members of the FAR, including Colonel Théoneste Bagosora and Colonel Ephrem Setako and Major Nyirahakizimana; the Presidential Guard; the *Interahamwe*, including Odette Nyirabagenzi, Angeline Mukandutiye and Ngerageza; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; other known participants, such as Father Wenceslas Munyeshyaka and Bishop Samuel Musabyimana; and other unknown participants, all such actions being taken either directly or through subordinates, for at least the period of mid-1993 through 17 July 1994. The particulars that give rise to his individual criminal responsibility are set forth in paragraphs 7 through 26.

Roadblocks

7. From and after 7 April 1994, Tharcisse Renzaho ordered and instigated soldiers, gendarmes, militia, local citizens and demobilized soldiers to construct and man roadblocks at Gitega and near the Ontracom facility in Kigali-*ville*. These roadblocks were used to identify and to kill Tutsis.

8. On or about 7 April 1994, and regularly thereafter, in broadcasts over Radio Rwanda, Tharcisse Renzaho ordered and instigated soldiers, gendarmes, militia, local citizens and demobilized soldiers to construct and to man roadblocks to intercept, identify and kill Tutsis, while allowing movement of commercial goods and the majority Hutu population.

9. On or about 10 April 1994, at a meeting at the *Préfecture* office of Kigali-*ville*, Tharcisse Renzaho ordered *conseillers* and *responsables de cellule* to set up roadblocks. These roadblocks were used to identify and to kill Tutsis.

10. On a date in May 1994 Tharcisse Renzaho convened a meeting at which he instigated and ordered *nyurnbakumi*, *responsables de cellule*, *conseillers* and *bourgmestres* to remain vigilant at roadblocks and to make sure that *Inynezi* do not succeed in hiding among the population. At this meeting Renzaho also committed the act of distributing weapons to *Interahamwe* militiamen.

The Killing Campaign in Kigali-ville

11. At diverse unknown dates beginning in mid-1993 and continuing through the first three months of 1994, Tharcisse Renzaho met regularly in his home with *Interahamwe* and *Impuzamugambi* groups, and he aided and abetted in the military train-

tions et de ses pouvoirs décrits au paragraphe 2 pour ordonner aux personnes placées sous son commandement et son contrôle de les commettre, mais encore incité et aidé et encouragé des personnes qui ne relevaient pas de son commandement et de son contrôle à le faire. En outre, l'accusé a participé volontairement et en toute connaissance de cause à une entreprise criminelle commune dont l'objet, le but et le résultat prévisible étaient de commettre le génocide du groupe racial ou ethnique tutsi et des personnes identifiées comme appartenant à ce groupe ou présumées soutenir les Tutsis tant dans la préfecture Kigali que sur le reste du territoire rwandais. Pour atteindre ce but criminel, l'accusé a agi de concert avec des dirigeants et des membres des FAR, dont le colonel Théoneste Bagosora, le colonel Ephrem Setako et le major Nyirahakizimana, les membres de la Garde présidentielle, les *Interahamwe*, notamment Odette Nyirabagenzi, Angeline Mukandutiye et Ngerageza, les «Forces de défense civile», la police communale, des milices civiles, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues, comme le père Wenceslas Munyeshyaka et l'évêque Samuel Musabyimana, et des personnes inconnues, tous les actes considérés étant accomplis directement ou par l'intermédiaire de subordonnés, pendant au moins la période allant du milieu de l'année 1993 au 17 juillet 1994. Les faits détaillés par lesquels il a engagé sa responsabilité pénale individuelle sont exposés aux paragraphes 7 à 26.

Barrages routiers

7. À partir du 7 avril 1994, Tharcisse Renzaho a ordonné aux militaires, aux gendarmes, aux miliciens, aux populations locales et aux soldats démobilisés de mettre en place et de tenir des barrages routiers à Gitega et près des installations de l'Ontracom à Kigali-ville et les a incités à agir de la sorte. Ces barrages routiers ont servi à identifier et tuer les Tutsis.

8. Le 7 avril 1994 ou vers cette date, sur les ondes de Radio Rwanda et de façon régulière par la suite, Tharcisse Renzaho a ordonné aux militaires, aux gendarmes, aux miliciens, à la population locale et aux soldats démobilisés de mettre en place et de tenir des barrages routiers, et les a incités à agir de la sorte, pour intercepter, identifier et tuer les Tutsis tout en laissant passer les marchandises et les membres de la population majoritaire hutue.

9. Le 10 avril 1994 ou vers cette date, à une réunion tenue au bureau préfectoral de Kigali-ville, Tharcisse Renzaho a donné aux conseillers et aux responsables de cellule l'ordre de mettre en place des barrages routiers qui ont servi à identifier et à tuer les Tutsis.

10. En mai 1994, Tharcisse Renzaho a convoqué une réunion au cours de laquelle il a incité les *nyumbakumi*, les responsables de cellule, les conseillers et les bourgmestres à rester vigilants aux barrages routiers et à veiller à ce que les *Inyenzi* ne réussissent pas à se cacher dans la population et leur a ordonné d'agir de la sorte. A cette réunion, il a également distribué des armes à des miliciens *Interahamwe*.

Campagne de massacre menée dans la préfecture de Kigali-ville

11. A différentes dates indéterminées au cours de la période allant du milieu de l'année 1993 à la fin du premier trimestre de 1994, Tharcisse Renzaho s'est régulièrement réuni chez lui avec des groupes d'*Interahamwe* et d'*Impuzamugambi*. En

ing of and distribution of ammunition to members of the *Interahamwe* and *Impuzamugambi*.

12. Between 6 April and 17 July 1994, Tharcisse Renzaho provided and facilitated the provision of bonds, permits, *laissez-passer*, and food to enable the movement and equipping of the *Interahamwe*, militia, soldiers and gendarmes who were participating in the killing of Tutsis, and by doing so aided and abetted this killing.

13. On 8 April 1994, Tharcisse Renzaho communicated with Colonel Bagosora by radio confirming that he had committed, ordered, instigated or aided and abetted the killing of the manager of *Banque Rwandaise de Développement*.

14. On or about 8 April 1994, near Hotel Baobab, Tharcisse Renzaho acted as the senior officia1 during an operation that involved the use of a military tank. Renzaho ordered, instigated or aided and abetted those who operated the tank to use its guns to shoot at Tutsi houses, resulting in the deaths of at least forty Tutsis.

15. On or about 9 April 1994, Tharcisse Renzaho distributed two UZI guns to an associate whose name was Ngerageza and who was the *Interahamwe* leader at a roadblock in Gitega *secteur*, for the purpose of killing Tutsis, and by doing so aided and abetted the killing.

16. On or about 9 April 1994, Tharcisse Renzaho**,** while dressed in the military uniform of a senior military official, accompanied armed *Interahamwe* at Kajari in Kanombe. The *Interahamwe* entered houses of Tutsis and killed the Tutsis who resided there. By escorting these *Interahamwe* Renzaho aided and abetted the killing of the Tutsis.

17. On or about 16 April 1994 at a meeting at the Kigali-*ville* prefectorial headquarters, Tharcisse Renzaho ordered or instigated *conseillers* to obtain firearms from the Ministry of Defence to be distributed at the *secteur* level. These weapons were used to kill Tutsis, and by causing the distribution of firearms Renzaho aided and abetted the killing.

18. On or about 30 April 1994, Tharcisse Renzaho dismissed, among other people, *secteur conseiller* Jean-Baptiste Rudasngwa and Celestin Sezibera, because he believed they were opposed to the killing of Tutsis. By replacing the aforementioned persons with *conseillers* who supported the killing of Tutsis Renzaho aided and abetted this killing.

19. On an unknown date within the period between on or about 7 and 30 May 1994, while at a meeting at Bishop Samuel Musabyimanays residence, Tharcisse Renzaho agreed to supply guns to Musabyimana. Renzaho thereafter during the same period tendered several Kalachnikov rifles, which were delivered by Major Nyirahakizimana. Said rifles were distributed among the militias and were used to kill Tutsis, and by providing these rifles Renzaho aided and abetted the killing.

outre, il a participé par aide et encouragement à la formation militaire de membres des mouvements *Interahamwe* et *Impuzamugambi* et à la distribution de munitions aux intéressés.

12. Entre le 6 avril et le 17 juillet 1994, Tharcisse Renzaho a assuré et facilité la délivrance de bons, de permis et de laissez-passer, ainsi que la fourniture de vivres, pour permettre aux *Interahamwe*, aux miliciens, aux soldats et aux gendarmes qui participaient aux massacres des Tutsis de se déplacer et de s'équiper, se rendant ainsi complice de ces massacres par aide et encouragement.

13. Le 8 avril 1994, Tharcisse Renzaho a confirmé par radiotéléphone au colonel Bagosora qu'il avait commis, ordonné, incité à commettre ou aidé et encouragé à commettre le meurtre du directeur de la Banque rwandaise de développement.

14. Le 8 avril 1994 ou vers cette date, près de l'hôtel Baobab, Tharcisse Renzaho a agi en haut responsable lors d'une opération réalisée à l'aide d'un char militaire, en ce qu'il a ordonné aux personnes conduisant le char de se servir des pièces d'artillerie dont ce char était équipé pour tirer sur les maisons de Tutsis, les a incités à le faire ou les a aidés et encouragés à agir de la sorte, entraînant de ce fait la mort d'au moins 40 Tutsis.

15. Le 9 avril 1994 ou vers cette date, Tharcisse Renzaho a remis à un acolyte du nom de Ngerageza, chef des *Interahamwe* postés à un barrage routier dans le secteur de Gitega, deux armes à feu de marque UZI pour tuer les Tutsis, participant ainsi par aide et encouragement au massacre de ceux-ci.

16. Le 9 avril 1994 ou vers cette date, Tharcisse Renzaho, vêtu de l'uniforme d'un haut responsable militaire, a tenu compagnie à des *Interahamwe* armés à Kajari dans la commune de Kanombe. Ces *Interahamwe* sont entrés chez les Tutsis et les ont tués. Pour avoir escorté les *Interahamwe* en question, Renzaho les a aidés et encouragés à tuer les Tutsis.

17. Le 16 avril 1994 ou vers cette date, lors d'une réunion tenue au bureau préfectoral de Kigali-ville, Tharcisse Renzaho a ordonné aux conseillers de se procurer des armes à feu au Ministère de la défense pour les distribuer dans les secteurs ou les a incités à agir de la sorte. Ces armes ont servi à tuer des Tutsis. Pour avoir provoqué la distribution d'armes à feu, Renzaho a aidé et encouragé les meurtriers à tuer ces Tutsis.

18. Le 30 avril 1994 ou vers cette date, Tharcisse Renzaho a démis de leurs fonctions plusieurs personnes, dont les conseillers de secteur Jean-Baptiste Rudasingwa et Célestin Sezibera, parce qu'il les croyait hostiles au massacre des Tutsis. Pour avoir remplacé ces personnes par des conseillers favorables au massacre des Tutsis, Renzaho a aidé et encouragé les auteurs à commettre ce massacre.

19. A une date indéterminée, entre le 7 et le 30 mai 1994 ou vers cette période, Tharcisse Renzaho, qui participait à une réunion à la résidence de l'évêque Samuel Musabyimana, a accepté de fournir des armes à feu à celui-ci. Par la suite, Renzaho a fourni au cours de la même période plusieurs kalachnikovs qui ont été livrées par le major Nyirahakizimana. Distribués aux miliciens, ces fusils ont servi à tuer des Tutsis. Pour les avoir fournis, Renzaho a aidé et encouragé les auteurs à tuer lesdits Tutsis.

20. In the month of June 1994 Tharcisse Renzaho, together with Colonel Ephrem Setako and Colonel Bagosora, attended an impromptu meeting at Hotel Kiyovu in Kigali where they planned the continued killings of members of the Tutsi population.

Specific Sites

21. Between 7 April and 17 July 1994 thousands of Tutsis took refuge in *Centre d'Education de Langues Africaines* ("CELA"), St. Paul's Pastoral Centre ("St. Paul's") and St. Famille Parish Church ("St. Famille"). Father Wenceslas Munyeshyaka was in charge of St. Famille; Odette Nyirabagenzi was the *conseiller de secteur* directly under the command and authority of Tharcisse Renzaho; and Angeline Mukandutiye was the school inspector as well as a leader of the *Interahamwe* and in *de facto* control of Bwahirimba *secteur.* Mukandutiye was directly under the command of and accountable to Renzaho.

22. On or about 20 April 1994, while in the company of Father Munyeshyaka, Tharcisse Renzaho ordered and instigated soldiers and *Interahamwe* to remove forcibly approximately forty persons, mostly Tutsi, from CELA. Many of these persons were subsequently killed, and Renzaho aided and abetted their killing.

23. On or about 22 April 1994 at St. Famille, Father Munyeshyaka handed over ten Tutsi men to Tharcisse Renzaho and the men were never seen again. They were killed and Renzaho aided and abetted their killing.

24. On or about 22 April 1994, while in the company of Odette Nyirabagenzi and Angeline Mukandutiye, Tharcisse Renzaho ordered and instigated the removal and murder of sixty Tutsi men at CELA. During other dates unknown, he ordered and instigated the murder of many other Tutsis at CELA.

25. On or about 14 June 1994, while in the company of Odette Nyirabagenzi and Angeline Mukandutiye, Tharcisse Renzaho ordered and instigated *Interahamwe* to remove sixty Tutsi boys from St. Paul's, and to kill these Tutsi boys.

26. On or about 17 June 1994, while in the company of Odette Nyirabagenzi and Angeline Mukandutiye, Tharcisse Renzaho ordered and instigated soldiers, militia and communal police to attack Tutsis who had sought refuge St. Famille and many Tutsis were killed.

Command Criminal Responsibility

27. Pursuant to Section 6 (3) of the Statute, the accused, Tharcisse Renzaho, is responsible for the crimes of genocide or complicity in genocide because specific criminal acts were committed by subordinates of the accused and the accused knew or had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. These subordinates included the leaders and mem-

20. En juin 1994, Tharcisse Renzaho, en compagnie des colonels Ephrem Setako et Bagosora, a pris part à une réunion impromptue à l'hôtel Kiyovu à Kigali. Au cours de cette réunion, ils ont planifié la poursuite du massacre des membres de la population tutsie.

Lieux précis

21. Entre le 7 avril et le 17 juillet 1994, des milliers de Tutsis se sont réfugiés au Centre d'éducation de langues africaines («CELA»), au Centre pastoral Saint Paul («Centre Saint Paul») et à l'église de la paroisse Sainte Famille. Le père Wenceslas Munyeshyaka était responsable de la paroisse Sainte Famille, Odette Nyirabagenzi était conseiller de secteur et relevait directement du commandement et de l'autorité de Tharcisse Renzaho, tandis qu'Angeline Mukandutiye, qui était non seulement inspecteur d'enseignement, mais aussi un des chefs des *Interahamwe,* exerçait de fait un contrôle sur le secteur de Bwahirimba. Mukandutiye relevait directement du commandement de Renzaho et lui rendait compte.

22. Le 20 avril 1994 ou vers cette date, alors qu'il était en compagnie du père Munyeshyaka, Tharcisse Renzaho a donné à des militaires et à des *Interahamwe* l'ordre d'extraire de force du CELA une quarantaine de personnes, pour la plupart des Tutsis, et les a incités à agir de la sorte. Beaucoup d'entre elles ont été tuées par la suite, et Renzaho a aidé et encouragé les meurtriers à les tuer.

23. Le 22 avril 1994 ou vers cette date, à la paroisse Sainte Famille, le père Munyeshyaka a livré à Tharcisse Renzaho dix hommes tutsis qui n'ont jamais été revus. Ils ont été tués et Renzaho a aidé et encouragé les meurtriers à les tuer.

24. Le 22 avril 1994 ou vers cette date, alors qu'il était en compagnie d'Odette Nyirabagenzi et d'Angeline Mukandutiye, Tharcisse Renzaho a ordonné et incité à commettre l'enlèvement et le meurtre de 60 hommes tutsis au CELA. À d'autres dates indéterminées, il a ordonné et incité à commettre le meurtre de nombreux autres Tutsis au CELA.

25. Le 14 juin 1994 ou vers cette date, alors qu'il était en compagnie d'Odette Nyirabagenzi et d'Angeline Mukandutiye, Tharcisse Renzaho a ordonné à des *Interahamwe* d'extraire du Centre Saint Paul 60 garçons tutsis pour les tuer et les a incités à agir de la sorte.

26. Le 17 juin 1994 ou vers cette date, alors qu'il était en compagnie d'Odette Nyirabagenzi et d'Angeline Mukandutiye, Tharcisse Renzaho a ordonné à des militaires, à des miliciens et à des agents de la police communale d'attaquer des Tutsis réfugiés à l'église de la paroisse Sainte Famille et les a incités à agir de la sorte. Les intéressés ont tué de nombreux Tutsis.

Responsabilité pénale du supérieur hiérarchique

27. En application de l'article 6.3 du Statut, l'accusé Tharcisse Renzaho est responsable du crime de génocide ou de celui de complicité dans le génocide en ce que ses subordonnés ont commis des actes criminels précis et il n'a pas pris les mesures nécessaires et raisonnables pour prévenir ceux-ci ou pour en punir les auteurs, alors qu'il savait ou avait des raisons de savoir que les subordonnés en questions étaient sur le point de commettre ou avaient commis ces actes. Au nombre de ces subordonnés figuraient des responsables et des membres des FAR, notamment le major Nyi-

bers of the FAR, including Major Nyirahakizimana; the Presidential Guard; the *Interahamwe*, including Odette Nyirabagenzi, Angeline Mukandutiye and Ngerageza; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; other known participants, such as Father Wenceslas Munyeshyaka and Bishop Samuel Musabyimana; and other unknown participants. In addition, these subordinates of the accused participated and contributed significantly in a joint criminal enterprise, whose object, purpose, or foreseeable outcome was the commission of genocide against the Tutsi racial or ethnic group and persons identified as Tutsi or presumed to support the Tutsi in Kigali *Préfecture* as well as throughout Rwanda, for at least the period from mid-1993 through 17 July 1994. The accused knew or had reason to know of the participation of his subordinates and the object, purpose, or foreseeable outcome of the joint criminal enterprise and the accused failed to take the necessary and reasonable measures to prevent his subordinates from participating in the joint criminal enterprise or to punish his subordinates for their participation in the joint criminal enterprise. The particulars of the participation of the accused and his subordinates in this joint criminal enterprise are set forth in paragraphs 28 through 48.

Roadblocks

28. From and after 7 April 1994, roadblocks at Gitega and near the Ontracom facility in Kigali-*ville* were constructed and manned by soldiers, gendarmes, militia and demobilized soldiers under the command and control of Tharcisse Renzaho. These roadblocks were used to identify and to kill Tutsis.

29. On or about 10 April 1994, at a meeting at the *Préfecture* office of Kigali-*ville*, *conseillers* and *responsables* de cellule who were under the command and control of Tharcisse Renzaho set up roadblocks. These roadblocks were used to identify and to kill Tutsis.

30. At a meeting that took place on a date in May 1994 *nyumbakumi*, *responsables de cellule*, *conseillers* and *bourgmestres* who were under the command and control of Tharcisse Renzaho were ordered by Renzaho to remain vigilant at roadblocks and to make sure that *Inynezi* did not succeed in hiding among the population. At this meeting *Interahamwe* militiamen under the command and control of Renzaho received weapons distributed by him.

The Killing Campaign in Kigali-*ville*

31. At diverse unknown dates beginning in mid-1993 and continuing through the first three months of 1994, *Interahamwe* and *Impuzamugambi* groups met regularly at the home of Tharcisse Renzaho. Renzaho assisted in the military training of and distribution of ammunition to his subordinates in the *Interahamwe* and to the *Impuzamugambi*, and had effective control over them in the sense of having the power to prevent or punish their acts.

32. Between 6 April and 17 July 1994, Tharcisse Renzaho provided and facilitated the provision of bonds, permits, *laissez-passer*, and food to enable the movement and equipping of the *Interahamwe*, militia, soldiers and gendarmes who were participating

rahakizimana, les éléments de la Garde présidentielle, des *Interahamwe*, dont Odette Nyirabagenzi, Angeline Mukandutiye et Ngerageza, les «Forces de défense civile», les agents de la police communale, des miliciens civils, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues, comme le père Wenceslas Munyeskyaka et l'évêque Samuel Musabyimana, ainsi que des personnes inconnues. En outre, ces subordonnés de l'accusé ont participé et contribué sensiblement à une entreprise criminelle commune dont l'objet, le but ou le résultat prévisible était de commettre le génocide du groupe racial ou ethnique tutsi et des personnes identifiées comme appartenant à ce groupe ou présumées soutenir les Tutsis tant dans la préfecture de Kigali que sur le reste du territoire rwandais, pendant au moins la période allant du milieu de l'année 1993 au 17 juillet 1994. L'accusé était au courant ou avait des raisons d'être au courant de la participation de ses subordonnés à l'entreprise criminelle commune et de l'objet, du but ou du résultat prévisible de cette entreprise et il n'a pas pris les mesures nécessaires et raisonnables pour les empêcher d'y participer ou pour les punir de leur participation. Les détails de la participation de l'accusé et de ses subordonnés à l'entreprise criminelle commune sont exposés aux paragraphes 28 à 48.

Barrages routiers

28. À partir du 7 avril 1994, des militaires, des gendarmes, des miliciens et des soldats démobilisés relevant du commandement et du contrôle de Tharcisse Renzaho ont monté et tenu des barrages routiers à Gitega et près des installations de l'Ontracom à Kigali-ville. Ces barrages routiers ont servi à identifier et tuer les Tutsis.

29. Le 10 avril 1994 ou vers cette date, à une réunion tenue au bureau préfectoral de Kigali-ville, des conseillers et des responsables de cellule relevant du commandement et du contrôle de Tharcisse Renzaho ont monté des barrages routiers. Ces barrages routiers ont servi à identifier et tuer les Tutsis.

30. Au cours d'une réunion tenue en mai 1994, Tharcisse Renzaho a ordonné aux *nyumbakumi*, aux responsables de cellule, aux conseillers et aux bourgmestres relevant de son commandement et de son contrôle de rester vigilants aux barrages routiers et de veiller à ce que les *Inyenzi* ne réussissent pas à se cacher dans la population. A cette réunion, des miliciens *Interaharnwe* relevant du commandement et du contrôle de Renzaho ont reçu des armes distribuées par celui-ci.

Campagne de massacre menée dans la préfecture de Kigali-ville

31. À différentes dates indéterminées au cours de la période allant du milieu de l'année 1993 à la fin du premier trimestre de 1994, des groupes d'*Interaharnwe* et d'*Impuzamugambi* se sont réunis régulièrement chez Tharcisse Renzaho. Renzaho a concouru à la formation militaire de ses subordonnés membres du mouvement *Interahamwe* et des *Impuzarnugambi*, ainsi qu'à la distribution de munitions aux intéressés et il exerçait un contrôle effectif sur eux en ce sens qu'il avait le pouvoir d'empêcher ou de sanctionner leurs actes.

32. Entre le 6 avril et le 17 juillet 1994, Tharcisse Renzaho a assuré et facilité la délivrance de bons, de permis et de laissez-passer, ainsi que la fourniture de vivres, pour permettre aux *Interahamwe*, aux miliciens, aux soldats et aux gendarmes qui participaient aux massacres des Tutsis de se déplacer et de s'équiper, et il exerçait un

in the killing of Tutsis, and had effective control over them in the sense of having the power to prevent or punish their acts.

33. On 8 April 1994, Tharcisse Renzaho communicated with Colonel Bagosora by radio confirming that those under his command and control had committed, ordered, instigated or aided and abetted the killing of the manager of *Banque Rwandaise de Développement*.

34. On or about 8 April 1994, near Hotel Baobab, Tharcisse Renzaho was the senior officia1 during an operation that involved the use of a military tank. While in Renzaho's presence and without his objection, the tank was used by Renzaho's subordinates to shoot at Tutsi houses, resulting in the deaths of at least forty Tutsis.

35. On or about 9 April 1994, Tharcisse Renzaho, while dressed in the military uniform of a senior military official, accompanied armed *Interahamwe* at Kajari in Kanombe. Renzaho's subordinates in the *Interahamwe* entered houses of Tutsis and killed the Tutsis who resided there in Renzaho's presence without his objection.

36. On or about 16 April 1994 at a meeting at the Kigali-*ville* prefectorial headquarters, *conseillers* under the command and control of Tharcisse Renzaho obtained firearms from the Ministry of Defense to be distributed at the *secteur* level. These weapons were used to kill Tutsis.

37. On multiple unknown dates between April and July 1994, Tharcisse Renzaho refused or failed to punish *Interahamwe* members directly under his control, command and supervision whom he knew from persona1 experience to have participated in the killing of Tutsis and moderate Hutus in Kigali, while at the same time acting to prevent or punish those committing attacks that were not part of the killing campaign.

38. On or about 30 April 1994, Tharcisse Renzaho dismissed, among other people, *secteur conseillers* Jean-Baptiste Rudasingwa and Celestin Sezibera, because he believed they were opposed to the killing of Tutsis. Renzaho replaced the aforementioned persons with *conseillers* who supported the killing of Tutsis, thus showing his command and control over local administrative officials in Kigali-*ville*.

Specific Sites

39. Between 7 April and 17 July 1994 thousands of Tutsis took refuge in CELA, St. Paul's and St. Famille. Father Wenceslas Munyeshyaka was in charge of St. Famille; Odette Nyirabagenzi was the *conseiller de secteur* directly under the command and authority of Tharcisse Renzaho; and Angeline Mukandutiye was the school inspector as well as a leader of the *Interahamwe* and in *de facto* control of Bwahirimba *secteur.* Mukandutiye was directly under the command of and accountable to Renzaho.

40. Between 7 April and 17 July 1994, Tharcisse Renzaho's subordinates, including but not limited to Father Munyeshyaka, Odette Nyirabagenzi and Angeline Mukandutiye, and other *Interahamwe* leaders, planned, prepared, ordered and instigated attacks on members of the racial or ethnic Tutsi group in Kigali. These

contrôle effectif sur eux en ce sens qu'il avait le pouvoir d'empêcher ou de sanctionner leurs actes.

33. Le 8 avril 1994, Tharcisse Renzaho a confirmé par radiotéléphone au colonel BAGOSORA que des personnes relevant de son commandement et de son contrôle avaient commis, ordonné, incité à commettre ou aidé et encouragé à commettre le meurtre du directeur de la Banque rwandaise de développement.

34. Le 8 avril 1994 ou vers cette date, près de l'hôtel Baobab, Tharcisse Renzaho était le haut responsable présent lors d'une opération réalisée à l'aide d'un char militaire. En présence de Renzaho et sans aucune objection de sa part, ses subordonnés ont utilisé ce char pour tirer sur les maisons de Tutsis, entraînant la mort d'au moins 40 Tutsis.

35. Le 9 avril 1994 ou vers cette date, Tharcisse Renzaho, vêtu de l'uniforme d'un haut responsable militaire, a tenu compagnie à des *Interahamwe* armés à Kajari dans la commune de Kanombe. Ses subordonnés membres du mouvement *Interahamwe* sont entrés chez les Tutsis et les ont tués en sa présence et sans aucune objection de sa part.

36. Le 16 avril 1994 ou vers cette date, lors d'une réunion tenue au bureau préfectoral de Kigali-ville, des conseillers relevant du commandement et du contrôle de Tharcisse Renzaho ont obtenu du Ministère de la défense des armes à feu à distribuer dans les secteurs. Ces armes ont servi à tuer des Tutsis.

37. À plusieurs dates indéterminées entre avril et juillet 1994, Tharcisse Renzaho a refusé ou s'est abstenu de punir des *Interahamwe* placés directement sous son contrôle, son commandement et sa supervision dont il savait, pour l'avoir constaté en personne, qu'ils avaient participé au massacre de Tutsis et de Hutus modérés à Kigali, tout en prenant des mesures pour prévenir ou punir les attaques qui ne s'inscrivaient pas dans le cadre de la campagne de massacre.

38. Le 30 avril 1994 ou vers cette date, Tharcisse Renzaho a démis de leurs fonctions plusieurs personnes, dont les conseillers de secteur Jean-Baptiste Rudasingwa et Célestin Sezibera, parce qu'il les croyait hostiles au massacre des Tutsis. Il a remplacé ces personnes par des conseillers favorables au massacre des Tutsis, prouvant ainsi qu'il exerçait une autorité et un contrôle sur les autorités administratives locales de Kigali-ville.

Lieux précis

39. Entre le 7 avril et le 17 juillet 1994, des milliers de Tutsis se sont réfugiés au CELA, au Centre Saint Paul et à l'église de la paroisse Sainte Famille. Le père Wenceslas Munyeshyaka était responsable de la paroisse Sainte Famille, Odette Nyirabagenzi était conseiller de secteur et relevait directement du commandement et de l'autorité de Tharcisse Renzaho, tandis qu'Angeline Mukandutiye, qui était non seulement inspecteur d'enseignement, mais aussi un des chefs des *Interahamwe*, exerçait de fait un contrôle sur le secteur de Bwahirimba. Mukandutiye relevait directement du commandement de Renzaho et lui rendait compte.

40. Entre le 7 avril et le 17 juillet 1994, des subordonnés de Tharcisse Renzaho, dont le père Munyeshyaka, Odette Nyirabagenzi et Angeline Mukandutiye, pour ne citer que ceux-là, et d'autres responsables du mouvement *Interahamwe* ont planifié, préparé, ordonné et incité à commettre des attaques contre des membres du groupe

attacks took place at St. Famille, St. Paul's, Kadaffi Mosque and CELA, among other places in the Nyarugenge *secteur* and were carried out with intent to kill or cause mental and bodily harm to members of the racial or ethnic Tutsi group in whole or in part.

41. On or about 20 April 1994, while in the Company of Father Munyeshyaka, soldier and *Interahamwe*, who were Tharcisse Renzaho's subordinates, removed forcibly approximately forty persons, mostly Tutsi, from CELA. Many of these persons were subsequently killed.

42. On or about 22 April 1994 at St. Famille, Tharcisse Renzaho's subordinate, Father Munyeshyaka, handed over ten Tutsi men to be killed by others of RENZAHO's subordinates and the men were never seen again.

43. On or about 22 April 1994, Tharcisse Renzahoys subordinates, Odette Nyirabagenzi and Angeline Mukandutiye, removed and caused the murder of sixty Tutsi men at CELA. During other dates unknown in April, May and June 1994 they removed and caused the murder of many other Tutsis at CELA.

44. On or about 14 June 1994, Tharcisse Renzaho's subordinates, Odette Nyirabagenzi and Angeline Mukandutiye, removed and caused the murder of sixty Tutsi boys at St. Paul's.

45. On or about 17 June 1994, Tharcisse Renzaho's subordinates, including but limited to Odette Nyirabagenzi and Angeline Mukandutiye, soldiers, militia and communal police attacked and killed Tutsis who had sought refuge St. Famille.

Sexual Violence

46. Tutsi women were raped by *Interahamwe* militia, soldiers and other individuals under the command and authority of Tharcisse Renzaho on April 16 and diverse unknown dates during the months of April, May and June 1994. *Conseillers* under the direct command and authority of Tharcisse Renzaho reported on a regular basis about the rape of Tutsi women by *Interahamwe* militia, soldiers and other individuals under the command and authority of Renzaho. Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such rapes or to punish the perpetrators thereof.

47. Father Munyeshyaka and other *Interahamwe* under the command and control of Tharcisse Renzaho compelled Tutsi women to provide them with sexual pleasures in exchange for the woman's safety at St. Famille during the period in which Tutsis sought refuge at St. Famille in the months of April, May and June 1994. Tharcisse Renzaho knew or had reason to know that these acts were being perpetrated against Tutsi women and he failed or refused to punish the perpetrators of these forced sexual acts at St. Famille.

48. *Interahamwe* soldiers and armed civilians under the command and control of Tharcisse Renzaho maintained Tutsi women at houses in central Kigali, where they compelled the women provide them with sexual pleasures in exchange for the women's safety on diverse unknown dates during the months of April, May and June 1994.

racial ou ethnique tutsi à Kigali. Ces attaques ont été perpétrées à la paroisse Sainte Famille, au centre Saint Paul, à la mosquée Kadaffi et au CELA, entre autres lieux, dans le secteur de Nyarugenge, dans l'intention de tuer les membres de l'ensemble ou d'une partie du groupe racial ou ethnique tutsi ou de porter atteinte à leur intégrité physique ou mentale.

41. Le 20 avril 1994 ou vers cette date, alors que Tharcisse Renzaho se trouvait en compagnie du père Munyeshyaka, des militaires et des *Interahamwe*, qui étaient ses subordonnés, ont extrait de force du CELA une quarantaine de personnes, pour la plupart des Tutsis. Beaucoup d'entre elles ont été tuées par la suite.

42. Le 22 avril 1994 ou vers cette date, à la paroisse Sainte Famille, l'un des subordonnés de Tharcisse Renzaho, en l'occurrence le père Munyeshyaka, a livré dix hommes tutsis pour qu'ils soient tués par d'autres subordonnés de l'intéressé et ces hommes n'ont jamais été revus.

43. Le 22 avril 1994 ou vers cette date, les subordonnés de Tharcisse Renzaho, en l'occurrence Odette Nyirabagenzi et Angeline Mukandutiye, ont enlevé et fait tuer 60 hommes tutsis au CELA. À d'autres dates indéterminées en avril, mai et juin 1994, ils ont enlevé et fait tuer de nombreux autres Tutsis au CELA.

44. Le 14 juin 1994 ou vers cette date, les subordonnés de Tharcisse Renzaho, en l'occurrence Odette Nyirabagenzi et Angeline Mukandutiye, ont enlevé et fait tuer 60 garçons tutsis au Centre Saint Paul.

45. Le 17 juin 1994 ou vers cette date, des subordonnés de Tharcisse Renzaho, notamment Odette Nyirabagenzi et Angeline Mukandutiye, pour ne citer que ceux-là, des militaires, des miliciens et des agents de la police communale ont attaqué et tué des Tutsis qui s'étaient réfugiés à l'église de la paroisse Sainte Famille.

Violence sexuelle

46. Des femmes tutsies ont été violées par des miliciens *Interahamwe*, des militaires et d'autres personnes relevant du commandement et de l'autorité de Tharcisse Renzaho le 16 avril et à différentes dates indéterminées en avril, mai et juin 1994. Des conseillers placés directement sous le commandement et l'autorité de Tharcisse Renzaho faisaient régulièrement état de viols commis sur des femmes tutsies par des miliciens *Interahamwe*, des militaires et d'autres personnes relevant aussi de son commandement et de son autorité. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher ces viols ou pour en punir les auteurs.

47. Le père Munyeshyaka et d'autres *Interahamwe* relevant du commandement et du contrôle de Tharcisse Renzaho ont contraint des femmes tutsies à leur procurer des plaisirs sexuels en échange de la sécurité de celles-ci à la paroisse Sainte Famille pendant la période où les Tutsis y ont trouvé refuge en avril, mai et juin 1994. Tharcisse Renzaho savait ou avait des raisons de savoir que ces actes sexuels forcés étaient en train d'être commis sur des femmes tutsies à la paroisse Sainte Famille, et il s'est abstenu ou a refusé d'en punir les auteurs.

48. Des *Interahamwe*, des militaires et des civils armés relevant du commandement et du contrôle de Tharcisse Renzaho ont séquestré des femmes tutsies dans certaines maisons situées au centre de Kigali, où ils les ont contraintes à leur procurer des plaisirs sexuels en échange de la sécurité de ces femmes à diverses dates indéterminées

Tharcisse Renzaho knew or had reason to know that these acts were being perpetrated against Tutsi women and he failed or refused to punish the perpetrators of these forced sexual acts.

Count III : Murder as a crime against humanity

The Prosecutor of the International Criminal Tribunal for Rwanda charges Tharcisse Renzaho with MURDER as a CRIME AGAINST HUMANITY, a crime stipulated in Article 3 (a) of the Statute, in that on and between 6 April and 17 July 1994 throughout Rwanda, particularly in Kigali-*ville Préfecture*, Tharcisse Renzaho, with intent to kill members of the Tutsi racial or ethnic group or persons identified as Tutsi or presumed to support the Tutsi, was responsible for the killing of such persons as part of a widespread or systematic attack against that civilian population on racial, ethnic and political grounds, as set forth in paragraphs 49 through 58.

CONCISE STATEMENT OF FACTS FOR COUNT III

Individual Criminal Responsibility

49. Pursuant to Section 6 (1) of the Statute, the accused, Tharcisse Renzaho, is individually responsible for murder as a crime against humanity because he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of this crime. With respect to the commission of this crime, Tharcisse Renzaho ordered those over whom he had command responsibility and control as a result of his position and authority described in paragraph 2 and he instigated and aided and abetted those over whom he did not have command responsibility and control. In addition, the accused willfully and knowingly participated in a joint criminal enterprise whose object, purpose and foreseeable outcome was the commission of crimes against humanity against the Tutsi racial or ethnic group and persons identified as Tutsi or presumed to support the Tutsi or to be politically opposed to "Hutu Power" in Kigali *Préfecture* as well as throughout Rwanda on racial, ethnic or political grounds. To fulfill this criminal purpose, the accused acted with leaders and members of the FAR; the Presidential Guard; the *Interahamwe*, such as Odette Nyirabagenzi; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; other known participants, such as Father Wenceslas Munyeshyaka; and other unknown participants, all such actions being taken either directly or through their subordinates for at least the period of 12 April through 15 June 1994. The particulars that gave rise to his individual criminal responsibility are set forth in paragraphs 50 through 53.

en avril, mai et juin 1994. Tharcisse Renzaho savait ou avait des raisons de savoir que ces actes sexuels forcés étaient en train d'être commis sur des femmes tutsies, et il s'est abstenu ou a refusé d'en punir les auteurs.

Troisième chef d'accusation :
Assassinat constitutif de crime contre l'humanité

Le Procureur du Tribunal pénal international pour le Rwanda accuse Tharcisse Renzaho d'ASSASSINAT constitutif de CRIME CONTRE L'HUMANITÉ, crime prévu à l'article 3 (a) du Statut, en ce que les 6 avril et 17 juillet 1994 ou entre ces dates, sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Kigali-ville, Tharcisse Renzaho, animé de l'intention de tuer des membres du groupe racial ou ethnique tutsi ou des personnes identifiées comme appartenant à ce groupe ou présumées soutenir les Tutsis, a été responsable du meurtre de ces personnes commis dans le cadre d'une attaque généralisée et systématique dirigée contre cette population civile en raison de son appartenance raciale, ethnique et politique, ainsi qu'il est exposé aux paragraphes 49 à 58.

RELATION CONCISE DES FAITS RELATIFS AU TROISIÈME CHEF D'ACCUSATION

Responsabilité pénale individuelle

49. En application de l'article 6 (1) du Statut, l'accusé Tharcisse Renzaho est individuellement responsable d'assassinat constitutif de crime contre l'humanité pour avoir planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter ce crime. S'agissant de la commission dudit crime, Tharcisse Renzaho a non seulement usé de ses fonctions et de ses pouvoirs décrits au paragraphe 2 pour ordonner aux personnes placées sous son commandement et son contrôle de le commettre, mais encore incité et aidé et encouragé des personnes qui ne relevaient pas de son commandement et de son contrôle à le faire. En outre, l'accusé a participé volontairement et en toute connaissance de cause à une entreprise criminelle commune dont l'objet, le but et le résultat prévisible étaient de commettre des crimes contre l'humanité contre le groupe racial ou ethnique tutsi et les personnes soit identifiées comme appartenant à ce groupe, soit présumées soutenir les Tutsis ou politiquement opposées au «Hutu Power», tant dans la préfecture de Kigali que sur le reste du territoire rwandais, en raison de l'appartenance raciale, ethnique ou politique des victimes. Pour atteindre ce but criminel, l'accusé a agi de concert avec des dirigeants et des membres des FAR, les membres de la Garde présidentielle, des *Interahamwe*, comme Odette Nyirabagenzi, les «Forces de défense civile», la police communale, des milices civiles, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues, comme le père Wenceslas Munyeshyaka, et des personnes inconnues, tous les actes considérés étant accomplis directement ou par l'intermédiaire de subordonnés pendant au moins la période allant du 12 avril au 15 juin 1994. Les faits détaillés par lesquels il a engagé sa responsabilité pénale individuelle sont exposés aux paragraphes 50 à 53.

50. On or about 13 or 14 April 1994, in the presence of others, Tharcisse Renzaho selected and ordered and instigated the killing of specific people at CELA; thereafter, people were selected and killed, including James, Charles, Wilson and Déglote Rwanga and Charles Gahima and his son.

51. On or about 22 April 1994, Tharcisse Renzaho aided and abetted Father Munyeshyaka in directing young men to be taken to CELA; the young men, including one with the name Christophe, were taken to CELA and subsequently killed.

52. On or about 28 April 1994, Tharcisse Renzaho ordered members of the *Interahamwe* to Nyarugenge commune to find and kill nine Tutsis, including Francois Nsengiyumva; a man whose name was Kagorora, as well as his two sons, Emile and Aimable; and a man whose name was Rutiyomba. These persons were subsequently killed by the *Interahamwe* pursuant to Renzaho's orders.

53. On or about 15 June 1994, Tharcisee Renzaho issued written orders to Odette Nyirabagenzi to kill André Kameya, a journalist who was critical of the Interim Government. On or about 15 June 1994, while in the Company of *Interahamwe*, Odette Nyirabagenzi found and had André Kameya killed pursuant to Renzaho's orders.

Command Criminal Responsibility

54. Pursuant to Section 6 (3) of the Statute, the accused, Tharcisse Renzaho, is responsible for the murder as a crime against humanity because specific criminal acts were committed by subordinates of the accused and the accused knew or had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. These subordinates included leaders and members of the FAR; the Presidential Guard; the *Interahamwe*, such as Odette Nyirabagenzi; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; other known participants, such as Father Wencelas Munyeshyaka; and other unknown participants. In addition, these subordinates of the accused participated and contributed significantly in a joint criminal enterprise whose object, purpose, or foreseeable outcome was the commission of crimes against humanity against the Tutsi racial or ethnic group and persons identified as Tutsi or presumed to support the Tutsi or to be politically opposed to "Hutu Power" in Kigali *Préfecture* as well as throughout Rwanda, on racial, ethnic or political grounds for at least the period 12 April through 15 June 1994. The accused knew or had reason to know of the participation of his subordinates and the object, purpose, or foreseeable outcome of the joint criminal enterprise and the accused failed to take the necessary and reasonable measures to prevent his subordinates from participating in the joint criminal enterprise or to punish his subordinates for their participation in the joint criminal enterprise. The particulars of the participation of the accused and his subordinates in this joint criminal enterprise are set forth in paragraphs 55 through 58.

50. Le 13 ou le 14 avril 1994 ou vers ces dates, en présence de tiers, Tharcisse Renzaho a choisi, ordonné de tuer et incité à tuer certaines personnes déterminées se trouvant au CELA. Par la suite, d'autres personnes ont été choisies et tuées, notamment James, Charles, Wilson et Déglote Rwanga, ainsi que Charles Gahima et son fils.

51. Le 22 avril 1994 ou vers cette date, Tharcisse Renzaho a aidé et encouragé le père Munyeshyaka en ce qu'il a ordonné que de jeunes gens soient conduits au CELA. Ces jeunes gens, dont un dénommé Christophe, ont été conduits au CELA et tués par la suite.

52. Le 28 avril 1994 ou vers cette date, Tharcisse Renzaho a ordonné à des *Interahamwe* de se rendre dans la commune de Nyarugenge pour y rechercher et tuer neuf Tutsis, dont François Nsengiyumva, un homme du nom de Kagorora, de même que ses deux fils Émile et Aimaible, et un homme du nom de Rutiyomba. Ces personnes ont ensuite été tuées par les *Interahamwe* en exécution des ordres de Renzaho.

53. Le 15 juin 1994 ou vers cette date, Tharcisse Renzaho a donné par écrit à Odette Nyirabagenzi l'ordre de tuer André Kameya, journaliste qui critiquait le gouvernement intérimaire. Le 15 juin 1994 ou vers cette date, en compagnie d'*Interahamwe*, Odette Nyirabagenzi a trouvé André Kameya et l'a fait tuer en exécution des ordres de Renzaho.

Responsabilité pénale du supérieur hiérarchique

54. En application de l'article 6 (3) du Statut, l'accusé Tharcisse Renzaho est responsable d'assassinat constitutif de crime contre l'humanité en ce que ses subordonnés ont commis des actes criminels précis et il n'a pas pris les mesures nécessaires et raisonnables pour prévenir ceux-ci ou pour en punir les auteurs, alors qu'il savait ou avait des raisons de savoir que les subordonnés en question étaient sur le point de commettre ou avaient commis ces actes. Au nombre de ces subordonnés figuraient des responsables et des membres des FAR, les éléments de la Garde présidentielle, des *Interahamwe*, dont Odette Nyirabagenzi, les «Forces de défense civile», les agents de la police communale, des miliciens civils, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues, comme le père Wenceslas Munyeshyaka, et des personnes inconnues. En outre, ces subordonnés de l'accusé ont participé et contribué sensiblement à une entreprise criminelle commune dont l'objet, le but ou le résultat prévisible était de commettre des crimes contre l'humanité contre le groupe racial ou ethnique tutsi et les personnes soit identifiées comme appartenant à ce groupe, soit présumées soutenir les Tutsis ou politiquement opposées au «Hutu Power», tant dans la préfecture de Kigali que sur le reste du territoire rwandais, pendant au moins la période allant du 12 avril au 15 juin 1994, en raison de leur appartenance raciale, ethnique ou politique. L'accusé était au courant ou avait des raisons d'être au courant de la participation de ses subordonnés à l'entreprise criminelle commune et de l'objet, du but ou du résultat prévisible de cette entreprise et il n'a pas pris les mesures nécessaires et raisonnables pour les empêcher d'y participer ou pour les punir de leur participation. Les détails de la participation de l'accusé et de ses subordonnés à l'entreprise criminelle commune sont exposés aux paragraphes 55 à 58.

55. On or about 13 or 14 April 1994, persons under the command and control of Tharcisse Renzaho killed certain persons in refuge at CELA, including but not limited to James, Charles, Wilson and Déglote Rwanga and Charles Gahima and his son.

56. On or about 22 April 1994, in the presence of Tharcisse Renzaho, his subordinate Father Munyeshyaka, directed young men to go to CELA; the young men, including one with the name Christophe, were taken to CELA and subsequently killed.

57. On or about 28 April 1994, members of the *Interahamwe* under the command and authority of Tharcisse Renzaho went to Nyarugenge commune and found and killed nine Tutsis, including Francois Nsengiyumva; a man whose name was Kagorora, as well as his two sons, Emile and Aimable; and a man whose name was Rutiyomba.

58. On or about 15 June 1994, Tharcisee Renzaho's subordinates, Odette Nyirabagenzi and a Company of *Interahamwe*, found and killed André Kameya, a journalist who was critical of the Interim Government.

Count IV: Rape as a crime against humanity

The Prosecutor of the International Criminal Tribunal for Rwanda charges Tharcisse Renzaho with RAPE as a CRIME AGAINST HUMANITY, a crime stipulated in Article 3 (g) of the Statute, in that on an between 7 April and 17 July 1994 throughout Rwanda, particularly in Kigali-*ville Préfecture*, Tharcisse Renzaho, with the intention that rape of members of the Tutsi racial or ethnic group or persons identified as Tutsi occur, was responsible for the rape of Tutsis as part of a widespread or systemic attack against that civilian population on racial and ethnic grounds, as set forth in paragraphs 58 through 61.

CONCISE STATEMENT OF FACTS FOR COUNT IV

Command Criminal Responsibility

59. Pursuant to Section 6 (3) of the Statute, the accused, Tharcisse Renzaho, is responsible for the rape as a crime against humanity because specific criminal acts were committed by subordinates of the accused and the accused knew or had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. These subordinates included leaders and members of the FAR; the Presidential Guard; the *Interahamwe*; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; other known participants, such as Father Wencelas Munyeshyaka; and other unknown participants. In addition, these subordinates of the accused participated and contributed significantly in a joint criminal enterprise whose object, purpose, or foreseeable out-

55. Le 13 ou le 14 avril 1994 ou vers ces dates, des personnes relevant du commandement et du contrôle de Tharcisse Renzaho ont tué certaines personnes réfugiées au CELA, notamment James, Charles, Wilson et Déglote Rwanga, ainsi que Charles Gahima et son fils, pour ne citer que celles-là.

56. Le 22 avril 1994 ou vers cette date, en présence de Tharcisse Renzaho, le père Munyeshyaka, son subordonné, a ordonné à de jeunes gens de se rendre au CELA. Ces jeunes gens, dont un dénommé Christophe, ont été conduits au CELA et tués par la suite.

57. Le 28 avril 1994 ou vers cette date, des *Interahamwe* relevant du commandement et de l'autorité de Tharcisse Renzaho se sont rendus dans la commune de Nyarugenge où ils ont trouvé et tué neuf Tutsis, dont François Nsengiyumva, un homme du nom de Kagorora, de même que ses deux fils Émile et Aimaible, et un homme du nom de Rutiyomba.

58. Le 15 juin 1994 ou vers cette date, des subordonnés de Tharcisse Renzaho, en l'occurrence Odette Nyirabagenzi et un groupe d'*lnteraharnwe*, ont trouvé et tué André Kameya, journaliste qui critiquait le gouvernement intérimaire.

Quatrième chef d'accusation :
Viol constitutif de crime contre l'humanité

Le Procureur du Tribunal pénal international pour le Rwanda accuse Tharcisse Renzaho de VIOL constitutif de CRIME CONTRE L'HUMANITÉ, crime prévu à l'article 3 (g) du Statut, en ce que les 7 avril et 17 juillet 1994 ou entre ces dates, sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Kigali-ville, Tharcisse Renzaho, qui voulait que des membres du groupe racial ou ethnique tutsi ou des personnes identifiées comme appartenant à ce groupe soient violés, a été responsable de viols de Tutsies commis dans le cadre d'une attaque généralisée et systématique dirigée contre cette population civile en raison de son appartenance raciale et ethnique, ainsi qu'il est exposé aux paragraphes 58 à 61.

RELATION CONCISE DES FAITS RELATIFS AU QUATRIEME CHEF D'ACCUSATION

Responsabilité pénale du supérieur hiérarchique

59. En application de l'article 6 (3) du Statut, l'accusé Tharcisse Renzaho est responsable de viol constitutif de crime contre l'humanité en ce que ses subordonnés ont commis des actes criminels précis, et il n'a pas pris les mesures nécessaires et raisonnables pour prévenir ceux-ci ou pour en punir les auteurs, alors qu'il savait ou avait des raisons de savoir que les subordonnés en question étaient sur le point de commettre ou avaient commis ces actes. Au nombre de ces subordonnés figuraient des responsables et des membres des FAR, les éléments de la Garde présidentielle, des Interahamwe, les «Forces de défense civile», les agents de la police communale, des miliciens civils, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues, comme le père Wenceslas Munyeshyaka, et des personnes inconnues. En outre, ces .subordonnés de l'accusé ont participé et contribué sensiblement à une entreprise criminelle commune dont l'objet, le but ou le résultat

come was the commission of crimes against humanity against the Tutsi racial or ethnic group in Kigali *Préfecture* as well as throughout Rwanda for at least the period of April, May and June 1994. The accused knew or had reason to know of the participation of his subordinates and the object, purpose, or foreseeable outcome of the joint criminal enterprise and the accused failed to take the necessary and reasonable measures to prevent his subordinates from participating in the joint criminal enterprise or to punish his subordinates for their participation in the joint criminal enterprise. The particulars of the participation of the accused and his subordinates in this joint criminal enterprise are set forth in paragraphs 60 through 62.

60. Tutsi women were raped by *Interahamwe* militia, soldiers and other individuals under the command and authority of Tharcisse Renzaho on April 16 and diverse unknown dates during the months of April, May and June 1994. *Conseillers* under the direct command and authority of Tharcisse Renzaho reported on a regular basis about the rape of Tutsi women by *Interahamwe* militia, soldiers and other individuals under the command and authority of Renzaho. Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such rapes or to punish the perpetrators thereof.

61. Father Munyeshyaka and other *Interahamwe* under the command and control of Tharcisse Renzaho compelled Tutsi women to provide them with sexual pleasures in exchange for the woman's safety at St. Famille in the period in which Tutsis sought refuge at St. Famille during the months of April, May and June 1994. Tharcisse Renzaho knew or had reason to know that these acts were being perpetrated against Tutsi women and he failed or refused to punish the perpetrators of these forced sexual acts at St. Famille.

62. *Interahamwe*, soldiers and armed civilians under the command and control of Tharcisse Renzaho maintained Tutsi women at houses in central Kigali, where they compelled the women provide them with sexual pleasures in exchange for the women's safety on diverse unknown dates during the months of April, May and June 1994. Tharcisse Renzaho knew or had reason to know that these acts were being perpetrated against Tutsi women and he failed or refused to punish the perpetrators of these forced sexual acts.

Count V: Murder as a violation of Article 3 common to the Geneva Conventions of 1949

The Prosecutor of the International Criminal Tribunal for Rwanda charges Tharcisse Renzaho with MURDER AS A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS OF 1949 AND ADDITIONAL PROTOCOL II OF 1977, a crime stipulated in Article 4 (a) of the Statute, in that Tharcisse Renzaho was responsible for the killings of non-combatant Tutsi men and youths during the period 7 April through 17 July 1994 when throughout Rwanda, particularly in Kigali-*ville Préfecture*, there was a non-international armed conflict within the meaning of Articles 1 and 2 of Protocol II Additional to the Geneva Convention of 1949, and the killing of the victims was closely related to the hostilities or committed in conjunction

prévisible était de commettre des crimes contre l'humanité contre le groupe racial ou ethnique tutsi dans la préfecture de Kigali et sur le reste du territoire rwandais, pendant au moins les mois d'avril, mai et juin 1994. L'accusé était au courant ou avait des raisons d'être au courant de la participation de ses subordonnés à l'entreprise criminelle commune et de l'objet, du but ou du résultat prévisible de cette entreprise et il n'a pas pris les mesures nécessaires et raisonnables pour les empêcher d'y participer ou pour les punir de leur participation. Les détails de la participation de l'accusé et de ses subordonnés à l'entreprise criminelle commune sont exposés aux paragraphes 60 à 62.

60. Des femmes tutsies ont été violées par des miliciens *Interahamwe*, des militaires et d'autres personnes relevant du commandement et de l'autorité de Tharcisse Renzaho le 16 avril et à différentes dates indéterminées en avril, mai et juin 1994. Des conseillers placés directement sous le commandement et l'autorité de Tharcisse Renzaho faisaient régulièrement état de viols commis sur des femmes tutsies par des miliciens *Interahamwe*, des militaires et d'autres personnes relevant aussi de son commandement et de son autorité. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher ces viols ou pour en punir les auteurs.

61. Le père Munyeshyaka et d'autres *Interahamwe* relevant du commandement et du contrôle de Tharcisse Renzaho ont contraint des femmes tutsies à leur procurer des plaisirs sexuels en échange de la sécurité de celles-ci à la paroisse Sainte Famille pendant la période où les Tutsis y ont trouvé refuge en avril, mai et juin 1994. Tharcisse Renzaho savait ou avait des raisons de savoir que ces actes sexuels forcés étaient en train d'être commis sur des femmes tutsies à la paroisse Sainte Famille et il s'est abstenu ou a refusé d'en punir les auteurs.

62. Des *Interahamwe*, des militaires et des civils armés relevant du commandement et du contrôle de Tharcisse Renzaho ont séquestré des femmes tutsies dans certaines maisons situées au centre de Kigali, où ils les ont contraintes à leur procurer des plaisirs sexuels en échange de la sécurité de ces femmes à diverses dates indéterminées en avril, mai et juin 1994. Tharcisse Renzaho savait ou avait des raisons de savoir que ces actes sexuels forcés étaient en train d'être commis sur des femmes tutsies et il s'est abstenu ou a refusé d'en punir les auteurs.

Cinquième chef d'accusation :
Meurtre constitutif de violations de l'article 3
commun aux conventions de Genève de 1949

Le Procureur du Tribunal pénal international pour le Rwanda accuse Tharcisse Renzaho de MEURTRE CONSTITUTIF DE VIOLATION DE L'ARTICLE 3 COMMUN AUX CONVENTIONS DE GENÈVE DE 1949 ET DU PROTOCOLE ADDITIONNEL II DE 1977, crime prévu à l'article 4 (a) du Statut, en ce que Tharcisse RENZAHO a été responsable du meurtre d'hommes et de jeunes tutsis qui ne prenaient pas part aux combats pendant la période allant du 7 avril et 17 juillet 1994, à l'époque où un conflit armé ne présentant pas un caractère international, au sens des articles 1 et 2 du Protocole additionnel II aux Conventions de Genève de 1949, se déroulait sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Kigali-ville, ce meurtre étant étroitement lié aux hostilités ou commis dans le cadre

with the armed conflict and the victims were persons taking no part in that conflict; all as is set forth in paragraphs 63 through 67.

CONCISE STATEMENT OF FACTS FOR COUNT V

Individual Criminal Responsibilitv

63. Pursuant to Section 6 (1) of the Statute, the accused, Tharcisse Renzaho, is individually responsible for murder as a violation of Article 3 Common to the Geneva Conventions of 1949 and Additional Protocol II of 1977 because he planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of these crimes. With respect to the commission of those crimes, Tharcisse Renzaho ordered those over whom he had command responsibility and control as a result of his position and authority described in paragraph 2 and he instigated and aided and abetted those over whom he did not have command responsibility and control. In addition, the accused participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was the commission of war crimes against non-combatant members of the Tutsi racial or ethnic group in Kigali *Préfecture* as well as throughout Rwanda. To fulfill this criminal purpose, the accused acted with leaders and members of the FAR; the Presidential Guard; the *Interahamwe*; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; and other known and unknown participants, all such actions being taken either directly or through their subordinates for at least the period of 6 April 1994 through 4 July 1994. The particulars that gave rise to his individual criminal responsibility are set forth in paragraphs 64 and 65.

64. Between 16 and 17 June 1994 the RPF fought their way to St. Paul's in Nyarugenge in Kigali-*ville* and rescued a large number of non-combatant Tutsis.

65. Pursuant to the authority vested in Tharcisse Renzaho as described in paragraph 2, and in retaliation for the actions of the RPF described in paragraph. 64. Tharcisse Renzaho on or about 17 June 1994 ordered soldiers of the FAR and *Interahamwe* to take and kill at least seventeen non-combatant Tutsi men from St. Famille who had not been rescued by the RPF.

Command Criminal Responsibilitv

66. Pursuant to Section 6 (3) of the Statute, the accused, Tharcisse Renzaho, is responsible for murder as a violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977 because specific criminal acts were committed by subordinates of the accused and the accused knew or had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. These subordinates included leaders and members of the FAR; the Presiden-

du conflit armé et les victimes des personnes qui ne jouaient aucun rôle dans ledit conflit, ainsi qu'il est exposé aux paragraphes 63 à 67.

RELATION CONCISE DES FAITS RELATIFS AU CINQUIÈME CHEF D'ACCUSATION

Responsabilité pénale individuelle

63. En application de l'article 6 (1) du Statut, l'accusé Tharcisse Renzaho est individuellement responsable de meurtre constitutif de violation de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II de 1977 pour avoir planifié, incité à commettre, ordonné, commis, ou de toute autre manière aidé et encouragé à planifier préparer ou exécuter ce crime. S'agissant de la commission dudit crime, Tharcisse Renzaho a non seulement usé de ses fonctions et de ses pouvoirs décrits au paragraphe 2 pour ordonner aux personnes placées sous son commandement et son contrôle de le commettre, mais encore incité et aidé et encouragé des personnes qui ne relevaient pas de son commandement et de son contrôle à le faire. En outre, l'accusé a participé volontairement et en toute connaissance de cause à une entreprise criminelle commune dont l'objet, le but et le résultat prévisible étaient de commettre des crimes de guerre dans la préfecture de Kigali et sur le reste du territoire rwandais contre des membres du groupe racial ou ethnique tutsi qui ne prenaient pas part aux combats. Pour atteindre ce but criminel, l'accusé a agi de concert avec des dirigeants et des membres des FAR, les membres de la Garde présidentielle, les *Interahamwe*, les «Forces de défense civile», la police communale, les milices civiles, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues et des personnes inconnues, tous les actes considérés étant accomplis directement ou par l'intermédiaire de subordonnés, pendant au moins la période allant du 6 avril au 4 juillet 1994. Les faits détaillés par lesquels il a engagé sa responsabilité pénale individuelle sont exposés aux paragraphes 64 et 65.

64. Entre le 16 et le 17 juin 1994, les combattants du FPR ont réussi à atteindre le Centre Saint Paul situé à Nyarugenge dans la préfecture de Kigali-ville où ils ont sauvé un grand nombre de Tutsis non-combattants.

65. Le 17 juin 1994 ou vers cette date, en vertu de ses pouvoirs décrits au paragraphe 2 et en représailles aux actions du FPR mentionnées au paragraphe 64, Tharcisse Renzaho a ordonné à des militaires des FAR et à des *Interahamwe* d'extraire de la paroisse Sainte Famille pour les tuer au moins 17 hommes tutsis non-combattants qui n'avaient pas été sauvés par le FPR.

Responsabilité pénale du supérieur hiérarchique

66. En application de l'article 6 (3) du Statut, l'accusé Tharcisse Renzaho est responsable de meurtre constitutif de violation de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II de 1977 en ce que ses subordonnés ont commis des actes criminels précis et il n'a pas pris les mesures nécessaires et raisonnables pour prévenir ceux-ci ou pour en punir les auteurs, alors qu'il savait ou avait des raisons de savoir que les subordonnés en question étaient sur le point de commettre ou avaient commis ces actes. Au nombre de ces subordonnés figuraient des responsables et des membres des FAR, les éléments de la Garde présidentielle,

tial Guard; the *Interahamwe*; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; and other known and unknown participants. In addition, these subordinates of the accused participated and contributed significantly in a joint criminal enterprise whose object, purpose, or foreseeable outcome was the commission of war crimes against non-combatant members of the Tutsi racial or ethnic group in Kigali *Préfecture* as well as throughout Rwanda for at least the period of 6 April 1994 through 4 July 1994. The accused knew or had reason to know of the participation of his subordinates and the object, purpose, or foreseeable outcomes of the joint criminal enterprise and the accused failed to take the necessary and reasonable measures to prevent his subordinates from participating in the joint criminal enterprise or to punish his subordinates for their participation in the joint criminal enterprise. The particulars of the participation of the accused and his subordinates in this joint criminal enterprise are set forth in paragraph 67.

67. In retaliation for the actions of the RPF described in paragraph 64, on or about 17 June 1994, soldiers of the FAR and *Interahamwe*, who were subordinates of Tharcisse Renzaho, killed at least seventeen non-combatant Tutsi men from St. Famille who had not been rescued by the RPF.

Count VI : Rape as a violation of Article 3 common to the Geneva Conventions of 1949

The Prosecutor of the International Criminal Tribunal for Rwanda charges Tharcisse Renzaho with RAPE AS A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS OF 1949 AND ADDITIONAL PROTOCOL II OF 1977, a crime stipulated in Article 4 (e) of the Statute, in that Tharcisse Renzaho was responsible for the rape of non-combatant Tutsi women during the period between 7 April and 17 July 1994 when throughout Rwanda, particularly in Kigali-*ville Préfecture*, there was a non-international armed conflict within the meaning of Articles 1 and 2 of Protocol II Additional to the Geneva Convention of 1949, and the raping of the victims was closely related to the hostilities or committed in conjunction with the armed conflict and the victims were persons taking no part in that conflict; al1 as set forth in paragraphs 68 through 72.

CONCISE STATEMENT OF FACTS FOR COUNT VI

68. During the relevant periods of 7 April 1994 through 4 July 1994, the FAR occupied central areas of Kigali, including Nyarugenge commune and the area around the St. Famille Church. The FAR trained and armed the *Interahamwe*; and were supported in the conflict by the *Interaharnwe*, the gendarmerie, *préfectural* communal police, and armed civilians.

des *Interahamwe*, les «Forces de défense civile», les agents de la police communale, des miliciens civils, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues et des personnes inconnues. En outre, ces subordonnés de l'accusé ont participé et contribué sensiblement à une entreprise criminelle commune dont l'objet, le but ou le résultat prévisible était de commettre des crimes de guerre dans la préfecture de Kigali et sur le reste du territoire rwandais contre des membres du groupe racial ou ethnique tutsi qui ne prenaient pas part aux combats, pendant au moins la période allant du 6 avril au 4 juillet 1994. L'accusé était au courant ou avait des raisons d'être au courant de la participation de ses subordonnés à l'entreprise criminelle commune et de l'objet, du but ou du résultat prévisible de cette entreprise et il n'a pas pris les mesures nécessaires et raisonnables pour les empêcher d'y participer ou pour les punir de leur participation. Les détails de la participation de l'accusé et de ses subordonnés à l'entreprise criminelle commune sont exposés au paragraphe 67.

67. Le 17 juin 1994 ou vers cette date, en représailles aux actions du FPR indiquées au paragraphe 64, des militaires des FAR et des *Interahamwe*, qui étaient des subordonnés de Tharcisse Renzaho, ont tué au moins 17 hommes tutsis non-combattants réfugiés à la paroisse Sainte Famille qui n'avaient pas été sauvés par le FPR.

Sixième chef d'accusation : Viol constitutif de violation de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II de 1977

Le Procureur du Tribunal pénal international pour le Rwanda accuse Tharcisse Renzaho de VIOL CONSTITUTIF DE VIOLATION DE L'ARTICLE 3 COMMUN AUX CONVENTIONS DE GENÈVE DE 1949 ET DU PROTOCOLE ADDITIONNEL II DE 1977, crime prévu à l'article 4 (e) du Statut, en ce que Tharcisse RENZAHO a été responsable du viol de femmes tutsies qui ne prenaient pas part aux combats pendant la période allant du 7 avril et 17 juillet 1994, à l'époque où un conflit armé ne présentant pas un caractère international, au sens des articles 1 et 2 du Protocole additionnel II aux Conventions de Genève de 1949, se déroulait sur l'ensemble du territoire rwandais, en particulier dans la préfecture de Kigali-ville, ce viol étant étroitement lié aux hostilités ou commis dans le cadre du conflit armé et les victimes des personnes qui ne jouaient aucun rôle dans ledit conflit, ainsi qu'il est exposé aux paragraphes 68 à 72.

RELATION CONCISE DES FAITS RELATIFS AU SIXIEME CHEF D'ACCUSATION

68. Au cours de la période allant du 7 avril au 4 juillet 1994 qui rentre dans l'intervalle susmentionné, les FAR ont occupé les zones centrales de Kigali, notamment la commune de Nyarugenge et la région environnant l'église de la paroisse Sainte Famille. Ils ont entraîné et armé les *Interahamwe* et menaient la guerre avec l'appui des *Interahamwe*, de la gendarmerie, de la police communale de la préfecture et de civils armés.

Command Criminal Responsibility

69. Pursuant to Section 6 (3) of the Statute, the accused, Tharcisse Renzaho, is responsible for rape as a violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977 because specific criminal acts were committed by subordinates of the accused and the accused knew or had reason to know that such subordinates were about to commit such acts before they were committed or that such subordinates had committed such acts and the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. These subordinates included leaders and members of the FAR; the Presidential Guard; the *Interahamwe*, such as Odette Nyirabagenzi; the "Civil Defense Forces"; communal police; civilian militias; local administrative officials; other soldiers and militiamen; other known participants, such as Father Wenceslas Munyeshyaka; and other unknown participants. In addition, these subordinates of the accused participated and contributed significantly in a joint criminal enterprise whose object, purpose, or foreseeable outcome was the commission of war crimes against non-combatant Tutsi women in Kigali *Préfecture* as well as throughout Rwanda for at least the period of April, May and June 1994. The accused knew or had reason to know of the participation of his subordinates and the object, purpose, or foreseeable outcome of the joint criminal enterprise and the accused failed to take the necessary and reasonable measures to prevent his subordinates from participating in the joint criminal enterprise or to punish his subordinates for their participation in the joint criminal enterprise. The particulars of the participation of the accused and his subordinates in this joint criminal enterprise are set forth in paragraphs 70 through 72.

70. Tutsi women were raped by *Interahamwe* militia, soldiers and other individuals under the command and authority of Tharcisse Renzaho on April 16 and diverse unknown dates during the months of April, May and June 1994. *Conseillers* under the direct command and authority of Tharcisse Renzaho reported on a regular basis about the rape of Tutsi women by *Interahamwe* militia, soldiers and other individuals under the command and authority of Renzaho. Tharcisse Renzaho failed or refused to take the necessary or reasonable measures to prevent such rapes or to punish the perpetrators thereof.

71. Father Munyeshyaka and other *Interahamwe* under the command and control of Tharcisse Renzaho compelled Tutsi women to provide them with sexual pleasures in exchange for the woman's safety at St. Famille in the period in which Tutsis sought refuge at St. Famille during the months of April, May and June 1994. Tharcisse Renzaho knew or had reason to know that these acts were being perpetrated against Tutsi women and he failed or refused to punish the perpetrators of these forced sexual acts at St. Famille.

72. *Interahamwe* soldiers and armed civilians under the command and control of Tharcisse Renzaho maintained Tutsi women at houses in central Kigali, where they compelled the women provide them with sexual pleasures in exchange for the women's safety on diverse unknown dates during the months of April, May and June 1994. Tharcisse Renzaho knew or had reason to know that these acts were being perpetrated against Tutsi women and he failed or refused to punish the perpetrators of these forced sexual acts.

Responsabilité pénale du supérieur hiérarchique

69. En application de l'article 6 (3) du Statut, l'accusé Tharcisse Renzaho est responsable de viol constitutif de violation de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II de 1977 en ce que ses subordonnés ont commis des actes criminels précis et il n'a pas pris les mesures nécessaires et raisonnables pour prévenir ceux-ci ou pour en punir les auteurs, alors qu'il savait ou avait des raisons de savoir que les subordonnés en question étaient sur le point de commettre ou avaient commis ces actes. Au nombre de ces subordonnés figuraient des responsables et des membres des FAR, les éléments de la Garde présidentielle, des *Interahamwe*, dont Odette Nyirabagenzi, les «Forces de défense civile», les agents de la police communale, des miliciens civils, les autorités administratives locales, d'autres militaires et miliciens, d'autres personnes connues, comme le père Wenceslas Munyeshyaka, et des personnes inconnues. En outre, ces subordonnés de l'accusé ont participé et contribué sensiblement à une entreprise criminelle commune dont l'objet, le but ou le résultat prévisible était de commettre des crimes de guerre dans la préfecture de Kigali et sur le reste du territoire rwandais, contre des femmes tutsies qui ne prenaient pas part aux combats, pendant au moins les mois d'avril, de mai et de juin 1994. L'accusé était au courant ou avait des raisons d'être au courant de la participation de ses subordonnés à l'entreprise criminelle commune et de l'objet, du but ou du résultat prévisible de cette entreprise et il n'a pas pris les mesures nécessaires et raisonnables pour les empêcher d'y participer ou pour les punir de leur participation. Les détails de la participation de l'accusé et de ses subordonnés à l'entreprise criminelle commune sont exposés aux paragraphes 70 à 72.

70. Le 16 avril et à différentes dates indéterminées en avril, mai et juin 1994, des femmes tutsies ont été violées par des miliciens *Interahamwe*, des militaires et d'autres personnes relevant du commandement et de l'autorité de Tharcisse Renzaho. Des conseillers placés directement sous le commandement et l'autorité de Tharcisse Renzaho faisaient régulièrement état de viols commis sur des femmes tutsies par des miliciens *Interahamwe*, des militaires et d'autres personnes relevant aussi de son commandement et de son autorité. Tharcisse Renzaho s'est abstenu ou a refusé de prendre les mesures nécessaires ou raisonnables pour empêcher ces viols ou pour en punir les auteurs.

71. Le père Munyeshyaka et d'autres *Interahamwe* relevant du commandement et du contrôle de Tharcisse Renzaho ont contraint des femmes tutsies à leur procurer des plaisirs sexuels en échange de la sécurité de celles-ci à la paroisse Sainte Famille pendant la période où les Tutsis y ont trouvé refuge en avril, mai et juin 1994. Tharcisse Renzaho savait ou avait des raisons de savoir que ces actes sexuels forcés étaient en train d'être commis sur des femmes tutsies à la paroisse Sainte Famille et il s'est abstenu ou a refusé d'en punir les auteurs.

72. Des *Interahamwe*, des militaires et des civils armés relevant du commandement et du contrôle de Tharcisse Renzaho ont séquestré des femmes tutsies dans certaines maisons situées au centre de Kigali, où ils les ont contraintes à leur procurer des plaisirs sexuels en échange de la sécurité de ces femmes à diverses dates indéterminées en avril, mai et juin 1994. Tharcisse Renzaho savait ou avait des raisons de savoir que ces actes sexuels forcés étaient en train d'être commis sur des femmes tutsies et il s'est abstenu ou a refusé d'en punir les auteurs.

The acts and omissions of Tharcisse Renzaho detailed herein are punishable in pursuant to Articles 22 and 23 of the Statute.

Signed at Arusha, Tanzania, this 20th day of September 2004.

[Signed] : Hassan Bubacar Jallow

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Les actes et les omissions de Tharcisse Renzaho exposés dans le présent acte d'accusation sont punissables conformément aux dispositions des articles 22 et 23 du Statut.

Arusha (Tanzanie), le 20 septembre 2004

[Signé] : Hassan Bubacar Jallow

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Décision sur la requête de la défense aux fins de communication de documents 19 octobre 2004 (ICTR-97-31-I)

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente ; William H. Sekule ; Solomy B. Bossa

Communication de documents, acte d'accusation, pièce justificatives jointes à l'acte d'accusation, dépositions de témoins, décisions – compétence du Greffier – acte d'accusation modifié est le seul à avoir été confirmé, obligation de communication ne porte que sur ce dernier – délais de traduction, délai raisonnable pour la communication – délai imparti pour soulever les exceptions préjudicielles forclos, non imputable à la défense, préjudice, report du début du délai à titre de réparation – requête acceptée en partie

Instruments internationaux cités : Règlement de procédure et de preuve, art. 2 (A), 33 (A) et (B), 40 bis *(F), 47 (F) (ii), 53 bis (A) et (B), 66 (A) (i), 72 (A) et (F), 73 (A) – Directive à l'intention du Greffe du Tribunal pénal international pour le Rwanda, art. 9 (iv)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (ci-après le «Tribunal»),

SIÉGEANT en la Chambre de première instance II composée de la Juge Arlette Ramaroson, Présidente, désignée conformément à l'article 73 (A) du Règlement de procédure et de preuve (le «Règlement»);

ÉTANT SAISI de la «Requête de la défense aux fins de communication de documents», enregistrée le 10 avril 2003 (la «Requête»);

CONSIDÉRANT

(i) la «Duplique du Procureur à la requête de la défense sous l'empire des articles 66 (A) (i), 72 (A) et 72 (F)», enregistrée le 28 juillet 2003 (la «Réponse»)[1];

(ii) la «Réplique de la défense à la réponse du Procureur à la requête de la défense aux fins de communication de documents», enregistrée le 24 septembre 2003 (la «Réplique»);

(iii) les «Conclusions du Greffier en application de l'article 33 (B) du Règlement de procédure et de preuve sur la Requête de la défense aux fins de communication de documents et la Requête en extrême urgence de la défense aux

[1] La Réponse était à l'origine déposée en anglais et intitulée «Prosecutor's Further Response to the Defence Motion Under Rule 66 (A) (i), 72 (A) and 72 (F)».

fins de communication de documents par le Greffe», enregistrée le 3 Septembre 2004 (les «Conclusions du Greffe»)[2];

NOTANT la «Décision relative à la Requête du Procureur en prorogation de la détention du suspect (Article 40 *bis* (F) du Règlement de procédure et de preuve)» en date du 4 novembre 2002 («la Décision du 4 novembre 2002»)[3]

NOTANT la «Décision portant confirmation de l'acte d'accusation prescrivant la non-divulgation des informations permettant d'identifier les témoins qui figurent dans les déclarations desdits témoins», rendue par le Juge Maqutu en date du 15 novembre 2002 («la Décision du 15 novembre 2002»)[4];

STATUANT uniquement sur la base des mémoires écrits déposés par les parties conformément à l'Article 73 du Règlement de procédure et de preuve (le «Règlement»);

ARGUMENTS DES PARTIES

Requête de la défense

1. La défense soutient que, en violation de l'article 66 (A) (i) du Règlement de procédure et de preuve, le Procureur ne lui a pas communiqué un certain nombre de pièces, notamment :

- l'acte d'accusation initial en date du 23 octobre 2002;
- la décision rendue par le Tribunal le 4 novembre 2002 (version française) à la suite de la requête déposée par le Procureur le 28 octobre 2002;
- la décision rendue par le Tribunal le 15 novembre 2002 (version française) confirmant l'acte d'accusation et ordonnant la protection des témoins;
- un certain nombre de déclarations de témoins : alors que, selon la défense, le Procureur aurait fait état de 69 procès-verbaux d'audition déjà signés lors de l'audience de comparution initiale, sur un total de 80 procès-verbaux, et d'un rapport d'expert, seuls 28 témoignages lui auraient été communiqués le 5 mars 2003.

2. En conséquence, la défense demande, en vertu des articles 72 (A) et (F) du Règlement et de la jurisprudence, que le délai de trente jours imparti pour soulever les exceptions préjudicielles soit reporté à compter de la transmission de l'ensemble des documents visés en version française tant à l'accusé qu'à son conseil.

[2] Les Conclusions du Greffe étaient à l'origine déposées en anglais et intitulées «Registrar's Submission Under Rule 33 (B) of the Rules On the Following Defence Motions : 1 – 'Requête de la défense aux fins de communication de documents'; 2 – 'Requête en extrême urgence de la défense aux fins de communication de documents par le Greffe'».

[3] L'original de la décision est en anglais et intitulé «Decision on the Prosecutor's Request for the Extension of the Suspect's Detention (Rule 40 *bis* (F) of the Rules of Procedure and Evidence).

[4] L'original de la décision est en anglais et intitulé «Order Confirming Indictment and For Non Disclosure of Identifying Information in Witness Statements».

3. La défense demande en conséquence à la Chambre d'ordonner la communication à la défense de la totalité des pièces jointes à l'acte d'accusation du 11 novembre 2002 et de décider que le délai prévu par l'article 72 (A) du Règlement ne commencera à courir qu'à compter de la réception desdites pièces par la défense.

Réponse du Procureur

4. Le Procureur rappelle que la version anglaise de l'acte d'accusation du 23 octobre 2002 et une traduction française non officielle ont été signifiées à l'accusé le 29 octobre 2002. Cet acte d'accusation a par la suite été amendé le 11 novembre 2002 et l'accusé aurait, selon le Procureur, informé le Tribunal le 21 novembre 2002 qu'il avait reçu signification de l'acte d'accusation modifié le 19 novembre 2002. Le Procureur soutient que l'acte d'accusation en version anglaise et sa traduction non officielle en français, accompagnés des déclarations des témoins caviardées, auraient été signifiés à l'accusé dans un délai et d'une manière conformes à l'article 66 (A) (i) du Règlement; selon le Procureur, la traduction française officielle aurait quant à elle été signifiée à l'accusé le 29 novembre 2002.

5. Le Procureur conteste devoir communiquer au conseil de la défense des pièces qui ont déjà été signifiées à l'accusé et au conseil de permanence qui le représentait le 23 octobre 2002. Le fait que l'acte d'accusation daté du 23 octobre 2002 n'ait pas été communiqué au conseil de la défense actuel de l'accusé ne porte nullement atteinte aux droits de l'accusé dès lors que ce conseil est en possession de l'acte d'accusation amendé en date du 11 novembre 2002, qui est l'acte pertinent à l'égard duquel l'accusé a plaidé.

6. Le Procureur maintient s'être acquitté des obligations qui lui incombent en matière de communication des pièces à la défense et conteste la prétention de la défense à l'effet que copies des dépositions d'autres témoins que ceux visés à l'article 66 (A) (i) du Règlement lui soient signifiées.

7. Le Procureur fait valoir que le délai fixé par l'article 72 (A) du Règlement est expiré.

8. Le Procureur ajoute que, tant que la date du début du procès n'est pas fixée, le Procureur n'est tenu par aucune obligation de communication des éléments de preuve plus de 60 jours avant cette date.

9. Le Procureur souligne par ailleurs qu'en vertu de l'article 33 du Règlement, c'est le Greffier qui est responsable de l'administration et est chargé des communications du Tribunal ou adressées à celui-ci. Dès lors, la communication des décisions ne relève pas de sa compétence et le Procureur invite la défense à s'adresser au Greffe pour recevoir communication des pièces publiques, telles que les décisions, dont elle aurait besoin.

10. Le Procureur prie la Chambre de rejeter la requête dans sa totalité.

Réplique de la Défense

11. La défense conteste l'allégation du Procureur selon laquelle l'acte d'accusation du 23 octobre 2002 en anglais et sa traduction non officielle en français auraient été signifiés à l'accusé au cours de l'audience du 29 octobre 2002.

12. La défense rappelle au Procureur qu'il aurait lui-même indiqué lors de l'audience du 29 octobre 2002 que son acte d'accusation était accompagné de 69 procès-verbaux d'audition déjà signés et d'un rapport d'expert (pp. 10-11 du procès-verbal de comparution) et que, lors de la comparution initiale de l'accusé, le 21 novembre 2002, le Juge Pillay aurait indiqué à l'accusé que le Procureur devait lui signifier les déclarations caviardées dont il disposait (p. 29 du procès-verbal de comparution).

13. La défense soumet que, n'ayant rien reçu au mois de mars 2003, elle se serait elle-même déplacée à Arusha et se serait rendue au Greffe pour se faire communiquer copie de 28 déclarations de témoins, à savoir les témoins AA, UI, KD, DBN, HK, UE, CAB, HAC, AU, HAP, UB (UB-1 et UB-2), HAN, HAQ, GI, MW, GLD, GLE, HAR, HAE, HAF, GLH, DDJ, FJ, GLK, UD et HAM (HAM-1 et HAM-2) sur les 69 annoncées par le Procureur, en plus du rapport d'expert. La défense produit un courrier électronique en date du 15 avril 2003, par lequel le Greffe lui garantissait par ailleurs lui avoir communiqué tous les documents qui devaient l'être à la demande du Procureur.

14. La défense fait dès lors valoir que le retard enregistré dans la signification des documents ne lui est pas imputable et que, la signification prévue par l'article 66 (A) (i) du Règlement n'ayant à ce jour toujours pas été complétée, le délai prévu par l'article 72 (A) du Règlement pour le dépôt des exceptions préjudicielles doit de fait être reporté.

Conclusions du Greffe

15. Le Greffe soumet que l'acte d'accusation modifié a été reçu par le Greffe le 11 novembre 2002 et a été notifié à l'accusé et son conseil de l'époque, Maître Francis Musei, le 19 novembre 2002 en anglais et français. Le Greffe produit en annexe 1 de ses conclusions les preuves de notification correspondantes.

16. Le Greffe soumet que les pièces justificatives jointes à l'acte d'accusation ont été reçues par le Greffe le 21 novembre 2002 et communiquées à l'accusé le 10 mars 2003 et à son conseil, Maître François Cantier, le 5 mars 2003. Le Greffe soumet en outre qu'une communication additionnelle a été reçue par le Greffe le 4 décembre 2002 et transmise, en français et en anglais, à l'accusé le 12 décembre 2002 et à son conseil, Maître François Cantier, le 5 mars 2003. Le Greffe produit en annexe 2 et 3 de ses conclusions les preuves de communication correspondantes. Le Greffe admet que les pièces justificatives jointes à l'acte d'accusation n'ont pas été communiquées à la défense dans les délais requis et s'engage à prendre les mesures nécessaires pour éviter que de tels retards se reproduisent à l'avenir.

17. Le Greffe soumet que la version française de la «Décision relative à la Requête du Procureur en prorogation de la détention du suspect (article 40 *bis* F) du Règlement de procédure et de preuve)» a été reçue par le Greffe le 13 mai 2003 et notifiée

à l'accusé et à son conseil, Maître François Cantier, le 15 mai 2003. Le Greffe produit en annexes 4 et 5 de ses conclusions les preuves de notification correspondantes.

18. Le Greffe soumet que la «Décision portant confirmation de l'acte d'accusation et prescrivant la non divulgation des informations permettant d'identifier les témoins qui figurent dans les déclarations desdits témoins» du 15 novembre 2002 a été notifiée à l'accusé et à son conseil, Maître Francis Musei, le 18 novembre 2002 en anglais. La version française a été notifiée à l'accusé le 26 novembre 2002; son conseil étant anglophone, la traduction en français ne lui a pas été notifiée. Le Greffe produit en annexe 6A et 6B de ses conclusions les preuves de communication correspondantes.

APRÈS EN AVOIR DÉLIBÉRÉ

19. Il ressort des pièces transmises par le Greffe en annexe de ses conclusions et des divers éléments du dossier les éléments suivants :

- L'acte d'accusation modifié a été notifié à l'accusé et son conseil de l'époque, Maître Francis Musei, en anglais et en français, le 19 novembre 2002;
- La version française de la décision du 4 novembre 2002 a été reçue par le Greffe le 13 mai 2003 et notifiée à l'accusé le 15 mai 2003;
- La version anglaise de la décision du 15 novembre 2002 a été notifiée à l'accusé et à son conseil de l'époque, Maître Francis Musei, le 18 novembre 2002. La version française de ce document a été remise à l'accusé le 26 novembre 2002, mais n'a pas été remise à son conseil;
- Les pièces justificatives transmises à l'appui de l'acte d'accusation ont été reçues par le Greffe le 21 novembre 2002; elles ont été communiquées à l'accusé le 10 mars 2003 et à son conseil, Maître François Cantier, le 5 mars 2003; ces pièces justificatives comprennent des «Notes explicatives» en anglais, ainsi qu'une série de déclarations de témoins, dont certaines sont anglais et d'autres en français;
- Des pièces justificatives complémentaires ont été reçues par le Greffe le 4 décembre 2002; elles ont été communiquées en anglais et en français à l'accusé, le 12 décembre 2002 et à son conseil, Maître François Cantier, le 5 mars 2003.

Signification de l'acte d'accusation

20. La Chambre rappelle qu'en vertu de l'article 53 *bis* (A) du Règlement, l'acte d'accusation est signifié à l'accusé en personne lorsqu'il est placé sous la garde du Tribunal ou le plus tôt possible ultérieurement. En vertu de l'article 53 *bis* (B) du Règlement, la signification consiste en la remise à l'accusé de la copie certifiée, conformément aux dispositions de l'article 47 (G), de l'acte d'accusation confirmé par le juge conformément à l'article 47 (F) (ii) du Règlement.

21. En l'espèce, la Chambre observe que l'acte d'accusation initial, en date du 23 octobre 2002, a été soumis pour confirmation par le Procureur par requête enregistrée le 25 octobre 2002. Toutefois, cet acte d'accusation initial tel que présenté à

cette date n'a jamais été confirmé. Le Procureur a en effet déposé, le 12 novembre 2002, un acte d'accusation modifié daté du 11 novembre 2002. Seul ce second acte d'accusation amendé a été confirmé par le Juge Maqutu par ordonnance en date du 15 novembre 2002.

22. Dès lors, la Chambre conclut que l'obligation de signification prévue à l'article 53 *bis* du Règlement ne portait que sur ce second acte d'accusation modifié à compter du 15 novembre 2002. En conséquence, la Chambre est de l'avis que la signification opérée à l'accusé et à son conseil en français et en anglais le 19 novembre 2002 remplit l'obligation mentionnée à l'article 53 *bis* du Règlement. La Chambre rejette donc la requête sur ce point.

Notification des décisions de la Chambre à la défense

23. La Chambre rappelle qu'en vertu de l'article 33 (A) du Règlement, le Greffier est responsable, sous l'autorité du Président, de l'administration et du service du Tribunal et est chargé de toute communication émanant du Tribunal ou adressée à celui-ci. En vertu de l'article 9 (iv) de la directive à l'intention du Greffe du Tribunal pénal international pour le Rwanda, la Section de l'administration des Chambres est en particulier chargée de classer et transmettre diligemment aux juges, aux parties et au Service de la presse et des relations publiques les jugements, ordonnances, requêtes, mémoires et autres documents officiels du Tribunal.

24. La Chambre rappelle également qu'en vertu de l'article 2 (A) du Règlement, le mot «Partie» signifie, sauf incompatibilité tenant au contexte, le Procureur ou l'accusé.

25. En ce qui concerne la version française de la décision du 4 novembre 2002 disponible à compter du 13 mai 2003, la Chambre considère que la notification à l'accusée opérée le 15 mai 2003 est intervenue dans un délai raisonnable, compte tenu des délais inhérents à la traduction des décisions. En ce qui concerne l'absence de notification de la version française de la décision au conseil de la défense, la Chambre observe que la notification de la version française au seul accusé remplit l'obligation de notification de la décision à la défense, en vertu de l'article 2 (A) du Règlement. Dès lors, la Chambre considère que la requête n'est pas fondée sur ce point et la rejette.

26. En ce qui concerne la décision du 15 novembre 2002, la Chambre considère que la notification à l'accusé et son conseil de la version anglaise opérée le 18 novembre 2002 et la notification à l'accusé de la traduction en français intervenue le 26 novembre 2002 sont intervenues dans un délai tout à fait raisonnable. En ce qui concerne le défaut de notification de la version française au conseil de la défense, la Chambre considère, pour les motifs ci-dessus énoncés, que la requête n'est pas fondée sur ce point et la rejette.

27. Toutefois, ayant pris bonne note que le conseil actuel de l'accusé est francophone, la Chambre donne consigne au Greffe de lui fournir copie de la version française des décisions des 4 et 15 novembre 2002, étant entendu que les dates de notification officielles de la version française de ces textes demeurent, respectivement, les 15 mai 2003 et 26 novembre 2002.

Transmission des pièces justificatives soumises à l'appui de l'acte d'accusation

28. La Chambre rappelle qu'en vertu de l'article 66 (A) (i) du Règlement, le Procureur communique à la défense, dans les trente jours suivant la comparution initiale de l'accusé, copie de toutes les pièces justificatives jointes à l'acte d'accusation lors de la demande de confirmation, ainsi que toutes les déclarations antérieures de l'accusé recueillies par le Procureur. En vertu de l'article 66 (A) (ii) du Règlement, copie des déclarations de tous les témoins que le Procureur entend appeler à la barre doit être communiquée à la défense au plus tard soixante jours avant le début du procès, sous réserve des articles 53 et 69 du Règlement.

29. La Chambre rappelle en outre qu'en vertu de l'article 72 (A) du Règlement, les exceptions préjudicielles doivent être enregistrées au plus tard trente jours après que le Procureur a communiqué à la défense toutes les pièces jointes et déclarations visées à l'article 66 (A) (i) du Règlement.

30. La Chambre observe qu'en vertu de l'article 66 (A) (i) du Règlement, les pièces justificatives auraient dû être transmises à la défense dans les trente jours suivant la comparution initiale de l'accusé, soit au plus tard le 29 novembre 2002. En l'espèce, ces documents ont été reçus par le Greffe le 21 novembre 2002 et n'ont été transmis que le 5 mars 2003 au conseil de la défense et le 10 mars 2003 à l'accusé. D'autres pièces justificatives «complémentaires» ont été transmises par le Procureur au Greffe le 4 décembre 2002 et remises à l'accusé le 12 décembre 2002, et à son conseil le 5 mars 2003.

31. La Chambre prend note des soumissions du Greffier selon lesquelles le Greffe n'a pas transmis les pièces justificatives soumises à l'appui de l'acte d'accusation dans le délai requis. La Chambre conclut que le retard pris par le Greffe dans la transmission à la défense des pièces justificatives déposées par le Procureur a pour conséquence la violation de l'article 66 (A) (i) du Règlement.

32. En ce qui concerne les pièces justificatives complémentaires, la Chambre observe qu'elles ont été déposées par le Procureur postérieurement à l'issue du délai de trente jours à compter de la comparution initiale de l'accusé. La Chambre en conclut que ce retard pris par le Procureur dans le dépôt des pièces justificatives complémentaires au Greffe en vue de leurs transmissions à la défense constitue également une violation de l'article 66 (A) (i) du Règlement.

33. La Chambre note les soumissions de la défense selon lesquelles le Procureur aurait mentionné, lors de la comparution initiale de l'accusé tenue le 29 octobre 2002, avoir déposé «une masse documentaire importante, comprenant 69 procès-verbaux d'auditions, des textes législatifs et réglementaires, un rapport d'expertise de Guichaoua, une requête additive en protection des victimes et des témoins, accompagnée de ses annexes»[5]. La Chambre note que la défense en a conclu que les pièces justificatives soumises à l'appui de l'acte d'accusation comprenaient l'ensemble de ces documents et, n'en ayant pas reçu la totalité, a considéré que le délai prévu à l'article 72 (A) du Règlement pour le dépôt des exceptions préjudicielles n'avait pas encore commencé à courir. Toutefois, il ressort du mémorandum de communication par le

[5] T. 29 octobre 2002, pp. 10-11.

Procureur des pièces justificatives caviardées en date du 21 novembre 2002, que la totalité des pièces justificatives présentées au juge Maqutu pour confirmation de l'acte d'accusation ont été transmises à la défense le 5 mars 2003. Dès lors, le délai de trente jours mentionné à l'article 72 (A) du Règlement a débuté à cette date et est à présent expiré, sans que la défense ait déposé d'exceptions préjudicielles.

34. Cependant, compte tenu des déclarations erronées du Procureur à l'audience du 29 octobre 2002, selon lesquelles il aurait communiqué 69 procès-verbaux à l'appui de l'acte d'accusation, la défense a pu considérer de bonne foi que la totalité des pièces justificatives ne lui avait pas encore été communiquée et que le délai pour le dépôt des exceptions préjudicielles n'avait pas commencé à courir. En conséquence, ce non respect du délai prescrit par la loi ne saurait être imputable à la défense qui subit un préjudice certain du fait que le délai pour le dépôt des exceptions préjudicielles est désormais forclos. Dès lors, à titre de réparation du préjudice causé à la défense par les violations constatées de l'article 66 (A) (i), la Chambre estime approprié de faire courir le délai de 30 jours prévu à l'article 72 (A) pour le dépôt des exceptions préjudicielles à compter de la présente décision.

PAR CES MOTIFS,

LA CHAMBRE DE PREMIÈRE INSTANCE,

CONSTATE que le délai prévu par l'article 66 (A) (i) du Règlement pour la transmission des pièces justificatives soumises à l'appui de l'acte d'accusation n'a pas été respecté;

DÉCIDE, à titre de réparation du préjudice résultant de la violation de l'article 66 (A) (i), que le délai de 30 jours prévu à l'article 72 (A) pour la présentation des exceptions préjudicielles par la défense court à compter de la présente décision;

INVITE le Greffe à fournir au conseil de l'accusé copie de la version française de la «Décision relative à la requête du Procureur en prorogation de la détention du suspect (article 40 *bis* (F) du Règlement de procédure et de preuve)» du 4 novembre 2002, étant entendu qu'une copie de ce texte a déjà été notifiée à la défense le 15 mai 2003;

INVITE le Greffe à fournir au conseil de l'accusé copie de la version française de la «Décision portant confirmation de l'acte d'accusation prescrivant la non-divulgation des informations permettant d'identifier les témoins qui figurent dans les déclarations desdits témoins» du 15 novembre 2002, étant entendu qu'une copie de ce texte a déjà été notifiée à la défense le 26 novembre 2002;

REJETTE les autres demandes formulées par la défense.

Arusha, le 19 Octobre 2004

[Signed] : Arlette Ramaroson; Willian H. Sekule; Solomy B. Bossa

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Décision sur la requête en extrême urgence de la défense aux fins de communication de documents par le Greffe 21 octobre 2004 (ICTR-97-31-I)

(Original : Français)

Chambre de première instance III

Juges : Arlette Ramaroson, Présidente ; William H. Sekule ; Solomy B. Bossa

Communication de documents – la défense ne mentionne ni le fondement légal de sa demande, ni la nature exacte des documents qu'elle demande – demande non fondée en droit – décision antérieure a déjà statué sur les autres points de la requête – requête rejetée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 33 (B), 73

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (ci-après le «Tribunal»),

SIÉGEANT en la Chambre de première instance II composée du Juge Arlette Ramaroson, Présidente, du Juge William H. Sekule, et du Juge Solomy B. Bossa (la «Chambre);

ÉTANT SAISI de la «Requête en extrême urgence de la défense aux fins de communication de documents par le Greffe», enregistrée le 21 avril 2004 (la «Requête»);

CONSIDÉRANT

(i) la «Réponse du Procureur à la requête en extrême urgence de la défense aux fins de communication de documents par le Greffe», enregistrée le 5 mai 2004 (la «Réponse»)[1]

(ii) les «Conclusions du Greffier en application de l'article 33 (B) du Règlement de procédure et de preuve sur la requête de la défense aux fins de communication de documents et la requête en extrême urgence de la défense aux fins de communication de documents par le Greffe», enregistrée le 3 Septembre 2004 (les «Conclusions du Greffe»)[2]

NOTANT la «Décision sur la requête de la défense aux fins de communication de documents» rendue par la Chambre en date du 19 octobre 2004 («la Décision du 19 octobre 2004»)

[1] La Réponse était à l'origine déposée en anglais et intitulée «Prosecutor's Response to the Extremely Urgent Defence Motion for Disclosure of Documents by the Registrar».

[2] Les conclusions du Greffe étaient à l'origine déposées en anglais et intitulées «Registrar's Submission Under Rule 33 (B) of the Rules On the Following Defence Motions : 1 – 'Requête de la défense aux fins de communication de documents'; 2 - 'Requête en extrême urgence de la défense aux fins de communication de documents par le Greffe'».

STATUANT uniquement sur la base des mémoires écrits déposés par les parties conformément à l'article 73 du Règlement de procédure et de preuve (le «Règlement»);

CONSIDÉRANT que la défense demande à la Chambre d'ordonner au Greffe de communiquer la liste des documents audiovisuels en sa possession;

CONSIDÉRANT que la défense ne mentionne ni le fondement légal de sa demande, ni la nature exacte des documents qu'elle demande;

CONSIDÉRANT par conséquent que la demande n'est pas fondée en droit et que la Chambre n'est pas en mesure de statuer sur une demande aussi vague;

CONSIDÉRANT que la décision du 19 octobre 2004 a statué sur les autres points de la requête, à savoir :

- la signification de l'acte d'accusation initial en date du 23 octobre 2002,
- la transmission des pièces justificatives soumises à l'appui de l'acte d'accusation,
- la notification des décisions rendues par la Chambre dans leur version française;

PAR CES MOTIFS,

LA CHAMBRE DE PREMIÈRE INSTANCE,

REJETTE la requête dans sa totalité.

Arusha, le 21 Octobre 2004

[Signé] : Arlette Ramaroson; William H. Sekule; Solomy B. Bossa

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Corrigendum de la décision sur la requête de la défense aux fins de communication de documents en date du 19 octobre 2004 22 octobre 2004 (ICTR-97-31-1)

(Original : Français)

Chambre de première instance II

Juges : Arlette Ramaroson, Présidente ; William H. Sekule ; Solomy B. Bossa

Corrigendum, expiration du délai de communication des pièces justificatives à la défense, délai respecté par le Procureur – modification de la décision, suppression d'un paragraphe

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (ci-après le «Tribunal»),

SIÉGEANT en la Chambre de première instance II composée de la Juge Arlette Ramaroson, Présidente, du Juge William H. Sekule et de la Juge Sotomy B. Bossa (la «Chambre»);

ÉTANT SAISI de la «Requête du Procureur en reconsidération de la décision sur la requête de la défense aux fins de communication de documents en date du 19 octobre 2004», enregistrée le 20 octobre 2004 (la «Requête»)[1];

NOTANT la «Décision sur la requête de la défense aux fins de communication de documents» en date du 19 Octobre 2004 («la Décision du 19 octobre 2004»);

CONSIDÉRANT que la Décision du 19 octobre 2004 mentionne à la ligne 3 du paragraphe 30 que le délai de communication à la défense des pièces justificatives expirait le 29 novembre 2002;

CONSIDÉRANT que la comparution initiale de l'accusé s'est déroulée le 21 novembre 2002 et que le délai pour le dépôt des pièces justificatives expirait par conséquent le 21 décembre 2002;

CONSIDÉRANT que la mention du 29 novembre 2002 à la ligne 3 du paragraphe 30 est par conséquent erronée et qu'elle doit être remplacée par la date du 21 décembre 2002;

CONSIDÉRANT qu'il s'ensuit que, contrairement à ce qui est mentionné au paragraphe 32 de la décision du 19 octobre 2004, les délais mentionnés à l'article 66 (A) (i) du Règlement procédure et de preuve ont été respectés par le Procureur;

CONSIDÉRANT qu'il convient par conséquent de supprimer le paragraphe 32 de la décision du 19 octobre 2004;

1 L'original de la requête est en anglais et intitulé : «Prosecutor's Motion to Reconsider the 'Décision sur la requête de la défense aux fins de communication de documents' of 19 October 2004».

CONSIDÉRANT que l'erreur précitée n'affecte pas le sens de la décision du 19 octobre 2004;

PAR CES MOTIFS,

LA CHAMBRE DE PREMIÈRE INSTANCE,

CONSTATE qu'une erreur s'est glissée à la ligne 3 du paragraphe 30 et au paragraphe 32 de la Décision du 19 octobre 2004;

MODIFIE le paragraphe 30 de la Décision du 19 octobre 2004 qui devient :

> «30. La Chambre observe qu'en vertu de l'article 66 (A) (i) du Règlement, les pièces justificatives auraient dû être transmises à la défense dans les trente jours suivant la comparution initiale de l'accusé, soit au plus tard le 21 décembre 2002. En l'espèce, ces documents ont été reçus par le Greffe le 21 novembre 2002 et n'ont été transmis que le 5 mars 2003 au conseil de la défense et le 10 mars 2003 à l'accusé. D'autres pièces justificatives «complémentaires» ont été transmises par le Procureur au Greffe le 4 décembre 2002 et remises à l'accusé le 12 décembre 2002, et à son conseil le 5 mars 2003.»

SUPPRIME le paragraphe 32 de la Décision dans sa totalité;

DÉCIDE qu'il n'y a plus lieu à statuer sur la requête du Procureur du fait du présent corrigendum.

Arusha, le 22 Octobre 2004

[Signed] : Arlette Ramaroson; William H. Sekule; Solomy B. Bossa

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The Prosecutor v. Emmanuel RUKUNDO

Case N° ICTR-2001-70

Case History

- Name : RUKUNDO
- First Name : Emmanuel
- Date of Birth : 1959
- Sex : male
- Nationality : Rwandan
- Former Official Function : Military chaplain at Ruhengeri prefecture, transferred afterwards to Kigali
- Counts : Genocide and crime against humanity (murder and extermination)

- Date of Indictment's confirmation : 5 July 2001[1]
- Date and Place of Arrest : 12 July 2001, in Geneva, Switzerland
- Date of Transfer : 20 September 2001
- Date of Initial Appearance : 26 September 2001
- Date of Trial Began : 15 November 2006

[1] Le texte de l'acte d'accusation est reproduit dans le *Recueil 2001*, p. 3179. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 2001*, p. 3151.

Le Procureur c. Emmanuel RUKUNDO

Affaire N° ICTR-2001-70

Fiche technique

- Nom : RUKUNDO
- Prénom : Emmanuel
- Date de naissance : 1959
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : aumônier de l'armée dans la préfecture de Ruhengeri, affecté ensuite à Kigali
- Chefs d'accusation : génocide et crimes contre l'humanité (assassinat et extermination)
- Date de confirmation de l'acte d'accusation : 5 juillet 2001[1]
- Date et lieu de l'arrestation : 12 juillet 2001, à Genève, en Suisse
- Date du transfert : 20 septembre 2001
- Date de la comparution initiale : 26 septembre 2001
- Date du début du procès : 15 Novembre 2006

[1] Le texte de l'acte d'accusation est reproduit dans le *Recueil 2001*, p. 3179. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 2001*, p. 3151.

Order of the Presiding Judge to Assign Judges 14 January 2004 (ICTR-2001-70-AR65)

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

Emmanuel Rukundo – Assignment of judges

International Instrument cited :

Statute, art. 11 (3) and 13 (4)

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Decision on Leave to Appeal (Provisional Release)" dated 18 December 2003 issued in *Rukundo v. Prosecutor*, N° ICTR-2001-70-AR65(D), by a three-judge Bench of the Appeals Chamber, which granted leave to appeal the Decision of 18 August 2003 denying the motion for provisional release of Appellant Emmanuel Rukundo ("Appellant");

NOTING the "Mémoire d'appel de la décision du 18 août 2003 rejetant la demande de mise en liberté provisoire," filed on 30 December 2003 by the Appellant personally, and the "Mémoire devant la chambre d'appel à l'encontre de la décision du 18 août 2003," filed the same day by counsel for the Appellant;

CONSIDERING the composition of the Appeals Chamber of the International Tribunal set out in Document IT/222 of the International Criminal Tribunal for the former Yugoslavia, dated 17 November 2003;

NOTING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal;

FOR THE FOREGOING REASONS,

ORDER that, in the case of *Emmanuel Rukundo v. The Prosecutor*, Case N° ICTR-2001-70-AR65, the Appeals Chamber be composed as follows :

Judge Florence Mumba
Judge Mehmet Güney
Judge Fausto Pocar
Judge Wolfgang Schomburg
Judge Inés Monica Weinberg de Roca

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

Done this 14th day of January 2003, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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Decision on Defence Motion for Translation into French of Prosecution and Procedural Documents in the **Rukundo** *Case*
Articles 20 and 31 of the Statute, and Rule 3 of the Rules of Procedure and Evidence
5 March 2004 (ICTR-2001-70-I)

(Original : French)

Trial Chamber III

Judges : Lloyd G. Williams, Q.C., presiding; Andrésia Vaz; Khalida Rachid Khan

Emmanuel Rukundo – Translation into French of Prosecution and Procedural Documents, Right of the Accused to a fair trial, Right of the Accused to be informed in detail in a language which he understands of the nature and cause of the charge against him, Duty of the Registrar to make arrangements for translation and interpretation of the working languages, Language of Lead Counsel of the Accused – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 3, 3 (A), 3 (E), 66 (A) (i), 66 (A) (ii) and 69; Statute, art. 20, 20 (2), 20 (4) (a) and 31

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

SITTING as Trial Chamber III (the "Chamber"), in the person of Judge Andrésia Vaz, designated pursuant to Rule 73 (A) of the Rules of Procedure and Evidence (the "Rules"),

SEIZED of the "Defence Extremely Urgent Motion for Translation into French of Prosecution and Procedural Documents in the *Rukundo* case", filed on 21 March 2003 (the "Motion"),

CONSIDERING the Response to the Motion, filed by the Prosecution on 27 March 2003 (the "Response") and the Defence Reply to the Response, filed on 4 April 2003 (the "Reply"),

CONSIDERING the Tribunal's Statute (the "Statute") and the Rules,

DECIDES, as indicated hereafter, based solely on the written briefs of the parties, pursuant to Rule 73"(A) of the Rules.

Décision relative à la requête de la défense aux fins d'obtenir la traduction en français de tous les documents et actes de procédure versés au dossier d'Emmanuel Rukundo Articles 20 et 31 du Statut, et 3 du Règlement de procédure et de preuve 5 mars 2004 (ICTR-2001-70-I)

(Original : Français)

Chambre de première instance III

Juges : Lloyd G. Williams, Q.C., Président; Andrésia Vaz; Khalida Rachid Khan

Emmanuel Rukundo – Obtention de la traduction en français de tous les documents et actes de procédure, Droit de l'accusé à un procès équitable, Droit à être informé dans une langue qu'il comprend et de façon détaillée de la nature et des motifs de l'accusation portée contre lui, Obligation au Greffier de prendre les dispositions pour assurer la traduction et l'interprétation dans les langues de travail, Langue du Conseil principal de l'accusé – Requête partiellement acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 3, 3 (A), 3 (E), 66 (A) (i), 66 (A) (ii) et 69; Statut, art. 20, 20 (2), 20 (4) (a) et 31

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIEGEANT pour la Chambre de première instance III (la «Chambre»), en la personne Juge Andrésia Vaz, désignée conformément à l'article 73 (A) du Règlement de Procédure et de Preuve (le «Règlement»);

ETANT SAISI de la «Requête en extrême urgence de la défense aux fins de traduction en français de tous les documents et acres de procédure versés au dossier Emmanuel Rukundo», déposée le 21 mars 2003 (la «requête»);

CONSIDERANT la réponse à la requête, déposée par le Procureur le 27 mars 2003 (la «réponse») et la réplique de la défense à la réponse, déposée le 4 avril 2003 (la «réplique»);

CONSIDERANT le Statut du Tribunal (le «Statut») et le Règlement;

STATUE, comme indiqué ci-après, sur la seule base des mémoires écrits déposés par les parties, conformément à l'article 73 (A) du Règlement.

PARTIES' SUBMISSIONS

Motion

1. The Defence notes that the Accused has chosen French as the language of his defence, but most of the documents relating to the proceedings against him were disclosed in English. Furthermore, most of the available French translations were filed late. The Accused would therefore not be in a position to adequately prepare his defence and his right to a fair trial would be prejudiced.

2. Invoking Articles 20 and 31 of the Statute, Rule 3 of the Rules, various provisions of domestic and international law, as well as ICTR and ICTY case law, the Defence further considers that this situation violates the Accused's right to be informed of the nature and cause of the charge against him in a language which he understands, thereby undermining the equality of arms[1].

3. The Defence points out that before referring this matter to the Chamber, it contacted the Registry by letter dated 26 September 2001, and filed a brief on 30 May 2002. The Prosecution responded, by letter dated 11 December 2002, that it had no obligation to provide documents in French when the original document was in English or when the documents were public. Thus, the parties in question and the Registry have not been able to resolve this contentious issue themselves.

4. Consequently, the Defence prays the Chamber :

(a) to order the Registry to transmit the French version of all decisions and orders already rendered, or which will be rendered, in the instant case in English;

(b) to order the Registry to transmit the French version of all motions, briefs and other submissions by the Prosecution filed in English, including annexes to the documents;

(c) to order the Registry to transmit "all documents disclosed between the Prosecution and the Defence, which documents the Prosecution intends to present as evidence during trial and during the various pre-trial proceedings";

[1] The Defence cites : Article 14 of the International Covenant on Civil and Political Rights, Article 6 (3) (a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 67 (1) of the Statute of the International Criminal Court, and various provisions national laws, including the Rwandan Legislative Decree N° 8/75 of 12 February 1975, and Article 31 (2) of the Swiss Constitution. The Defence cites the following decisions : *The Prosecutor v. Mika Muhimana*, Case N° ICTR-95-l-B-I, "Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel" (Trial Chamber), 6 November 2001 ("the *Muhimana* Decision 6 November 2001"), and *Prosecutor v. Zejnil Delalic and Others*, Case N° IT-96-21, "Decision on Defence Application for Forwarding the Documents in the Language of the Accused" (ICTY, Trial Chamber), 25 September 1996 ("the *Delalic* Decision of 25 September 1996").

ARGUMENTS DES PARTIES

Requête

1. La défense note que l'accusé a choisi le français comme langue de sa défense. Or, la plupart des documents relatifs aux procédures engagées à son encontre lui auraient été communiqués en anglais. En outre, la plupart des traductions en français mises à sa disposition auraient été déposées avec retard. L'accusé ne serait dès lors pas en mesure de préparer convenablement sa défense et son droit à un procès équitable serait bafoué.

2. S'appuyant sur les articles 20 et 31 du Statut, l'article 3 du Règlement, diverses dispositions de droit international ou interne, ainsi que des précédents jurisprudentiels des Chambres du Tribunal et du Tribunal pénal international pour l'ex-Yougoslavie (le «TPIY»), la défense voit en outre dans cette situation une violation du droit de l'accusé à être informé, dans une langue qu'il comprend, de la nature et des motifs de l'accusation portée contre lui, portant atteinte à l'égalité des armes[1].

3. La défense précise qu'avant de saisir la Chambre de cette question, elle s'est adressée au Greffe par lettre le 26 septembre 2001 et a déposé un mémoire le 30 mai 2002. Le Procureur aurait répondu, par lettre en date du 11 décembre 2002, qu'il n'avait aucune obligation de fournir des documents traduits en français lorsque le document existe en original en langue anglaise ou lorsque les documents sont publics. En conséquence, les parties concernées et le Greffier n'auraient pas pu régler par eux-mêmes ce contentieux.

4. En conséquence, la défense sollicite de la Chambre qu'elle ordonne :

a) la communication par le Greffe de la version française de toutes les décisions et ordonnances déjà rendues ou qui seront rendues en l'espèce en anglais;

b) la communication par le Greffe de la version française de toutes les requêtes, mémoires et autres soumissions de l'accusation déposés en anglais, y compris les annexes à ces documents;

c) la communication par le Greffe de «toutes les pièces faisant l'objet de communications entre le Procureur et la Défense et qui constituent des éléments de preuve que ce dernier entend présenter aussi bien dans la phase du procès proprement dit qu'au cours des diverses requêtes d'avant le procès»;

[1] La défense cite : l'article 14 du Pacte international sur les droits civils et politiques, l'article 6 alinéa 3 (a) de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, l'article 67 alinéa 1 du Statut de la Cour pénale internationale, et diverses dispositions de droits internes dont le décret-loi n°8/75 du 12 février 1975, du Rwanda, et à l'Article 31 alinéa 2 de la Constitution Helvétique. La défense cite en outre les décisions suivantes : *Le Procureur c. Mika Muhimana* Affaire N° ICTR-95-1-B-I, Décision relative la requête de la défense aux fins de traduction des documents de l'accusation et des actes de procédure en kinyarwanda, langue de l'accusé, et en français, langue de son Conseil (Chambre de première instance), 6 novembre 2001 («la décision *Muhimana* du 6 novembre 2001»), *et Le Procureur c. Zejnil Delalic et consorts*, Affaire N°IT-96-21, Décision relative à la requête de la défense aux fins de transmission des documents dans la langue de l'accusé (TPIY, Chambre de première instance), 25 septembre 1996 («la décision *Delalic* du 25 septembre 1996»).

(d) to ascertain, before rendering its decisions, that there is a complete French version of motions, briefs and various submissions;

(e) to order that the time limit for response and reply should start running only from the moment that the French version has been disclosed to the Accused.

Response

5. The Prosecution responds :

(a) that the Motion is needless in that the applicable rules already provide for translation into French of the documents requested;

(b) that the Motion is irrelevant regarding the point summarized in paragraph 5 (c) above, in that *inter partes* disclosures should not involve the Chamber or the Registry, and because the Prosecution has already undertaken to communicate with the Defence in French;

(c) that the request summarized in paragraph 5 (d) above is too general, and that by requesting that the time limit to respond be predicated on the Prosecution's submissions filed in English, the Defence is seeking to circumvent Rule 72 (D) of the Rules, by obtaining a time limit exceeding the regulatory rive days;

(d) that the Motion is frivolous as it is general, for the Defence has not exhausted the available remedies before referring the matter to the Chamber, and that it should not have been filed as an extremely urgent motion. The Prosecution, accordingly, suggests that the Chamber order non-payment of fees for the filing of the Motion, pursuant to Rule 73 (E) of the Rules[2].

Reply

6. In reply, the Defence reiterates in the main the arguments advanced in its Motion.

DELIBERATIONS

7. Having considered the relevant case law, including the one cited by the Defence, the Chamber finds that in view of the Accused's right to a fair trial (Article 20 (2) of the Statute) and of his right to be informed in detail in a language which he under-

[2] Rule 73 (E) of the Rules has become Rule 73 (F), further to the amendment of Rule 73 at the plenary session of the Tribunal, on 26 and 27 May 2003. Rule 73 (F) states that : "In addition to the sanctions envisaged by Rule 46, a Chamber may impose sanctions against the Counsel if Counsel brings a motion, including a preliminary motion that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof."

d) la vérification par la Chambre même, de l'existence d'une version française des requêtes, mémoires et soumissions diverses dans leur intégralité, avant de rendre ses décisions;

e) que les délais de réponse et de réplique ne commencent à courir qu'à compter de la communication de la version française à l'accusé.

Réponse

5. Le Procureur répond en substance :

a) Que la requête est inutile, en ce que les textes applicables prévoient déjà la traduction en français des documents demandés;

b) Que la requête n'est pas pertinente en son point résumé au paragraphe 5 (c) ci-dessus, en ce que les communications entre les parties ne devraient pas impliquer la Chambre ou le Greffe et parce que le Procureur a déjà pris l'engagement de communiquer avec la défense en français;

c) Que la demande résumée au paragraphe 5 (d) ci-dessus est trop générale, et qu'en demandant des délais de réponse en fonction des soumissions du Procureur déposées en anglais, la défense cherche à contourner l'article 72 (D) du Règlement, en obtenant des délais dépassant les cinq jours réglementaires;

d) Que la requête est frivole de par sa généralité, car la défense n'aurait pas épuisé les recours disponibles avant de saisir la Chambre, et qu'elle n'aurait pas dû être déposée en extrême urgence. Il suggère dès lors que la Chambre ordonne le non-paiement des frais associés au dépôt de la requête, sur la base de l'article 73 (E) du Règlement[2].

Réplique

6. En réplique, la défense réitère pour l'essentiel les arguments développés dans sa requête.

DÉLIBÉRATIONS

7. Ayant considéré la jurisprudence pertinente, y compris celle citée par la défense, la Chambre considère qu'en vertu du droit de l'accusé à un procès équitable (Article 20 (2) du Statut) et de son droit à être informé dans une langue qu'il comprend et

[2] L'article 73 (E) du Règlement est devenu l'article 73 (F), suite à la modification de l'article 73 lors de dernière session plénière du Tribunal, les 26 et 27 mai 2003. L'article 73 (F) dispose que, «[o]utre les sanctions envisagées à l'article 46, une Chambre peut sanctionner un conseil si ce dernier dépose une requête, y compris une exception préjudicielle, qui, de l'avis de la Chambre, est fantaisiste, ou constitue un abus de procédure. La Chambre peut demander qu'il soit sursis au paiement d'une partie ou de la totalité des honoraires qui sont dus au titre de la requête déposée, et/ou des frais y relatifs.

stands of the nature and cause of the charge against him (Article 20 (4) (a) of the Stature), the Accused has the right to obtain the French translations of :

(i) the decisions and orders rendered in his case;

(ii) the supporting material transmitted to the Judge confirming the indictment against him, pursuant to Rule 66 (A) (i) of the Rules;

(iii) prior statements by Prosecution witnesses pursuant to Rule 66 (A) (ii) of the Rules, insofar as the Prosecution intends to call them to testify; and

(iv) evidence on which the Prosecution intends to rely, subject to Rule 69 of the Rules.

8. Under Article 31 of the Statute and Rule 3 (A) of the Rules, the Tribunal's working languages are English and French, while Rule 3 (E) of the Rules enjoins the Registrar to make any necessary arrangements for translation and interpretation of the working languages. It is therefore the Registrar's responsibility to make every effort to ensure the necessary translation of documents, filed in one of the Tribunal's working languages, into the other working language.

9. Lead Counsel for the Accused is French-speaking, but he also understands English and can explain the content of the documents to the Accused. In agreement with the findings of Trial Chamber I in the *Muhimana* Case, the Chamber finds that it is Counsel's duty to inform the Accused of the content of the opposing party's submissions in the motions brought before the Chamber, and of the content of other briefs filed or disclosed in his case. The Defence has therefore not justified why the rime limit for the filing of parties' submissions should be systematically suspended until the day of receipt of the French translation of the Prosecution's submissions. Nor has the Defence justified why the Chamber should wait for the filing of those translations before deciding on the parties' motions.

FOR THESE REASONS,

THE TRIBUNAL

(I) INSTRUCTS the Registrar to produce, as soon as practicable, the French translations of the documents referred to in paragraph 7 above,

(II) DENIES the Motion in ail other respects.

Arusha, 5 March 2004.

[Signed] : Andrésia Vaz

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de façon détaillée de la nature et des motifs de l'accusation portée contre lui (Article 20 (4) (a) du Statut), l'accusé a le droit d'obtenir la version française :

i) des décisions et ordonnances rendues dans son dossier;

ii) des éléments justificatifs présentés au juge confirmateur de l'acte d'accusation à son encontre, visés à l'article 66 (A) (i) du Règlement;

iii) des déclarations préalables des témoins à charge visées à l'article 66 (A) (ii) du Règlement, pour autant que le Procureur entende les appeler à témoigner; et

iv) des éléments de preuve sur lesquels le Procureur compte s'appuyer, sous réserve de l'article 69 du Règlement.

8. Aux termes des articles 31 du Statut et 3 (A) du Règlement, les langues de travail du Tribunal sont l'anglais et le français, tandis que l'article 3 (E) du Règlement fait obligation au Greffier de prendre les dispositions voulues pour assurer la traduction et l'interprétation dans les langues de travail. Il revient donc au Greffier de faire tous les efforts pour effectuer les traductions nécessaires des documents déposés dans l'une des langues de travail du Tribunal, dans l'autre langue de travail.

9. Le Conseil principal de l'accusé est francophone, mais il comprend aussi l'anglais et il est capable d'expliquer à l'accusé le contenu des documents. En accord avec les conclusions de la Chambre de première instance I dans l'affaire *Muhimana*, la Chambre considère qu'il est du devoir de ses conseils d'informer l'accusé de la teneur des arguments de la partie adverse dans le cadre des requêtes dont est saisie la Chambre, et de la teneur des autres memoranda déposés ou communiqués dans son affaire. La défense n'a donc pas justifié que les délais de dépôt des soumissions des parties soient systématiquement suspendus jusqu'au jour de la réception de la traduction des soumissions de l'accusation en français. La défense n'a pas non plus justifié que la Chambre doive attendre le dépôt de ces traductions avant de décider sur les requêtes des parties.

PAR CES MOTIFS,

LE TRIBUNAL

I. ENJOINT au Greffier de produire, dans les meilleurs délais, les traductions en français des documents visés au paragraphe 7 ci-dessus;

III. REJETTE la requête pour le surplus.

Arusha, le 5 mars 2004,

[Signed] : Andrésia Vaz

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Decision on Appeal from the Decision of Trial Chamber III of 18 August 2003 denying Application for Provisional Release 8 March 2004 (ICTR-2001-70-AR65(D))

(Original : English)

Appeals Chamber

Judges : Fausto Pocar, Presiding; Florence Mumba, Mehmet Güney, Wolfgang Schomburg, Inés Mónica Weinberg de Roca

Emmanuel Rukundo – Provisional Release only upon an order of the Chamber, Ultra vires nature of the decision denying provisional release rendered by a single judge – Remittance of the decision

International Instrument cited :

Rules of Procedure and Evidence, rule 65 (A)

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January and 31 December 1994 ("International Tribunal");

NOTING the "Decision on Leave to Appeal (Provisional Release)" issued by a Bench of this Appeals Chamber on 18 December 2003 in which the Defence request for leave to appeal was granted;

BEING SEIZED OF the "Mémoire d'appel de la décision du 18 Août 2003 rejetant la demande de mise en liberté provisoire" filed by Emmanuel Rukundo ("Appellant") on 30 December 2003 ("Appellant's Brief") and the "Mémoire devant la Chambre d'appel à l'encontre de la décision du 18 Août 2003" filed by Lead Counsel Moriceau on 30 December 2003 ("Defence's Brief"), which both challenge the "Decision on Defence Motion to Fix a date for the Commencement of the Trial of Father Emmanuel Rukundo or, in the alternative, to request his Provisional Release" issued on 18 August 2003 ("Impugned Decision") by Judge Williams sitting as a single Judge designated by Trial Chamber III pursuant to Rule 73 (A) of the Rules of Procedure and Evidence ("Rules") denying the Defence motion;

NOTING the "Prosecutor's Response to Rukundo's Motion for Leave to Appeal the Decision of 18 August 2003" filed by the Office of the Prosecutor on 5 January 2004 ("Prosecutor's Response");

NOTING that Rule 65 (A) of the Rules provides that "an accused may not be provisionally released except upon an order of a Trial Chamber";

CONSIDERING that Rule 65 of the Rules sets out the procedure to be followed in deciding an application for provisional release and that the provision for "a Trial Chamber" to adjudicate in respect of the application may not be circumvented by del-

egating the decision to a single Judge pursuant to the provision of Rule 73 (A) of the Rules;

FINDING therefore that in designating a single judge to decide an application for provisional release, Trial Chamber III violated the express requirements of Rule 65 and that consequently the Impugned Decision was taken by the single judge *ultra vires*;

HEREBY QUASHES the Impugned Decision;

AND ORDERS THE REMITTANCE of the application for Provisional Release to the full Trial Chamber for its decision.

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

Done this 8th day of March 2004, at The Hague, The Netherlands.

[Signed] : Fausto Pocar, Presiding Judge

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Decision on Defence Motion for his Provisional Release Rule 65, Rule 65 **bis** *and Rule 73* **bis** *of the Rules of Procedure and Evidence 16 March 2004 (ICTR-2001-70-I)*

(Original : English)

Trial Chamber III

Judges : Lloyd G. Williams, Q.C., Presiding; Andrésia Vaz; Khalida Rachid Khan

Emmanuel Rukundo – Provisional Release – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 65, 65 bis and 73 bis

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

SITTING as Trial Chamber III composed of Judges Lloyd G. Williams, Q.C., presiding, Andrésia Vaz and Khalida Rachid Khan ("Chamber");

BEING SEISED of the "Decision on Appeal from the Decision of Trial Chamber III of 18 August 2003 Denying the Application for Provisional Release," dated 8 March 2004 which ordered the remittance of the application for Provisional Release to the full bench of the Trial Chamber for its Decision;

RECONSIDERING THEREFORE the Defence "Motion to Fix a Date for the Commencement of the Trial of Father Emmanuel Rukundo or, in the Alternative, to Request his Provisional Release," as filed on 21 May 2003; the "Prosecutor's Response to the Defence Motion for Provisional Release (Bail) or to Fix a Date for a Pre-Trial Conference," as filed on 27 May 2003 and the Defence Reply thereto filed on 3 July 2003; and the "Registrar's Submission under Rule 33 (B) of the Rules on Defence Counsel's Motion for Provisional Release of Father Emmanuel Rukundo," filed on 18 July 2003 and the Defence response thereto filed on 28 July 2003;

CONSIDERING the Statute of the Tribunal ("Statute") and the Rules, particularly Rule 65 as it was amended at the thirteenth plenary session of 26 and 27 May 2003;

CONSIDERING FURTHER the "Decision on Defence Motion to Fix a Date for the Commencement of the Trial of Father Emmanuel Rukundo or, in the Alternative, to Request his Provisional Release," dated 18 August 2003;

NOTING that the Trial Chamber, now fully constituted, agrees with the reasoning in the aforementioned Decision of 18 August 2003;

Décision relative à la requête de la défense aux fins de mise en liberté provisoire Articles 65, 65 **bis** *et 73* **bis** *du Règlement de procédure et de preuve 16 mars 2004 (ICTR-2001-70-I)*

(Original : Anglais)

Chambre de première instance III

Juges : Lloyd G. Williams, Président de Chambre; Andresia Vaz; Khalida Rachid Khan

Emmanuel Rukundo – Mise en liberté provisoire – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 65, 65 bis et 73 bis

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIEGEANT en la Chambre de première instance III composée des juges Lloyd G. Williams, Président de Chambre, Andrésia Vaz et Khalida Rachid Khan (la «Chambre»),

SAISI de l'arrêt d'appel relatif à la décision de la Chambre de première instance III du 18 août 2003 rejetant la requête aux fins de mise en liberté provisoire, date du 8 mars 2004, ordonnant renvoi pour décision de la requête aux fins de mise en liberté provisoire devant la Chambre de première instance en formation plénière,

REEXAMINANT EN CONSEQUENCE la «Requête en fixation d'une date pour le début du procès de l'accusé et à défaut de mise en liberté de Emmanuel Rukundo», déposée le 21 mai 2003; la Réponse du Procureur à la requête de la Défense aux fins de mise en liberté provisoire (sous conditions) ou de fixation de la date de la conférence préalable au procès, déposée le 27 mai 2003 et la réplique de la défense y relative, produite le 3 juillet 2003, et les Observations du Greffier, formulées en vertu de l'article 33 (B) du Règlement sur la requête de la défense aux fins de mise en liberté provisoire du père Emmanuel Rukundo, déposée le 18 juin 2003 et la réponse de la défense y relative, déposée le 28 juillet 2003,

VU le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve, en particulier en son article 65 qui a été modifié lors de la treizième session plénière des 26 et 27 mai 2003,

VU EN OUTRE, la Décision relative à la requête formée par la défense aux fins d'obtenir la fixation de la date d'ouverture du procès du père Emmanuel Rukundo ou, à défaut, sa mise en liberté provisoire, datée du 18 août 2003,

PRENANT ACTE de ce que la Chambre de première instance, siégeant en formation plénière, fait sien le raisonnement suivi dans la décision susmentionnée datée du 18 août 2003,

NOW DECIDES the matter, pursuant to Rule 73 (A) of the Rules, solely on the basis of the written briefs filed by the parties;

AND HEREBY

ADOPTS the reasoning in the Decision of 18 August 2003; and

DENIES the Defence Motion for Provisional Release.

Arusha, 16 March 2004

[Signed] : Lloyd G. Williams, Q.C.; Andrésia Vaz; Khalida Rachid Khan

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STATUANT en venu de l'article 73 (A) du Règlement sur la requête sur la seule base des mémoires écrits déposés par les parties,

SOUSCRIT au raisonnement suivi dans la décision du 18 août 2003 et

REJETTE la requête de la Défense aux fins de mise en liberté provisoire de l'accuse.

Fait à Arusha, le 16 mars 2004

[Signé] : Lloyd G. Williams; Andrésia Vaz; Khalida Rachid Khan

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Order of the Presiding Judge to Assign Judges 24 March 2004 (ICTR-2001-70-AR65(D).2)

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

Emmanuel Rukundo – Assignment of judges

International Instrument cited :

Statute, art. 11 (3) and 13 (4)

I, THEODOR MERON, President of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Requête en extrême urgence aux fins d'autorisation d'interjeter appel de la décision de la Chambre de première instance du 18 mars 2004 rejetant la demande de libération provisoire," filed by Emmanuel Rukundo personally on 24 March 2004;

CONSIDERING the composition of the Appeals Chamber of the International Tribunal set out in Document IT/222 of the International Criminal Tribunal for the former Yugoslavia, dated 17 November 2003;

NOTING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal and Rule 65 (D) of the Rules of Procedure and Evidence of the International Tribunal;

FOR THE FOREGOING REASONS,

ORDER that the three-judge bench of the Appeals Chamber in the case of *Emmanuel Rukundo v. Prosecutor*, Case N° ICTR-2001-70-AR65(D).2, shall be composed as follows :

Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

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

Done this 25th day of March 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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Décision relative à la demande d'autorisation d'interjeter appel (mise en liberté provisoire) 28 avril 2004 (ICTR-2001-70-AR65 (D).2)

(Original : Anglais)

Chambre d'appel

Juges : Mehmet Güney, Président; Fausto Pocar; Inés Mónica Weinberg de Roca

Emmanuel Rukundo – Mise en liberté provisoire, Appel pour des motifs valables, Définition des motifs valables, Rejet de la longueur de la detention comme motif valuable d'appel – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 65 et 65 (D)

LA FORMATION DE TROIS JUGES DE LA CHAMBRE D'APPEL du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994 (le «Tribunal international»),

VU la «Decision on Appeal from the Decision of Trial Chamber III of 18 August 2003 denying Application for Provisional Release» rendue le 8 mars 2004, par laquelle la Chambre d'appel faisait droit à l'appel du requérant en annulant la décision de la Chambre de première instance du 18 août 2003 et ordonnait le renvoi de la requête initiale de mise en liberté provisoire à la Chambre de première instance entièrement constituée;

SAISIE de la «Requête en extrême urgence aux fins d'autorisation d'interjeter appel de la décision de la Chambre de Première Instance du 18 mars 2004 rejetant la demande de libération provisoire» déposée le 24 mars 2004 par Emmanuel Rukundo lui-même (l'«appelant») en vertu de l'article 65 (D) du Règlement de procédure et de preuve du Tribunal international (le «Règlement»), lequel demande autorisation d'interjeter appel de la «Decision on Defence Motion for his Provisional Release» rendue par la Chambre de première instance III le 18 mars 2004 (la «Décision contestée»);

NOTANT que la «Prosecutor's Response to Rukundo's Motion for Leave to Appeal the Decision of 18 March 2004» a été déposée par le Procureur le 8 avril 2004, soit en dehors des délais prescrits par le paragraphe 5 de la Directive pratique relative à la procédure de dépôt des écritures en appel devant le Tribunal du 16 septembre 2002 (IT 155 Rev.1);

ATTENDU que la décision contestée a été rendue en vertu de l'article 65 du Règlement;

ATTENDU qu'en application de l'article 65 (D) du Règlement une décision rendue par une Chambre de première instance aux termes de cet article sera susceptible d'appel lorsque des motifs valables pour ce faire auront été invoqués;

ATTENDU qu'il existe des «motifs valables» au sens de l'article 65 (D) du Règlement de faire droit à la demande d'autorisation d'interjeter appel s'il apparaît que la Chambre de première instance a pu verser dans l'erreur en rendant la décision contestée;

ATTENDU que l'appelant fait valoir les arguments suivants au soutien de sa demande :

(i) la Chambre de première instance a erré en ne tenant pas compte des écritures échangées en appel;

(ii) la longueur excessive de la détention préventive justifie la mise en liberté provisoire;

(iii) la Chambre de première instance a erronément mis à la charge de l'appelant les démarches à entreprendre auprès du pays dans lequel il souhaite être provisoirement libéré;

CONSIDERANT que, si la Chambre de première instance est tenue d'examiner tous les éléments déposés devant elle pour se prononcer sur une demande de mise en liberté provisoire, les écritures mentionnées par l'appelant ont été déposées devant la Chambre d'appel dans le cadre d'une procédure d'appel et n'ont pas été soumis à la Chambre de première instance;

CONSIDERANT que, quand bien même la longue période de détention préventive de l'appelant pourrait être jugée excessive, elle ne constitue pas en soi un motif suffisant pour justifier la mise en liberté provisoire;

CONSIDERANT que rien aux termes de l'article 65 du Règlement n'indique que l'accusé doive fournir, comme condition préalable à sa mise en liberté provisoire, des éléments prouvant que le pays dans lequel il souhaite être provisoirement libéré consent à l'accueillir ou des garanties de ce pays en vue de la comparution de l'accusé à son procès mais que l'Appelant doit néanmoins convaincre la Chambre de première instance que, s'il est libéré, il comparaîtra en temps voulu devant le Tribunal international;

ATTENDU que la Chambre de première instance a refusé la demande de mise en liberté provisoire au motif qu'elle n'avait pas acquis la certitude que l'appelant comparaîtrait s'il était mis en liberté provisoire;

CONSIDERANT ainsi qu'il n'apparaît pas que la Chambre de première instance ait pu verser dans l'erreur en rendant la décision contestée;

RAPPELANT néanmoins que rien aux termes de l'article 65 du Règlement n'interdit à l'appelant de déposer une nouvelle demande de mise en liberté provisoire devant la Chambre de première instance, demande accompagnée de toutes les pièces de nature à convaincre la Chambre de première instance que, s'il est libéré, l'appelant comparaîtra et ne mettra pas en danger une victime, un témoin ou toute autre personne;

PAR CES MOTIFS,
REFUSE l'autorisation d'interjeter appel de la décision contestée.

Fait en français et en anglais, le texte français faisant foi.

Fait le 28 avril 2004, à La Haye (Pays-Bas).

[Signé] : Mehmet Güney

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Decision on the Motion for Provisional Release of Father Emmanuel Rukundo (Rule 65 (B) of the Rules of Procedure and Evidence) 15 July 2004 (ICTR 2001-70-I)

(Original : French)

Trial Chamber III

Judges : Andrésia Vaz, presiding; Sergei Aleckseevich Egorov; Florence Rira Arrey

Emmanuel Rukundo – Provisional release, Conditions : satisfaction that the accused will appear for trial and that he will not pose a danger to any victim, witness or other person et absence de danger Burden of the proof on the Accused – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rule 65 (B)

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

SITTING as Trial Chamber III (the "Trial Chamber"), composed of Judge Andrésia Vaz, presiding Judge, Sergei Aleckseevich Egorov and Judge Florence Rita Arrey;

CONSIDERING the Motion for Provisional Release of Father Emmanuel Rukundo, filed by the Defence on 11 June 2004;

CONSIDERING the Prosecutor's Response to Rukundo's Motion for Provisional Release, filed on 18 June 2004;

CONSIDERING the Defence's Brief in Reply to the Prosecutor's Response to the Motion for Provisional Release, and Application for an Extension of Time-Limit for Filing a Reply, filed on 23 June 2004, and Reply to Prosecutor's Response to Rukundo's Motion for Provisional Release, filed on 6 July 2004;

CONSIDERING the Registrar's Submission under Rule 33 (B) of the Rules Defence Counsel's Motion for Provisional Release of Father Emmanuel Rukundo, filed by the Deputy Registrar on 12 July 2004;

CONSIDERING the Statute of the Tribunal (the "Stature") and the Rules of Procedure and Evidence (the "Rules");

NOW RULES on the Motion based solely on the briefs of the parties pursuant to Rule 73 (A) of the Rules.

INTRODUCTION

1. On 18 August 2003, the Trial Chamber, with a single Judge sitting, rendered a Decision on the Defence Motion seeking a date the Commencement of the Trial of

Décision relative à la Requête de mise en liberté provisoire du père Emmanuel Rukundo Article 65 (B) du Règlement de procédure et de preuve 15 juillet 2004 (ICTR-2001-70-I)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente; Sergei Aleckseevich Egorov; Florence Rita Arrey

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance III (la «Chambre»), composée des juges Andrésia Vaz, Présidente, Sergei Aleckseevich Egorov et Florence Rita Arrey;

SAISI de la «Requête de mise en liberté provisoire du Père Emmanuel Rukundo», déposée par la défense le 11 juin 2004;

CONSIDÉRANT la «Prosecutor's Response to Rukundo's Motion for Provisional Release», déposée par le Procureur le 18 juin 2004;

CONSIDERANT le «Mémoire en réponse à celui du Procureur concernant la requête de mise en liberté provisoire en demande de délai pour répliquer», déposée par la défense le 23 juin 2004, et la «Réplique à la réponse du Procureur à la requête du Père Emmanuel Rukundo aux fins de mise en liberté provisoire», déposée par la défense le 6 juillet 2004;

CONSIDÉRANT la «Registrar's Submission under Rule 33 (B) of the Rules on Defence Counsel's Motion for Provisional Release of Father Emmanuel Rukundo», déposée par le Greffier-Adjoint le 12 juillet 2004;

CONSIDÉRANT le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve du Tribunal (le «Règlement»);

STATUE comme suit, sur la base des mémoires écrits des parties, conformément à l'article 73 (A) du Règlement.

INTRODUCTION

1. Le 18 août 2003, la Chambre composée d'un juge unique, a rendu une «Décision relative à la requête formée par la défense aux fins d'obtenir la fixation de la date

Father Emmanuel Rukundo or, in the alternative, his Provisional Release. The Trial Chamber dismissed the Motion in its entirety.

2. On 30 December 2003, the Defence brought before the Appeals Chamber an Appeal of the Decision of 18 August 2003 Denying motion for Provisional Release and an Appeal of the Decision of 18 August 2003. On 8 March 2004, the Appeals Chamber granted the Applicant's appeal and reversed the Trial Chamber's 18 August 2003 Decision on the ground that Rule 65 of the Rules does not allow a single judge to decide on the provisional release of an accused. The Appeals Chamber remanded the initial application for provisional release to the Trial Chamber fully constituted.

3. On 18 March 2004, the fully-constituted Trial Chamber again denied the application by the Accused in a Decision on Defence Motion for his Provisional Release in which the Trial Chamber endorsed the reasoning and orders of the 18 August 2003 Decision.

4. The Accused filed an application for leave to appeal from the 18 March 2004 Decision denying his application for provisional release. The Appeals Chamber denied the Accused's application for Leave to Appeal in its Decision on the Application for leave to Appeal rendered on 28 April 2004.

SUBMISSIONS BY THE PARTIES

Defence Submissions

5. The Defence submits that the duration of provisional detention the Accused is subjected to is a breach of his right to be tried without undue delay and, is therefore, violative of the presumption of innocence principle.

6. The Defence further submits that if released, the Accused undertakes to appear for trial and to strictly observe such conditions as were imposed on him by the Trial Chamber in order to satisfy itself that he will appear before it when so required. The Accused intends, in the event that he were released, to return to his Diocese of Lausanne whose Bishop and parishioners are ready to receive him as attested by the petition and documents attached to his application.

7. The Defence reiterates that the Accused does not pose a danger to any victim, witness or other person, including by offering as proof his unimpeachable conduct before, during and after the 1994 events in Rwanda and the fact that he is unaware of the identity of the people who will be called to testify against him. The Accused also undertakes not to try to know their identifies.

8. The Defence also submits that the Accused is in possession of a letter from the Minister of Justice of Switzerland pledging that should an order for his provisional release be issued, Switzerland would entertain the matter.

d'ouverture du procès du père Emmanuel Rukundo ou, à défaut, sa mise en liberté provisoire». La Chambre a rejeté la totalité des demandes de l'accusé.

2. La défense a saisi la Chambre d'appel le 30 décembre 2003 d'un «Mémoire d'appel de la décision du 18 août 2003 rejetant la demande de mise en liberté provisoire d'Emmanuel Rukundo» et d'un «Mémoire devant la Chambre d'appel à l'encontre de la décision du 18 août 2003». Le 8 mars 2004, La Chambre d'appel a fait droit à l'appel du requérant en annulant la décision de la Chambre de première instance du 18 août 2003 au motif que les termes de l'article 65 du Règlement n'autorisent pas un juge unique à siéger pour se prononcer sur la liberté provisoire d'un accusé. Elle a ordonné le renvoi de la requête initiale de mise en liberté provisoire à la Chambre de première instance entièrement constituée.

3. C'est ainsi que le 18 mars 2004, la Chambre de première instance, entièrement constituée, a rejeté une seconde fois la requête de l'accusé dans une décision intitulée «Decision on Defence Motion for his Provisional Release». Dans cette décision, la Chambre de première instance a affirmé qu'elle était d'accord avec le raisonnement et les termes de la décision rendue le 18 août 2003.

4. L'accusé a introduit une demande aux fins d'autorisation d'interjeter appel de la décision de la Chambre de première instance du 18 mars 2004 rejetant la demande de liberté provisoire. La Chambre d'appel l'a débouté dans sa décision intitulée «Décision relative à la demande d'autorisation d'interjeter appel (mise en liberté provisoire)» rendue le 28 avril 2004.

ARGUMENTS DES PARTIES

Arguments de la défense

5. La défense soutient que la durée de la détention préventive de l'accusé constitue une violation de son droit à être jugé dans un délai raisonnable et porte, par conséquent, atteinte à la présomption d'innocence.

6. La défense affirme en outre que l'accusé s'engage à comparaître au procès, s'il était libéré, et à respecter strictement toutes les conditions auxquelles la Chambre le soumettrait pour s'assurer de son retour devant elle au moment opportun. Il propose, s'il est libéré, de retourner en Suisse, dans son diocèse de Lausanne dont l'évêque et les paroissiens sont prêts à l'accueillir comme l'attestent la pétition et les documents en annexe de sa requête.

7. La défense réaffirme que l'accusé ne constitue pas un danger pour une victime, un témoin, ou toute autre personne notamment en justifiant de son attitude irréprochable tant avant, pendant qu'après les événements qui ont frappé le Rwanda en 1994 et du fait qu'il n'a pas connaissance de l'identité des personnes qui seront amenées à témoigner contre lui. Il s'engage, par ailleurs, à ne pas chercher à découvrir leur identité.

8. La défense soutient également que l'accusé justifie d'une lettre du ministre de la Justice Suisse assurant que «si la liberté provisoire est décrétée, elle est disposée à envisager la situation».

Prosecutor's Submissions

9. As a preliminary submission, the Prosecutor argues that the issue of the provisional release of the Accused has been fully addressed in earlier Decisions of the Trial Chamber and, as a result, it is now *res judicata*. The Defence application is therefore an abuse of process. The Prosecutor refers to his earlier submissions on this issue in the instant case.

10. The Prosecutor relies on the jurisprudence of the European Court of Human Rights and of the Tribunal in arguing that the duration of the detention of the Accused may not be deemed to be undue in view of the seriousness of the crimes charged and the complexity of the case.

11. The Prosecutor submits that the requirements of Rule 65 of the Rules have not been met, which requirements are a condition precedent for any provisional release.

Defence Reply

12. In its Reply of 2 July 2004, the Defence submits that its application is not a request for review of the Appeals Chamber's Decision of 28 April 2004 which is said to have settled the matter but that it is rather a consequence thereof. The Accused further submits that his is a new application based on new arguments adduced therein.

DELIBERATIONS

13. The Prosecutor submits that the Motion is an abuse of process because the Trial Chamber has ruled on the issue of provisional release of the Accused in its earlier decisions. The Trial Chamber agrees with the Appeals Chamber that there is no provision in Rule 65 of the Rules that prohibits [the Accused] from filing a new application for provisional release before the Trial Chamber, with such materials as could satisfy the Trial Chamber that, if released, [the Accused] will appear for trial and will not pose a danger to any victim, witness or other person. In light of the new submissions made by the Defence in support of its Motion, the Trial Chamber finds that there is no abuse of process and rules the Motion admissible.

14. Rule 65 (B) of the Rules reads :

> "Provisional release may be ordered by a Trial Chamber only after giving the host country and the country to which the accused seeks to be released the opportunity to be heard, and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person."

Arguments du Procureur

9. À titre préliminaire, le Procureur souligne que la question de la mise en liberté provisoire de l'accusé a déjà été pleinement examinée par des décisions antérieures de la Chambre qui ont acquis l'autorité de la chose jugée, de sorte que la présente requête est un abus de procédure. Le Procureur renvoie aux arguments présentés dans le cadre des précédents actes de procédure émis par lui sur cette question dans la présente affaire.

10. Le Procureur se fonde sur la jurisprudence de la Cour européenne des droits de l'homme ainsi que sur celle du présent Tribunal pour soutenir que la durée de la détention de l'accusé ne peut être tenue pour déraisonnable en raison de la gravité des infractions à la charge de l'accusé et de la complexité de l'affaire.

11. Le Procureur soutient que l'accusé n'a pas su établir que les critères de l'article 65 du Règlement sont remplis, alors même que cette exigence conditionne l'appréciation favorable de toute requête de mise en liberté provisoire.

Réplique de la défense

12. Dans une réplique datée du 2 juillet 2004, la défense prétend que sa requête n'est pas une demande en révision de la décision de la Chambre d'appel du 28 avril 2004 qui constituerait l'autorité de la chose jugée sur la question. Elle en assure, au contraire, le prolongement. La défense prétend par ailleurs qu'il s'agit bien d'une nouvelle demande basée sur les éléments nouveaux exposés dans sa requête.

DÉLIBÉRATIONS

13. Le Procureur soutient que la présente requête constitue un abus de procédure dans la mesure où la Chambre a déjà examiné la question de la mise en liberté provisoire de l'accusé dans des décisions antérieures. La Chambre est d'avis avec la Chambre d'appel que

> «rien aux termes de l'article 65 du Règlement n'interdit à [l'accusé] de déposer une nouvelle demande de mise en liberté provisoire devant la Chambre de première instance, demande accompagnée de toutes les pièces de nature à convaincre la Chambre de première instance que, s'il est libéré, [l'accusé] comparaîtra et ne remettra pas en danger une victime, un témoin ou toute autre personne».

Au vu des éléments nouveaux introduits par la défense en soutien de sa requête, la Chambre estime qu'il n'y a pas lieu de conclure à un abus de procédure et déclare la requête recevable.

14. L'article 65 (B) du Règlement est libellé comme suit :

> «La mise en liberté provisoire ne peut être ordonnée par la Chambre de première instance qu'après avoir donné au pays hôte, et au pays où l'accusé demande à être libéré, la possibilité d'être entendus, et pour autant qu'elle ait la certitude que l'accusé comparaîtra et, s'il est libéré, ne mettra pas en danger une victime, un témoin ou toute autre personne».

15. The Trial Chamber notes that pursuant to the provisions of Rule 65 (B) of the Rules, that it is up to the Accused to satisfy the Trial Chamber that he will appear for trial before the Tribunal and that he will not pose a danger to any victim, witness or other person.

16. The Trial Chamber is mindful of fact that the Accused bas been in detention since 12 July 2001, that is, for a period of three years. The Defence argues from the period of detention of the Accused that there exist exceptional circumstances which should be taken into account in considering whether good cause is shown for his provisional release. The Trial Chamber notes that the new wording of Rule 65 (B), which came into force on 27 May 2003, no longer makes provisional release contingent upon exceptional circumstances being shown. As the Appeals Chamber recalled, the period of provisional detention may not be deemed under Rule 65 (B) cause justifying an order for provisional release of an accused person. Consequently, the Trial Chamber will not entertain the argument based on the period of provisional detention.

17. The Defence has suggested to the Trial Chamber that, if released, the Accused wishes to return to his diocese in Lausanne, Switzerland, providing in support of its submission a letter from the Minister of Justice pledging that if an order for his provisional release were entered, Switzerland would willing to entertain the matter. The Trial Chamber observes that the Government of Switzerland has not given any indication as to whether or not it agrees or would agree to allow the Accused into Switzerland and as to whether it would take appropriate action to ensure that the Accused appear for his trial. The Trial Chamber notes that provisional release may only be considered if more specific information were provided by Switzerland.

18. In support of its application, the Defence also submitted an attestation from the Bishop of Lausanne, Geneva and Fribourg and a petition from parishioners of the diocese stating that they are willing to welcome the Accused. The Trial Chamber notes that such information is not such as to satisfy it that the Accused will appear for his trial.

19. The Trial Chamber reiterates that the requirements of Rule 65 (B) of the Rules are cumulative and not alternative. Consequently, no application for provisional release may be granted if any one of such requirements were not met. Since is not satisfied that, if provisionally released, the Accused will appear for trial, the Trial Chamber denies the Defence Motion. The Trial Chamber finds that it is not necessary for it to consider whether the Accused has shown that he will not pose a danger to any victim, witness or other person.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DISMISSES the Defence Motion for the provisional release of the Accused.

Arusha, 15 July 2004

[Signed] : Andrésia Vaz; Sergei Aleckseevich Egorov; Florence Rita Arrey

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15. Aux termes des dispositions de l'article 65 (B) du Règlement, la Chambre relève qu'il appartient en particulier à l'accusé de prouver qu'il comparaîtra pour son jugement devant le Tribunal et qu'il ne mettra pas en danger une victime, un témoin ou toute autre personne.

16. La Chambre est consciente de la durée de la détention de l'accusé depuis le 12 juillet 2001, soit 3 ans déjà. En arguant de la durée de la détention de l'accusé, la défense en fait une circonstance exceptionnelle à prendre en considération dans l'appréciation des raisons qui pourraient justifier sa mise en liberté provisoire. La Chambre souligne que la nouvelle version de l'article 65 (B), entrée en vigueur le 27 mai 2003, ne subordonne plus la mise en liberté provisoire à l'existence de circonstances exceptionnelles. Comme l'a rappelé la Chambre d'appel, la durée de la détention préventive n'est pas un élément justificatif pris en compte par les dispositions de l'article 65 (B) pour ordonner la mise en liberté provisoire d'un accusé; en conséquence, la Chambre ne retiendra pas l'argument relatif à la durée de la détention préventive.

17. La défense a informé la Chambre que, si l'accusé est libéré, il souhaite retourner dans son diocèse de Lausanne, en Suisse. Elle se prévaut d'une lettre du ministre de la Justice Suisse assurant que «si la liberté provisoire est décrétée, elle est disposée à envisager la situation». La Chambre relève qu'aucune précision n'est donnée par la Suisse sur le point de savoir si elle accepte ou acceptera de recevoir l'accusé sur son territoire et qu'elle prendra toutes les dispositions requises pour que l'accusé comparaisse à son procès. La Chambre note que la liberté provisoire peut être envisagée si des informations plus précises sont données par la Suisse.

18. La défense a également produit à l'appui de sa demande une attestation de l'évêque de Lausanne, Genève et Fribourg, ainsi qu'une pétition des paroissiens de ce diocèse indiquant qu'ils sont disposés à l'accueillir. La Chambre note que ces informations ne sont pas de nature à la convaincre que l'accusé comparaîtra à son procès.

19. La Chambre souligne que les conditions prévues par l'article 65 (B) du Règlement sont cumulatives et non alternatives. Ainsi, aucune demande de mise en liberté provisoire ne peut être accueillie si l'une quelconque de ces conditions n'est pas satisfaite. La Chambre n'ayant pas acquis la certitude que l'accusé comparaîtra au procès, s'il est mis en liberté provisoire, la requête de la défense doit être rejetée. La Chambre estime qu'il n'est pas nécessaire qu'elle vérifie si l'accusé a prouvé qu'il ne mettra pas en danger une victime, un témoin ou toute autre personne.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la défense demandant la mise en liberté provisoire de l'accusé.

Arusha, le 15 juillet 2004

[Signé] : Andrésia Vaz, Président; Sergei Aleckseevich Egorov; Florence Rita Arrey

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The Prosecutor v. Laurent SEMANZA

Case N° ICTR-97-20

Case History

- Name : SEMANZA
- First Name : Laurent
- Date of birth : 1944
- Sex : Male
- Nationality : Rwandan
- Former Official Function : Mayor of Bicumbi
- Date of Indictment's Confirmation : 23 October 1997[1]
- Counts : Genocide, Direct and Public Incitement to Commit Genocide, Complicity in Genocide, Crimes against Humanity and Serious Violations of Article 3 Common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date of Indictment's Amendments : 23 June 1999, 2 July 1999 and 22 October 1999
- Date and Place of Arrest : 27 March 1996, in Cameroon
- Date of Transfer : 19 November 1997
- Date of Initial Appearance : 16 February 1998
- Pleading : not guilty
- Date Trial Began : 16 October 2000
- Date and content of the Sentence : 15 May 2003, 25 years imprisonment
- Appeal upheld conviction and increased sentence to 35 years (20 May 2005)

[1] The text of the indictment is reproduced in the *1995-1997 Report*, p. 778. The text of the Decision to confirm the indictment is reproduced in the *1995-1997 Report*, p. 786.

Le Procureur c. Laurent SEMANZA

Affaire N° ICTR-97-20

Fiche technique

- Nom : SEMANZA
- Prénom : Laurent
- Date de naissance : 1944
- Sexe : Masculin
- Nationalité : Rwandaise
- Fonction occupée au moment des faits incriminés : Bourgmestre de Bicumbi
- Date de la confirmation de l'acte d'accusation : 23 octobre 1997[1]
- Chefs d'accusation : Génocide, Incitation directe et publique à commettre le genocide, Complicité dans le génocide, Crimes contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II de 1977 aux dites Conventions
- Dates de modifications subséquentes portées à l'acte d'accusation : 23 juin 1999, 2 juillet 1999 et 22 octobre 1999
- Date et lieu d'arrestation : 27 mars 1996, au Cameroon
- Date de transfert : 19 novembre 1997
- Date de comparution initiale : 16 février 1998
- Présicision sur le plaidoyer : Non coupable
- Date du début du procès : 16 octobre 2000
- Date et contenu du prononcé de la peine : 15 mai 2003, 25 ans d'emprisonnement
- Sentence confirmée en appel et augmentation de la peine à 35 ans (20 mai 2005)

[1] Le texte de l'acte d'accusation est reproduit dans le volume *1995-1997* des *Recueils*, p. 778. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans ce même volume, p. 786.

Decision on Aloys Ntabakuze's Motion for Disclosure of Transcripts of Closed Sessions and Materials Filed Under Seal During the Testimony of Witness DCH 28 January 2004 (ICTR-9 7-20-T)

(Original : English)

Trial Chamber III

Judges : Lloyd G. Williams, Q.C., Presiding; Andrésia Vaz; Khalida Rachid Khan

Aloys Ntabakuze – disclosure of closed session testimony – protected witness – materiality and relevance of the witness's testimony to the defence – motion granted

International instruments cited : Rules of procedure and evidence, Rules 54, 73 (A) and (E), 81 (B)

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

SITTING as Trial Chamber III composed of Judges Lloyd G. Williams, Q. C., Presiding, Andrésia Vaz and Khalida Rachid Khan ("Chamber");

BEING SEIZED of "Aloys Ntabakuze's Motion for Disclosure of Transcripts of Closed Sessions and Materials Filed under Seal during the testimony of Witness DCH", filed on 16 December 2003 ("Motion"), transferred to this Chamber by Trial Chamber I for its Consideration;

CONSIDERING further the "Reply by the Defence of Laurent Semanza to the Motion by Major Aloys Ntabakuze's Defence for Disclosure of the Transcripts and Exhibits of the Testimony in Closed Session of Prosecution Witness DCH", filed on 31 December 2003 ("Reply");

RECALLING the "Decision on the Prosecution Motion for the Protection of Witnesses," in the case of *The Prosecutor v. Laurent Semanza* by Trial Chamber II, filed on 10 December 1998;

NOTING that the Prosecutor has neither replied to the instant Motion, within the time frame stipulated in Rule 73 (E) of the Rules, nor applied for an extension of time;

CONSIDERING the relevant provisions of the Statute of the Tribunal ("Statute") and the Rules, particularly Rules 54 and 81 (B);

REVIEWS the present matter solely on the basis of the written briefs of the parties, as prescribed in Rule 73 (A) of the Rules

SUBMISSION OF THE PARTIES

Defence Motion

1. Counsel for Ntabakuze prays for the issuance of an order, pursuant to Rule 54, for the disclosure of closed session testimony of a prosecution witness who testified in the case of *The Prosecutor v. Laurent Semanza* under the pseudonym 'DCH' (hereinafter, "Witness DCH")[1]. The said witness is listed as a prosecution witness in the ongoing case of *The Prosecutor v. Bagosora et. al*., in which Ntabakuze stands accused[2].

2. Counsel is already in receipt of Witness DCH's unredacted statements, but is presently seeking an order for disclosure of statements made from 15 through 18 April 2002 during which time the witness testified in the *Semanza* case, as well as documents filed under seal during the course of that case.

3. The disclosure of the said documents are being requested to facilitate the preparation of the Accused's case.

4. The Defence has also submitted an undertaking to comply with the protective measures afforded to the witness by the "Decision on the Prosecution Motion for the Protection of Witnesses" issued on 10 December 1998.

Reply by the Defence of Laurent Semanza

5. Counsel for Semanza holds the view that the present request relates materially to the Defence of Accused Ntabakuze and therefore submits that it would be appropriate and in the interest of justice for the Chamber to grant the present Motion.

DELIBERATIONS

6. Rule 54 affords the Chamber the authority to issue such orders as may be necessary for the investigation, preparation or conduct of a trial. Rule 81 further provides for the disclosure of all or part of the record of closed proceedings when the reasons for ordering the non-disclosure no longer exist. While the Chamber notes that Witness DCH is still a protected witness, it is nevertheless mindful of the materiality and relevance of the witness's testimony to the defence of the Accused.

FOR THE FOREGOING REASONS, THE CHAMBER

[1] *The Prosecutor v. Laurent Semanza*, ICTR-97-20-T.

[2] *The Prosecutor v. Bagosora et. al*., ICTR-98-41-T. Witness DCH is listed in the Annex to the Prosecutor's Pre-Trial Brief of 21 January 2002, and in a revised witness list dated 30 April 2003.

GRANTS the Motion and amends the protective measures ordered in respect of Witness DCH, to the extent of making it, and any documents filed under seal, available to the Trial Chamber seized of Accused Ntabakuze's case;

INVITES the Trial Chamber hearing Accused Ntabakkuze's case to determine the date and manner in which the requested documents should be disclosed; and

REMINDS the Defence for Accused Ntabakuze of his undertaking to abide by the provisions of the protective measures Order issued in respect of this Witness, dated 10 December 1988.

Arusha, 28 January 2004

[Signed] : Lloyd G illiams, Q C; Andrésia Vaz; Khalida Rachid Khan

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Decision on Motion for Protective Measures 15 March 2004 (ICTR-97-20-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Fausto Pocar; Inés Mónica Weinberg de Roca

Witness protective measures – witness heard in closed session, prejudice of the Prosecution – real danger, objective fears, circumstances of the case – identifying informations kept under seal – Witnesses and Victims Support Section motion granted in part

International instruments cited : Rules of procedure and evience, Rules 69, 75, 98, 107, 115

International cases cited :

T.P.I.Y. : Appeals Chamber, The Prosecutor v. Dario Kordić and Mario Čerkez, Decision on Motion for Clarification and Motions for Protective Measures, 13 October 2003 (IT-95-4/2-A)

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "International Tribunal", respectively);

NOTING the "Decision on Defence Motion for Leave to Present Additional Evidence and to Supplement Record on Appeal" filed on 12 December 2003 ("Rule 115 Decision"), in which the Appeals Chamber ordered that the testimony of Witness TDR would be heard by the Appeals Chamber as additional evidence pursuant to Rules 98, 107, and 115 of the Rules of Procedure and Evidence ("Rules");

BEING SEISED OF the "Defence Extremely Urgent Motion for Protective Measures to be Granted to Witness TDR Pursuant to Rule 69 and 75 of the Rules of Procedure and Evidence" filed confidentially by the Appellant Semanza on 22 January 2004 ("Motion" and "Appellant" respectively) in which the Appellant explains that the witness fears reprisals against his life if he testifies publicly and therefore asks that :

(i) "all identifying information and data" of Witness TDR be placed under seal and not be disclosed to the press, the public, or the Rwandan government;

(ii) the hearing of the testimony of Witness TDR be conducted entirely in closed session;

(iii) the Witness Protection Unit be ordered to take necessary measures to provide the protection requested by Witness TDR in his confidential information sheet, which in addition to seeking appropriate protective measures before, during, and after testimony also includes a request for medical attention and for payment of hotel costs at his place of residence;

CONSIDERING the "Prosecution Response to Defence Extremely Urgent Motion for Protective Measures to be Granted to Witness TDR" filed on 27 January 2004, in which the Prosecution indicates that it does not oppose the Appellant's first and third requests on the basis that they are "usual practices and measures", but objects to the request for the "extraordinary measure" of hearing the witness in closed session because it is not justified by the Appellant's submissions;

NOTING the "Defence Reply to the Prosecution Response to Defence Extremely Urgent Motion for Protective Measures to be Granted to Witness TDR Pursuant to Rules 69 and 75 of the Rules of Procedure and Evidence" filed confidentially on 28 January 2004, in which the Appellant stresses that Witness TDR is particularly vulnerable; explains that if any part of Witness TDR's testimony is heard in open session this will reveal his identity; and argues that the Prosecutor failed to show how it would suffer any prejudice if the entire hearing of Witness TDR were conducted in closed session;

CONSIDERING that the principle of a public hearing with full disclosure of the identification of a witness is important both to the public and to the International Tribunal but that the principle is susceptible to allowances being made in the circumstances of a particular case;

CONSIDERING that the determination of whether all or part of a witness's testimony will be held in closed session is best made at the time of the hearing;

CONSIDERING that the Appellant's request concerning medical treatment and hotel costs at the place of residence are not related to the witness's testimony before this Tribunal and are not matters of witness protection;

CONSIDERING that the witness has stated that he fears that revealing his identity publicly could expose him to harm;

CONSIDERING that a request for protective measures pursuant to Rule 75 of the Rules must demonstrate a real likelihood that the person may be in danger or at risk[1];

FINDING that the Appellant has demonstrated that there is an objective basis for the fears of Witness TDR and that, in the circumstances of this case, it is appropriate that the identity and whereabouts of Witness TDR not be publicly disclosed in order to safeguard the witness's privacy and security, as provided in Rule 75 (A) of the Rules;

FINDING that the circumstances of this case warrant an order that all identifying information and data of Witness TDR be kept under seal, that no records revealing Witness TDR's identity or whereabouts be disclosed to the public, and that the testimony authorized by the Rule 115 Decision be given under a pseudonym;

FOR THE FOREGOING REASONS;

HEREBY GRANTS the Motion in part;

ORDERS that all identifying information and data of Witness TDR be kept under seal, that no records revealing Witness TDR's identity or whereabouts be disclosed to the public, and that the testimony authorized by the Rule 115 Decision be given under a pseudonym;

DIRECTS the Witnesses and Victims Support Section to take all steps necessary to safeguard the security and privacy of Witness TDR in the giving of the testimony authorized by the Rule 115 Decision; and

DISMISSES the Motion in all other respects.

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

Done this 15th day of March 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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[1] *Prosecutor v. Kordić and Čerkez*, N° IT-95-4/2-A, Decision on Motion for Clarification and Motions for Protective Measures, 13 October 2003, para. 23.

Decision on Applicant Bisengimana's Motion for Extension of Time for Filling a Reply 23 March 2004 (ICTR-97-20-A)

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca

Bisengimana – filing of a reply, extension of time, Appeals Chamber, good cause – amicus curiae, moving party, no standing of the applicant – motion denied

Inernational instruments cited : Rules of procedure and evidence, Rule 116 – Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings of 16 September 2002, paragraph 12

I, Inés Monica Weinberg de Roca, Pre-Appeal Judge in this case[1],

NOTING the pending "Urgent Motion by Paul Bisengimana for Leave to Appear as *Amicus Curia*e in Laurent Semanza's Case on Appeal" filed on 19 February 2004 by Paul Bisengimana, an accused currently awaiting trial at the International Tribunal ("Applicant" and "Application")[2], in which he seeks to participate as *amicus curiae* in the appeal against the *Semanza* Judgement;

BEING SEISED OF the "Demande de délai supplémentaire pour préparer la réplique à la réponse du Procureur à la requête urgente de Paul Bisengimana aux fins d'obtenir l'autorisation d'intervenir en qualité d'*amicus curiae* dans la cause en appel de Laurent Semanza " filed 15 March 2004 ("Request for Extension"), in which the Applicant Bisengimana seeks an extension of time to file a reply to the parties' responses to his Application on the grounds that :

1. He was served on 9 March 2004 with the "Reply of Laurent Semanza to Paul Bisengimana's [Application]" filed 23 February 2004;

2. He was served on 10 March 2004 with the "Prosecution Response to [Application]" filed on 1 March 2004;

3. He requires further time to obtain and to undertake an in-depth study of all documents filed in the *Semanza* appeal;

CONSIDERING the "Prosecution Response to [Request for Extension]" dated 1 March 2004 but filed on 16 March 2004, in which the Prosecution opposes an extension of time;

CONSIDERING the "Reply by Semanza's Defence to [Request for Extension]" filed 17 March 2004 ("Prosecution Response"), in which the Appellant Semanza does not oppose an extension of time;

[1] "Order of the Presiding Judge Replacing the Pre-Appeal Judge", 15 July 2003.
[2] Case N° ICTR-00-60-I.

CONSIDERING the "Réplique à [Prosecution Response]" filed 18 March 2004, in which the Applicant states, *inter alia*, that he reserves the right not to wait for the decision of the Appeals Chamber because he will be in a position to study the briefs and to file his reply five days after the receipt of the responses of the Prosecution and Semanza in the French language;

NOTING that paragraph 12 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings of 16 September 2002 ("Practice Direction") provides that "[t]he moving party may file a reply within four days of the filing of the response" and that Rule 116 of the Rules of Procedure and Evidence ("Rules") provides that "[t]he Appeals Chamber may grant a motion to extend a time limit upon a showing of good cause;

NOTING, however, that the Practice Direction defines the "moving party" as "a party wishing to move the Appeals Chamber for a specific ruling or relief" and does not refer to the particular circumstance of a non-party seeking to intervene as *amicus curiae* in appeal proceedings;

FINDING that the Applicant does not have standing to request art extension of time;

NOTING further that even if the Applicant had standing he has not demonstrated good cause for an extension beyond 15 March 2004, which is four days from the late service of the responses;

HEREBY DENIES the Request for Extension.

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

Done this 23rd day of March 2004,

At The Hague, The Netherlands.

[Signed] : Judge Inés Monica Weinberg de Roca

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Decision on Amicus Curiae *Application of Paul Bisengimana 30 March 2004 (ICTR-97-20-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Fausto Pocar; Inés Mónica Weinberg de Roca

Amicus curiae – appellant does not oppose – intervention would not assist the Appeals Chamber in the proper determination of the appeals – rights of the applicant – motion denied

International instruments cited : Articles 19, 20 – Rules of procedure and evidence, Rule 74

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

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "International Tribunal", respectively),

BEING SEISED OF the "Urgent Motion by Paul Bisengimana for Leave to Appear as *Amicus Curiae* in Laurent Semanza's Case on Appeal"[1] filed on 19 February 2004 by Paul Bisengimana, an accused currently awaiting trial at the International Tribunal[2] ("Application"), in which he seeks to participate as *amicus curiae* in the appeal against the *Semanza* Judgement and requests the Appeals Chamber to order that all references to his name be redacted from the *Semanza* Judgement and to issue a *corrigendum* to the *Semanza* Judgement;

NOTING the "Reply of Laurent Semanza to Paul Bisengimana's *Requête urgente de Paul Bisengimana aux fins d'obtenir l'autorisation d'intervenir en qualité d'*amicus curial *[sic] dans la cause en appel de Laurent Semanza*" filed on 23 February 2004[3], in which the Appellant Semanza does not oppose the Application;

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[1] The Appeals Chamber notes that this document was incorrectly titled with the case name "*Paul Bisengimana contre le Procureur*" and with the incorrect case number ICTR-2001-60-1. Notwithstanding these errors, the Appeals Chamber will consider this filing as part of the case of *Semanza v. Prosecutor*, Case N° ICTR-97-20-A.

[2] Case N° ICTR-00-60-I.

[3] The Appeals Chamber notes that this document was incorrectly titled with the case name "*Paul Bisengimana contre le Procureur*" and with the case number ICTR-2001-60-1. The cover page of this document contains a further error in the handwritten notation of the Registry which identifies the document as belonging to Case N° ICTR-71-20-A or ICTR-91-20-A. Notwithstanding these errors, the Appeals Chamber will consider this filing as part of the case of *Semanza v. Prosecutor*, Case N° ICTR-97-20-A.

NOTING the "Prosecution Response to *Requête urgente de Paul Bisengimana aux fins d'obtenir l'autorisation d'intervenir en qualité d'*amicus curiae *dans le [sic] cause en appel de Laurent Semanza*" filed on 1 March 2004, in which the Prosecution opposes the Application;

NOTING that the Prosecution's further "Réponse à la 'Requête urgente de Paul Bisengimana aux fins d'obtenir l'autorisation d'intervenir en qualité d'*amicus curiae* dans la cause en appel de Laurent Semanza,'" filed on 4 March 2004[4], was later withdrawn by correspondence dated 8 March 2004 and filed on 17 March 2004;

NOTING that Rule 74 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") provides that "[a] Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber";

FINDING, pursuant to Rule 74 of the Rules, that the proposed intervention of Paul Bisengimana would not assist the Appeals Chamber in the proper determination of the appeals from the *Semanza* Judgement;

CONSIDERING that the Appeals Chamber cannot order the redaction of a Trial Chamber Judgement but can only consider an appeal from it;

CONSIDERING furthermore that it will be the duty of the Trial Chamber that will hear the case of *Prosecutor v. Bisengimana* to respect the rights of the Applicant Bisengimana pursuant to Articles 19 and 20 of the Statute;

FOR THE FOREGOING REASONS,

DISMISSES the Application in its entirety.

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

Done this 30th day of March 2004, at The Hague, The Netherlands.

[Signed]: Theodor Meron; Mohamed Shahabuddeen; Mehmet Güney; Fausto Pocar; Inés Mónica Weinberg de Roca

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[4] The Appeals Chamber notes that this document was incorrectly titled with the case name "*Paul Bisengimana contre le Procureur*" and with the case number ICTR-2001-60-1.

Decision on Application for Reconsideration of Amicus Curiae *Application of Paul Bisengimana 19 May 2004 (ICTR-97-20-A)*

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Fausto Pocar; Inés Mónica Weinberg de Roca

Amicus curiae – *intervention of the Applicant would not assist the Appeals Chamber in the proper determination of the appeals – reconsideration, new element, joint criminal enterprise, may implicate the Applicant – inherent discretionary power of the Appeals Chamber – the Appeals Chamber was already aware of the element when it rendered the decision rejecting the intervention – injustice – motion denied*

International instruments cited :

ICTR : Appeals Chamber, The Prosecutor v. Joseph Kanyabashi*, Decision (Motion for Review or Reconsideration), 12 September 2000 (ICTR-96-15-AR72)*

ICTY : Appeals Chamber, The Prosecutor v. Zdravko Mucić et al.*, Judgment on Sentence Appeal, 8 April 2003 (IT-96-21-A* bis*)*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "International Tribunal", respectively),

RECALLING the "Decision on *Amicus Curiae* Application of Paul Bisengimana" of 30 March 2004 ("Decision"), which rejected the *amicus curiae* application of Paul Bisengimana, an accused currently awaiting trial at the International Tribunal ("Applicant"),[1] because the proposed intervention of the Applicant would not assist the Appeals Chamber in the proper determination of the appeals from the Judgement in the case of *Prosecutor v. Semanza*;

BEING SEISED OF the "*Requête urgente de Paul Bisengimana en révision de la décision de la chambre d'appel du 30 Mars 2004 suite à la découverte d'un élément nouveau et aux fins d'obtenir l'autorisation d'intervenir en qualité d*'amicus curiae *dans la cause en appel de Laurent Semanza*" filed 29 April 2004 ("Application"), in which the Applicant seeks reconsideration of the Decision because he discovered subsequent to the Decision that the Prosecution was arguing in the *Semanza* appeal that

[1] *Prosecutor v. Bisengimana*, Case No. ICTR-2000-60-I.

Laurent Semanza was a participant in a joint criminal enterprise, which may implicate the Applicant;

NOTING the "Prosecutor's Response" filed 7 May 2004;

NOTING that Laurent Semanza did not file a response and that the Applicant did not file a reply;

CONSIDERING that the Appeals Chamber has an inherent discretionary power to reconsider its previous decision where it is necessary to do so in order to prevent an injustice[2];

CONSIDERING that, although the Applicant's prior pleadings did not specifically argue the joint criminal enterprise issue that he now raises as a reason for reconsideration, the Appeals Chamber was already aware of the contents of the "Prosecution's Notice of Appeal" in the *Semanza* case filed 16 June 2003 when it rendered the Decision rejecting the proposed intervention of the Applicant;

FINDING therefore that the Applicant has not demonstrated that it is necessary to reconsider the Decision in order to prevent an injustice;

FOR THE FOREGOING REASONS,

DISMISSES the Application in its entirety.

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

Done this 19th day of May 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron, Presiding Judge

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[2] *Prosecutor v. Mucić et al*., ICTY Case No. IT-96-21-A *bis*, Judgment on Sentence Appeal, 8 April 2003, paras. 49 *et seq*; *Kanyabashi v. Prosecutor*, No ICTR-96-15-AR72, Decision (Motion for Review or Reconsideration), 12 September 2000, p. 2.

Order Concerning Letter of Appellant Dated 2 July 2004 18 August 2004 (ICTR-97-20-A)

(Original : English)

Appeals Chamber

Judge : Inés Weinberg de Roca, Pre-Appeal Judge

Protective measures, whereabouts of witness – confidential letter – conditions for specific relief or ruling from the Appeals Chamber, not met – motion denied

Inernational instruments cited : Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, paragraph 10

I, Inés Monica Weinberg de Roca, Pre-Appeal Judge ha this case,

NOTING the confidential letter dated 2 August 2004 and received on 4 August 2004 from Mr Charles A. Taku, Counsel for the Appellant Laurent Semanza, wherein he addresses the Appeals Chamber on certain Matters concerning the whereabouts of witness TDR for whom protective measures have been granted by the Tribunal,

CONSIDERING that, in accordance with paragraph 10 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal ("Directive"), a party seeking to more the Appeals Chamber for a specific relief or ruling shall file a Motion containing the precise ruling or relief sought, the specific provision of the Rules of Procedure and Evidence under which relief is sought, and the grounds on which the ruling or relief is sought,

CONSIDER1NG that the confidential letter sent by Counsel for the Appellant does not conform to the Directive,

HEREBY REJECT the filing of the confidential letter.

Done in English and French, the English text being authoritative,

Done this 18th day of August 2004, at The Hague, The Netherlands.

[Signed] : Inés Monica Weinberg de Roca

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Scheduling Order
19 November 2004 (ICTR-97-20-A)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Mohamed Shahabuddeen; Mehmet Güney; Fausto Pocar; Inés Mónica Weinberg de Roca

Additionnal evidence, testimony – timetable

International instruments cited : Rules of procedure and evidence, Rules 98, 107, 115

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Judgement and Sentence" rendered in this case by Trial Chamber III on 15 May 2003;

NOTING in relation to the defence appeal, the Defence Appeal Brief filed on 21 October 2003, the Prosecution Response to Defence Appeal Brief filed on 1 December 2003, and the Defence Reply to Prosecutor's Reply (sic) to Defence Appeal Brief filed on 15 December 2003, and in relation to the Prosecution appeal, the Prosecution Appeal Brief filed on 1 September 2003, Defence Reply (sic) Brief filed on 10 October 2003, Prosecution Reply to the "Defence's Reply to Prosecutor's Brief" filed on 27 October 2003;

NOTING the International Tribunal's "Decision on Defence Motion for Leave to Present Additional Evidence and to Supplement Record on Appeal", 12 December 2003, whereby Laurent Semanza was granted leave pursuant to Rule 115 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") to present as additional evidence the testimony of Witness TDR, and that it was ordered pursuant to Rule 98 and Rule 107 of the Rules, that Witness TDR will be heard by the Appeals Chamber and any rebuttal evidence submitted by the Prosecutor and admitted on appeal;

CONSIDERING that the filing of the briefs in this Appeal is complete;

HEREBY ORDERS that the evidentiary hearing shall take place on Monday 13 December 2004, and the hearing on the merits of this Appeal on Monday 13 December 2004, Tuesday 14 December 2004, and Wednesday 15 December 2004, in Arusha;

INFORMS the parties that the timetable of the hearings will be as follows :

Monday, 13 December 2004

Evidentiary Hearing

10:30-11:30 Testimony of Witness TDR (1 hour)
11:30-12:00 Submission of the Defence (30 minutes)
12:00-12:30 Submission of the Prosecution (30 minutes)

Prosecution Appeal

15:00-15:15 Introductory Statement by the Presiding Judge (15 minutes)
15:15-17:15 Submission of the Prosecution (2 hours)

Tuesday, 14 December 2004

9:00-11:00 Response of the Defence (2 hours)
11:00-11:30 Reply of the Prosecution (30 minutes)
11:30-12:00 Pause (30 minutes)

Defence Appeal

12:00-13:00 Submission of the Defence (1 hour)
13:00-15:00 Pause (2 hours)
15:00-16:30 Continued Submission of the Defence (1 hour and 30 minutes)
16:30-18:00 Response of the Prosecution (1 hour and 30 minutes)

Wednesday, 15 December 2004

9:30-10:30 Continued Response of the Prosecution (1 hour)
10:30-10:45 Pause (15 minutes)
10:45-11:15 Reply of the Defence (30 minutes)
11:15-11:30 Brief address by Laurent Semanza (15 minutes optional)

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

Dated this 19th day of November 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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The Prosecutor v. Athanase SEROMBA

Case N° ICTR-2001-66

Case History

- Name : SEROMBA
- First Name : Athanase
- Date of Birth : unknown
- Sex : male
- Nationality : Rwandan
- Former Official Function : Catholic Priest, Nyange Parish, Kivumu *commune*

- Counts : genocide, or in the alternative complicity in genocide; conspiracy to commit genocide; crimes against humanity (extermination)

- Date of Indictment's Confirmation : 4 July 2001[1]
- Date and Place of Arrest : 6 February 2002, in Arusha, Tanzania
- Date of Transfer : 6 February 2002
- Date of Initial Appearance : 8 February 2002
- Date Trial Began : 20 September 2004
- Date and Content of the Sentence : 13 December 2006, 15 years imprisonment

- Appeal : life imprisonment by judgement of 15 March 2008

[1] The text of the Indictment is reproduced in the *2001 Report*, p. 3302.

Le Procureur c. Athanase SEROMBA

Affaire N° ICTR-2001-66

Fiche technique

- Nom : SEROMBA
- Prénom : Athanase
- Date de naissance : inconnue
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : prêtre catholique de la paroisse de Nyange, Commune de Kivumu
- Chefs d'accusation : génocide, ou subsidiairement complicité dans le génocide, entente en vue de commettre le génocide, crimes contre l'humanité (extermination)
- Date de confirmation de l'acte d'accusation : 4 juillet 2001[1]
- Date et lieu de l'arrestation : 6 février 2002, à Arusha, en Tanzanie
- Date du transfert : 6 février 2002
- Date de la comparution initiale : 8 février 2002
- Date du début du procès : 20 septembre 2004
- Date et contenu du prononcé de la peine : 13 décembre 2006, 15 ans d'emprisonnement
- Appel : condamné à la prison à vie le 12 mars 2008

[1] Le texte de l'acte d'accusation est reproduit dans le *Recueil 2001*, p. 3303.

Decision on the Defence Motions to Annul or Withdraw the Indictment 13 January 2004 (ICTR-2001-66-I)

(Original : not specified)

Trial Chamber I

Judges : Erik Møse

Athanase Seromba – No obligation to the Prosecution to interview a suspect prior to indictment, Bases for challenging a confirmed Indictment – Motion denied

International Instrument cited :

Rules of Procedure and Evidence, rules 42, 43, 47, 72 and 73 (E); Statute, art. 17 and 18

International Cases cited :

I.C.T.R : Trial Chamber I, The Prosecutor v. Ferdinand Nahimana*, Decision on the Preliminary Motion Filed By the Defence Based on Defects in the Form of the Indictment, 24 November 1997 (ICTR-96-11-T, Rep. 1995-1997, p. 436)*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Judge Erik Møse, designated by the Trial Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

BEING SEIZED of the Defense "Requête à fin d'annulation ou de retrait d'acte d'accusation", filed on 6 May 2003; and its "Requête complémentaire à fin d'annulation ou de retrait d'acte d'accusation", filed on 7 May 2003;

CONSIDERING the Prosecutor's "Response to Seromba's Motions to Annul or Withdraw the Indictment", filed on 8 May 2003;

HEREBY DECIDES the motion upon the parties' briefs.

INTRODUCTION

1. The Indictment against the Accused Athanase Seromba was confirmed on 4 July 2001. After his surrender, the Accused was transferred to the United Nations Detention Facility in Arusha on 6 February 2002, and made his initial appearance on 8 February 2002. The Prosecution addressed a request for an interview to the Accused on 12 February 2002, and then repeated the request to his Lead Counsel (who had been appointed on 5 March 2003) on 17 April 2003.

SUBMISSIONS

2. According to the Defence, the Prosecution's failure to question the accused prior to his indictment is a procedural irregularity rendering the indictment null and void. This obligation is said to arise from the Prosecution's authority to question suspects under Article 17 of the Statute of the International Tribunal for Rwanda, viewed in conjunction with the rules governing the questioning of suspects set forth in Rules 42 and 43. These and other rules enunciate an adversarial principle governing each and every phase of the of Tribunal's criminal procedure, including the collection of evidence for use in support of an indictment, which requires the Prosecution to interview the Accused before an indictment is confirmed. The Prosecution's requests to interview the Accused after his indictment and transfer to Arusha do not satisfy that obligation. The remedy requested is that the indictment be declared void or ordered withdrawn.

3. The Prosecution disputes that there is any obligation to interview a suspect before they are indicted. Whether to interview a suspect is a matter of discretion, not obligation. Rule 63 permits the Prosecution to interview an Accused after they are indicted and the requests to do so were not procedurally improper. Further, the Prosecution argues that the Defence motion is an attempt to re-litigate the decision to confirm the indictment, which is inadmissible. The Prosecution considers the Defence motion to be frivolous and invites the Chamber to impose sanctions, including denying fees to the Defence.

DELIBERATIONS

4. This motion raises two questions : first, whether the Prosecution is required to interview a suspect at the pre-indictment stage; and second, the effect of such a failure, if any, on an indictment which has already been confirmed.

5. Neither the Statute nor the Rules requires the Prosecution to interview a suspect prior to indictment. Article 17 states that the Prosecution "shall have the power" to investigate in a variety of ways, including the power to question suspects. Rules 42 and 43 set forth the rights of suspects, if the power to interview is exercised. Nothing in Article 17, or Rules 42 or 43, suggests that the plain meaning of "power" is qualified by any mandatory obligation. Nor does Article 18 or Rule 47 require that any particular type of evidence be submitted to a reviewing judge to establish a *prima facie* case for confirmation of an indictment, or otherwise indicate that the pre-indictment investigation must be adversarial.

6. It is thus unnecessary to decide whether such a procedural irregularity would constitute grounds for reviewing an indictment which has already been confirmed. It is worth recalling, however, that Rule 72 offers precise guidance as to the bases on which a confirmed indictment may be challenged. Challenges on other grounds, though not expressly excluded, are generally inadmissible. As this Chamber has observed,

> …neither Rule 47 nor Rules 72 and 73 of the Rules permit appeals against a decision rendered by a single Judge to confirm an indictment. Only in special circumstances can a preliminary motion raising objections to the form of the confirmation of an indictment be applied as an indirect means to obtain a review by a Trial Chamber of a confirming decision[1].

7. The Chamber declines to impose sanctions under Rule 73 (E).

FOR THE ABOVE REASONS, THE CHAMBER

DENIES THE MOTION.

Arusha, 13 January 2004

[Signed] : Erik Møse

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[1] *Prosecutor v. Ferdinand Nahimana*, Case Nº ICTR-96-11-T, Decision of 24 November 1997 on the Preliminary Motion Filed By the Defence Based on Defects in the Form of the Indictment (TC), para. 6.

Decision on the Prosecution Request to Withdraw its Motion for Trial in Rwanda 14 January 2004 (ICTR-2001-66-I)

(Original : English)

Trial Chamber I

Judge : Erik Mose

Athanase Seromba – Withdrawal of a motion for holding all or part of the trial of the Accused in Rwanda, Lack of adequate facilities for holding such trials – Motion granted

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Judge Erik Mose, designated by the Trial Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

BEING SEIZED OF the Prosecution "Request...to Withdraw Motion for Trial in Rwanda", filed on 8 January 2004;

CONSIDERING the Prosecution "Motion for Trial in Rwanda", filed on 3 June 2002, and its "Supplemental Submissions in Support of the Prosecutor's Motion for Trial in Rwanda", filed on 11 June 2002; the Defense "Réplique à la requête du Procureur aux fins de la tenue du procès au Rwanda", filed on 15 May 2003; and the letters of Athanase Seromba dated 7 June 2002, and 14 June 2002, filed on 10 June 2002 and 18 June 2002 respectively;

HEREBY DECIDES the motion.

The Prosecution has requested permission to withdraw its motion for holding all or part of the trial of the Accused in Rwanda. The motion was opposed by the Defence. The Chamber notes that adequate facilities for holding such trials do not appear to be available at present[1]. It is important to avoid any delay. The Chamber is of the view that the Prosecution should be permitted to withdraw its motion.

Motions which have been filed requesting *amicus curiae* status in relation to the Prosecution motion are, accordingly, moot.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the request to withdraw the motion;

DECLARES that the related *amicus curiae* motions are moot.

Arusha, 14 January 2004

[Signed] : Erik Mose

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[1] Transcripts of Status Conference held on 13 January 2004.

Décision relative à la requête du Procureur en retrait de sa requête aux fins de la tenue de procès au Rwanda 14 janvier 2004 (ICTR-2001-66-I)

(Original : Anglais)

Chambre de première instance

Juge : Erik Mose

Athanase Seromba – Retrait de la requête du Procureur aux fins de la tenue en tout ou en partie du procès de l'accusé au Rwanda, Défaut d'installations propres à la tenue du procès – Requête acceptée

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA

SIEGEANT en la personne du juge Erik Mase, désigné par la Chambre de première instance en vertu de l'article 73 du Règlement de procédure et de preuve du Tribunal (le «Règlement»),

SAISI de la requête du Procureur en retrait de sa requête aux fins de la tenue de procès au Rwanda, déposée le 8 janvier 2004,

VU la requête du Procureur aux fins de la tenue de procès au Rwanda, déposée le 3 juin 2002; les «arguments supplémentaires du Procureur à l'appui de sa requête pour un procès au Rwanda», produits le 11 juin 2002; la «Réplique à la requête du Procureur aux fins de la tenue du procès au Rwanda» déposée le 15 mai 2003, et les lettres d'Athanase Seromba datées des 7 et 14 juin 2002, déposées les 10 et 18 juin 2002 respectivement,

STATUE sur la requête.

Le Procureur a demandé l'autorisation de retirer sa requête aux fins de la tenue en tout ou en partie du procès de l'accusé au Rwanda à laquelle la défense s'est opposée. Notant que les installations propres à la tenue de tels procès font défaut[1] à ce stade et qu'il est impératif d'éviter tout retard, la Chambre considère que le Procureur doit être autorisé à retirer sa requête.

Les requêtes en comparution en qualité d'*amicus curiae* à l'occasion de la requête du Procureur sont dès lors sans objet.

PAR CES MOTIFS, LA CHAMBRE,

FAIT DROIT à la requête en retrait de la requête;

DECLARE sans objet les requêtes en comparution en qualité d'*amicus curiae*.

Fait à Arusha le 14 janvier 2004

[Signé] : Erik Mose

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[1] Transcriptions de la conférence de mise en état tenue le 13 janvier 2004.

Order for the Temporary Transfer of Detained Witnesses Rule 90 bis *of the Rules of Procedure and Evidence 19 August 2004 (ICTR-2001-66-I)*

(Original : French)

Trial Chamber III

Judge : Khalida Rachid Khan

Athanase Seromba – Transfer of detained witness

International Instrument cited :

Rules of Procedure and Evidence, rules 73 (A) and 90 bis *(B)*

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

SITTING as Trial Chamber III (the "Chamber"), Judge Khalida Rachid Khan, designated in accordance with Rule 73 (A) and pursuant to Rule 90 *bis* (B) of the Rules of Procedure and Evidence (the "Rules").

SEIZED of the Prosecutor's Motion for the temporary transfer of detained witnesses under Rule 90 *bis* of the Rules of Procedure and Evidence, filed on 12 January 2004.

CONSIDERING the Statute (the "Statute") and the Rules of Procedure and Evidence of the Tribunal (the "Rules"), particularly, in its Rule 90 *bis*.

HEREBY DECIDES as follows, solely on the basis of the written brief and documents attached thereto.

1. The Prosecutor's Motion requests the Chamber to order, pursuant to Rule 90 *bis* of the Rules, the transfer of eight (8) of its witnesses known by the pseudonyms CBO, CBQ, CBT, CBR CBT, CBU, CDK, CDL and CNJ, currently detained in Rwanda, to testify in the instant case for a period that shall be left to the discretion of the Chamber. The Prosecutor attached to the Motion a letter from the Minister of Justice and Institutional Relations of Rwanda dated 8 July 2004. In the letter, the Minister confirmed that the presence of the witnesses concerned was not required for any criminal proceedings in progress in Rwanda during the period they are required by the Tribunal and that their transfer to Arusha would not extend the period of their detention.

2. Rule 90 *bis* (B) of the Rules stipulates in its first two paragraphs that :

> (B) The transfer order shall be issued by a Judge or Trial Chamber only after prior verification that the following conditions have been met :
>
> (i) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;
>
> (ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State.

Ordonnance de transfert temporaire de témoins détenus Article 90 bis du Règlement de procédure et de preuve 19 août 2004 (TPIR-2001-66-I)

(Original : Français)

Chambre de première instance III

Juge : Khalida Rachid Khan

Athanase Seromba – Transfert de témoins détenus

Instrument international cité :

Règlement de Procédure et de preuve, art. 73 (A) et 90 bis *(B)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance III (la «Chambre»), la Juge Khalida Rachid Khan, désignée conformément à l'article 73 (A) et en vertu de l'article 90 *bis* (B) du Règlement de procédure et de preuve (le «Règlement»);

SAISI de la «Requête du Procureur aux fins de transfert temporaire de témoins détenus en vertu de l'article 90 *bis* du Règlement de Procédure et de Preuve», déposée le 12 janvier 2004;

CONSIDÉRANT le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve du Tribunal (le «Règlement»), notamment en son article 90 *bis*.

STATUE comme suit sur la seule base de la requête écrite et des pièces qui y sont jointes.

1. Dans sa requête, le Procureur demande à la Chambre d'ordonner conformément à l'article 90 *bis* du Règlement, le transfert de huit (8) de ses témoins connus sous les pseudonymes CBO, CBQ, CBR, CBT, CBU, CDK, CDL et CNJ, actuellement détenus au Rwanda, aux fins de leur comparution en la présente espèce pour une durée laissée à la discrétion de la Chambre. En annexe à sa requête, le Procureur joint une lettre du Ministre de la justice et des relations institutionnelles du Rwanda datée du 8 juillet 2004. Dans cette lettre le Ministre indique que la présence des témoins concernés n'est pas nécessaire dans une procédure pénale en cours au Rwanda pendant la période durant laquelle ils seront appelés à comparaître au Tribunal et que leur transfert à Arusha n'aura pas pour effet de prolonger la durée de leur détention.

2. L'article 90 *bis* (B) du Règlement dispose en ses deux premiers alinéas :

> B) L'ordre de transfert ne peut être délivré par un juge ou une Chambre qu'après vérification préalable de la réunion des conditions suivantes :
>
> i) La présence du témoin détenu n'est pas nécessaire dans une procédure pénale en cours sur le territoire de l'État requis pour la période durant laquelle elle est sollicitée par le Tribunal;
>
> ii) Son transfert n'est pas susceptible de prolonger la durée de sa détention telle que prévue par l'État requis.

3. To order the transfer of detained witnesses, the Judge or Chamber seized is required to verify the two conditions set out under Rule 90 *bis* (B) of the Rules. Since the conditions for such verification are not specified in the Rules, the Judge or Chamber enjoys broad powers of discretion in that regard. In the Chamber's opinion, a letter from the Minister of Justice and Institutional Relations, who is the most appropriate authority to guarantee such information on the status of the detainees, fully meets both conditions as prescribed, namely, that the detainees whom the Prosecutor wishes to call are not required for any criminal proceedings in Rwanda, and that their stay at the Tribunal will not prolong the period of their detention, hence the need to issue the transfer order.

4. Since trial in the instant case is scheduled to commence on 20 September 2004, and the presentation of the Prosecution's case is expected to last some twenty days, the eight (8) witnesses, known by the pseudonyms CBO, CBQ, CBR, CBT, CBU, CDK, CDL and CNJ, are required to be present in Arusha not later than 19 September 2004, and for a period not exceeding one month.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

I. ORDERS, pursuant to Rule 90 *bis* (B) of the Rules, that the protected witnesses, known by the pseudonyms CBO, CBQ, CBR, CBT, CBU, CDK, CDL and CNJ, be transferred to Arusha, not later than 19 September and for a period of one month;

II. ORDERS the Registrar to ensure that their conditions of detention in Arusha are at least the same as their conditions of detention in Rwanda;

III. Consequently, REMINDS the Registrar of his obligations under Rule 90 *bis* of the Rules;

IV. Further, REQUESTS, the Government of the Republic of Rwanda to comply with the present Order, to cooperate with the Prosecutor and the Registrar and, in conjunction with the Government of the United Republic of Tanzania, the Registrar and the Victims and Witnesses Support Section of the Tribunal, to take the necessary measures to implement the present decision.

Arusha, 19 August 2004

[Signed] : Khalida Rachid Khan

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3. Pour ordonner le transfert de témoins détenus, le Juge ou la Chambre saisie doit vérifier les deux conditions établies par l'article 90 *bis* (B) du Règlement. Le Règlement n'ayant pas précisé quelles sont les modalités d'une telle vérification, le Juge ou la Chambre jouit, à cet effet, d'une grande discrétion. De l'avis de la Chambre, une lettre du Ministre rwandais de la justice et des relations institutionnelles, qui est l'autorité la mieux qualifiée pour garantir une telle information sur la situation des détenus, satisfait pleinement les deux conditions requises, à savoir que les détenus que le Procureur entend appeler à la barre ne sont pas requis dans une procédure pénale au Rwanda, et que leur séjour au Tribunal ne prorogerait pas leur détention. Il échet dès lors de prendre l'ordonnance de transfert y relative.

4. L'ouverture du procès dans la présente affaire ayant été prévue pour le 20 septembre 2004, et la présentation des moyens de preuve du Procureur devant durer une vingtaine de jours, la présence à Arusha des huit (8) témoins connus sous les pseudonymes CBO, CBQ, CBR, CBT, CBU, CDK, CDL et CNJ, est requise pour le 19 septembre 2004, au plus tard, et pour une durée ne devant pas excéder un mois.

PAR CES MOTIFS, LA CHAMBRE

I. ORDONNE, en vertu de l'article 90 *bis* (B) du Règlement, que les témoins protégés connus sous les pseudonymes CBO, CBQ CBR, CBT, CBU, CDK, CDL et CNJ soient transférés à Arusha, au plus tard le 19 septembre et pour une durée de un mois;

II. ORDONNE au Greffier de s'assurer que leurs conditions de détention à Arusha de sorte que celles-ci soient au moins égales à leurs conditions de détention au Rwanda;

III. RAPPELLE, par conséquent, au Greffier ses obligations telles qu'établies dans l'article 90 *bis* du Règlement;

IV. DEMANDE, en outre, au gouvernement de la République du Rwanda de se conformer à la présente ordonnance, de coopérer avec le Procureur et le Greffier et de prendre, en collaboration avec le gouvernement de la République-Unie de Tanzanie, le Greffier et la Section d'appui aux victimes et aux témoins du Tribunal, les mesures nécessaires à l'exécution de la présente décision.

Arusha, le 19 Août 2004

[Signé] : Khalida Rachid Khan

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*Décision sur les requêtes en annulation de sanction et en intervention en qualité d'***Amicus Curiae** *Articles 46 et 74 du Règlement de procédure et de preuve 22 octobre 2004 (TPIR-2001-66-T)*

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Président; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Requête en amicus curiae présentée par l'Association des avocats de la défense près le TPIR (ADAD), Pouvoir discrétionnaire de la Chambre d'autoriser une intervention en qualité d'amicus curiae – Nature de l'avertissement donné aux conseils de la défense, Distinction claire entre l'avertissement et les sanctions proprement dites - Pouvoir inhérent de la Chambre de reconsidérer ses décisions, Exercice en opportunité – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 46, 46 (A), 73 (A) et 74

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Jean Paul Akayesu*, Avertissement aux conseils de la défense, 19 mars 1998 (ICTR-96-4-T, Rec. 1998, p. 43); Chambre de première instance II,* Le Procureur c. Juvénal Kajelijeli*, Décision relative à la requête du procureur en rectification de l'acte d'accusation…Avertissement au Bureau du Procureur par application de l'article 46 (A), 25 janvier 2001 (ICTR-98-44A-T, Rec. 2001, p. 1595)*

T.P.I.Y. : Chambre d'appel, Le Procureur c. Zdravko Mucić et consorts*, Arrêt relatif à la sentence, 8 avril 2003 (IT-96-21)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance III (la «Chambre»), composée des Juges Andrésia Vaz, Présidente, Karin Hökborg et Gberdao Gustave Kam;

SAISI de la lettre intitulée «La sanction infligée le 21/09/2004 aux conseils de l'Abbé Athanase Seromba», déposée par la défense le 24 septembre 2004; de la «Requête en intervention volontaire comme *Amicus Curiae* par l'Association des avocats de la défense près le TPIR (ADAD) en soutien à la demande d'annulation des sanctions infligées aux conseils de Seromba par la Chambre III, le 21 septembre 2004», déposée le 27 septembre 2004; et de la lettre d'Athanase Seromba datée du 27 septembre 2004, déposée le 4 octobre 2004;

CONSIDERANT le mémoire du Procureur intitulé «Réponse à la requête de la défense du 29 septembre 2004 et l'Association des avocats de la défense près le TPIR

tendant à rapporter la décision du 21 septembre 2004 de la Chambre III infligeant un avertissement aux conseils de la défense», déposé le 04 octobre 2004;

RAPPELANT la décision orale rendue par la Chambre lors de l'audience du 21 septembre 2004[1], et la notification subséquente qui en a été faite par le Greffe, le 22 septembre 2004, à Me Pognon et Me Monthé, conseils chargés de la défense de l'accusé Athanase Seromba;

STATUE comme suit, sur la base des mémoires écrits des parties et conformément à l'article 73 (A) du Règlement.

ARGUMENTS

La défense

1. Dans leur lettre datée du 24 septembre 2004, Me Pognon et Me Monthé, respectivement conseil principal et co-conseil pour la défense de l'accusé Athanase Seromba, expliquent avoir reçu du Greffe du Tribunal de céans notification de la décision rendue par la Chambre le 21 septembre 2004, par laquelle celle-ci leur «infligeait un avertissement à titre de sanction» pour «attitude irrespectueuse et discourtoise» à l'audience et ce, en application des dispositions de l'article 46 du Règlement de procédure et de preuve.

2. Me Pognon et Me Monthé soutiennent avoir pourtant dûment informé la Chambre de l'impossibilité dans laquelle ils se trouvaient d'assister à l'audience, suite à la missive adressée à la chambre par l'accusé et confirmant la suspension temporaire de leur mandat.

3. Les conseils de la défense concluent que «cette sanction inique et inopportune» est offensante à leur égard. En conséquence, ils prient la Chambre de bien vouloir rapporter sa décision orale du 21 septembre 2004.

4. Pour sa part, l'accusé Athanase Seromba, dans sa lettre en date du 27 septembre 2004, souligne que le fait pour ses conseils de s'être conformés à ses instructions ne saurait constituer une faute qui leur serait imputable. L'accusé conclut alors au retrait de «l'avertissement injuste» infligé à Me Pognon et Me Monthé.

L'Association des avocats de la défense près le Tribunal (ADAD)

5. Dans sa requête aux fins d'intervention comme *amicus curiae*, l'ADAD se présente comme une «association à caractère professionnel regroupant les avocats de la défense près le Tribunal pénal international pour le Rwanda (TPIR)», ayant pour objet «la promotion et la défense des droits de la défense des intérêts professionnels ainsi que ceux des membres des équipes de la défense». A ce titre, l'ADAD se considère comme l'association professionnelle la mieux placée pour éclairer la Chambre sur les questions touchant à la discipline des avocats commis près le TPIR.

[1] T. 21 septembre 2004, p. 6.

6. Se prévalant de la qualité de membres de Me Pognon et Me Monthé, l'ADAD excipe, à la fois, de la qualité et d'un intérêt pour agir en la présente cause. L'ADAD demande, en conséquence, à ce qu'il plaise à la Chambre accepter sa requête en intervention volontaire comme *amicus curiae*. A l'appui de sa demande, l'ADAD invoque les dispositions de l'article 74 du Règlement.

7. L'ADAD soutient également que l'avertissement prévu à l'article 46 (A) du Règlement est une «peine disciplinaire» dans les barreaux du «système civil law». L'ADAD en conclut que la décision de la Chambre est entachée d'un vice de forme et de fond en ne citant pas, préalablement à la sanction, Me Pognon et Me Monthé pour leur notifier les faits reprochés, d'une part, et en ne les invitant pas à se défendre sur ces faits, d'autre part. Sur cette base, l'ADAD sollicite de la Chambre le retrait de sa décision orale du 21 septembre 2004.

Le Procureur

8. Dans son mémoire déposé le 04 octobre 2004, le Procureur soutient que la Chambre ne saurait rapporter la décision d'avertissement, prise en application de l'article 46, aux motifs que cette mesure ne constitue pas une sanction. En conséquence, le Procureur demande à la Chambre de rejeter la requête des conseils de la défense comme mal fondée. De même, il conclut pour le rejet des conclusions de l'ADAD aux motifs, d'une part, que celle-ci n'est pas habilitée à intervenir en *amicus curiae* car n'ayant pas été autorisée par la Chambre, et d'autre part, que la matière objet du présent litige est une question de police d'audience relevant, à ce titre, du pouvoir souverain des juges.

DÉLIBÉRATIONS

Sur la jonction des requêtes et la réponse hors délai du Procureur

9. La Chambre, en application de l'article 73 (A) du Règlement, décide d'accueillir comme une requête, la lettre datée du 24 septembre 2004, par laquelle les conseils de la défense demandent à la Chambre de rapporter sa décision orale du 21 septembre 2004.

10. La Chambre constate également que la requête en *amicus curiae* présentée par l'Association des avocats de la défense près le TPIR (ADAD), de même que la demande formulée par l'accusé, présente une identité de cause avec la requête susvisée des conseils de la défense. Aussi, la Chambre, dans l'intérêt d'une bonne administration de la justice, décide de joindre les deux requêtes aux fins d'une décision unique.

11. Enfin, nonobstant le fait que le mémoire du procureur ait été déposé au Greffe au-delà du délai de 5 jours prescrit, la Chambre estime qu'il est opportun de passer outre la forclusion encourue de ce fait et de retenir ledit mémoire au dossier.

Sur la nature de l'avertissement donné aux conseils de la défense

12. L'article 46 (A) du Règlement dispose :

> Une Chambre peut, après un avertissement, prendre des sanctions contre un conseil, si elle considère que son comportement reste offensant ou injurieux, entrave la procédure ou va autrement à l'encontre des intérêts de la justice. Cette disposition s'applique *mutatis mutandis* aux membres du Bureau du Procureur.

13. A la lecture des dispositions qui précèdent, la Chambre est d'avis que l'article 46 (A) établit une distinction claire entre l'avertissement et les sanctions proprement dites[2]. En effet, ces sanctions, consécutives à l'avertissement préalablement donné, ne peuvent être prises par la Chambre que si le conseil ou le membre du Bureau du Procureur concerné persiste dans un comportement offensant ou injurieux, de nature à entraver la procédure. Pour la Chambre, seules ces sanctions constituent des mesures disciplinaires et non l'avertissement qui, en l'espèce, ne doit s'appréhender que comme une simple mise en demeure, destinée à rappeler à l'ordre les conseils de la défense sur l'obligation de respect due à la Chambre par toute partie au procès.

14. La Chambre, dans sa décision du 21 septembre 2004, ne fait que rappeler cette obligation à Me Pognon et Me Monthé dans des termes suivants :

> «La Chambre, constatant l'attitude irrespectueuse et discourtoise des avocats de l'accusé, qui ont quitté la salle d'audience alors que la Chambre siégeait, décide de donner un avertissement à Me Pognon et à Me Monthé conformément à l'article 46 du Règlement de procédure et de preuve …»[3]

De ce qui précède, la Chambre conclut au rejet de la prétention des conseils de la défense tendant à faire passer pour une sanction professionnelle, l'avertissement que leur a adressé la Chambre, en son audience du 21 septembre 2004.

Sur la demande aux fins de voir rapporter la décision d'avertissement

15. La Chambre considère qu'en lui demandant de rapporter la décision orale rendue le 21 septembre 2004, les conseils de la défense font implicitement référence au pouvoir de réexamen par la Chambre de toute décision par elle rendue.

16. Sur ce point, la Chambre estime devoir rappeler la jurisprudence de la Chambre d'appel du Tribunal Pénal International pour l'ex-Yougoslavie (TPIY) dans l'affaire *Zdravko Mucic et consorts*[4]. Dans cette espèce, la Chambre d'appel a, en effet, déclaré ce qui suit :

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[2] Cf. *Le Procureur c. Juvénal Kajelijeli*, Affaire N°. ICTR-98-44A-T, «décision relative à la requête du procureur en rectification de l'acte d'accusation…Avertissement au Bureau du Procureur par application de l'article 46 (A)», 25 janvier 2001, p.13.; *Le Procureur c. Jean Paul Akayesu*, Affaire N°. ICTR-96-4-T, «Avertissement aux conseils de la défense», 19 mars 1998, pp. 2-3.

[3] T. 21 septembre 2004, p. 6.

[4] *Le Procureur c. Zdravko Mucic, Hazim Delic et Esad Landzo*, 'Arrêt relatif à la sentence', 8 avril 2003, para. 53.

«La Chambre d'appel dispose du pouvoir inhérent de reconsidérer toute décision, y compris un arrêt, si cela se révèle nécessaire pour éviter une injustice. Elle a précédemment indiqué qu'une chambre peut reconsidérer une décision lorsqu'elle est persuadée que sa décision antérieure n'était pas fondée et avait entraîné un préjudice et non pas seulement dans le cas où les circonstances ont changé. La décision d'une Chambre de réexaminer relève en soi du pouvoir souverain d'appréciation qui lui est reconnu …»

17. La Chambre entend s'inspirer de cette jurisprudence aux fins d'apprécier l'opportunité de revenir ou non sur la décision portant avertissement des conseils de la défense.

18. Pour ce faire, la Chambre fait d'abord remarquer que la décision d'avertissement prise le 21 septembre 2004 est juridiquement fondée, en ce qu'elle rentre dans le domaine de son pouvoir inhérent de direction et de contrôle des débats à l'audience. Un tel pouvoir, propre à la nature juridictionnelle de la Chambre, ne saurait souffrir d'une quelconque contestation, même en présence de circonstances particulières

Sur la demande en amicus curiae de l'ADAD

19. L'article 74 du Règlement est ainsi libellé :

Une Chambre peut, si elle le juge souhaitable dans l'intérêt d'une bonne administration de la justice, inviter ou autoriser tout Etat, toute organisation ou toute personne à comparaître devant elle et lui présenter toute question spécifiée par la Chambre.

20. Aux termes des dispositions qui précèdent, la Chambre dispose d'un pouvoir discrétionnaire aux fins d'autoriser ou non une intervention en qualité d'*amicus curiae*.

21. La Chambre constate, en outre, que le mémoire présenté par l'ADAD ne soulève pas de question pertinente de nature à l'éclairer dans la solution de la présente affaire. En conséquence, la Chambre considère qu'il n'y a pas lieu d'autoriser l'ADAD à intervenir comme *amicus curiae* dans la présente cause.

PAR CES MOTIFS, LA CHAMBRE,

REJETTE la requête de Me Pognon et de Me Monthé, en tous ses chefs;

REJETTE la requête de l'ADAD aux fins d'intervention en *amicus curiae*.

Arusha, le 22 octobre 2004

[Signé] : Andrésia Vaz; Karin Hökborg; Gberdao Gustave Kam

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Décision sur la requête de la défense aux fins de non admission de documents 22 octobre 2004 (TPIR-2001-66-T)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente ; Karin Hökborg ; Gberdao Gustave Kam

Athanase Seromba – Admission de documents, Exigence d'un lien avec le témoignage pour l'introduction d'un document comme pièce à conviction lors d'un témoignage – Requête rejetée

Jurisprudence internationale citée :

T.P.I.Y. : Chambre de première instance, Le Procureur c. Zejnil Delalić et consorts*, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample, 19 janvier 1998 (IT-96-21)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance III (la «Chambre»), composée des Juges Andrésia Vaz, Président, Karin Hökborg et Gberdao Gustave Kam ;

SAISI de la «Requête aux fins de non admission de documents», déposée par la défense le 28 septembre 2004 ;

VU la «Réponse à la requête de la défense du 28 septembre 2004 pour non admission de documents», déposée par le Procureur le 4 octobre 2004 ;

STATUANT comme suit, sur la base des mémoires écrits des parties, conformément à l'article 73 (A) du Règlement ;

RAPPELANT que toute partie demandant l'introduction d'un document comme pièce à conviction lors d'un témoignage doit établir le lien qui existe entre celui-ci et ledit témoignage[1] ;

CONSIDÉRANT que la Chambre a rendu des décisions orales lors des audiences du 27 septembre 2004 admettant le document intitulé «African Rights Report» (réf. K0239874-9894) comme pièce à conviction sous réserve de l'évaluation ultérieure de sa valeur probante[2], et a rejeté les articles du *Sunday Times* du 21 novembre 1999[3] et de *La Nazione* du 22 novembre 1999[4] ;

[1] T. 28 septembre 2004, pp. 1-2.

[2] T. 27 septembre 2004, pp. 33 et p. 59. *Prosecutor v. Zejnil Delalic et al*, "Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample", 19 January 1998, para. 30.

[3] T. 27 septembre 2004, pp. 61-62.

[4] T. 28 septembre 2004, p. 9.

Il échet de déclarer que la requête de la défense est devenue sans objet.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la défense aux fins de non admission de documents.

Arusha, le 22 octobre 2004

[Signé] : Andrésia Vaz; Karin Hökborg; Gberdao Gustave Kam

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Décision sur la requête de la défense aux fins de non admission d'un rapport d'expertise 22 octobre 2004 (TPIR-2001-66-T)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Admission d'un rapport d'expertise, Faculté du Procureur de déterminer l'usage des éléments de preuve en sa possession et du moment auquel il doit demander leur admission comme pièces à conviction – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 73 (F) et 94 bis

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance III (la «Chambre»), composée des Juges Andrésia Vaz, Président, Karin Hökborg et Gberdao Gustave Kam;

SAISI de la «Requête aux fins de la non admission du rapport d'expertise de Mac Cullum intitulé "Rôle de l'Eglise dans le génocide commis au Rwanda"», déposée par la défense le 29 septembre 2004;

CONSIDÉRANT la «Réponse à la requête de la défense aux fins de la non admission du rapport d'expertise de Mac Cullum intitulé "Rôle de l'Eglise dans le génocide commis au Rwanda"», déposée par le Procureur le 1er octobre 2004;

STATUE comme suit, sur la base des mémoires écrits des parties, conformément à l'article 73 (A) du Règlement;

ARGUMENTS DES PARTIES

La défense

1. La défense conteste la qualification de M. Mac Cullum comme témoin expert, car aucun élément contenu dans son rapport ne permet d'appréhender et d'apprécier son aptitude à traiter du sujet. Par conséquent, la défense rejette le rapport de M. Mac Cullum qui ne saurait être utilisé comme un vade-mecum pour tout procès impliquant un religieux devant le Tribunal. En outre, le contenu de ce rapport ne renseigne aucunement sur les poursuites engagées à l'encontre de l'Abbé Athanase Seromba.

2. La défense affirme que le Procureur n'a pas l'intention de faire comparaître M. Mac Cullum comme témoin expert de l'accusation, son nom ne figurant pas sur la liste modifiée de ses témoins.

3. Le Rwanda étant un pays multiconfessionnel, la défense se demande à quelle église se réfère le rapport de M. Mac Cullum. Elle relève, d'une part, qu'aucune église rwandaise n'est mise en accusation devant le Tribunal, et d'autre part, que les religieux de l'Église catholique jugés devant le Tribunal le sont sur la base de faits qui leur sont personnellement imputés.

Le Procureur

4. Le Procureur soutient qu'il n'a pas l'intention, pour le moment, de faire comparaître M. Mac Cullum comme témoin expert. La démarche de la défense ne concorde ni avec les intentions du Procureur ni avec l'esprit de l'article 94 *bis* du Règlement.

5. Le Procureur rappelle que le rapport de M. Mac Cullum fait partie d'une liste de preuves documentaires dont il lui revient de juger de l'usage à en faire et du moment le plus approprié pour le produire devant la Chambre.

6. Pour ce faire, il considère la requête de la défense non seulement comme prématurée et mal fondée en vertu des dispositions de l'article 94 *bis* du Règlement, mais également comme constitutive d'un abus de droit en application de l'article 73 (F) du Règlement.

Délibérations

7. La Chambre relève que le rapport de M. Mac Cullum fait partie d'une liste de preuves documentaires transmises par le Procureur à la Chambre et à la défense.

8. De l'avis de la Chambre, il appartient au Procureur seul de déterminer l'usage qu'il compte faire des éléments de preuve se trouvant en sa possession et du moment auquel il doit s'y référer pour demander leur admission comme pièces à conviction. La défense ne peut préjuger ni de la manière dont le Procureur entend les utiliser ni du moment approprié pour leur versement au dossier.

9. La Chambre constate que M. Mac Cullum ne figure pas sur la liste des témoins de l'accusation dans la présente affaire, celle-ci n'ayant pas pour le moment l'inten-

tion de le faire comparaître comme témoin expert. Dès lors, la Chambre estime que la défense ne saurait fonder sa requête sur l'article 94 *bis* du Règlement. La Chambre relève qu'en l'état le Procureur ne l'a pas saisie d'une requête aux fins d'admission de ce document.

10. La Chambre considère qu'il n'y a pas lieu de faire application des dispositions de l'article 73 (F) du Règlement à l'encontre de la défense.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la défense aux fins de non admission du rapport de M. Mac Cullum;

DIT qu'en l'état, ce document n'est pas pour autant admis comme élément de preuve du Procureur.

Arusha, le 22 octobre 2004

[Signé] : Andrésia Vaz; Karin Hökborg; Gberdao Gustave Kam

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Ordonnance sur la prorogation de la période de transfert temporaire de témoins détenus Article 90 bis *(F) du Règlement de procédure et de preuve 29 octobre 2004 (TPIR-2001-66-T)*

(Original : Français)

Chambre de première instance III

Juge Athanase Seromba – Prorogation de la période de transfert temporaire de témoins détenus, Pas d'effet sur la période de détention des témoins

Instrument international cité :

Règlement de Procédure et de preuve, art. 90 bis *(F) : Andrésia Vaz*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance III (la «Chambre»), la Juge Andrésia Vaz, désignée conformément à l'article 73 (A) et en vertu de l'article 90 *bis* (F) du Règlement de procédure et de preuve (le «Règlement»);

SAISI de la requête du Procureur intitulée «Prosecutor's Motion to Extend the Period of the Temporary Transfer of Detained Witnesses Pursuanto Rule 90 *bis* (F)», déposée le 12 janvier 2004;

RAPPELANT son «Ordonnance de transfert temporaire de témoins détenus», rendue le 19 août 2004, et son ordonnance orale en vue de la prorogation de la période

de transfert des témoins détenus CNJ, CBR et CDL au 31 octobre 2004, rendue le 15 octobre 20041;

CONSIDÉRANT le Statut du Tribunal (le «Statut») et le Règlement de procédure et preuve du Tribunal (le «Règlement»), notamment en son article 90 *bis*.

STATUE comme suit sur la seule base de la requête écrite du Procureur.

1. Dans sa requête, le Procureur demande à la Chambre d'ordonner conformément à l'article 90 *bis* (F) du Règlement, la prorogation jusqu'au 31 janvier 2005 de la période de transfert de trois (3) de ses témoins connus sous les pseudonymes CNJ, CBR et CDL actuellement présents à Arusha, aux fins de leur comparution en la présente espèce. Le Procureur rappelle que ces trois témoins, arrivés à Arusha le 17 septembre 2004, n'ont pas pu témoigner au cours de la première session du procès tenue du 20 septembre au 22 octobre 2004. La période de leur séjour à Arusha a été prorogée une première fois par la Chambre jusqu'au 31 octobre 2004. Cependant, la reprise du procès ayant été programmée pour le 19 janvier 2005 afin de permettre au procureur de terminer la présentation de ses moyens de preuve, la présence des témoins CNJ, CBR et CDL est requise à cette période.

2. Aux termes des dispositions de l'article 90 *bis* (F)

> Si, au cours du délai fixe par le Tribunal, la présence du témoin détenu demeure nécessaire, un juge ou une Chambre peut proroger le délai, dans le respect des conditions fixées au paragraphe (B).

3. La Chambre note qu'à l'appui de ses deux requêtes précédentes, le Procureur avait joint une lettre du Ministre de la justice et des relations institutionnelles du Rwanda datée du 8 juillet 2004. En annexe de cette lettre du Ministre, figure une liste de noms de témoins détenus, y compris CNJ, CBR et CDL, dont la présence n'est requise dans aucune procédure pénale en cours au Rwanda pendant la période durant laquelle ils seront appelés à comparaître au Tribunal. En outre, leur transfert à Arusha n'aura pas pour effet de prolonger la durée de détention. La Chambre est dès lors satisfaite que les conditions posées par l'article 90 *bis* (F) sont réunies.

4. La reprise du procès dans la présente affaire ayant été prévue pour le 19 janvier 2005, afin que le Procureur termine la présentation de ses moyens de preuve, la Chambre estime que la présence à Arusha des trois (3) témoins connus sous les pseudonymes CNJ, CBR et CDL est encore nécessaire. Il échet donc de proroger la durée de leur transfert jusqu'au 31 janvier 2005.

PAR CES MOTIFS, LA CHAMBRE

I. ORDONNE, en vertu de l'article 90 *bis* (F) du Règlement, que la période de transfert à Arusha des témoins détenus, connus sous les pseudonymes CNJ, CBR et CDL soit prorogée jusqu'au 31 janvier 2005;

II. RAPPELLE, par conséquent, au Greffier ses obligations telles qu'établies dans l'article 90 *bis* du Règlement et dans l'ordonnance du 19 août 2004.

Arusha, le 29 octobre 2004

[Signé] : Andrésia Vaz

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Décision relative à la requête de Gaspard Kanyarukiga en jonction et en suspension de procès Article 48 bis *du Règlement de procédure et de preuve 29 novembre 2004 (TPIR-2001-66-T)*

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Président ; Karin Hökborg ; Gberdao Gustave Kam

Athanase Seromba – Gaspard Kanyarukiga – Requête en jonction de procès, Conditions matérielles à remplir pour la jonction : rattachement des actes des accusés à une infraction pénale susceptible d'être déterminée précisément et existence d'un plan, stratégie ou dessein communs, Chefs d'accusation d'entente en vue de commettre le genocide similaires, Pouvoir discrétionnaire de la Chambre d'ordonner la jonction ayant égard aux droits de l'accusé et à l'intérêt de la justice, Droit à un procès équitable et rapide d'Athanase Seromba – Requête rejetée

Instrument international cité :

Règlement de Procédure et de preuve, art. 2, 48 et 48 bis ; Statut, art. 19 (1) et 20 (4) (c)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Elizaphan Ntakirutimana et consorts*, Décision sur la requête du Procureur en jonction des actes d'accusation, 22 février 2001 (ICTR-96-10-I et ICTR-96-17-T, Rec. 2001, p. 2985) ; Chambre de première instance I,* Le Procureur c. Athanase Seromba*, Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins, 30 juin 2003 (ICTR-2001-66, Rec. 2003, p. 3991)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le « Tribunal »),

SIÉGEANT en la Chambre de première instance III (la « Chambre »), composée des Juges Andrésia Vaz, Président, Karin Hökborg et Gberdao Gustave Kam ;

SAISI de la Requête de l'accusé Gaspard Kanyarukiga intitulée « Extremely urgent pre-trial motion for the accused, Gaspard Kanyarukiga, requesting *inter alia* the consolidation of his trial with that of Father Anasthase Seromba » (la « requête »), déposée le 14 octobre 2004 ;

CONSIDÉRANT la réponse du Procureur intitulée « Prosecutor's response to extremely urgent pre-trial motion of the accused Gaspard Kanyarukiga » (la « réponse »), déposée le 19 octobre 2004 ;

CONSIDÉRANT que la défense de l'accusé Athanase Seromba n'a pas répondu à la présente requête dans les délais prescrits par l'article 73 du Règlement de procédure et de preuve (« Règlement ») ;

CONSIDÉRANT le Statut du Tribunal (le «Statut») et le Règlement;

STATUE comme suit, sur la base des mémoires écrits des parties, conformément à l'article 73 (A) du Règlement;

RAPPEL DE LA PROCÉDURE

1. Athanase Seromba a été transféré au Tribunal pénal international pour le Rwanda le 6 février 2002, en provenance de Florence (Italie). Sa comparution initiale a eu lieu le 8 février 2002. Après deux ans et demi d'incarcération et de procédure, son procès a commencé le 20 septembre 2004.

2. Gaspard Kanyarukiga a été arrêté en Afrique du Sud le 16 juillet 2004. Il a été transféré au Tribunal le 19 juillet 2004. Sa comparution initiale a eu lieu le 22 juillet 2004 en présence du conseil de permanence qui lui a été assigné par le Greffier en vertu de l'article 44 *bis* (D) du Règlement.

3. Par une lettre en date du 17 septembre 2004, la défense de Gaspard Kanyarukiga a saisi le Procureur afin qu'il envisage la possibilité d'une jonction de procès entre les affaires Kanyarukiga et Seromba. Dans sa réponse du 11 octobre 2004, le Procureur a rejeté une telle possibilité pour trois raisons : premièrement, la demande de la défense n'a été faite que trois jours avant l'ouverture du procès d'Athanase Seromba, ce qui ne donnait pas suffisamment de temps au Procureur pour envisager la jonction des deux procès; deuxièmement, le procès d'Athanase Seromba avait déjà commencé depuis 7 jours lorsque le Procureur a reçu la lettre de la défense le 27 septembre 2004; enfin, il appartient au Bureau du Procureur seul de déterminer la date du début de chaque procès.

4. C'est à la suite de ce refus du Procureur que le Tribunal a été saisi d'une demande en jonction et en suspension de procès par la défense de Gaspard Kanyarukiga.

ARGUMENTS DES PARTIES

La défense de Gaspard Kanyarukiga

5. La défense soutient que les actes d'accusation d'Athanase Seromba et de Gaspard Kanyarukiga présentent de nombreuses similitudes dans les faits. Elle affirme que si la Chambre saisie de l'affaire *Athanase Seromba* entend les éléments de preuve impliquant également Gaspard Kanyarukiga et les tient pour crédibles, elle pourrait en tirer des conclusions factuelles relatives à la responsabilité pénale individuelle de Gaspard Kanyarukiga, sans que ce dernier n'ait eu l'opportunité de contester lesdits éléments de preuve. La défense estime que cela revient à juger Gaspard Kanyarukiga en son absence.

6. La défense affirme que si la Chambre n'accède pas à sa requête, les témoins ayant déjà comparu dans l'affaire Seromba seront encore appelés à témoigner dans le procès impliquant Gaspard Kanyarukiga. De l'avis de la défense, cela est contraire à l'objectif de célérité des procédures pénales en cours devant le Tribunal.

7. En se fondant sur les articles 19 (1), 20 (2) à (4) du Statut, et sur les articles 48, 48 *bis* et 50 du Règlement, la défense demande donc à la Chambre de suspendre le procès d'Athanase Seromba et de joindre les deux procès.

8. La défense demande alternativement soit l'autorisation de contre-interroger les témoins de l'accusation, soit la suppression de toute référence à Gaspard Kanyarukiga dans l'acte d'accusation d'Athanase Seromba et au cours de son procès, soit enfin une décision de la Chambre ordonnant que lui soient communiqués tous les procès verbaux d'auditions des témoins à charge dans lesquels le nom de Gaspard Kanyarukiga sera mentionné.

Le Procureur

9. Le Procureur estime que chaque accusé est jugé selon les faits qui lui sont imputés, qu'il soit jugé séparément ou conjointement avec d'autres accusés. Le Procureur affirme que le fait pour Gaspard Kanyarukiga d'être jugé séparément d'Athanase Seromba n'a rien d'inéquitable et ne porte aucunement atteinte à ses droits fondamentaux. Un juge ou une Chambre évalue la crédibilité de tout témoin sur la base de ce qu'il entend au cours de sa déposition et non sur les témoignages faits devant une autre Chambre.

10. Le Procureur relève qu'il ne revient pas à Gaspard Kanyarukiga de déterminer la stratégie mise en œuvre par le Bureau du Procureur dans la perspective de la clôture des procès devant le Tribunal. Le Procureur soutient par ailleurs que les articles 48 et 48 *bis* du Règlement offrent la possibilité pour une Chambre de joindre les instances et les procès lorsque les personnes sont accusées d'une même infraction ou d'infractions différentes commises à l'occasion de la même opération. Cependant, ces deux articles ne contiennent aucune obligation pour la Chambre.

11. Le Procureur estime en outre qu'il est tardif de demander une jonction de procès à ce stade avancé de la procédure dans la présente instance et note que la présentation des moyens de preuve à charge dans la présente affaire est pratiquement terminée. En conséquence, le Procureur demande le rejet de la requête de la défense.

DÉLIBÉRATIONS

12. La Chambre souligne que la demande introduite par Gaspard Kanyarukiga est une requête incidente à l'instance principale concernant Athanase Seromba. Pour cette raison, il revient à la Chambre de première instance saisie de l'affaire *Le Procureur c. Athanase Seromba* de connaître de cette requête incidente.

13. Il ressort des éléments du dossier que ladite requête porte sur une jonction de procès conformément à l'article 48 *bis* du Règlement qui dispose que

> «[s]ur autorisation d'une Chambre de première instance, en application de l'article 73, des personnes qui sont inculpées séparément, accusées de la même infraction ou d'infractions différentes commises à l'occasion de la même opération, peuvent être jugées ensemble.»

14. Aux termes de l'article 2 du Règlement, par «opération» on entend

«un certain nombre d'actes ou d'omissions survenant à l'occasion d'un seul événement ou de plusieurs événements, en un seul endroit ou en plusieurs endroits, et faisant partie d'un plan, d'une stratégie ou d'un dessein commun».

15. Dans la mise en œuvre des dispositions du Règlement relatives à la jonction, la jurisprudence établit que, pour qu'elle soit autorisée, certaines conditions doivent être réunies, à savoir le rattachement des actes des accusés à une infraction pénale, susceptible d'être déterminée précisément dans le temps et dans l'espace, et l'existence d'un plan, d'une stratégie ou d'un dessein communs auxquels les accusés étaient parties[1].

16. La Chambre relève que les chefs d'accusation d'entente en vue de commettre le génocide des deux actes d'accusation contiennent respectivement les paragraphes 23 et 33 similaires se référant à la participation des deux accusés à la même opération visant à exterminer les Tutsis dans la commune de Kivumu. La Chambre constate que nombre de paragraphes des deux actes d'accusation relatent des faits plaçant les deux accusés aux mêmes endroits, aux mêmes moments et participant aux mêmes actes.

17. Une fois l'existence d'une même opération établie, l'article 48 *bis* laisse à la Chambre la possibilité d'ordonner ou non la jonction. Dans l'exercice de cette discrétion, la Chambre tiendra compte à la fois des droits de l'accusé pour lesquels elle est garante en vertu de l'article 19 (1) du Statut, et de l'intérêt de la justice qui est un élément de l'opportunité découlant de son pouvoir discrétionnaire. De l'avis de la Chambre, ce n'est que si les droits de l'accusé, Athanase Seromba, et l'intérêt de la justice ne sont pas affectés qu'une jonction pourra être autorisée.

18. La Chambre rappelle que le procès d'Athanase Seromba a déjà commencé et que le Procureur est sur le point de terminer la présentation des moyens de preuve à charge. Elle est d'avis que le fait d'accueillir la requête de la défense aux fins d'un procès joint des accusés Gaspard Kanyarukiga et Athanase Seromba se traduirait inévitablement par l'ajournement du procès d'Athanase Seromba et allongerait de manière substantielle la durée de la procédure. Ainsi, cette jonction de procès ne satisfait ni aux exigences de l'article 19 qui garantit le droit à un procès équitable et rapide, ni à celles de l'article 20 (4) (c) qui consacre le droit de la personne accusée, en l'occurrence Athanase Seromba, à être jugée sans retard excessif.

19. De l'avis de la Chambre, la référence à Gaspard Kanyarukiga dans l'acte d'accusation contre Athanase Seromba n'implique pas que la Chambre connaîtra des faits à sa charge. Dans ces conditions, la Chambre considère qu'il n'y a pas lieu de supprimer toute référence à Gaspard Kanyarukiga en l'espèce.

20. La Chambre relève que chaque accusé est jugé sur la base des éléments de preuve à sa charge présentés au cours de son procès et que les preuves produites contre un accusé ne valent qu'à son encontre. Les procès sont conduits devant des juges professionnels qui procèdent pour toute affaire dont ils sont saisis à l'évaluation de la preuve. Ils ne sont pas liés par les appréciations factuelles faites par leurs pairs dans d'autres affaires. En conséquence, il est inapproprié d'autoriser la défense de Gaspard Kanyarukiga à contre-interroger les témoins de l'accusation en l'espèce. La

[1] *Le Procureur c. Elizaphan Ntakirutimana et consorts*, Affaire ICTR N° 96-10-I-ICTR-96-17-T, «Décision sur la requête du Procureur en jonction des actes d'accusation», 22 février 2001, paras. 17-18.

Chambre rappelle que Gaspard Kanyarukiga est présumé innocent jusqu'à ce que sa culpabilité soit établie conformément aux dispositions du Statut et du Règlement du Tribunal.

21. Par ailleurs, en ce qui concerne la communication des transcriptions demandée par la défense, la Chambre rappelle que toutes les transcriptions des audiences publiques sont disponibles auprès du Greffe qui est invité en l'espèce à les communiquer à la défense de Gaspard Kanyarukiga. S'agissant des transcriptions des sessions à huis clos, les mesures de protection dont bénéficient les témoins[2] empêchent toute divulgation sans une autorisation préalable de la Chambre, qui fera l'objet d'un examen au cas par cas.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de l'accusé Gaspard Kanyarukiga en jonction et en suspension de procès, ainsi que les demandes alternatives.

Arusha, le 29 novembre 2004

[Signé] : Andrésia Vaz; Karin Hökborg; Gberdao Gustave Kam

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Décision relative à la requête de la défense aux fins de communication de pièces et de suspension du procès Articles 66 et 68 du Règlement de procédure et de preuve 13 décembre 2004 (TPIR-2001-66-T)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente; Karin Hökborg; Gberdao Gustave Kam

Athanase Seromba – Allégation de violation des mesures de protection des témoins par le dépôt de requêtes confidentielles, Allégation mal fondée – Obligation de communication des pièces par le Procureur, Obligation de communiquer les déclarations préalables des témoins, Définition des declarations préalables, Obligation de communication que dans la langue choisie par l'accusé pour sa défense, Obligation de communication dés l'entrée en possession des documents de nature à disculper en tout ou en partie l'accusé ou à porter atteinte à la crédibilité des éléments de preuve à charge mais pas avant – Requête rejetée

[2] *Le Procureur c. Athanase Seromba*, Affaire N° ICTR-2001-66-I, «Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins», 30 juin 2003.

Instrument international cité :

Règlement de Procédure et de preuve, art. 3 (D), 66, 66 (A) (ii), 68 et 68 (A); Statut, art. 20 (4) (a)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Ignace Bagilishema*, Décision sur la requête de la défense pour que la Chambre ordonne au Procureur de communiquer les aveux de culpabilité des témoins Y, Z et AA, 8 juin 2000 (ICTR-95-1A-T, Rec. 2000, p. 167); Chambre de première instance I,* Le Procureur c. Athanase Seromba*, Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins, 30 juin 2003 (ICTR-2001-66, Rec. 2003, p. 3991); Chambre de première instance* ***XXX****,* Le Procureur c. Aloys Simba*, Décision relative à la requête en vue d'ordonner des autorités rwandaises la communication au procureur des dossiers de poursuite des témoins prisonniers, 14 juillet 2004 (ICTR-2001-76-T, Rec. 2004, p.* ***XXX****)*

T.P.I.Y. : Chambre de première instance, Le Procureur c. Tihomir Blaškić*, Decision on the Production of Discovery Materials, 27 January 1997 (IT-95-14); Chambre de première instance,* Le Procureur c. Tihomir Blaškić*, Decision on the Defense Motion to Compel the Disclosure of Rule 66 and 68 Material Relating to Statements made by a person known as "X", 15 July 1998 (IT-95-14)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance III (la «Chambre»), composée des juges Andrésia Vaz, Présidente, Karin Hökborg et Gberdao Gustave Kam;

SAISI d'une «requête aux fins de communication de pièces : dossier complet des procès de Kibuye et Ruhengeri impliquant le père Athanase Seromba et sept témoins du Procureur (CBJ, CBN, CBO, CDL, YAU) appelés à déposer devant le Tribunal», déposée par la défense au Greffe le 24 septembre 2004; d'une «requête complémentaire aux fins de communication de pièces : dossier complet des procès de Kibuye et Ruhengeri impliquant le père Athanase Seromba et sept témoins du Procureur (CBJ, CBN, CBO, CDL, YAU) appelés à déposer devant le Tribunal. Dossiers complets des témoins CBI, CBQ, CBR, CBT, CDK et CNJ», déposée le 28 septembre 2004; et d'une «requête aux fins de suspension du procès en vue de la communication de pièces à la défense», déposée le 4 octobre 2004;

CONSIDÉRANT également la «réponse du Procureur à la requête de la défense tendant à la communication de pièces : dossier complet des procès de Kibuye et Ruhengeri impliquant le père A. Seromba et sept témoins du Procureur CBJ, CBN, CBO, CBS, CBY, CDL, YAU appelés à déposer devant le Tribunal», déposée le 28 septembre 2004, suivie d'une «réponse complémentaire aux fins de communication de pièces concernant les procès de Kibuye et de Ruhengeri impliquant le père A. Seromba et sept témoins du Procureur CBJ, CBN, CBO, CBS, CBY, CDL, YAU appelés à déposer devant le Tribunal», déposée le 29 septembre 2004;

CONSIDÉRANT le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve du Tribunal (le «Règlement»);

STATUE comme suit, sur la base des mémoires écrits des parties, conformément à l'article 73 (A) du Règlement.

ARGUMENTS DES PARTIES

La défense

1. Dans sa requête en communication de pièces en date du 24 septembre 2004, la défense fait valoir que le dossier judiciaire du procès des massacres à la paroisse catholique de Nyange qui s'est tenu, en première instance, à Kibuye et, en appel, à Ruhengeri est essentiel pour la défense de l'abbé Athanase Seromba, aux motifs que ce dernier y a été cité comme accusé, en compagnie de six autres personnes dont deux prêtres ayant été acquittés à l'issue de la procédure.

2. La défense soutient également que le dossier judiciaire susmentionné contient des éléments à décharge permettant de mieux contre-interroger ceux des témoins du Procureur ayant déjà comparu devant les juridictions rwandaises. Au nombre de ces témoins figurent notamment CBO, CBJ, CBN, CBY, CBS, CDL et YAU, pour lesquels la défense réclame la communication des documents judiciaires rwandais.

3. La défense allègue, par ailleurs, que la non communication par le Procureur de l'ensemble du dossier judiciaire rwandais constitue une violation des articles 20 (4) (e) du Statut et 66 du Règlement. Sur ce fondement, la défense demande à la Chambre de surseoir à l'audition des témoins CBO, CBJ, CBN, CBS, CBY, CDL et YAU jusqu'à communication par le Procureur du dossier judiciaire susvisé, dans les trois langues de travail du Tribunal que sont l'anglais, le français et le kinyarwanda.

4. Dans sa requête complémentaire en communication de pièces, la défense répartit les témoins de l'accusation en quatre catégories :

(i) La première catégorie vise les témoins non détenus et non comparants aux procès de Kibuye et de Ruhengeri. Il s'agit de Rémi Sahiri, Alessandro Farrugia, Materassi Massimo, CBK, YAT, CBI et CBT. La défense affirme être disposée à contre-interroger ces témoins, à l'exception CBI et CBT, pour lesquels la divulgation des déclarations non caviardées est incomplète.

(ii) La seconde catégorie concerne les témoins détenus et non comparants aux procès de Kibuye et de Ruhengeri, à savoir CBQ, CBR, CDK et CNJ. La défense exige la communication de la totalité du dossier judiciaire rwandais de chacun de ces témoins avant tout contre-interrogatoire.

(iii) La troisième catégorie regroupe les témoins non détenus ayant comparu dans les procès de Kibuye et de Ruhengeri. Il s'agit des témoins CBJ, CBN, CBS, CBY et YAU. La défense subordonne l'audition desdits témoins à la communication par le Procureur du dossier complet les concernant, y compris les pièces particulières requises dans la lettre du 23 septembre 2004 s'agissant notamment des témoins CBJ, CBN, CBS et YAU.

(iv) La quatrième catégorie englobe les témoins détenus ayant comparu aux procès de Kibuye et de Ruhengeri, à savoir CBO et CDL. La défense subordonne l'audition de ces témoins à la communication non seulement du dossier des procès susmentionnés, mais aussi du dossier judiciaire contenant leurs déclarations

antérieures. Au final, la défense allègue également de la non communication par le Procureur des déclarations non caviardées de ces deux témoins.

5. La défense soutient également que la jurisprudence du Tribunal fait obligation au Procureur de communiquer toutes les pièces demandées[1].

6. A ce stade, la défense demande plus spécifiquement à la Chambre de surseoir à l'audition des témoins à charge CBI, CBO, CBJ, CBN, CBR, CBS, CBT, CBY, CDK, CDL, CNJ et YAU jusqu'à communication par le Procureur des documents réclamés.

7. Dans sa requête en suspension du procès pour communication de pièces, la défense maintient toutes ses conclusions précédentes, en invoquant en plus la lettre de l'accusé du 4 octobre 2004. Dans cette lettre, lue à l'audience par son conseil principal, Athanase Seromba dénonce, en effet, une manœuvre de dissimulation des éléments disculpatoires de l'accusation par le Procureur. L'accusé soutient également que, nonobstant les demandes renouvelées de ses avocats, le Procureur ne communique qu'avec parcimonie le dossier judiciaire des procès de Kibuye et de Ruhengeri, procès dans lesquels il est cité comme accusé, en même temps que deux autres prêtres, acquittés en appel. Athanase Seromba fait valoir, en outre, que les rares éléments du dossier judiciaire susvisé, divulgués en Kinyarwanda à la défense, ne relèvent que des procédures suivies devant les *Gacaca*. L'accusé déclare, enfin, qu'une telle dissimulation des éléments de preuve à décharge porte atteinte à ses intérêts, en ce qu'elle constitue une violation de l'article 20 (4) du Statut et des articles 66 (A) et 68 du Règlement. En conséquence, il sollicite de la Chambre l'ajournement de l'audition des témoins de l'accusation jusqu'à divulgation complète du dossier judiciaire réclamé.

Le Procureur

8. Dans son mémoire en réplique en date du 28 septembre 2004, le Procureur dit avoir communiqué à la défense, aussi bien la liste des témoins de l'accusation appelés à déposer devant la Chambre que tous les documents relatifs au dossier judiciaire rwandais en sa possession. Ce faisant, le Procureur soutient s'être acquitté de toutes ses obligations au regard des dispositions de l'article 66 du Règlement. Au demeurant, le Procureur reproche à la défense de ne pas faire la preuve des démarches par elle entreprises aux fins d'obtention des documents réclamés.

[1] *Le Procureur c. Ignace Bagilishema*, affaire nº ICTR-95-1A-T, "Décision sur la requête de la défense pour que la Chambre ordonne au Procureur de communiquer les aveux de culpabilité des témoins Y, Z et AA"", 8 juin 2000; *The Prosecutor v. Pauline Nyiramasuhuko*, Case nº ICTR-97-21-T, "Decision on the Defence Motion for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda, and all other Documents Information Pertaining to the Judicial Proceedings in their respect", 18 September 2001, para. 20; *The Prosecutor v. Juvénal Kajelijeli*, Case nº. ICTR-98-44A-T, "Decision on Juvénal Kajelijeli Motion Requesting the Recalling of Prosecution Witness GAO", 2 November 2001, para. 6; *The Prosecutor v. Emmanuel Bagambiki et al*, Case nº. ICTR-99-46-T, «Decision on Bagambiki's and Ntagerura's Motion for Disclosure of Confessions of Detained Witnesses, 8 March 2002.

9. Le Procureur allègue, en outre, qu'Athanase Seromba n'était pas directement concerné par les procès de Kibuye et de Ruhengeri, la procédure à son égard ayant fait l'objet d'une disjonction.

10. Le Procureur fait valoir, par ailleurs, que la défense a violé les mesures de protection dont bénéficient les témoins en mentionnant dans sa requête que sept des témoins de l'accusation étaient directement impliqués dans les procédures au Rwanda, d'une part, et en précisant notamment que le témoin CBO a comparu comme accusé devant les Tribunaux rwandais, d'autre part.

11. De ce qui précède, le Procureur conclut au rejet de la requête de la défense, en tous ses chefs et demande, en outre, à la Chambre d'ordonner des mesures additionnelles afin de garantir la protection des témoins de l'accusation, en application de l'article 75 (A) du Règlement.

12. Dans son mémoire complémentaire du 29 septembre 2004, le Procureur maintient ses premières prétentions, tout en relevant notamment que la jurisprudence produite par la défense ne s'applique pas aux déclarations faites par des témoins non détenus.

DÉLIBÉRATIONS

Sur l'allégation de violation des mesures de protection de témoins

13. Dans ses réponses, le Procureur soutient que les requêtes introduites par la défense violent les mesures de protection des témoins, telles qu'ordonnées par la Chambre dans la présente affaire[2].

14. La Chambre note pourtant que les requêtes incriminées sont confidentielles. Dès lors, elle considère comme mal fondée la demande du Procureur aux fins de mesures additionnelles de protection de témoins.

Sur l'obligation de communication des pièces par le Procureur

L'obligation de communication résultant de l'article 66 (A) (ii)

15. La Chambre note que conformément aux dispositions de l'article 66 (A) (ii) du Règlement, le Procureur a l'obligation de communiquer à la défense :

> Au plus tard soixante jours avant la date fixée pour le début du procès, copie des dépositions de tous les témoins que le Procureur entend appeler à la barre. Une Chambre de première instance peut, à condition que le bien-fondé d'une telle mesure lui soit démontré, ordonner que des copies des déclarations de

[2] *Le Procureur c. Athanase Seromba*, affaire nº ICTR-2001-66-I, «Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins», 30 juin 2003.

témoins à charge supplémentaires soient remises à la défense dans un délai fixé par la Chambre.

16. La Chambre rappelle la décision *Blăskic* du Tribunal pénal international pour l'ex-Yougoslavie (le «TPIY») affirmant que toutes les déclarations préalables des témoins du Procureur, quelle qu'en soit la forme, doivent être communiquées à la défense[3].

17. La Chambre est d'avis que les dossiers judiciaires des témoins de l'accusation, ainsi que leurs dépositions dans les procès de Kibuye et de Ruhengeri, leurs aveux et confessions devant les autorités rwandaises, doivent être considérés comme des déclarations préalables que le Procureur a l'obligation de divulguer à la défense. Toutefois, lorsque ces déclarations préalables de témoins émanent d'instances autres que le Bureau du Procureur, le Procureur ne doit les divulguer à la défense que dans la mesure où il les a en sa possession ou sous son contrôle.

18. Dans sa Décision orale du 29 septembre 2004[4], la Chambre a constaté que le Procureur a communiqué, à la date du 27 septembre 2004, des documents en kinyarwanda relatifs au dossier judiciaire des témoins CNJ, CBR, CDK, CBT, CBQ, tel que réclamé par la défense. Le Procureur s'est également engagé à communiquer tout nouveau document qu'il recevrait des autorités rwandaises. Estimant que les documents dont la défense réclamait communication paraissaient importants pour le contre-interrogatoire, la Chambre a ordonné au Procureur de tout mettre en œuvre pour obtenir le dossier complet des procès de Kibuye et de Ruhengeri et les déclarations antérieures faites par les témoins de l'accusation devant les autorités rwandaises et de les communiquer à la défense[5].

19. La Chambre tient ici à préciser que l'obligation de divulgation incombant au Procureur ne peut s'exercer que dans la langue choisie par l'accusé pour sa défense, en conformité avec l'article 20 (4) (a) du Statut et l'article 3 du Règlement. En l'espèce, la Chambre constate que le Procureur a communiqué à la défense un certain nombre de documents en kinyarwanda, sans que ceux-ci n'aient, au préalable, fait l'objet d'une traduction en français, langue choisie par l'accusé Athanase Seromba. A cet égard, la Chambre reconnaît que même s'il revient au Procureur de prendre les mesures pratiques à même de lui permettre d'exécuter ses obligations en matière de communication de pièces, elle ne saurait pour autant, dans les circonstances actuelles, valablement lui imputer le défaut de traduction en français des documents réclamés par la défense, dans la mesure où les services de traduction du Tribunal ne relèvent pas de l'autorité du Procureur mais plutôt de celle du Greffier, conformément à l'article 3 (D) du Règlement. Dans ces conditions, la Chambre ne saurait donc conclure à une violation effective par le Procureur de son obligation de communication résultant de l'article 66 (A) (ii) du Règlement. En conséquence, la Chambre considère que la demande présentée à cette fin par la défense est mal fondée.

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[3] *The Prosecutor v. Tihomir Blaskic*, Case N° IT-95-14-pt, "Decision on the Production of Discovery Materials", 27 January 1997, para. 38.

[4] T. 29 septembre 2004, p. 8.

[5] *Le Procureur c. Aloys Simba*, affaire n°. ICTR-01-76-7, «Décision relative à la requête en vue d'ordonner des autorités rwandaises la communication au procureur des dossiers de poursuite des témoins prisonniers», 14 juillet 2004, para. 7.

20. La Chambre souligne, en outre, que ces documents n'émanant pas des services du Procureur, le délai fixé à l'article 66 (A) (ii) pour la communication à la défense des déclarations de témoins ne saurait s'appliquer en l'espèce.

L'obligation de communication résultant de l'article 68 (A) du Règlement

21. Aux termes des dispositions de l'article 68 (A) du Règlement :

> Le Procureur communique aussitôt que possible à la défense tous les éléments dont il sait effectivement qu'ils sont de nature à disculper en tout ou en partie l'accusé ou à porter atteinte à la crédibilité de ses éléments de preuve à charge.

22. La Chambre est d'avis que pour remplir, à l'égard de la défense, son obligation de communication visée à l'article 68 (A) du Règlement, le Procureur doit, au préalable, être en possession des documents qui sont de nature soit à disculper en tout ou en partie l'accusé, soit à porter atteinte à la crédibilité des éléments de preuve à charge[6].

23. En l'espèce, le Procureur déclare ne pas être en possession de la totalité des dossiers judiciaires et des procès verbaux d'audition des témoins réclamés par la défense. La défense n'en fournit pas non plus la preuve contraire[7]. La Chambre en déduit que l'allégation de violation de l'obligation de communication de l'article 68 (A) n'est pas avérée. En conséquence, la Chambre considère comme mal fondée la demande formulée par la défense à cette fin.

Sur la demande de suspension du procès

24. La Chambre relève qu'à ce jour, 12 des témoins de l'accusation sur les 18 annoncés par le Procureur ont déjà déposé. Or, au nombre de ceux-ci figurent notamment CBN, YAU, YAT et CBJ, quatre témoins pour lesquels la défense sollicite la suspension du procès jusqu'à communication par le Procureur des documents réclamés.

25. Sur ce point, la Chambre est d'avis que toute mesure de suspension ne peut valoir que pour les témoins n'ayant pas encore comparu devant elle. Les témoins CBN, YAU, YAT et CBJ ayant déjà comparu, la Chambre considère comme sans objet la demande de la défense aux fins de suspension du procès.

26. Au surplus, la Chambre rappelle sa décision orale du 29 septembre 2004[8], dans laquelle elle réserve le droit pour la défense de réclamer tout contre-interrogatoire supplémentaire pour ceux des témoins concernés par la procédure au Rwanda. Cette mesure garantit le droit de l'accusé à un procès équitable. Dans ces conditions, la Chambre estime qu'il n'y a pas lieu de suspendre le procès.

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[6] *Le Procureur c. Ignace Bagilishema*, affaire nº ICTR-95-1A-T, "Décision sur la requête de la défense pour que la Chambre ordonne au Procureur de communiquer les aveux de culpabilité des témoins Y, Z et AA"", 8 juin 2000, para. 7.

[7] *The Prosecutor v. Tihomir Blaskic*, " Decision on the Defense Motion to Compel the Disclosure of Rule 66 and 68 Material Relating to Statements made by a person known as "X"", Case N° IT-95-14-T, Ch. 15 July 1998, para. 14.

[8] T. 29 septembre 2004, p. 8.

PAR CES MOTIFS, LA CHAMBRE,

Rejette la requête de la défense en tous ses chefs.

Rejette, en outre, la demande du Procureur aux fins de mesures complémentaires de protection des témoins.

Arusha, le 13 décembre 2004

[Signé] : Andrésia Vaz; Karin Hökborg; Gberdao Gustave Kam

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The Prosecutor v. Ephrem SETAKO

Case N° ICTR-2004-81

Case History

- Name : SETAKO
- First Name : Ephrem
- Date of Birth : May 1949
- Sex : male
- Nationality : Rwandan
- Former Official Function : *Lieutenant Colonel* of Rwandan Armed Forces («FAR»)
- Date of indictment's confirmation : 22 March 2004
- Counts : genocide, or in the alternative, complicity to commit genocide, crimes against humanity (murder and extermination) and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II
- Date and Place of Arrest : 25 February 2004, in Amsterdam, The Netherlands
- Date of transfer : 17 November 2004
- Date of initial Appearance : 22 November 2004
- Pleading : not guilty
- Date Trial Began : 25 August 2008

Le Procureur c. Ephrem SETAKO

Affaire N° ICTR-2004-81

Fiche technique

- Nom : SETAKO
- Prénom : Ephrem
- Date de naissance : mai 1949
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : colonel à la retraite des Forces armées rwandaises («FAR»)
- Date de la confirmation de l'acte d'accusation : 22 mars 2004
- Chefs d'accusation : génocide, ou subsidiairement, complicité dans le génocide, crimes contre l'humanité (assassinat et extermination) et violations graves de l'article 3 commun aux Conventions de Genève de 1949 et du Protocole additionnel II auxdites conventions
- Date et lieu de l'arrestation : 25 février 2004, à Amsterdam, Pays-Bas
- Date du transfert : 17 novembre 2004
- Date de la comparution initiale : 22 novembre 2004
- Précision sur le plaidoyer : non coupable
- Date du début du procès : 25 août 2008

Ordonnance aux fins du Transfert et du placement en détention provisoire du suspect Articles 17, 18 et 28 du Statut et 40 **bis** *du Règlement de procédure et de preuve 26 février 2004 (ICTR-2004-81-DP)*

(Original : Français)

Juge : Andrésia Vaz, juge de permanence

Transfert – placement en détention provisoire – génocide, crime contre l'humanité, extermination, violations graves de l'article 3 commun aux Conventions de Genève – indices concordants, compétence du Tribunal – enquête en cours, éléments de preuve ont déjà été rassemblés, acte d'accusation à soumettre dans les deux semaines – détention par le Royaume des Pays-Bas – mesure nécessaire, risque d'évasion, d'intimidation ou d'atteintes à l'intégrité physique ou mentale des victimes ou des témoins, de destruction d'éléments de preuve, autrement nécessaire à la conduite de l'enquête – Quartier pénitentiaire du Tribunal à Arusha – information du suspect sur ses droits – requête accordée

Instruments internationaux cités : Statut, art. 2, 3, 17, 18 et 28 – Règlement de procédure et de preuve, art. 40 bis, 42, 43 – l'article 3 commun aux Conventions de Genève du 12 août 1949 pour la protection des victimes en temps de guerre, et du Protocole additionnel II auxdites Conventions du 8 juin 1977 – Résolution 955 adoptée le 8 novembre 1994 par le Conseil de sécurité des Nations Unies

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»);

SIEGEANT en la personne de Madame le Juge Andrésia Vaz, désignée par le Président du Tribunal conforérment à l'article 28 du Règlement de procédure et de preuve du Tribunal (le «Règlement»);

ETANT saisie de la «Request for Transfer and Provisional Detention Under Article 40 *bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda» déposée le 25 février 2004 par le Procureur;

NOTANT que, par ladite requête, le Procureur demande le transfert immédiat, et le placement en détention provisoire dans les locaux du centre de détention du Tribunal, d'Ephrem Setako, né en mai 1949 dans la commune de Nkuli en préfecture de Ruhengeri au Rwanda, colonel en retraite des Forces Armées Rwandaises;

CONSIDERANT la Résolution 955 adoptée le 8 novembre 1994 par le Conseil de sécurité des Nations Unies, à laquelle est annexé le Statut du Tribunal (le «Statut»), et en particulier les articles 17, 18 et 28 du Statut, ainsi que le Règlement de procédure et de preuve du Tribunal (le «Règlement»), en particulier l'article 40 *bis* du Règlement, aux termes duquel :

> Article 40 *bis* : Transfert et détention provisoire de suspects
>
> A) Dans le cadre d'une enquête, le Procureur peut transmettre au Greffier, pour ordonnance par un juge désigné conformément à l'article 28, une requête

aux fins de transfert et de placement en détention provisoire d'un suspect dans les locaux du quartier pénitentiaire relevant du Tribunal. Cette requête est motivée et, à moins que le Procureur souhaite seulement interroger le suspect, mentionne un chef d'accusation provisoire et est accompagnée d'un sommaire des éléments sur lesquels s'est appuyé le Procureur.

B) Le juge ordonne le transfert et la détention provisoire du suspect, si les conditions suivantes sont remplies :

i) Le Procureur a demandé à un Etat de procéder à l'arrestation et au placement en garde à vue du suspect, conformément à l'article 40, ou le suspect est autrement détenu par un Etat;

ii) Après avoir entendu le Procureur, le juge considère qu'il existe des indices graves et concordants tendant à montrer que le suspect aurait commis une infraction relevant de la compétence du Tribunal;

iii) Le juge considère la détention provisoire comme une mesure nécessaire pour empêcher l'évasion du suspect, l'intimidation ou les atteintes à l'intégrité physique ou mentale des victimes ou des témoins ou la destruction d'éléments de preuve ou comme autrement nécessaire à la conduite de l'enquête.

C) La détention provisoire du suspect peut être ordonnée pour une durée qui ne saurait être supérieure à 30 jours à compter du lendemain du transfert du suspect au quartier pénitentiaire du Tribunal.

D) L'ordonnance de transfert et de placement en détention provisoire du suspect doit être signée par le juge et revêtue du sceau du Tribunal. L'ordonnance mentionne les éléments sur lesquels le Procureur se fonde pour présenter la requête visée au paragraphe (A), y compris le chef d'accusation provisoire, ainsi que les motifs pour lesquels le juge rend l'ordonnance, compte tenu du paragraphe (B). L'ordonnance précise également la durée initiale de la détention provisoire et est accompagnée d'un document rappelant les droits du suspect, tels qu'indiqués par le présent article et les articles 42 et 43.

E) Dès que possible, des copies de l'ordonnance et de la requête du Procureur sont notifiées par le Greffier au suspect et à son conseil.

(..)

AYANT ENTENDU le Procureur dans le cadre d'une procédure non contradictoire ce jour, 26 février 2004, et ayant examiné l'ensemble des éléments qui nous ont été soumis, y compris une déclaration du Chef des enquêtes du Bureau du Procureur datée du 19 février 2004, annexée à la requête («la déclaration du 19 février 2004»);

NOTANT que le Procureur suspecte Ephrem Setako d'avoir participé à une campagne d'extermination visant des centaines de Tutsi dans la préfecture de Ruhengeri au Rwanda au regard de faits survenus durant la période de compétence temporelle du Tribunal, tels que décrits dans la déclaration du 19 février 2004, attestant que des enquêtes sont en cours, que certains éléments de preuve ont déjà été rassemblés et qu'il compte soumettre un acte d'accusation à l'encontre d'Ephrem Setako dans les deux semaines à venir;

CONSIDERANT que la requête du Procureur est suffisamment motivée, et qu'elle inclut trois chefs d'accusation provisoire à l'encontre du suspect : celui de génocide, conformément à l'article 2 du Statut, celui de crimes contre l'humanité, conformément à l'article 3 du Statut, et celui de violations graves de l'article 3 commun aux

Conventions de Genève du 12 août 1949 pour la protection des victimes en temps de guerre, et du Protocole additionnel II auxdites Conventions du 8 juin 1977, conformément à l'article 3 du Statut;

CONSIDERANT que le suspect, Ephrem Setako, est actuellement détenu par les autorités nationales du Royaume des Pays-Bas;

CONSIDERANT qu'il existe des indices graves et concordants tendant à montrer que le suspect, Ephrem Setako, aurait commis une ou plusieurs infractions relevant de la compétence du Tribunal;

CONSIDERANT, en outre, que la détention provisoire du suspect Ephrem SETAKO apparaît comme une mesure nécessaire pour empêcher l'évasion du suspect, l'intimidation ou les atteintes à l'intégrité physique ou mentale des victimes ou des témoins ou la destruction d'éléments de preuve ou comme autrement nécessaire à la conduite de l'enquête.

LE TRIBUNAL,

I. FAIT DROIT A LA REQUETE

II. ORDONNE le transfert immédiat du suspect Ephrem Setako au Quartier pénitentiaire du Tribunal à Arusha et son placement en détention provisoire pour 30 jours à compter du lendemain de son transfert au Quartier pénitentiaire du Tribunal;

III. ENJOINT au Procureur de déposer l'acte d'accusation concernant le suspect dès que possible, afin que la décision sur la requête aux fins de confirmation de l'acte puisse être rendue avant l'expiration du délai de 30 jours;

IV. DONNE INSTRUCTION au Greffier :

i) de donner notification de cette Ordonnance aux autorités compétentes du Royaume des Pays-Bas, et d'en informer le Gouvernement de la République rwandaise;

ii) de notifier dès que possible au suspect et à son conseil des copies de la présente ordonnance et de la requête du Procureur;

iii) de s'assurer que le suspect aura été informé de ses droits en vertu, notamment, des articles 17 du Statut et 40 *bis*, 42 et 43 du Règlement, dispositions dont copie devra lui être remise.

V. PRIE le Gouvernement du Royaume des Pays-Bas de se conformer à la présente Ordonnance aux fins du transfert et du placement en détention provisoire du suspect Ephrem SETAKO, conformément à la Résolution 955 du Conseil de sécurité des Nations Unies et à l'article 28 du Statut annexé à cette dernière, et de placer Ephrem SETAKO en garde à vue dans l'attente de son transfert au siège du Tribunal.

Fait à Arusha, le 26 février 2004

[Signé] : Andrésia Vaz

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Indictment
22 March 2004 (ICTR-2004-81-I)

(Original : English)

The Prosecutor of the International Criminal Tribunal for Rwanda ("The Prosecutor"), pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda (the "Statute of the Tribunal"), charges :

Colonel Ephrem SETAKO

with GENOCIDE, pursuant to Articles 2 (3) (a), 6 (1) and 6 (3) of the Statute of the Tribunal; or alternatively, COMPLICITY IN GENOCIDE, pursuant to Articles 2 (3) (e) and 6 (1) of the Statute of the Tribunal; MURDER as a CRIME AGAINST HUMANITY, pursuant to articles 3 (a), 6 (1) and 6 (3) of the Statute of the Tribunal; EXTERMINATION as a CRIME AGAINST HUMANITY, pursuant to Articles 3 (b), 6 (1) and 6 (3) of the Statute of Tribunal and WAR CRIMES pursuant to Articles 4 (a), 4 (f), 6 (1) and 6 (3) of the Statute of the Tribunal.

THE ACCUSED

1. Colonel Ephrem Setako was born in May 1949 in Nkuli commune, Ruhengeri prefecture, Rwanda.

2. During the period covered by this indictment, Colonel Ephrem Setako was a retired Colonel in the *Forces Armées Rwandaises* ["FAR"], the Rwandan Army. Though retired, he was nonetheless a senior public official by virtue of his participation in the United Nations Group of Military Observers in Rwanda. Colonel Ephrem Setako was trained as a lawyer and also previously served the Ministry of Defense in its *Division des Affaires Administratives et Juridiques*.

CONCISE STATEMENT OF FACTS, INCLUDING CHARGES

3. During the period covered by this indictment, Colonel Ephrem Setako participated in a joint criminal enterprise with the following individuals : Col. Theoneste Bagosora, Col. Anatole Nsengiyumva, Protais Zigiranyirazo, Joseph Nzirorera, Casimir Bizimunugu, Col. Augustin Bizimungu, Juvénal Kajelijeli, Esdras Baheza, Musafiri, Michel Niyigaba, Dominique Gatsimbanyi, Basile Nsabumugisha, Cap. Hasengineza, Fabien Manirigaba, Col. Ntibitura, Col. Marcel Bivugabagabo, and other known and unknown participants. Each member of the joint criminal enterprise acted in concert with each other and with other members of the joint criminal enterprise, either directly or through their subordinates, which included members of the FAR, the Presidential Guard, the *Interahamwe*, the *Amahindure*, "Civil Defence Forces," and other soldiers and militiamen.

Acte d'accusation
22 mars 2004 (ICTR-2004- 81-I)

(Original : Anglais)

Le Procureur du Tribunal pénal international pour le Rwanda (le «Procureur»), en vertu des pouvoirs qui lui sont conférés par l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le «Statut»), accuse

le colonel Ephrem SETAKO

de GENOCIDE, en application des articles 2 (3) (a), 6 (1) et 6 (3) du Statut, ou, à titre subsidiaire, de COMPLICITE DANS LE GENOCIDE, en application des articles 2 (3) (e) et 6 (1) du Statut, ainsi que d'ASSASSINAT constitutif de CRIME CONTRE L'HUMANITE, en application des articles 3 (a), 6 (1) et 6 (3) du Statut, d'EXTERMINATION constitutive de CRIME CONTRE L'HUMANITE, en application des article 3 (b), 6 (1) et 6 (3) du Statut, et de CRIMES DE GUERRE, en application articles 4 (a), 4 (f), 6 (1) et 6 (3) du Statut.

L'ACCUSÉ

1. Le colonel Ephrem Setako est né en mai 1949, dans la commune de Nkuli, préfecture de Ruhengeri, au Rwanda.

2. Ephrem Setako était colonel à la retraite des Forces armées rwandaises (les «FAR») au moment des faits visés dans le présent acte d'accusation. Bien que retraité de l'armée rwandaise, il avait la qualité de haut fonctionnaire du fait de sa participation au Groupe d'observateurs militaires des Nations Unies au Rwanda. Avocat de formation, il avait également travaillé pour la Division des affaires administratives et juridiques du ministère de la défense.

CHEFS D'ACCUSATION ET EXPOSÉ SUCCINCT DES FAITS

3. Durant la période visée dans le présent acte d'accusation, le colonel Ephrem Setako a pris part à une entreprise criminelle commune réunissant le colonel Théoneste Bagosora, le colonel Anatole Nsengiyumva, Protais Zigiranyirazo, Joseph Nzirorera, Casimir Bizimungu, le colonel Augustin Bizimungu, Juvénal Kajelijeli, Esdras Baheza, Musafiri, Michel Niyigaba, Dominique Gatsimbanyi, Basile Nsabumugisha, le capitaine Hasengineza, Fabien Manirigaba, le colonel Ntibitura, le colonel Marcel Bivugabagabo, et d'autres personnes connues et inconnues. Chaque membre de l'entreprise criminelle commune a agi de concert avec les autres membres, soit directement, soit par l'intermédiaire de ses subordonnés, parmi lesquels les membres des FAR, de la Garde présidentielle, des *Interahamwe*, des *Amahindure* et des «Forces de défense civile», ainsi que d'autres militaires et miliciens.

4. The object and purpose of the joint criminal enterprise was to destroy, in whole or in part, the Tutsi racial or ethnical group, as such; to kill persons identified as Tutsi or presumed to support the Tutsi or to be politically opposed to "Hum Power" in a widespread or systematic attack against a civilian population on political, ethnic, or racial grounds; which included murdering, seriously harming, and/or otherwise treating in a cruel manner, and pillaging property of persons not taking an active part in hostilities during a non-international armed conflict between the Rwandan Government and the Rwanda Patriotic Front ["RPF"].

5. The crimes enumerated in Counts 1-6 of this indictment were within the object and purpose of the joint criminal enterprise. Colonel Ephrem Setako either intended the commission of each of these crimes, or alternatively, Colonel Ephrem Setako was aware that these crimes were the possible consequence of the execution of the joint criminal enterprise and the crimes were in fact the natural and foreseeable consequences of its execution.

6. Colonel Ephrem Setako, acting individually or in concert with other members of the joint criminal enterprise, participated in the joint criminal enterprise in the following ways :

a. Planning, instigating, ordering, participating in, or otherwise aiding and abetting the killing of Tutsi civilians in Ruhengeri and Kigali-ville *préfectures*, in particular, by training, indoctrinating, encouraging, and distributing arms to members of the FAR, the Presidential Guard, the *Interahamwe*, the *Amahindure*, "Civil Defence Forces," and other soldiers and militiamen engaged in the execution of the purpose of the joint criminal enterprise;

b. Directing, commanding, controlling and otherwise asserting effective control over members of the FAR, the Presidential Guard, the *Interahamwe*, the *Amahindure*, "Civil Defence Forces," and other soldiers and militiamen engaged in the execution of the purpose of the joint criminal enterprise.

7. By virtue of his former military rank and status and his role in providing and supervising their military training, Colonel Ephrem Setako was a superior to and exercised effective control over soldiers including Presidential Guards, communal police, and militiamen, particularly *Interahamwe*, "Civil Defence Forces," and *Amahindure* in Ruhengeri and Kigali-ville *préfectures*. Furthermore, Colonel Ephreln Setako's close public associations with high-ranking national military and political figures further reinforced his authority over local residents and militiamen in Nkuli, Mukingo and Kiyovu *communes*. For each crime committed by these subordinates, Colonel Ephrem Setako knew or had reason to know that these crimes were about to be or had been committed and he failed to take necessary and reasonable measures to prevent them or to punish the persons who committed them.

8. Between 1 January and 31 December 1994, citizens native to Rwanda were severally identified according to the following ethnic or racial classifications : Tutsi, Hutu, and Twa.

4. L'objectif et le dessein de l'entreprise criminelle commune étaient de détruire en tout ou en partie le groupe racial ou ethnique tutsi comme tel, de tuer, dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale, des personnes identifiées comme étant tutsies ou considérées comme soutenant les Tutsis ou politiquement opposées au mouvement «Hutu Power», et, notamment, de tuer des personnes ne prenant pas une part active aux hostilités du conflit armé non international opposant le gouvernement rwandais et le Front patriotique rwandais (le «FPR»), de porter gravement atteinte à l'intégrité de ces personnes et/ou leur infliger tous autres traitements cruels et de piller leurs biens.

5. Les crimes énumérés aux chefs 1 à 6 du présent acte d'accusation relevaient de l'objectif et du dessein de l'entreprise criminelle commune. Le colonel Ephrem Setako entendait que chacun de ces crimes soit commis ou, à défaut, savait que ces crimes étaient la conséquence possible de la mise en oeuvre de l'entreprise criminelle commune, dont ils étaient en fait la conséquence naturelle et prévisible.

6. Le colonel Ephrem Setako, agissant seul ou de concert avec d'autres parties à l'entreprise criminelle commune, a participé à celle-ci comme suit :

a. Il a planifié, incité à commettre, ordonné, contribué à commettre ou de toute autre manière aidé et encouragé à commettre le meurtre des civils tutsis dans les préfectures de Ruhengeri et de Kigali-ville, notamment en formant, en endoctrinant, en encourageant et en armant les membres des FAR, de la Garde présidentielle, des *Interahamwe*, des *Amahindure* et des «Forces de défense civile», ainsi que d'autres militaires et miliciens engagés dans la réalisation du dessein de l'entreprise criminelle commue;

b. Il a dirigé, commandé, contrôlé les membres des FAR, de la Garde présidentielle, des *Interahamwe*, des *Amahindure*, des «Forces de défense civile», ainsi que d'autres militaires et miliciens engagés dans la réalisation du dessein de l'entreprise criminelle commune, et a de toute autre manière exercé un contrôle effectif sur ces personnes.

7. Du fait du grade et du statut qui avaient été les siens au sein de l'armé rwandaise, et du rôle qu'il jouait en assurant et en supervisant l'entraînement militaire des intéressés, le colonel Ephrem Setako était un supérieur hiérarchique qui exerçait un contrôle effectif sur les militaires – dont les gardes présidentiels –, la police communale et les miliciens – en particulier sur les *Interahamwe*, les «Forces de défense civile» et les *Amahindure* –, dans les préfectures de Ruhengeri et de Kigali-ville. En outre, l'association, étroite et notoire, du colonel Ephrem Setako avec des personnalités militaires et politiques de haut rang a contribué à asseoir son autorité auprès des habitants et des miliciens des communes de Nkuli, de Mukingo et de Kiyovu. Chaque fois qu'un crime a été perpétré par les subordonnés précités, le colonel Ephrern Setako savait ou avait des raisons de savoir que l'infraction allait être ou avait été commise et n'a pas pris les mesures nécessaires et raisonnables pour empêcher sa commission ou en punir les auteurs.

8. Entre le 1er janvier et le 31 décembre 1994, une distinction était faite entre les citoyens d'origine rwandaise selon la classification ethnique ou raciale suivante : Tutsis, Hutus et Twas.

9. Between 6 April and 17 July 1994, throughout Rwanda, there were widespread or systematic attacks against a civilian population based on Tutsi ethnic or racial identification or political opposition to the MRND. As a result of the attacks there was a large number of deaths of persons of Tutsi ethnic or racial identity and of persons perceived to be politically opposed to the MRND.

Counts 1 - 2 : Genocide, or alternatively Complicity in Genocide

The Prosecutor charges Colonel Ephrem Setako with GENOCIDE, a crime stipulated in Article 2 (3) (a) of the Statute, in that on or between the dates of 1 January and 17 July 1994, in Ruhengeri and Kigali-ville *préfectures*, Rwanda, Colonel Ephrem Setako was responsible for killing or causing serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, the Tutsi racial or ethnical group.

Alternatively, the Prosecutor charges Colonel Ephrem Setako with COMPLICITY IN GENOCIDE, a crime stipulated in Article 2 (3) (e) of the Statute, in that on or between the dates of 1 January and 17 July 1994, in Ruhengeri and Kigali-ville *préfectures*, Rwanda, Colonel Ephrem Setako instigated or provided the means to other persons to kill or cause serious bodily or mental harm to members of the Tutsi population, knowing that those other persons intended to destroy, in whole or in part, the Tutsi racial or ethnical group.

10. Colonel Ephrem Setako's intention to destroy in whole or in part the Tutsis as a group was manifested in many ways, including by various statements that he made, orders that he issued, meetings that he presided or attended, and by his public association with, support of, and collaboration with other notorious advocates of the destruction of the Tutsi, as set forth in this indictment.

11. Between January and July 1994, Colonel Ephrem Setako met regularly with the *Interahamwe* and other influential MRND members and military officers to instigate, prepare and plan the killing of Tutsis. They met on diverse dates at several locations in Ruhengeri *préfecture*, particularly in Nkuli and Mukingo communes, notably :

11.1. Between January and April 1994, Colonel Ephrem Setako participated in regular meetings with influential persons from Nkuli and Mukingo communes, including Joseph Nzirorera, Col. Augustin Bizimungu, Juvénal Kajelijeli and various political leaders and businessmen and members of the local and regional territorial administration to instigate, prepare and plan the killing of Tutsis. These meetings were held once a week on average, generally on weekends, at the residence of Joseph Nzirorera in Busogo *secteur*, Nkuli *commune*. During these meetings Colonel Ephrem Setako addressed participants and advised that all Tutsi without exception must be exterminated.

9. Entre le 6 avril et le 17 juillet 1994, sur toute l'étendue du territoire du Rwanda, des attaques généralisées ou systématiques ont été dirigées contre la population civile sur la base de l'appartenance des victimes à l'ethnie ou à la race tutsie, ou de leur opposition politique au MRND. De nombreuses personnes appartenant à l'ethnie ou à la race tutsie, ou considérées comme politiquement opposées au MRND, ont perdu la vie par suite de ces attaques.

Chefs 1 et 2 : Génocide ou, à titre subsidiaire, complicité dans le génocide

Le Procureur accuse le colonel Ephrem Setako de GENOCIDE, infraction prévue à l'alinéa (a) du paragraphe (3) de l'article 2 du Statut, en ce que, entre le 1er janvier et le 17 juillet 1994 ou à ces dates, dans les préfectures de Ruhengeri et de Kigali-ville, au Rwanda, le colonel Ephrem Setako a été responsable du meurtre de membres de la population tutsie ou d'atteintes graves à leur intégrité physique ou mentale, actes commis dans l'intention de détruire en tout ou en partie le groupe racial ou ethnique tutsi.

Subsidiairement, le Procureur accuse le colonel Ephrem Setako de COMPLICITE DANS LE GENOCIDE, infraction prévue à l'alinéa (e) du paragraphe (3) de l'article 2 du Statut, en ce que, entre le 1er janvier et le 17 juillet 1994 ou à ces dates, dans les préfectures de Ruhengeri et de Kigali-ville, au Rwanda, le colonel Ephrem Setako a incité à tuer les membres de la population tutsie ou à porter gravement atteinte à leur intégrité physique ou mentale, ou a fourni aux auteurs de ces crimes les moyens de les commettre, en sachant que lesdits auteurs avaient l'intention de d6tmire en tout ou en partie le groupe racial ou ethnique tutsi.

10. Le colonel Ephrem Setako a manifesté de maintes façons son intention de détmire en tout ou en partie le groupe tutsi comme tel, notamment par diverses déclarations qu'il a faites, par des ordres qu'il a donnés, par des réunions qu'il a présidées ou auxquelles il a assisté, et par les liens avérés qu'il a noués – par association, soutien et collaboration – avec d'autres partisans notoires de la destruction des Tutsis, comme indiqué dans le présent acte d'accusation.

11. Entre les mois de janvier et de juillet 1994, le colonel Ephrem Setako s'est régulièrement réuni avec les *Interahamwe* ainsi que des membres influents du MRND et des officiers de l'armée rwandaise pour inciter à commettre, préparer et planifier le meurtre des Tutsis. Ces réunions se sont tenues à diverses dates, en divers lieux de la préfecture de Ruhengeri, et en particulier dans les communes de Nkuli et de Mukingo, notamment aux occasions suivantes :

11.1 Entre les mois de janvier et d'avril 1994, le colonel Ephrem Setako a participé à des réunions régulières avec des personnes influentes des communes de Nkuli et de Mukingo, dont Joseph Nzirorera, le colonel Augustin Bizimungu, Juvénal Kajelijeli et divers dirigeants politiques, hommes d'affaires et membres de l'administration locale et régionale, pour inciter à commettre, préparer et planifier le meurtre des Tutsis. Ces réunions se tenaient en moyenne une fois par semaine, généralement le week-end, en la demeure de Joseph Nzirorera, dans le secteur de Busogo, commune de Nkuli. Lors de ces réunions, le colonel Ephrem Setako s'est adressé aux participants pour leur indiquer que tous les Tutsis sans exception devaient être exterminés.

11.2. On a date unknown between 14 and 31 March 1994, during a meeting held at the residence of Joseph Nzirorera in Busogo *secteur*, Nkuli *commune*, Colonel Ephrem Setako ordered members of the *Amahindure* ("Volcanic Lava Force"), paramilitary group, and *Interahamwe* to mount roadblocks and to search for, and kill, all Tutsi. At this same meeting, Colonel Ephrem Setako also ordered members of the *Amahindure* and *Interahamwe* to exterminate all Tutsi without exception if the RPF advanced to Ruhengeri. Acting on these orders, members of the *Amahindure* and *Interahamwe* set up roadblocks and killed Tutsi in Mukingo *commune*.

11.3. During March and April 1994 on dates unknown, at meetings held once a week on average, generally on weekends, at the residence of Joseph Nzirorera in Busogo *secteur*, Nkuli *commune*, Colonel Ephrem Setako instigated and planned the killing of Tutsi by ordering local administrative officials and *Interahamwe* to accelerate the mounting of roadblocks to prevent the flight or the escape of Tutsi civilians and of Hutu civilians politically opposed to the MRND so that they could be killed.

12. On a date unknown between 1 February and 31 March 1994, Colonel Ephrem Setako delivered a quantity of weapons to a roadblock in Nkuli *commune*, including rifles and ammunition and grenades, intending them to be distributed to *Interahamwe* and used to kill Tutsi civilians. The weapons distributions and the instructions to *Interahamwe* during 1994 followed a pattern that Colonel Ephrem Setako had already established during period 1990-1993 leading up to April 1994 wherein Colonel Ephrem Setako planned and prepared the killing of Tutsi by providing military training, weapons, *kitenge* uniforms, and anti-Tutsi indoctrination to demobilized soldiers and *Interahamwe*.

13. On or about the morning of 7 April 1994, Colonel Ephrem Setako, accompanied by Joseph Nzirorera, transported a load of weapons, including machetes and rifles, to the *bureau communal* in Nkuli *commune* and caused them to be distributed to a group of *Interahamwe*. Colonel Ephrem Setako and Joseph Nzirorera addressed the *Interahamwe*, after which the group dispersed in several different directions to search for and kill the Tutsis.

14. On or about the morning of 7 April 1994, Colonel Ephrem Setako participated in a meeting at the Busogo *secteur* residence of Joseph Nzirorera with, among others, Juvénal Kajelijeli, Esdras Baheza, a businessman, and Bambonye, President of the CDR in Mukingo *commune*. During the meeting, Colonel Ephrem Setako and the other participants decided that all Tutsi must be killed in retaliation for the death of President Juvénal Habyarimana. Immediately thereafter, and in furtherance of their decision to exterminate all Tutsi, Juvénal Kajelijeli and Bambonye gathered together a group of *Interahamwe* from the marketplace and ordered them to commence the attacks. Starting that morning and continuing through the afternoon, *Interahamwe* militiamen led by Juvénal Kajelijeli, providing assistance to and reinforced by soldiers from Mukamira Military Camp, attacked and killed hundreds of Tutsi civilians in Busogo *secteur.*

11.2. A une date indéterminée située entre le 14 et le 31 mars 1994, lors d'une réunion tenue en la demeure de Joseph Nzirorera, dans le secteur de Busogo, commune de Nkuli, le colonel Ephrem Setako a donné ordre à des membres du groupe paramilitaire des *Amahindure* («la force de la lave») et à des membres des *Interahamwe* de mettre en place des barrages routiers ainsi que de rechercher et de tuer tous les Tutsis. A cette réunion, le colonel Ephrem Setako a également ordonné aux *Amahindure* et aux *Interahamwe* d'exterminer tous les Tutsis sans exception si le FPR avançait sur Ruhengeri. Exécutant les ordres ainsi donnés, les *Amahindure* et les *Interahamwe* ont établi des barrages routiers et tué les Tutsis dans la commune de Mukingo.

11.3. A des dates indéterminées des mois de mars et d'avril 1994, lors de réunions tenues en moyenne une fois par semaine, généralement le week-end, en la demeure de Joseph Nzirorera, dans le secteur de Busogo, commune de Nkuli, le colonel Ephrem Setako a incité à commettre et planifié le meurtre des Tutsis en ordonnant a des responsables de l'administration locale et aux *Interahamwe* d'accélérer la mise en place de barrages routiers pour empêcher la fuite ou l'évasion des civils tutsis ou des civils hutus politiquement opposés au MRND, afin que ceux-ci fussent tués.

12. A une date indéterminée située entre le 1er février et le 31 mars 1994, le colonel Ephrem Setako a livré des armes à un barrage routier de la commune de Nkuli, notamment des fusils, des munitions et des grenades, son intention étant que ces armes fussent distribuées aux *Interahamwe* et utilisées pour tuer les civils Tutsis. La distribution d'armes et les instructions données aux *Interahamwe* en 1994 suivaient un schéma que le colonel Ephrem Setako avait déjà établi de 1990 à 1993, durant la période précédant avril 1994. Selon ce schéma, le colonel Ephrem Setako planifiait et préparait le meurtre des Tutsis en assurant l'entraînement militaire, l'approvisionnement en armes et en uniformes de tissu kitenge et l'endoctrinement anti-tutsi des militaires démobilisés et des *Interahamwe*.

13. Dans la matinée du 7 avril 1994 ou vers ce moment, le colonel Ephrem Setako, accompagné de Joseph Nzirorera, a transporté une cargaison d'armes, parmi lesquelles des machettes et des fusils, au bureau communal de Nkuli, et a fait en sorte qu'elles fussent distribuées à un groupe d'*Interahamwe*. Le colonel Ephrem Setako et Joseph Nzirorera se sont adressés aux *Interahamwe*, par suite de quoi le groupe s'est dispersé et ses membres sont partis dans diverses directions pour traquer et tuer les Tutsis.

14. Dans la matinée du 7 avril 1994 ou vers ce moment, le colonel Ephrem Setako a participé à une réunion tenue en la demeure de Joseph Nzirorera, dans le secteur de Busogo, à laquelle assistaient également, entre autres personnes, Juvénal Kajelijeli, Esdras Baheza, homme d'affaires, et Bambonye, président de la CDR dans la commune de Mukingo. A cette réunion, le colonel Ephrem Setako et les autres participants ont décidé que tous les Tutsis devaient être tués en représailles à la mort du Président Juvénal Habyarimana. Immédiatement après cette réunion, et en exécution de la décision prise par les participants d'exterminer tous les Tutsis, Juvénal Kajellieli et Bambonye ont rassemblé un groupe d'*Interahamwe* qui se trouvaient au marché et leur ont donné l'ordre de déclencher les attaques. A partir de ce matin-là et durant tout l'après-midi, les miliciens *Interahamwe*, menés par Juvénal Kajelijeli, prêtant main forte aux militaires du camp de Mukamira et renforcés par ceux-ci, ont attaqué et tué des centaines de civils tutsis dans le secteur de Busogo.

15. Victims of the attacks included whole families of Tutsi resident in Busogo *secteur*, notably Sebahutu, Gateyiteyi, and Kamakora and their families, along with approximately 300 Tutsi that sought refuge inside the Busogo *paroisse*, all of whom were killed. The dead bodies from the church were removed the next day and buried in mass graves in Rwinzovu *secteur* upon orders from Juvénal Kajelijeli and Col. Augustin Bizimungu.

16. On or about 8 April 1994 Colonel Ephrem Setako delivered a quantity of weapons and military provisions, including numerous rifles, ammunition, pistols and camouflage uniforms, to Juvénal Kajelijeli at the Mukingo *bureau communal*. Colonel Ephrem Setako intended the weapons and provisions to be distributed and used to kill the Tutsis and they were in fact distributed and used in this manner.

17. On or about 11 April 1994 Colonel Ephrem Setako instigated, ordered, and aided and abetted the killing of Tutsi civilians throughout the various communes in Ruhengeri *prefecture* by expanding the training and membership in the *Amahindure* from 80 to over 600 youths, by providing further military training, rifles, and grenades to the *Amahindure*, and by ordering them to go even to Butaro, the farthest *commune* in Ruhengeri bordering Uganda, and to kill all Tutsi there.

18. On a date unknown between 14 and 18 April 1994, Colonel Ephrem Setako, accompanied by Col. Augustin Bizimungu, Col. Marcel Bivugabagabo and Maj. Mugaragu, and others, instigated, ordered, and participated in the planning of an attack upon the Court of Appeals building in Ruhengeri where numerous Tutsi civilians, largely women, children and elderly persons, were sheltered. Before the attack, Colonel Setako told the group of attackers that the only enemy was the Tutsi and that they must be exterminated. The attackers used firearms and traditional weapons. Approximately 100-300 Tutsi were killed. Colonel Ephrem Setako was present when the attack began. Afterwards, he asked the attackers to confirm that all Tutsi had been killed.

19. On diverse dates between 12 April and 30 June 1994 Colonel Ephrem Setako, accompanied by and acting in concert with, or assisting, various military authorities, such as Col. Theoneste Bagosora, Col. Anatole Nsengiyumva, Col. Tharcisse Renzaho, along with Protais Zigiranyirazo, instigated, ordered, participated in or aided and abetted the killing of Tutsis in Kigali-ville *préfecture*, notably :

19.1 On a date unknown between 12 and 15 April 1994, Colonel Ephrem Setako, accompanied by Protais Zigiranyirazo, Col. Theoneste Bagosora and Col. Anatole Nsengiyumva, instigated and aided and abetted the killings of Tutsis at a principal roadblock in Kiyovu *commune*. The roadblock, adjacent to the Kiyovu residence of Protais Zigiranyirazo, was strategically situated on a thoroughfare leading to the Embassies of France, Germany and Tanzania, and the Hotel Milles ColIines and the Presbyterian Church, which were likely centers of refuge for Tutsi fleeing attacks. It was manned by 40-50 persons including members of the *Interahamwe* and the Presidential Guard. On this occasion Colonel Ephrem Setako arrived at the roadblock as *Interahamwe* were killing several Tutsi. He remained while the attackers finished off the survivors and stood with Col. Theoneste Bagosora and Protais Zigiranyirazo as

15. Parmi les victimes de ces attaques figuraient des familles entières de Tutsis habitant dans le secteur de Busogo. Ont ainsi perdu la vie, Sebahutu, Gateyiteyi, Kamakora et leurs familles respectives, de même qu'environ 300Tutsis qui s'étaient réfugiés à la paroisse de Busogo. Les corps de ceux-ci ont été enlevées de l'église le lendemain pour être enterrées dans des charniers dans le secteur de Rwinzovu, sur les ordres de Juvénal Kajelijeli et du colonel Augustin Bizimungu.

16. Le 18 avril 1994 ou vers cette date, le colonel Ephrem Setako a livré des armes et des fournitures militaires, dont de nombreux fusils, des munitions, des revolvers et des tenues de camouflage, à Juvénal Kajelijeli, au bureau communal de Mukingo. Le colonel Ephrem Setako entendait que ces armes et fournitures fussent distribuées et utilisés pour tuer les Tutsis, ce qui fut effectivement le cas.

17. Le 11 avril 1994 ou vers cette date, le colonel Ephrem Setako a incité à commettre, ordonné, aidé et encouragé à commettre le meurtre des civils tutsis sur le territoire des diverses communes de la préfecture de Ruhengeri, en intensifiant la formation et le recrutement des *Amahindure*, dont les effectifs sont passés de 80 à 600 jeunes, en continuant d'assurer l'entraînement militaire de ceux-ci, en leur fournissant fusils et grenades, et en leur ordonnant d'aller tuer les Tutsis jusqu'à Butaro, la commune la plus éloignée de la préfecture de Ruhengeri, située à la frontière ougandaise

18. A une date indéterminée située entre le 14 et le 18 avril 1994, le colonel Ephrem Setako, en compagnie du colonel Augustin Bizimungu, du colonel Marcel Bivugabagabo, du major Mugaragu et d'autres personnes, a incité à planifier une attaque contre le bâtiment de la Cour d'appel de Ruhengeri, a ordonné cette planification et y a pris part. La Cour d'appel de Ruhengeri abritait de nombreux civils tutsis, en majorité des femmes, des enfants et des personnes âgées. Avant l'attaque, le colonel Ephrem Setako a dit au groupe d'assaillants que les Tutsis étaient le seul ennemi et qu'ils devaient être exterminés. Les assaillants se sont servis d'armes à feu et d'armes traditionnelles pour tuer entre 100 et 300 Tutsis. Le colonel Ephrem Setako était présent au début de l'attaque. Après les faits, il a demandé aux assaillants si tous les Tutsis avaient été tués.

19. A diverses dates situées entre le 12 avril et le 30 juin 1994, le colonel Ephrem Setako, en compagnie de plusieurs autorités militaires, dont le colonel Théoneste Bagosora, le colonel Anatole Nzengiyumva, le colonel Tharcisse Renzaho, de même que Protais Zigiranyirazo, et agissant de concert avec ces personnes ou leur prêtant son assistance, a incité à commettre, ordonné, contribué à commettre, ou aidé et encouragé à commettre le meurtre des Tutsis dans la préfecture de Kigali-ville, notamment aux occasions suivantes :

19.1. A une date indéterminée située entre le 12 et le 15 avril 1994, le colonel Ephrem Setako, en compagnie de Protais Zigiranyirazo, du colonel Théoneste Bagosora et du colonel Anatole Nsengiyumva, a incité et aidé et encouragé à commettre le meurtre des Tutsis à un barrage routier majeur dans la commune de Kiyovu. Le barrage, adjacent à la demeure de Protais Zigiranyirazo, dans la commune de Kiyovu, était stratégiquement établi sur une voie de passage conduisant aux ambassades française, allemande et tanzanienne, ainsi qu'à l'hôtel Mille collines et à l'église presbytérienne, lieux de refuge probables pour les Tutsis fuyant les attaques. Les personnes qui tenaient ce barrage, au nombre de 40 à 50, comprenaient des *Interahamwe* et des gardes présidentiels. Le colonel Ephrem Setako est arrivé sur les lieux alors que les *Interahamwe* tuaient plusieurs Tutsis. Il est resté sur place pendant que les assaillants

these two men encouraged the killers to continue their "work". Approximately 50 bodies of Tutsi children, elderly persons, men, and women already lay on the ground next to the roadblock in full view.

19.2. On or about 14 April, Colonel Ephrem Setako returned to the roadblock adjacent to the residence of Protais Zigiranyirazo in Kiyovu *commune* and instigated members of the *Interahamwe* and the Presidential Guard to kill Tutsis by encouraging them to kill as they were in the very process of doing so. Fifteen to twenty persons that were identified as Tutsi were shot, cut by machetes, or clubbed to death in Colonel Ephrem Setako's presence.

19.3. On a date unknown between 14 and 30 June 1994, Colonel Ephrem Setako, accompanied by Col. Theoneste Bagosora and Col. Anatole Nsengiyumva, returned to the roadblock adjacent to the Kiyovu residence of Protais Zigiranyirazo at a time when several Tutsi civilians had been stopped and identified and were about to be killed. Colonel Ephrem Setako refused to intervene despite their pleas to him for mercy. Members of the *Interahamwe* and the residential Guard killed approximately 10 of these individuals in Colonel Ephrem Setako's presence including Yohani Rulangwa, a guard at the French Cultural Center, and Vianney, last name unknown, who was a guard at the GTZ staff houses. On a date unknown between 14 and 30 June 1994, Colonel Ephrem Setako, accompanied by Col. Theoneste Bagosora, Col. Anatole Nsengiyumva, and Gabriel Mbyariyehe, *conseiller* of Nyarugenge *secteur*, returned to the roadblock adjacent to the Kiyovu residence of Protais Zigiranyirazo. Colonel Ephrem Setako instigated and abetted members of the *lnterahamwe* and the Presidential Guard to kill Tutsi in his presence by encouraging them to kill Tutsi and praising them when they had done so.

19.4. On a date unknown between 14 and 30 June 1994, Tutsi residential guards in the vicinity of the Hotel Kiyovu in Kiyovu *commune* were ordered to attend a meeting at the hotel along with members of the *Interahamwe* and the Presidential Guard. In the presence of Colonel Ephrem Setako and Col. Anatole Nsengiyumva who each stood at his side, Col. Theoneste Bagosora ordered members of the *Interahamwe* and the Presidential Guard to kill the Tutsi guards present at the meeting. Immediately afterwards, members of the *Interahamwe* and the Presidential Guard killed Tutsi guards including Gahigi, an employee at the MINITRAP water project; Rukundo, an employee at BINEP; Karega; Vianney, last name unknown, who worked at CHK; and a man named "MINITRAP".

Count 3 : Murder as a Crime Against Humanity

The Prosecutor charges Colonel Ephrem Setako with MURDER as a CRIME AGAINST HUMANITY, as stipulated in Article 3 (a) of the Statute, in that on or between the dates of 1 January and 17 July 1994, in Ruhengeri and Kigali-ville *préfectures*, Rwanda, Colonel Ephrem Setako was responsible for murdering persons as

achevaient les victimes et a tenu compagnie au colonel Théoneste Bagosora et à Protais Zigiranyirazo au moment où ces deux hommes encourageaient les meurtriers à poursuivre leur «travail». Les corps d'une cinquantaine de Tutsis – enfants, personnes âgées, hommes et femmes – jonchaient déjà, au vu de tous, les alentours du barrage.

19.2. Le 14 avril 1994 ou vers cette date, le colonel Ephrem Setako est retourné au barrage routier adjacent à la demeure de Protais Zigiranyirazo, dans la commune de Kiyovu, et a incité les membres des *Interahamwe* et de la Garde présidentielle à tuer les Tutsis, en les encourageant à agir de la sorte alors qu'ils étaient précisément occupés à cette tâche. De 15 à 20 personnes identifiées comme étant tutsies ont été tuées à l'arme à feu, à la machette ou au gourdin, en la présence du colonel Ephrem Setako.

19.3. A une date indéterminée située entre le 14 et le 30juin 1994, le colonel Ephrem Setako, en compagnie du colonel Théoneste Bagosora et du colonel Anatole Nsengiyumva, est retourné au barrage routier adjacent à la demeure de Protais Zigiranyirazo, dans la commune de Kiyovu, alors que plusieurs civils Tutsis y avaient été arrêtés et identifiés, et devaient y être tués. Le colonel Ephrem Setako a refusé d'intervenir malgré les supplications des victimes. Les *Interahamwe* et les gardes présidentiels ont tué une dizaine de ces personnes en présence du colonel Ephrem Setako. Parmi ces victimes figuraient Yohani Rulangwa, gardien du Centre culturel français, et Vianney, de patronyme inconnu, gardien des logements du personnel de la GTZ.

19.4. A une date indéterminée située entre le 14 et le 30 juin 1994, le colonel Ephrem Setako, en compagnie du colonel Théoneste Bagosora, du colonel Anatole Nsengiyumva et de Gabriel Mbyariyehe, conseiller du secteur de Nyarugenge, est retourné au barrage routier adjacent à la demeure de Protais Zigiranyirazo, dans la commune de Kiyovu. Le colonel Ephrem Setako a incité et encouragé les membres des *Interahamwe* et de la Garde présidentielle à tuer les Tutsis en sa présence, en les exhortant à agir de la sorte et les en félicitant lorsqu'ils s'y étaient appliqués.

19.5. A une date indéterminée située entre le 14 et le 30juin 1994, les gardiens tutsis affectés à des habitations situées dans les environs de l'hôtel Kiyovu, dans la commune du même nom, ont reçu l'ordre d'assister à une réunion tenue audit hôtel, en même temps que les *Interahamwe* et les gardes présidentiels. En présence des colonels Ephrem Setako et Anatole Nsengiyumva, qui le flanquaient de part et d'autre, le colonel Théoneste Bagosora a ordonné aux *Interahamwe* et aux gardes présidentiels de tuer les gardiens tutsis qui s'étaient présentés à la réunion. Ses ordres ont été exécutés sur le champ. Parmi les victimes figuraient Gahigi, employé du «Projet-Eau» du Minitrap, Rukundo, employé du Binep, Karega, un certain Vianney de patronyme inconnu, employé du CHK, et un surnommé «MINITRAP».

Chef 3 : Assassinat constitutif de crime contre l'humanité

Le Procureur accuse le colonel Ephrem Setako d'ASSASSINAT constitutif de CRIME CONTRE L'HUMANITE, infraction prévue à l'alinéa (a) de l'article 3 du Statut, en ce que, entre le 1er janvier et le 17 juillet 1994, dans les préfectures de Ruhengeri et de Kigali-ville, au Rwanda, le colonel Ephrem Setako a été responsable d'assassinats commis dans le cadre d'une attaque généralisée ou systématique dirigée

part of a widespread or systematic attack against a civilian population on political, ethnic, or racial grounds.

20. During 1994, particularly between 6 April and 17 July 1994, Colonel Ephrem Setako planned, instigated, ordered, participated in, or otherwise aided and abetted the killing of persons identified as Tutsi, or deemed to be sympathetic to the Tutsi, or to support the RPF, or to be politically opposed to the MRND in Ruhengeri and Kigali-ville *préfectures*, as set forth in this indictment. Such attacks were widespread or systematic in the region of Bigogwe, extending to Nkuli and Mukingo *communes* in Ruhengeri.

20.1. On a date unknown between 1 and 10 February 1994, Colonel Ephrem Setako ordered an adult male individual known to the Prosecutor to kill Bernard Bajyagahe, a Tutsi civilian. This individual did as Colonel Ephrem Setako ordered and shot Bernard Bajyagahe in the chest, causing his death.

20.2. On or about the 7 April, at the Rwankeri School of Adventists, in Mukingo Commune, Colonel Ephrem Setako caused the death of a young Tutsi girl by ordering an adult male individual known to the Prosecutor, to pour petrol upon the Tutsi girl and set her alight, which orders were carried out resulting in the death of the young Tutsi girl in the presence of Colonel Ephrem Setako.

20.3. On or about the 7 April 1994, about midday in Busogo *Secteur*, near the ISAE area in Mukingo *Commune*, Colonel Ephrem Setako caused the death of a young male Tutsi by ordering the local Hutu population gathered near by "to kill the young male Tutsi and throw him in the dustbin" whereupon the local Hutu population acting upon the orders and in the presence of Colonel Ephrem Setako killed the young male Tutsi by stoning him to death.

20.4. On or about the morning of 7 April 1994 in Nkuli *commune*, Colonel Ephrem Setako instigated or aided and abetted the killing of two Tutsi civilians identified as Kaboga (of Gitwa cellule) and Bambasi (of Kagano cellule), both of were killed by members of the *Interahamwe* armed by Colonel Ephrem Setako. The killings took place at a roadblock near Colonel Ephrem Setako's Nkuli *commune* residence as he stood nearby and watched.

20.5. On or about 8 April 1994 in Gitwa *secteur*, Nkuli *commune*, Colonel Ephrem Setako ordered a group of *Interahamwe* to kill the wife of Pasteur Semasabike because she was identified as Tutsi. When Pasteur Semasabike, a Hutu, objected, Ephrern Setako ordered that he be killed also. A man identified as Barbereho shot and killed them both upon the orders of Colonel Ephrem Setako and in his presence.

Count 4 : Extermination as a Crime Against Humanity

The Prosecutor charges Colonel Ephrem Setako with EXTERMINATION as a CRIME AGAINST HUMANITY, as stipulated in Article 3 (b) of the Statute, in that on or between the dates of 1 January and 17 July 1994, in Ruhengeri and Kigali-ville *préfectures*, Rwanda, Colonel Ephrem Setako was responsible for exterminating

contre une population civile en raison de son appartenance politique, ethnique ou raciale.

20. Au cours de l'année 1994, en particulier entre le 6 avril et le 17 juillet, dans les préfectures de Ruhengeri et de Kigali-ville, le colonel Ephrem Setako a planifié, incité commettre, ordonné, contribué à commettre ou de toute autre manière aidé et encouragé à commettre le meurtre des personnes identifiées comme étant tutsies, ou considérées comme sympathisantes des Tutsis, comme soutenant le FPR ou comme politiquement opposées au MRND, tel qu'il est indiqué dans le présent acte d'accusation. De telles attaques ont été perpétrées de façon généralisée et systématique dans la région de Bigogwe, s'étendant aux communes de Nkuli et de Mukingo dans la préfecture de Ruhengeri.

20.1. A une date indéterminée située entre le 1er et le 10 février 1994, le colonel Ephrem Setako a ordonné à un adulte de sexe masculin, connu du Procureur, de tuer un civil tutsi nommé Bernard Bajyagahe. L'homme a exécuté l'ordre donné par le colonel Ephrem Setako et abattu la victime d'un coup de feu à la poitrine.

20.2. Le 7 avril 1994 ou vers cette date, 5. l'acole adventiste de Rwankeri, dans la commune de Mukingo, le colonel Ephrem Setako a fait tuer une jeune fille tutsie en ordonnant à un adulte de sexe masculin, connu du Procureur, de verser de l'essence sur la victime et d'y mettre le feu. L'homme a exécuté ces ordres et la victime est ainsi décédé en présence du colonel Ephrem Setako.

20.3. Le 7 avril 1994 ou vers cette date, en milieu de journée, dans le secteur de Busogo, près de la zone de I'ISAE, dans la commune de Mukingo, le colonel Ephrem Setako a fait tuer un jeune homme tutsi en ordonnant à la population hutue locale de «tuer le jeune homme tutsi et de le jeter dans la poubelle». La population a exécuté ces ordres et a tué la victime par lapidation en présence du colonel Ephrem Setako.

20.4. Dans la matinée du 7 avril 1994 ou vers ce moment, dans la commune de Nkuli, le colonel Ephrem Setako a incité ou aidé et encouragé à commettre le meurtre de deux civils tutsis identifiés comme étant Kaboga (de la cellule de Gitwa) et Bambasi (de cellule de Kagano), ces deux victimes ayant été tuées par les membres des *Interahamwe* que le colonel Ephrem Setako avait armés. Ces meurtres ont été commis à un barrage routier situé près de la demeure du colonel Ephrem Setako, dans la commune de Nkuli, alors que celui-ci était présent et assisté à la scène.

20.5. Le 8 avril 1994 ou vers cette date, dans le secteur de Gitwa, commune de Nkuli, le colonel Ephrem Setako a donné ordre à un groupe d'*Interahamwe* de tuer la femme du pasteur Semasabike, celle-ci ayant été identifiée comme tutsie. Lorsque le pasteur Semasabike, qui appartenait à l'ethnie hutue, a protesté, Ephrem Setako a également ordonné sa mise à mort. Un homme du nom de Barbereho a abattu les deux victimes sur les ordres et en la présence du colonel Ephrern Setako.

Chef 4 : Extermination constitutive de crime contre l'humanité

Le Procureur accuse le colonel Ephrem Setako d'EXTERMINATION constitutive de CRIME CONTRE L'HUMANITE, infraction prévue à l'alinéa (b) de l'article 3 du Statut, en ce que, entre le 1er janvier et le 17 juillet 1994 ou à ces dates, dans les préfectures de Ruhengeri et de Kigali-ville, au Rwanda, le colonel Ephrem Setako

persons as part of a widespread or systematic attack against a civilian population on political, ethnic, or racial grounds.

21. During 1994, particularly between 7 April and 30 June 1994, Colonel Ephrem Setako, acting in concert with or assisted by Joseph Nzirorera, Juvénal Kajelijeli, Col. Augustin Bizimungu, among others, planned, instigated, ordered, participated in, or otherwise aided and abetted the killing of hundreds of civilians in several massive, systematically coordinated attacks against groups of persons identified as Tutsi, or deemed to be sympathetic to the Tutsi, or to support the RPF, or to be politically opposed to the MRND in Ruhengeri and Kigali-ville *préfectures*, as set forth in this indictment.

21.1. On or about the morning of 7 April 1994 Colonel Ephrem Setako, acting in concert with Juvénal Kajelijeli, planned, instigated, ordered, participated in, or otherwise aided and abetted the killing of hundreds of Tutsi residents of Busogo *secteur.* Ephrem Setako provided military training and weapons to the perpetrators of the attacks and participated in meetings to organize the killings. Attacks were directed, in particular, against several family compounds where numerous Tutsi civilians were gathered, and against the Busogo *paroisse*, where hundreds of Tutsi men, women and children had taken refuge. Hundreds of men, women and children were killed, among whom can be counted Sebahutu, Gateyiteyi, and Kamakora and their families.

21.2. On a date unknown between 14 and 18 April 1994, Colonel Ephrem Setako, acting in concert with Joseph Nzirorera, Juvénal Kajelijeli, Col. Augustin Bizimungu, among several other military officials, planned, instigated, ordered, participated in, or otherwise aided and abetted the killing of hundreds of Tutsi civilians, largely women and elderly persons, that had taken refuge in the Court of Appeals building in Ruhengeri.

21.3. At a meeting held on or about 25 April 1994, at Mukamira Military Camp, in Mukamira sector in Nkuli *commune*, Colonel Ephrem Setako in the company of Juvenal Kajelijeli and Dominique Gatsimbanyi caused the death of approximately 30-50 family members of Tutsi soldiers who had sought refuge at the Camp by ordering some 220 soldiers and members of the "Civil Defense Force" present at the meeting to kill them, whereupon they were killed.

21.4. On or about 25 April 1994, at Mukamira Military Camp, in Mukamira sector in Nkuli *commune*, Colonel Ephrem Setako ordered members of the "Civil Defence Force" present at the Camp to establish a roadblock to stop and kill all Tutsi irrespective of age who attempted to pass through the roadblock. Acting upon the orders of Colonel Ephrem Setako, a roadblock, under the charge of one Corporal Bizimungu was established at the main Mukamira junction across the road to Kabaya where approximately 30-40 Tutsi refugees were stopped, transferred to Mukamira Military Camp, killed, and their bodies dumped in a naturally occurring pit known as "Ibibare" within the Mukamira Military Camp.

a été responsable d'extermination de personnes dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale.

21. Au cours de l'année 1994, en particulier entre le 7 avril et le 30juin, dans les préfectures de Ruhengeri et de Kigali-ville, le colonel Ephrem Setako, agissant de concert avec notamment Joseph Nzirorera, Juvénal Kajelijeli et le colonel Augustin Bizimungu, ou avec le concours de ces personnes, a planifié, incité à commettre, ordonné, contribué à commettre ou de toute autre manière aidé et encouragé à commettre le meurtre de centaines de civils à l'occasion de plusieurs attaques de grande envergure systématiquement coordonnées et dirigées contre des groupes de personnes identifiées comme étant tutsies, ou considérées comme sympathisantes des Tutsis, comme soutenant le FPR ou comme politiquement opposées au MRND, comme indiqué dans le présent acte d' accusation.

21.1. Dans la matinée du 7 avril 1994 ou vers ce moment, le colonel Ephrem Setako, agissant de concert avec Juvénal Kajelijeli, a planifié, incité à commettre, ordonné, contribué à commettre ou de toute autre manière aidé et encouragé à commettre le meurtre de centaines d'habitants tutsis du secteur de Busogo. Le colonel Ephrem Setako a assuré l'entraînement militaire des auteurs des attaques, leur a fourni des armes et a participé aux réunions consacrées à l'organisation des tueries. Les attaques étaient dirigées en particulier contre plusieurs concessions familiales où nombre de civils tutsis s'étaient rassemblés, et contre la paroisse de Busogo où des centaines d'hommes, de femmes et d'enfants tutsis s'étaient réfugiés. Des centaines d'hommes, de femmes et d'enfants ont été tués, dont Sebahutu, Gateyiteyi et Kamakora ainsi que leurs familles.

21.2. A une date indéterminée située entre le 14 et le 18 avril 1994, le colonel Ephrem Setako, agissant de concert avec Joseph Nzirorera, Juvénal Kajelijeli, le colonel Augustin Bizimungu et en compagnie de plusieurs autres chefs militaires, a planifié, incité à commettre, ordonné, contribué à commettre ou de toute autre manière aidé et encouragé à commettre le meurtre des centaines de civils tutsis, pour la plupart des femmes et des personnes âgées, qui s'étaient réfugiés dans le bâtiment de la Cour d'appel de Ruhengeri.

21.3. A une réunion tenue le 25 avril 1994 ou vers cette date, au camp militaire de Mukamira, dans le secteur du même nom, commune de Nkuli, le colonel Ephrem Setako, en compagnie de Juvénal Kajelijeli et de Dominique Gatsimbanyi, a fait tuer environ 30 a 50 parents de soldats tutsis qui s'étaient réfugiés au camp militaire, en donnant l'ordre aux quelque 220 soldats et membres des «Forces de défense civile» présents à la réunion de les tuer, ordre qui a été exécuté.

21.4. Le 25 avril 1994 ou vers cette date, au camp militaire de Mukamira, dans le secteur du même nom, commune de Nkuli, le colonel Ephrem Setako a demandé aux membres des «Forces de défense civile» présents d'établir un barrage routier pour arrêter et tuer tous les Tutsis, sans distinction d'âge, qui tenteraient de passer. En ex6cution de cet ordre du colonel Ephrem Setako, un barrage routier dirigé par un certain caporal Bizimungu a été établi au principal carrefour de Mukamira, sur la route de Kabaya. Environ 30 à 40 réfugiés tutsis y ont été arrêtés, puis transférés au camp militaire de Mukamira et tués. Après quoi, leurs corps ont été jetés dans une fosse naturelle située dans l'enceinte du camp et communément appelée «Ibibare».

21.5. On or about 11 May 1994, at Mukamira Military Camp, in Mukamira sector in Nkuli commune, Colonel Ephrem Setako arrived with approximately nine Tutsi civilians in his military vehicle. He ordered that the Tutsi be removed from his vehicle and ordered Cap. Hasengineza to kill the men. Acting upon these orders, soldiers and members of the "Civil Defense Force" killed the men and left their bodies at the Camp.

Count 5 : Causing Violence to Life, Health and Physical or Mental Well-Being of Persons as a Serious Violation of Article 3 Common to the Geneva Conventions and Additional Protocol II Thereto

Count 6 : Pillage as a Serious Violation of Article 3 Common to the Geneva Conventions and Additional Protocol II Thereto

The Prosecutor charges Colonel Ephrem Setako with CAUSING VIOLENCE TO LIFE, HEALTH AND PHYSICAL OR MENTAL WELL-BEING OF PERSONS; AND PILLAGE as Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II thereto pursuant to Articles 4 (a), 4 (f), 6 (1) and 6 (3) of the Statute of the Tribunal in that on or between the dates of 6 April and 17 July 1994, throughout the territory of Rwanda, Colonel Ephrem Setako was responsible for murdering, seriously harming, and/or otherwise treating in a cruel manner, and pillaging property of persons taking no active part in the hostilities in the context of an armed conflict not of an international nature.

22. Between 1 January 1994 and 17 July 1994 in Rwanda, there was a non-international armed conflict within the meaning of Articles 1 and 2 of Protocol II Additional of 1977 to the Geneva Convention of 1949.

23. Between 1 January 1994 and 17 July 1994, Rwanda was a state party of the Geneva Convention of 12 August 1949 and the Additional Protocol II of 8 June 1977, having succeeded to the Geneva Conventions of 12 August 1949 on 5 May 1964 and having acceded to Protocols additional thereto of 1977 on 19 November 1984.

24. Between 1 January 1994 and 17 July 1994 the belligerents in the non-international armed conflict were the Rwandan Government and the RPF. The belligerents were bound by Article 3 Common to the four 1949 Geneva Conventions and by the provisions of Additional Protocol II of 1977.

25. Colonel Ephrem Setako, Joseph Nzirorera, Col. Augustin Bizimungu, Casimir Bizimungu and Juvénal Kajelijeli, among others, trained, equipped, indoctrinated, and armed *Interahamwe* militias, particularly the *Amahindure*, and incorporated them in attacks against civilians launched by soldiers for offensive purposes in the non-international armed conflict between the Rwandan Government and the RPF, as set forth in this indictment.

21.5. Le 11 mai 1994 ou vers cette date, le colonel Ephrem Setako est arrivé au camp militaire de Mukamira, dans le secteur du même nom, commune de Nkuli, avec environ neuf civils tutsis dans son véhicule militaire. Après avoir ordonné que ces Tutsis fussent débarqués de son véhicule, il a demandé au capitaine Hasengineza de tuer les hommes. Exécutant cet ordre, les soldats et les membres des «Forces de défense civile» ont tué les hommes et laissé leurs corps au camp.

Chef 5 : Atteintes à la vie, à la santé et au bien-être physique ou mental de personnes, crimes constitutifs de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II auxdites conventions

Chef 6 : Pillages constitutifs de violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II auxdites conventions

Le Procureur accuse le colonel Ephrem Setako d'ATTEINTES A LA VIE, A LA SANTE ET AU BIEN-ETRE PHYSIQUE OU MENTAL DE PERSONNES et de PILLAGES, crimes constitutifs de VIOLATIONS GRAVES DE L'ARTICLE 3 COMMUN AUX CONVENTIONS DE GENEVE ET DU PROTOCOLE ADDITIONNEL II AUXDITES CONVENTIONS, en vertu des alinéas (a) et (f) de l'article 4 ainsi que des paragraphes 1 et 3 de l'article 6 du Statut, en ce que, entre le 6 avril et 17 juillet 1994 ou à ces dates, sur toute l'étendue du territoire du Rwanda, le colonel Ephrem SETAKO a été responsable de meurtres, d'atteintes graves et/ou d'autres traitements cruels, ainsi que de pillages, actes dirigés contre des personnes ne participant pas activement aux hostilités engagées dans le cadre d'un conflit à caractère non international.

22. Entre le 1er janvier et le 17 juillet 1994, le Rwanda a été le théâtre d'un conflit armé à caractère non international au sens des articles 1 et 2 du Protocole additionnel II de 1977 aux Conventions de Genève de 1949.

23. Entre le 1er janvier et le 17 juillet 1994, l'Etat rwandais était partie aux Conventions de Genève du 12 août 1949 ainsi qu'au Protocole additionnel II du 8 juin 1977, ayant adhéré auxdites Conventions le 5 mai 1964 et aux Protocoles additionnels à ces Conventions le 19 novembre 1984.

24. Entre le 1er janvier et le 17 juillet 1994, les belligérants engagés dans le conflit armé à caractère non international étaient le gouvernement rwandais et le FPR. Lesdits belligérants étaient liés par l'article 3 commun aux quatre Conventions de Genève de 1949 et par les dispositions du Protocole additionnel II de 1977.

25. Le colonel Ephrem Setako, Joseph Nzirorera, le colonel Augustin Bizimungu, Casimir Bizimungu et Juvénal Kajelijeli, parmi d'autres personnes, ont formé, équipé, endoctriné et armé les milices *Interahamwe*, en particulier les *Amahindure*, et ont incorporé ces milices dans des attaques dirigées contre des civils et lancées par des militaires, à des fins offensives, dans le cadre du conflit armé non international qui opposait le gouvernement rwandais et le FPR, comme indiqué dans le présent acte d'accusation.

26. During 1994, particularly between 6 April and 17 July 1994, Colonel Ephrem Setako planned, instigated, ordered, participated in, or otherwise aided and abetted the killing of persons deemed to support the RPF or to be sympathetic to the RPF in Ruhengeri *préfecture*, specifically in the Nkuli and Mukingo *communes*, and Kigali-ville *préfecture*. These persons were taking no active part in the hostilities and were protected persons under Common Article 3 and Additional Protocol II, notably :

26.1. On or about the morning of 7 April 1994, Colonel Ephrem Setako participated in a meeting at the Busogo *secteur* residence of Joseph Nzirorera with, among others, Juvénal Kajelijeli, Esdras Baheza, a businessman, and Bambonye, President of the CDR in Mukingo *commune*. During the meeting, Colonel Ephrem Setako and the other participants decided that all Tutsi must be killed in retaliation for the death of President Juvénal Habyarimana. Immediately thereafter, and in furtherance of their decision to kill all Tutsi, Juvénal Kajelijeli and Bambonye gathered together a group of *Interahamwe* from the marketplace and ordered them to commence the attacks. Starting that morning and continuing through the afternoon, *Interahamwe* militiamen led by Juvénal Kajelijeli, providing assistance to and reinforced by soldiers from Mukamira Military Camp, attacked and killed hundreds of Tutsi civilians in Busogo *secteur.* At the same time, they used petrol to burn down Tutsi houses and looted Tutsi property, particularly fields and livestock.

26.2. On a date unknown between 14 and 18 April 1994, Colonel Ephrem Setako, accompanied by Col. Augustin Bizimungu, Col. Marcel Bivugabagabo and Maj. Mugaragu, and others, instigated, ordered and participated in the planning and execution of an attack upon the Court of Appeals building in Ruhengeri where numerous Tutsi civilians, largely women, children and elderly persons, were sheltered. Approximately 100-300 Tutsi civilians were killed.

26.3 At a meeting held on or about 25 April 1994, at Mukamira Military Camp, in Mukamira sector in Nkuli *Commune*, Colonel Ephrem Setako in the company of Juvénal Kajelijeli and Dominique Gatsimbanyi caused the death of some 30-50 family members of Tutsi soldiers who had sought refuge at the Camp by ordering some 220 soldiers and members of the Civil Defense Force present at the said meeting to kill them, whereupon they were killed.

26.4. On or about 25 April 1994, at Mukamira Military Camp, in Mukamira sector in Nkuli *commune*, Colonel Ephrem Setako ordered members of the "Civil Defence Force" present at the Camp to establish a roadblock to stop and kill all Tutsi irrespective of age who attempted to pass through the roadblock. Acting upon the orders of Colonel Ephrem Setako, a roadblock, under the charge of one Corporal Bizimungu was established at the main Mukamira junction across the road to Kabaya where approximately 30-40 Tutsi refugees were stopped, transferred to Mukamira Military Camp, killed, and their bodies dumped in a naturally occurring pit known as "Ibibare" within the Mukamira Military Camp.

26. Au cours de l'année 1994, particulièrement entre le 6 avril et le 17 juillet, dans la préfecture de Ruhengeri, notamment dans les communes de Nkuli et de Mukingo, ainsi que dans la préfecture de Kigali-ville, le colonel Ephrem Setako a planifié, incité à commettre, ordonné, contribué à commettre ou de toute autre manière aidé et encouragé à commettre le meurtre de personnes présumées soutenir le FPR ou en être des sympathisants. Ces personnes ne participaient pas activement aux hostilités et étaient protégées en vertu de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II, notamment :

26.1 Dans la matinée du 7 avril 1994 ou vers ce moment, le colonel Ephrem Setako a participé à une réunion tenue en la demeure de Joseph Nzirorera, dans le secteur de Busogo, à laquelle assistaient également, entre autres personnes, Juvénal Kajelijeli, Esdras Baheza, homme d'affaires, et Bambonye, président de la CDR dans la commune de Mukingo. A cette réunion, le colonel Ephrem Setako et les autres participants ont décidé que tous les Tutsis devaient être tués en représailles à la mort du Président Habyarimana. Immédiatement après cette réunion et en exécution de la décision prise par les participants de tuer tous les Tutsis, Juvénal Kajelijeli et Bambonye ont rassemblé un groupe d'*Interahamwe* qui se trouvaient au marché et leur ont donné l'ordre de déclencher les attaques. A partir de ce matin-là et durant tout l'après-midi, les miliciens *Interahamwe*, menés par Juvénal Kajelijeli, prêtant main forte aux militaires du camp de Mukamira et renforcés par ceux-ci, ont attaqué et tué des centaines de civils tutsis dans le secteur de Busogo. Parallèlement, ils se sont servis d'essence pour incendier les maisons des Tutsis, dont ils ont pillé les biens, notamment les terres et le bétail.

26.2. A une date indéterminée située entre le 14 et le 18 avril 1994, le colonel Ephrem Setako, en compagnie du colonel Augustin Bizimungu, du colonel Marcel Bivugabagabo, du major Mugaragu et d'autres personnes, a incité à planifier et à exécuter une attaque contre le bâtiment de la Cour d'appel de Ruhengeri, a ordonné cette planification et cette exécution, et y a pris part. Nombre de civils tutsis, pour la plupart des femmes, des enfants et des personnes âgées, s'étaient réfugiés dans se bâtiment et l'attaque s'est soldée par la mort d'environ 100 à 300 d'entre eux.

26.3. A une réunion tenue le 25 avril 1994 ou vers cette date, au camp militaire de Mukamira, dans le secteur du même nom, commune de Nkuli, le colonel Ephrem Setako, en compagnie de Juvénal Kajelijeli et de Dominique Gatsimbanyi, a fait tuer 30 à 50 parents de soldats tutsis qui s'étaient réfugiés au camp, en demandant aux quelque 220 soldats et membres des «Forces de défense civile» présents à la réunion de tuer ces gens, instruction qui a été exécutée.

26.4. Le 25 avril 1994 ou vers cette date, au camp militaire de Mukamira, dans le secteur du même nom, commune de Nkuli, le colonel Ephrem Setako a donné l'ordre aux membres des «Forces de défense civile» présents au camp d'établir un barrage routier pour arrêter et tuer tous les Tutsis, sans distinction d'âge, qui tenteraient de passer. En exécution de cet ordre du colonel Ephrem Setako, un barrage routier dirigé par un certain caporal Bizimungu a été établi au principal carrefour de Mukamira, sur la route de Kabaya, où environ 30 à 40 réfugiés tutsis ont été arrêtés pour être transférés au camp militaire de Mukamira et tués. Après quoi, leurs corps ont été jetés dans une fosse naturelle située dans l'enceinte du camp militaire de Mukamira et communément appelée «Ibibare».

27. During March and April 1994 on dates unknown, at meetings held once a week on average, generally at weekends, at the residence of Joseph Nzirorera in Busogo *secteur*, Nkuli *commune*, Colonel Ephrem Setako instigated and planned the killing of Tutsi. Following these meetings, members of the *Amahindure* and *Interahamwe* destroyed Tutsi property including cows, houses, and trees of economic importance.

28. Pillage was within the object and purpose of the joint criminal enterprise to destroy the Tutsi, as such. Colonel Ephrem Setako committed Genocide as a co-perpetrator, acting in concert with others in a common scheme, strategy or plan, and was aware that pillage by his co-perpetrators against protected persons was a possible consequence of such joint criminal enterprise, and pillage was in fact the natural and foreseeable consequence of such joint criminal enterprise.

The acts and omissions of Colonel Ephrem Setako detailed herein are punishable in reference to Articles 22 and 23 of the Statute.

Arusha, this 22nd day of March 2004

[Signed] : Hassan Bubacar Jallow

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Decision on Confirmation of an Indictment Against Ephrem Setako 22 March 2004 (ICTR-2004-81-I)

(Original : Not Specified)

Trial Chamber I

Judge : Sergei Alekseevich Egorov, Confirming Judge

Confirmation of the Indictment – consideration of the modified indictment and the supporting materials, prima facie case – six counts, genocide, complicity to commit genocide, murder as a crime against humanity, extermination as a crime against humanity, as well as serious violations of Common Article 3 to the Geneva Conventions and Additional Protocol II thereto – confirmation

International instruments cited : Statute, art. 18 – Rules of procedure and evidence, art. 28, 47

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

27. A des dates indéterminées des mois de mars et d'avril 1994, lors de réunions tenues en moyenne une fois par semaine, généralement le week-end, en la demeure de Joseph Nzirorera, dans le secteur de Busogo, commune de Nkuli, le colonel Ephrem Setako a incité à commettre et planifié le meurtre des Tutsis. A la suite de ces réunions, des *Amahindure* et des *Interahamwe* ont détruit les biens des Tutsis, dont du bétail, des maisons et des arbres présentant un intérêt économique.

28. Le pillage s'inscrivait dans le cadre de l'objet et du but de l'entreprise criminelle commune visant à détruire les Tutsis, comme tels. Le colonel Ephrem Setako a commis des actes de génocide en qualité de coauteur, agissant de concert avec d'autres personnes dans le cadre d'un projet, d'une stratégie ou d'un plan communs, et savait que le pillage des biens de personnes protégées par les autres coauteurs était l'une des conséquences possibles de l'entreprise criminelle commune, et le pillage a en fait été la conséquence naturelle et prévisible de cette entreprise.

Les actes et omissions du colonel Ephrem Setako exposés dans le présent acte d' accusation sont punissables conformément aux dispositions des articles 22 et 23 du Statut.

Arusha, le 22 mars 2004

[Signé] : Hassan Bubacar Jallow

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Décision portant confirmation de l'acte d'accusation dressé contre Ephrem Setako 22 mars 2004 (ICTR-2004-81-I)

(Original : Anglais)

Chambre de première instance I

Juge : Sergei Alekseevich Egorov, juge confirmateur

Confirmation de l'acte d'accusation – examen de l'acte d'accusation modifié et des pièces justificatives, présomptions qu'il y a lieu d'engager des poursuites – six chefs d'accusation, génocide, complicité dans le génocide, crime contre l'humanité (assassinat), crime contre l'humanité (extermination) et violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II – confirmation

Instruments internationaux cités : Règlement de procédure et de preuve, art. 28, 47

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SITTING as Judge Sergei Alekseevich Egorov, confirming judge, as designated by the President of the Tribunal pursuant to Rule 28 of the Tribunal's Rules of Procedure and Evidence ("Rules");

BEING SEIZED of the Prosecutor's request to confirm an indictment against Ephrem Setako pursuant to Rule 47 filed on 16 March 2004 in the form of a letter to the President of the Tribunal;

HAVING CONSIDERED the original indictment against Ephrem Setako and its supporting materials filed on 16 March 2004;

HAVING HEARD the Prosecutor in an *ex parte* hearing on 22 March 2004 pursuant to Rule 47 (D);

HAVING ADJOURNED the review so as to give the Prosecutor the opportunity to modify the indictment pursuant to Rule 47 (F) (i);

HAVING CONSIDERED the indictment against Ephrem Setako, as modified, and additional supporting materials filed on 22 March 2004;

BEING SATISFIED that the Prosecutor has established a *prima facie* case as required by Article 18 of the Statute for the six counts of genocide, complicity to commit genocide, murder as a crime against humanity, extermination as a crime against humanity, as well as serious violations of Common Article 3 to the Geneva Conventions and Additional Protocol II thereto;

THE TRIBUNAL THEREFORE CONFIRMS all six counts set forth in the indictment against Ephrem Setako filed on 22 March 2004; and

ORDERS that the confirmed indictment be served on the accused as soon as possible in a language that he understands.

Arusha, 22 March 1994

[Signed] : Sergei Alekseevich Egorov

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Warrant of Arrest and Order for Transfer and Detention of Ephrem Setako 22 March 2004 (ICTR-2004-81-I)

(Original : Not Specified)

Trial Chamber I

Judge : Sergei Alekseevich Egorov

Request to issue a warrant of arrest – transfer of the accused and any seized items – Kingdom of the Netherlands – arrest and transfer to the seat of the Tribunal – Genocide, Complicity in Genocide, Murder as a Crime against Humanity, Extermination as a Crime against Humanity, and Serious Violations of Common Article 3 to the

SIEGEANT en la personne du juge Sergei Alekseevich Egorov, désigné par le Président du Tribunal conformément à l'article 28 du Règlement de procédure et de preuve (le «Règlement»),

SAISI de la requête du Procureur en confirmation de l'acte d'accusation dressé contre Sergei Alekseevich Egorov conformément à l'article 47 du Règlement, déposée le 16 mars 2004 sous forme d'une lettre adressée au Président du Tribunal,

VU l'acte d'accusation initial dressé contre Ephrem Setako et les pièces justificatives déposés le 16 mars 2004,

Le Procureur ENTENDU dans le cadre d'une audience non contradictoire tenue le 22 mars 2004 conformément à l'article 47 (D) du Règlement,

AYANT AJOURNE l'examen de l'acte d'accusation afin de permettre au Procureur de procéder à sa modification conformément à l'article 47 (F) (i) du Règlement,

AYANT EXAMINE l'acte d'accusation modifié dressé contre Ephrem Setako, et les pièces justificatives supplémentaires déposés le 22 mars 2004,

CONVAINCU QU'en vertu de l'article 18 du Statut, le Procureur a établi, au vu des présomptions, qu'il y a lieu d'engager des poursuites relativement aux six chefs d'accusation de génocide, complicité dans le génocide, crime contre l'humanité – assassinat, crime contre l'humanité – extermination et violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II,

LE TRIBUNAL CONFIRME les six chefs retenus contre Ephrem Setako dans l'acte d'accusation déposé le 22 mars 2004, et

ORDONNE que l'acte d'accusation confirmé soit signifié le plus tôt possible à l'accusé dans une langue qu'il comprend.

Fait à Arusha, le 22 mars 2004

[Signé] : Sergei Alekseevich Egorov

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Mandat d'arrêt et ordonnance de transfert et de détention d'Ephrem SETAKO 22 mars 2004 (ICTR-2004-81-I)

(Original : Anglais)

Chambre de première instance I

Juge : Sergei Alekseevich Egorov

Demande d'émission de mandat d'arrêt – transfert de l'accusé et de tous les biens saisis sur lui – Pays-Bas – arrestation, transfert au siège du Tribunal – génocide, complicité dans le génocide, assassinat constitutif de crime contre l'humanité, extermination constitutive de crime contre l'humanité et violations graves de l'article 3

Geneva Conventions and Additional Protocol II thereto – search for and seize of all physical evidence related to the alleged crimes, transfer to the Office of the Prosecutor – certified copy of the Warrant of Arrest, accompanied by a copy of the indictment and a statement of the rights of the accused – Registrar – transfer to the custody of the Tribunal

International instruments cited : Statute, art. 18 (2), 19 (2), 20, 28 – Rules of procedure and evidence, art. 28, 40, 42, 43, 47 (G), (H) (i) and 54 to 61

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

SITTING as Judge Sergei Alekseevich Egorov, confirming judge, designated by the President of the Tribunal pursuant to Rule 28 of the Tribunal's Rules of Procedure and Evidence ("Rules");

BEING SEIZED of the Prosecutor's request to issue a warrant of arrest and order of transfer of the accused and any seized items filed on 16 March 2004 in the form of a letter to the President of the Tribunal and the further oral request during the confirmation hearing on 22 March 2004;

CONSIDERING Articles 18 (2), 19 (2), and 28 of the Statute of the Tribunal and Rules 40, 47 (H) (i) and 54 - 61;

CONSIDERING the indictment against Ephrem Setako filed on 22 March 2004, which was confirmed on 22 March 2004;

HEREBY RESPECTFULLY REQUESTS the Kingdom of the Netherlands to :

(i) Arrest and Transfer to the seat of the Tribunal Ephrem Setako, a citizen of Rwanda, born in Nkuli *commune*, Ruhengeri prefecture, Rwanda, who is accused of having committed during 1994 in Rwanda the following crimes : Genocide, Complicity in Genocide, Murder as a Crime against Humanity, Extermination as a Crime against Humanity, and Serious Violations of Common Article 3 to the Geneva Conventions and Additional Protocol II thereto as set forth in the indictment against him filed and confirmed on 22 March 2004;

(ii) Search for and Seize all physical evidence related to the crimes alleged to have been committed by Ephrem Setako and to transfer all such evidence to the Office of the Prosecutor in Arusha, Tanzania;

(iii) Serve on Ephrem Setako, at the time of his arrest, or as soon as is practicable immediately following arrest, in a language he understands, a certified copy of this Warrant of Arrest, accompanied by a copy of the indictment against him filed and confirmed on 22 March 1994 and certified in accordance with Rule 47 (g) and a statement of the rights of the accused as set forth in Article 20 of the Statute and in Rules 42 and 43;

(iv) Caution Ephrem Setako that any statement made by him shall be recorded and may be used as evidence against him;

(v) Notify the Registrar of the Tribunal of the arrest of Ephrem Setako for the purposes of arranging his transfer to the custody of the Tribunal and surrender Ephrem Setako to the Tribunal without delay; and

commun aux Conventions de Genève et du Protocole additionnel II – perquisition et saisie de tous éléments de preuve matériels liés aux crimes reprochés à l'accusé, transfert au Bureau du Procureur – notification à l'accusé du mandat d'arrêt, de l'acte d'accusation et de ses droits – Greffier – placement en détention au quartier pénitentiaire du Tribunal

Instruments internationaux cités : Statut, art. 18 (2), 19 (2), 20, 28 – Règlement de procédure et de preuve, art. 28, 40, 42, 43, 47 (G), (H) (i), 59 (A) et 61

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIEGEANT en la personne du juge Sergei Alekseevich Egorov, juge confirmateur, désigné par le Président du Tribunal conformément à l'article 28 du Règlement de procédure et de preuve du Tribunal (le «Règlement»),

SAISI de la requête déposée par le Procureur le 16 mars 2004 sous la forme d'une lettre adressée au Président du Tribunal et dans laquelle il demande de décerner un mandat d'arrêt contre l'accusé et d'ordonner son transfert et celui de tous les biens saisis sur lui, ainsi que de la requête orale présentée à cet effet lors de l'audience du 22 mars 2004 au cours de laquelle l'acte d'accusation a été confirmé,

VU les articles 18 (2), 19 (2) et 28 du Statut du Tribunal ainsi que les articles 40, 47 (H) (i) et 54 à 61 du Règlement,

VU l'acte d'accusation établi contre Ephrem Setako, déposé le 22 mars 2004 et confirmé le 22 mars 2004,

PRIE le Royaume des Pays-Bas :

(i) De placer en état d'arrestation et de transférer au siège du Tribunal Ephrem Setako, citoyen rwandais, né en commune de Nkuli, préfecture de Ruhengeri (Rwanda), accusé d'avoir commis en 1994 au Rwanda les crimes énumérés ci-après : génocide, complicité dans le génocide, assassinat constitutif de crime contre l'humanité, extermination constitutive de crime contre l'humanité et violations graves de l'article 3 commun aux Conventions de Genève et du Protocole additionnel II, tels que visés dans l'acte d'accusation établi contre lui, déposé et confirmé le 22 mars 2004;

(ii) De perquisitionner et de saisir tous éléments de preuve matériels liés aux crimes reprochés à Ephrem Setako et de transférer tous ces éléments de preuve au Bureau du Procureur à Arusha (Tanzanie);

(iii) De notifier à Ephrem Setako au moment de son arrestation, ou dès que possible immédiatement après son arrestation, dans une langue qu'il comprend, une copie certifiée conforme du présent mandat d'arrêt accompagnée d'une copie de l'acte d'accusation déposé et confirmé le 22 mars 2004 et certifiée conforme, en vertu de l'article 47 (g) du Règlement et d'un document rappelant les droits de l'accusé tels qu'énoncés à l'article 20 du Statut et aux articles 42 et 43 du Règlement;

(iv) D'informer Ephrem Setako que chacune de ses déclarations sera enregistrée et pourra être utilisée comme moyen de preuve contre lui;

(v) De donner notification au Greffier du Tribunal de l'arrestation d'Ephrem Setako afin qu'il prenne les dispositions nécessaires pour son transfert et sa remise sans retard au Tribunal;

(vi) Report forthwith to the Registrar of the Tribunal if unable to execute the present warrant of arrest and order for surrender, indicating the reasons for the inability to give effect thereto, pursuant to Rule 59 (A) of the Rules.

THE TRIBUNAL FURTHER ORDERS that Ephrem Setako be placed into the custody of the Tribunal's detention facility upon his transfer to the seat of the Tribunal, in Arusha, Tanzania.

Arusha, 22 March 2004

[Signed] : Sergei Alekseevich Egorov

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(vi) D'informer sans délai le Greffier du Tribunal, s'il n'a pas pu exécuter le présent mandat d'arrêt et ordonnance de transfert, en en indiquant les raisons, conformément à l'article 59 (A) du Règlement

LE TRIBUNAL ORDONNE EN OUTRE le placement en détention d'Ephrem Setako au quartier pénitentiaire du Tribunal dès son transfert au siège du Tribunal à Arusha (Tanzanie).

Fait à Arusha le 22 mars 2004

[Signé] : Sergei Alekseevich Egorov

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The Prosecutor v. Aloys SIMBA

Case N° ICTR-2001-76

Case History

- Name : SIMBA
- First Name : Aloys
- Date of Birth : 1942
- Sex : Male
- Nationality : Rwandan
- Former Official Function : *Député* in the *Conseil national* and president of MRND in Gikongoro *préfecture*
- Counts : Genocide or in the alternative, Complicity in Genocide, Extermination as a Crime against Humanity and Murder as a Crime against Humanity

- Date and Place of Arrest : 27 November 2001, in Senegal
- Date of Transfer : 11 March 2002
- Date of Initial Appearance : 18 March 2002
- Date Trial Began : 30 August 2004
- Date and content of the Sentence : 13 December 2005, sentenced to 25 years of imprisonment.
- Appeal dismissed on the 27th of November 2007.

Le Procureur c. Aloys SIMBA

Affaire N° ICTR-2001-76

Fiche technique

- Nom : SIMBA
- Prénom : Aloys
- Date de naissance : 1942
- Sexe : Masculin
- Nationalité : Rwandaise
- Fonction occupée au moment des faits incriminés : député au Conseil national et président du MRND de la préfecture de Gikongoro
- Chefs d'accusation : Génocide ou, à titre subsidiaire, complicité dans le génocide, extermination en tant que crime contre l'humanité et assassinat en tant que crime contre l'humanité
- Date de confirmation de l'acte d'accusation : 8 janvier 2002
- Date et lieu de l'arrestation : 27 novembre 2001, au Sénégal
- Date du transfert : 11 mars 2002
- Date de la comparution initiale : 18 mars 2002
- Date du début du procès : 30 août 2004
- Date et contenu du prononcé de la peine : 13 décembre 2005, condamné à 25 ans d'emprisonnement.
- Appel rejeté le 27 novembre 2007.

Decision on the Defence Motion to Release Aloys Simba Pursuant to Rules 40 bis *(H) and 40* bis *(K) 26 January 2004 (ICTR-01-76-I)*

(Original : Not specified)

Trial Chamber I

Judges : Erik Møse; Jai Ram Reddy; Sergey Alekseevich Egorov

Aloys Simba – release – provisional detention, time limit, constructive custody – frivolous motion – fees and costs – motion denied

International Instrument Cited : Rules of Procedure and Evidence, Rules 2, 40 bis*, 40* bis *(C), 40* bis *(D), 40* bis *(F), 40* bis *(G),40* bis *(K) and 47 (H) (ii)*

International Cases Cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Jean Bosco Barayagwiza*, Decision, 3 November 1999 (ICTR-97-19-AR72*, Reports 1999*, p. 166*) – *Appeals Chamber,* The Prosecutor v. Jean Bosco Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 (ICTR-97-19-AR72,* Reports 2000*, p. 240) – Trial Chamber,* The Prosecutor v. Aloys Simba*, Order for Transfer and Provisional Detention, 23 November 2001 (ICTR-2001-76-DP)*

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergey Alekseevich Egorov ("the Chamber");

BEING SEIZED OF the Defence "Requête…en vue de déclarer la détention de l'accusé Aloys Simba, arbitraire et pour demander sa mise en liberté subséquente (article 40 *bis* (H), 40 *bis* (K) du RPP)", filed on 31 October 2002;

CONSIDERING the Prosecution "Response to the Defence Motion Alleging Arbitrary Detention and Seeking Release", etc., filed on 5 December 2002; the Defence "Réplique de la défense à la réponse du procureur suite à la requête de la défense", etc., filed on 2 January 2003; and the Registrar's "Mémoire du greffier relativement à la requête de la défense", etc., filed on 10 January 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 23 November 2001, after hearing *in camera* submissions from the Prosecution, Judge Andresia Vaz ordered the "immediate transfer of the suspect Aloys Simba" to the Tribunal's Detention Facility in Arusha, and his provisional detention

Décision relative à la requête de la défense aux fins de mise en liberté d'Aloys Simba, en application de l'article 40 **bis** *(H) et (K)*
26 janvier 2004 (ICTR-01-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergey Alekseevich Egorov

Aloys Simba – mise en liberté – détention provisoire, délai, garde implicite – requête fantaisiste – frais et honoraires – requête rejetée

Instrument international cité : Règlement de procédure et de preuve, art. 2, 40 bis, *40* bis *(C), 40* bis *(D), 40* bis *(F), 40* bis *(G), 40* bis *(K) et 47 (H) (ii)*

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Jean Bosco Barayagwiza*, arrêt, 3 novembre 1999 (ICTR-97-19-AR72,* Recueil 1999, *p. 166) – Chambre d'appel,* Le Procureur c. Jean Bosco Barayagwiza, *arrêt (Demande du Procureur en révision ou réexamen), 31 mars 2000 (ICTR-97-19-AR72,* Recueil 2000, *p. 241) – Chambre de première instance,* Le Procureur c. Aloys Simba*, Ordonnance de transfert et de détention provisoire, 23 novembre 2001 (ICTR-2001-76-DP)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Møse, Président de Chambre, Jai Ram Reddy et Sergey Alekseevich Egorov (la «Chambre»),

SAISI de la «Requête de la défense en vue de déclarer la détention de l'accusé Aloys Simba arbitraire et pour demander sa mise en liberté subséquente (article 40 *bis* (H) et (K) du RPP) déposée le 31 octobre 2002,

VU la réponse du Procureur intitulée «Response to the Defense Motion Alleging Arbitrary Detention and seeking Release» etc., déposée le 5 décembre 2002, la «Réplique de la défense à la réponse du Procureur suite à la requête de la défense», etc., déposée le 2 janvier 2003, et le «Mémoire du Greffier relativement à la requête de la Défense», etc., déposé le 10 janvier 2003,

STATUE À PRÉSENT sur la requête.

INTRODUCTION

1. Ayant entendu les conclusions du Procureur à huis clos le juge Andrésia Vaz a, le 23 novembre 2001, ordonné le transfert immédiat du suspect Aloys Simba au quartier pénitentiaire du Tribunal à Arusha et son placement en détention provisoire pour

there "for a period of not more than 30 days from the day after the transfer."[1] The order also requested the assistance of the Government of Senegal in giving effect to the order, and to "hold Aloys Simba in custody until he is handed over to the Tribunal".

2. On 27 November 2001, Simba was arrested and detained by the Senegalese Government. He challenged the validity of his prospective transfer and arrest before the courts of Senegal, although the date on which this legal challenge was initiated is not apparent from the parties' submissions. While still in detention in Senegal, an Indictment against Simba was confirmed by Judge Winston C. Maqutu on 8 January 2002. Two days later, a Senegalese court rejected Simba's legal challenge, and on 16 February 2002, the Senegalese Head of State authorized his transfer to the Tribunal. On 9 March 2002, Simba was remanded into the custody of Tribunal officials who served him with the Indictment. He arrived in Arusha on 11 March 2002, after an overnight stop of some 24 hours in Mali where another person was taken into custody by Tribunal officials, and made his initial appearance before the Tribunal on 18 March 2002.

SUBMISSIONS

3. The Defence argues that the Order on its face contravenes Rule 40 *bis* (D) as it does not contain an initial time limit for provisional detention and that, in any event, the Accused was provisionally detained for a period greater than that permitted under Rule 40 *bis*. The Accused was in the "constructive custody" of the Tribunal as soon as he was arrested in Senegal and the period of provisional detention must be imputed to the Tribunal as of that date. Further, the Defence implies that the provisional detention of Simba did not come to an end upon the confirmation of an Indictment against him, as service was only effected on 9 March 2003. During the Accused's provisional detention, the Prosecution did not request periods of extension as required under Rule 40 *bis* (F) and (G). Legal proceedings initiated by the Accused in Senegal do not excuse the Prosecution's obligation to comply with the time-limits set out in Rule 40 *bis*. The violations of Rule 40 *bis* render the continued detention of the Accused illegal and deprives the Tribunal of jurisdiction.

4. The Prosecution responds that the arrest, transfer, and detention of the Accused did not violate any provisions of the Rules. First, the order does contain a time limit of thirty days and is therefore not deficient on its face. Second, the period of provisional detention did not violate Rule 40 *bis*, which commences only on the day after the suspect's transfer to the Tribunal's detention facility. The period of detention in the requested State is attributable to that State, not the Tribunal. Any delay between the Accused's arrest and transfer was not the result of negligence by the Prosecution, but rather to the legal proceedings commenced at the Accused's own initiative in the courts of Senegal. The Prosecutor also argues that upon confirmation of the Indict-

[1] *Prosecutor v. Aloys Simba*, Case N° ICTR-2001-76-DP, Order for Transfer and Provisional Detention, 23 November 2001.

une période n'excédant pas 30 jours à compter du lendemain de son transfert au quartier pénitentiaire du Tribunal[1]. L'ordonnance priait en outre le Gouvernement de la République du Sénégal de se conformer à ses prescriptions relatives au transfert et au placement en détention provisoire et de «placer Aloys Simba en garde à vue jusqu'à ce qu'il soit remis au Tribunal».

2. Le 27 novembre 2001, Simba a été arrêté et placé en détention par le gouvernement de la République du Sénégal. Il a attaqué la validité de son arrestation et de son transfert éventuel devant les tribunaux sénégalais. Mais la date à laquelle ce recours a été formé n'apparaît pas clairement dans les arguments des parties. Pendant que Simba se trouvait encore en garde à vue au Sénégal, un acte d'accusation dressé contre lui a été confirmé par le juge Winston C. Maqutu le 8 janvier 2002. Deux jours plus tard, un tribunal sénégalais a rejeté le recours formé par Simba, et le 16 février 2002, le Chef de l'État sénégalais a autorisé son transfert au Tribunal. Le 9 mars 2002, Simba a été remis aux autorités du Tribunal qui lui ont notifié son acte d'accusation. Le 11 mars 2002, il est arrivé à Arusha après une escale de 24 heures au Mali où les autorités du Tribunal ont récupéré un autre suspect. Il a fait sa comparution initiale devant le Tribunal le 18 mars 2002.

ARGUMENTS DES PARTIES

3. La défense fait valoir que l'ordonnance viole manifestement les dispositions de l'article 40 *bis* (D) en ce sens qu'elle ne précise pas la durée initiale de la détention provisoire et qu'en tout état de cause l'accusé a été gardé en détention provisoire au-delà du délai prescrit par l'article 40 *bis*. L'accusé était sous la «garde implicite» du Tribunal dès son arrestation au Sénégal et le Tribunal doit être responsable de sa détention provisoire à compter de cette date. De plus, la défense estime que la détention provisoire de Simba ne s'est pas arrêtée avec la confirmation de l'acte d'accusation dressé contre lui car ledit acte ne lui a été notifié que le 9 mars 2003. Durant la détention provisoire de l'accusé, le Procureur n'a pas sollicité la prorogation des délais prévue à l'article 40 *bis* (F) et (G). La procédure judiciaire engagée au Sénégal par l'accusé ne relève pas le Procureur de l'obligation à lui faite de se conformer aux délais prescrits par l'article 40 *bis*. Les violations de l'article 40 *bis* rendent illégale la poursuite de la détention de l'accusé et font que son procès échappe à la compétence du Tribunal.

4. Le Procureur répond que l'arrestation, le transfert et la détention provisoire de l'accusé n'ont violé aucune disposition du Règlement. Premièrement, l'ordonnance présente bien un délai de 30 jours et n'est donc entachée d'aucun vice de forme. Deuxièmement, la période de détention provisoire n'a pas violé les dispositions de l'article 40 *bis*, car elle ne court qu'à compter du lendemain du transfert du suspect au quartier pénitentiaire du Tribunal. La période de détention dans l'État requis est imputable à celui-ci et non au Tribunal. Tout retard constaté entre l'arrestation et le transfert de l'accusé ne résulte pas d'une négligence du Procureur, mais plutôt de la procédure judiciaire engagée, de sa propre initiative, par l'accusé devant les juridictions séné-

[1] *Le Procureur c. Aloys Simba*, affaire n° ICTR-2001-76-DP, Ordonnance de transfert et de détention provisoire, 23 novembre 2001.

ment on 8 January 2002, Aloys Simba was no longer a suspect to whom Rule 40*bis* applies, but rather an Accused as defined by Rules 2 and 47 (H) (ii). Even assuming that the period of detention was illegal, the Tribunal's jurisdiction *rationae personae* should not be affected.

DELIBERATIONS

5. The portions of Rule 40 *bis* most pertinent to this motion are as follows :

> (C) The provisional detention of the suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal.
>
> (D) …The order shall also specify the initial time limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rule 42 and 43.

6. The Chamber rejects the argument that the Order was facially deficient for failing to specify an initial time limit. Section II of the Order, mirroring the language of Rule 40 *bis* (C), authorizes the suspect to be "provisionally detained…for a period of not more than 30 days from the day after the transfer to the Tribunal's Detention Facility."[2]

7. The time limits for provisional detention set forth in Rule 40 *bis* (C) commence only "from the day after the transfer of the suspect to the detention unit of the Tribunal". Nevertheless, the Appeals Chamber has held that there may be occasions when a person, arrested by a State at the request of the Tribunal, is deemed to be within the "constructive custody" of the Tribunal for the purposes of calculating the time-limits set out in Rule 40 *bis*. The conditions for imputing constructive custody to the Tribunal, as set forth by the Appeals Chamber, are that : (a) the suspect, but for the request by the Prosecution or the Tribunal, would not be in the State's custody; and (b) that the State was willing to transfer the suspect at the relevant time[3]. The Appeals Chamber specifically considered whether the doctrine of constructive custody would apply to a suspect who challenged his or her detention before the courts of the State, making reference to the case of *Ntakirutimana* :

> …Ntakirutimana had challenged the transfer process and is thus clearly distinguishable from the facts in the present case. There is no evidence here that either the Appellant sought to challenge his transfer to the Tribunal, or that Cameroon was unwilling to transfer him. On the contrary, the Deputy Prosecutor of the Cameroon Centre Province Court of Appeal, appearing at the Rwandan extradition hearing on 31 May 1996, argued that the Tribunal had primacy and, thus, convinced that Court to defer to the Tribunal. Moreover, as noted above, the President of Cameroon signed a decree order to transfer the Appellant prior to

[2] *Ibid.*

[3] *Jean-Bosco Barayagwiza v. Prosecutor*, Case N° ICTR-97-19-AR72, Decision (AC), 4 November 1999, paras. 54-61.

galaises. Le Procureur fait également valoir que dès la confirmation de l'acte d'accusation, le 8 janvier 2002, Aloys Simba n'était plus le suspect auquel s'applique l'article 40 *bis* mais plutôt un accusé au sens des articles 2 et 47 (H) (ii) du Règlement. Même si la période de détention provisoire était illégale, cela n'aurait aucun effet sur la compétence *rationae personae* du Tribunal.

DÉLIBÉRATION

5. Les dispositions les plus pertinentes de l'article 40 *bis* en l'espèce sont les suivantes :

> C) La détention provisoire du suspect peut être ordonnée pour une durée qui ne saurait être supérieure à 30 jours à compter du lendemain du transfert du suspect au quartier pénitentiaire du Tribunal.
>
> D) … L'ordonnance précise également la durée initiale de la détention provisoire et est accompagnée d'un document rappelant les droits du suspect, tels qu'indiqués par le présent article et les articles 42 et 43.

6. La Chambre rejette l'argument selon lequel l'ordonnance était entachée d'un vice de forme pour n'avoir pas précisé un délai initial. S'inspirant du libellé de l'article 40 *bis* (C), le paragraphe II du dispositif de l'ordonnance ordonne le placement en détention provisoire du suspect … pour une période n'excédant pas 30 jours à compter du lendemain de son transfert au quartier pénitentiaire du Tribunal»[2].

7. Le délai de détention provisoire prévu à l'article 40 *bis* (C) ne commence à courir qu'«à compter du lendemain du transfert du suspect au quartier pénitentiaire du Tribunal». Toutefois la Chambre d'appel a estimé qu'il peut y avoir des cas où une personne arrêtée à la demande du Tribunal est considérée comme étant placée sous la «garde implicite» du Tribunal, aux fins du décompte du délai prévu à l'article 40 *bis*. Les conditions d'imputation de la «garde implicite» au Tribunal, telles qu'énoncées par la Chambre d'appel sont les suivantes : a) Le suspect n'aurait pas été sous la garde de l'État si le Procureur ou le Tribunal ne l'avait pas demandé ; et b) l'État était disposé à transférer le suspect au moment opportun[3]. La Chambre d'appel a examiné spécifiquement les conditions d'application du principe de la garde implicite à un suspect ayant attaqué sa détention devant les tribunaux de l'État requis en se référant à l'affaire *Ntakirutimana* :

> … Ntakirutimana avait contesté le processus de transfert, ce qui, à l'évidence, distingue sa situation de celle de l'appelant en l'espèce. En effet, rien ne démontre ici que l'Appelant a cherché à contester son transfert vers le tribunal, ni que le Cameroun s'est opposé à son extradition. Au contraire, le Substitut du Procureur de la Chambre d'appel de la Province du Centre au Cameroun, comparaissant à l'audience du 31 mai 1996 consacrée à la demande d'extradition formée par le gouvernement rwandais, a fait valoir que le Tribunal avait la primauté sur la juridiction rwandaise et a, de ce fait, convaincu la Chambre d'appel de

[2] *Ibid.*

[3] *Jean-Bosco Barayagwiza c. le Procureur*, affaire n° ICTR-97-19-AR72, arrêt (CA), 4 novembre 1999, paras. 54 à 61.

the signing of the Warrant of Arrest and Order for Surrender by Judge Aspegren on 23 October 1997. These facts indicate that Cameroon was willing to transfer the Appellant[4].

The Defence's argument that the time-periods of Rule 40 *bis* must apply notwithstanding any procedures undertaken by the suspect in the State of detention is contrary to this clear direction from the Appeals Chamber. Nor would it be logical, as any proceedings before State courts regarding a detained suspect which lasted more than ninety days would automatically trigger a violation of Rule 40 *bis*, notwithstanding the lack of any control over those proceedings by the Tribunal.

8. The Defence has failed to establish that the Government of Cameroon was prepared to transfer Aloys Simba to the Tribunal as required for the application of the doctrine of constructive custody. Accordingly, the plain meaning of Rule 40 *bis* (C), that the thirty day time-limit commences on "the day after the transfer to the suspect to the detention unit of the Tribunal", must apply. Having reached this conclusion, and in the absence of fuller submissions from the parties, the Chamber sees no reason to consider the date upon which Aloys Simba became an Accused.

9. The Prosecution argues that the motion is frivolous and has requested that Defence costs associated with the motion be denied. Though recognizing that the Defence motion verges on the frivolous, the Chamber declines, on this occasion, to exercise its discretion to impose sanctions.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 26 January 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergey Alekseevich Egorov

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[4] *Ibid*. para. 59. The finding that the suspect was in the constructive custody of the Tribunal was subsequently reviewed by the Appeals Chamber after submissions by the Prosecution showing that Cameroon was not, in fact, prepared to transfer the suspect at the relevant time. During that period, the suspect was held not to be in the constructive custody of the Tribunal. *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration) (AC), 31 March 2000, paras. 56-58.

se dessaisir au profit du Tribunal. De plus, comme souligné supra, le Président camerounais a signé un décret ordonnant le transfert de l'appelant avant que le Président Aspegren n'ait signé, le 23 octobre 1997, le mandat d'arrêt et ordonnance de transfèrement au Tribunal le concernant. Il ressort de ces faits que le Cameroun était disposé à transférer l'appelant[4].

L'argument de la défense selon lequel le délai prévu à l'article 40 *bis* doit s'appliquer nonobstant toute procédure engagée par le suspect dans l'État où il est détenu est contraire à cette directive claire de la Chambre d'appel. Cela n'aurait pas été logique non plus car toute procédure devant une juridiction nationale concernant un suspect et durant plus de 90 jours entraînerait automatiquement une violation des dispositions de l'article 40 *bis*, indépendamment du fait que le Tribunal n'a aucun contrôle sur le déroulement d'une telle procédure.

8. La défense n'a pas pu établir que le gouvernement du Sénégal était disposé à transférer Aloys Simba au Tribunal comme l'exige le principe de la garde implicite. Par conséquent, le sens évident de l'article 40 *bis* (C) selon lequel le délai de 30 jours court à compter «du lendemain du transfert du suspect au quartier pénitentiaire du Tribunal» doit s'appliquer. Ayant abouti à cette conclusion, et en l'absence d'arguments plus complets des parties, la Chambre ne voit pas pourquoi elle doit examiner le problème de la date à laquelle Aloys Simba est devenu accusé.

9. Le Procureur fait valoir que la requête est fantaisiste et demande le non paiement des émoluments et des frais de la défense y afférents. Tout en reconnaissant que la requête de la défense frise la légèreté, la Chambre s'abstient, cette fois-ci, d'user de son pouvoir discrétionnaire d'infliger des sanctions.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête

Arusha le 26 janvier 2004

[Signé] : Erik Møse; Jai Ram Reddy; Sergey Alekseevich Egorov

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[4] *Ibid*., para. 59. La conclusion selon laquelle le suspect se trouvait sous la garde implicite du Tribunal a par la suite été révisée par la Chambre d'appel à la lumière des arguments avancés par le Procureur pour établir qu'en fait le Cameroun n'était pas disposé à transférer le suspect au moment opportun. Pendant cette période, le suspect ne se trouvait pas sous la garde implicite du Tribunal. *Jean-Bosco Barayagwiza c. le Procureur*, affaire n° ICTR-97-19-AR72, arrêt (Demande du Procureur en révision ou réexamen) (CA), 31 mars 2000, paras. 56 à 58.

Decision on Defence Motion Alleging Defects in the Form of the Indictment 26 January 2004 (ICTR-2001-76-I)

(Original : English)

Trial chamber I

Judges : Erik Møse; Jai Ram Reddy; Sergey Alekseevich Egorov

Aloys Simba – defects in the form of the indictment – amended indictment – motion moot

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergey Alekseevich Egorov ("the Chamber");

BEING SEISED of the Defence "Preliminary Motion for Defects in the Form of the Indictment", etc., filed on 31 October 2002;

CONSIDERING the Prosecution "Response" thereto, filed on 18 February 2003; and the Defence Reply thereto filed on 6 June 2003;

HEREBY DECIDES the Motion.

INTRODUCTION

1. The Indictment was confirmed on 8 January 2002, and the Accused pleaded not guilty to all four counts of the Indictment on 18 March 2002. The present motion was filed on 31 October 2002. On 18 February 2003, the Prosecution filed its submissions in opposition to the motion, arguing that the Indictment was not defective. However, on 28 November 2003, the Prosecution filed a motion requesting leave to amend its Indictment, conceding that it was, in part, an effort to respond to Defence requests for greater specificity in pre-trial motions[1]. On 15 January 2004, the Defence filed a response opposing the amendments, partly because its effect was to improperly deprive the Chamber of the opportunity to decide the present motion.

[1] Prosecutor's Request for Leave to File an Amended Indictment, 28 November 2003, para. 6 (i).

Décision relative à la requête de la défense en exceptions préjudicielles pour vices de forme des quatre chefs d'accusation 26 janvier 2004 (ICTR-2001-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergey Alekseevich Egorov

Aloys Simba – vices de forme de l'acte d'accusation – acte d'accusation amendé – requête sans objet

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»);

SIÉGEANT en la Chambre de première instance I, composée des juges Møse, Président de Chambre, Jai Ram Reddy et Sergey Alekseevich Egorov (la «Chambre»),

SAISI de la Requête de la défense en exceptions préjudicielles pour vices de forme des quatre chefs d'accusation … datée du 31 octobre 2002,

VU la réponse du Procureur à ladite requête déposée le 18 février 2003 et la réplique de la défense déposée le 6 juin 2003,

STATUANT CI-APRÈS sur ladite requête,

INTRODUCTION

1. L'acte d'accusation a été confirmé le 8 janvier 2002 et l'accusé a plaidé non-coupable le 18 mars 2002 de chacun des quatre chefs d'accusation retenus contre lui. La présente requête a été déposée le 31 octobre 2002 et, le 18 février 2003, le Procureur a déposé des écritures tendant à la voir rejeter au motif que l'acte d'accusation ne comportait aucun vice de forme. Toutefois, le 28 novembre 2003, le Procureur a déposé une requête en modification de l'acte d'accusation dans le cadre d'une initiative visant en partie à répondre aux voeux de la défense de voir les requêtes formées pendant la phase de la mise en état formulées avec plus de précision. Le 15 janvier 2004, la défense a déposé une réplique dans laquelle elle s'insurge contre la modification envisagée, estimant notamment qu'elle aurait pour effet d'ôter à la Chambre la possibilité de statuer sur la présente requête.

SUBMISSIONS

2. The Defence asserts that all four counts in the Indictment are defective. The acts supporting the first count, genocide, are not sufficiently identified in time or place, rendering the charge impermissibly vague. The second count, complicity in genocide, is said to be defective because the names of some accomplices are redacted, depriving the Accused of the right to be informed of the nature of the charges against him. The third count, extermination as a crime against humanity, is indistinguishable, in law and in fact, from the second count and, therefore, should be treated as merged with the second count. It is also said to be unduly vague. The final count, murder as a crime against humanity, is also vague as it does not identify any victims by name, fails to allege the requisite connection to "widespread and systematic attacks", and fails to allege the requisite discriminatory motive.

3. The Prosecution submitted a variety of arguments in opposition to the motion in its Response, but substantially changed its position when, on 28 November 2003, it filed a motion to amend the Indictment. The amendments to the Indictment are directly relevant to the defects raised by the Defence in its motion. In a separate decision filed today, the Chamber has granted leave to amend the Indictment.

DELIBERATIONS

4. A review of the Indictment, which the Prosecution has today been granted leave to file, shows that the defects raised by the Defence in respect of Counts One, Two and Four are significantly remedied. The particulars supporting the count of genocide are more detailed and more extensive than in the Indictment to which the Defence objected. The names of accomplices to the charge of complicity in genocide, previously redacted, have now been disclosed. The names of victims and more specific details as to time of commission have been included in support of the charge of murder. These changes substantially alter the basis of the Defence motion and render it moot in respect of these counts.

5. Count Three, charging the Accused with extermination as a crime against humanity, remains largely untouched by the amendments approved today. Nevertheless, a decision on the Defence motion on Count Three would be improper. The Chamber has no jurisdiction to decide motions on Indictments which have been superceded; nor to decide motions in respect of Indictment which did not exist at the time of filing. Should the Defence wish to maintain its objections, it must file a new preliminary motion directed at the current Indictment.

ARGUMENTS DES PARTIES

2. La défense affirme que les quatre chefs retenus dans l'acte d'accusation présentent tous des vices de forme. Les faits invoqués à l'appui du premier chef d'accusation, à savoir le génocide, ne sont pas décrits avec la précision voulue, dans le temps et dans l'espace; d'où une imprécision inadmissible de la charge imputée. Elle fait valoir que le deuxième chef d'accusation, la complicité dans le génocide, présente un vice de forme attendu que le caviardage des noms de certains complices a pour effet de priver l'accusé du droit d'être informé de la nature des accusations portées contre lui. Elle soutient que le troisième chef d'accusation, l'extermination constitutive de crime contre l'humanité, ne peut, ni en droit ni en fait, être différencié du deuxième chef d'accusation et doit par conséquent être considéré comme étant un de ses éléments. Elle considère que cette charge est beaucoup trop vague pour être admise. La défense tient également pour vague le dernier chef d'accusation, l'assassinat constitutif de crime contre l'humanité, dès lors qu'aucune des victimes qui y sont visées n'y est nommément citée, que le lien de connexité requis n'y est pas établi avec les «attaques généralisées et systématiques» n'y est pas articulé et que le motif discriminatoire exigé n'y est pas imputé.

3. Dans sa réponse, le Procureur a avancé divers arguments pour s'opposer à ce qu'il soit fait droit à la requête de la défense, sauf à remarquer que dans sa requête en modification de l'acte d'accusation déposée le 28 novembre 2003, sa position a considérablement changé. Les modifications proposées relativement à l'acte d'accusation contribuent directement à le purger des vices relevés par la défense dans sa requête. Dans une décision distincte déposée aujourd'hui, la Chambre a fait droit à la requête en modification de l'acte d'accusation.

DÉLIBÉRATION

4. Il ressort de l'examen de l'acte d'accusation que la Chambre a, ce jour, autorisé le Procureur à déposer que les vices de forme relevés par la défense relativement aux chefs d'accusation, 1, 2 et 4 ont substantiellement été purgés. Les pièces justificatives produites à l'appui du chef de génocide sont plus détaillées et plus exhaustives que les éléments articulés dans l'acte d'accusation contre lequel s'insurge la défense. Précédemment caviardés, les noms des complices visés au chef de complicité dans le génocide sont à présent divulgués. Les noms des victimes accompagnés de renseignements plus précis sur le moment de la commission des actes allégués ont été fournis à l'appui du chef d'assassinat. Ces changements ont pour effet d'altérer de manière notable la base de la requête de la défense et de la rendre sans objet au regard de ces trois chefs d'accusation.

5. Les modifications approuvées aujourd'hui sont dans une large mesure sans conséquence sur le troisième chef d'accusation visant l'extermination constitutive de crime contre l'humanité. Toutefois, une décision sur la requête de la défense relativement à ce troisième chef d'accusation serait inopportune. La Chambre n'est pas compétente pour statuer sur des requêtes visant un acte d'accusation qui a été remplacé par un autre; elle n'est pas davantage compétente pour statuer sur des requêtes visant un acte d'accusation qui n'existait pas au moment où lesdites requêtes ont été formées. Si la défense tient à maintenir ses objections, elle doit déposer une nouvelle requête en exception préjudicielle portant sur l'acte d'accusation actuel.

FOR THE ABOVE REASONS, THE CHAMBER
DECLARES the motion moot.

Arusha, 26 January 2004

[Signed**] :** Erik Møse; Jai Ram Reddy; Sergey Alekseevich Egorov

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Decision on Motion to Amend Indictment 26 January 2004 (ICTR-2001-76-I)

(Original : English)

Trial Chamber I

Judges : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

Aloys Simba – motion to amend the indictment - factors to be weighed – motion granted

International Instruments Cited : Rules of Procedure and Evidence, Rules 40 bis *and 50 – Statute, Art. 6 (1), 19 (1) and 20 (4) (c)*

International Cases Cited :

I.C.T.R. : Trial Chamber III, The Prosecutor v. Protais Zigiranyirazo*, Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment, 15 October 2003 (ICTR-2001-73-I,* Reports 2003, *p. 4018) – Appeals Chamber,* The Prosecutor v. Edouard Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III, Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 8 October 2003 (ICTR-98-44-AR73,* Reports 2003*, p. 1504)*

I.C.T.Y. : Trial Chamber II, The Prosecutor v. Radoslav Brdanin and Momir Talic*, Decision on Filing of Replies, 7 June 2001 (IT-99-36)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEISED of the Prosecution "Request for Leave to File an Amended Indictment", with annexes, filed on 28 November 2003;

PAR CES MOTIFS, LA CHAMBRE
DÉCLARE la requête sans objet.

Arusha, le 26 janvier 2004

[Signé] : Erik Møse; Jai Ram Reddy; Sergey Alekseevich Egorov

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Décision relative à la requête en modification de l'acte d'accusation 26 janvier 2004 (ICTR-2001-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

Aloys Simba – requête en modification de l'acte d'accusation – facteurs à mettre en balance – requête acceptée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 40 bis *et 50 – Statut, art. 6 (1), 19 (1) et 20 (4) (c)*

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance III, Le Procureur c. Protais Zigiranyirazo, *Décision de la Chambre de première instance relative à la requête du Procureur en modification de l'acte d'accusation et à la requête urgente de la défense en communication des documents appuyant la requête du Procureur en modification de l'acte d'accusation, 15 octobre 2003 (ICTR-2001-73-I,* Recueil 2003, *p. 4019) – Chambre d'appel,* Le Procureur c. Edouard Karemera et consorts, *Décision relative à l'appel interlocutoire interjeté par le Procureur de la décision rendue le 8 octobre 2003 par la Chambre de première instance III refusant d'autoriser le dépôt d'un acte d'accusation modifié, 19 décembre 2003 (ICTR-98-AR73,* Reports 2003*, p. 1505)*

T.P.I.Y. : Chambre de première instance II, Le Procureur c. Radoslav Brdanin et Momir Talic, *Décision de la Chambre de première instance sur le dépôt des répliques, 7 juin 2001 (IT-99-36)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en sa Chambre de première instance I composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la requête du Procureur en modification de l'acte d'accusation, déposée le 28 novembre 2003 avec des annexes,

CONSIDERING the Defence Response thereto, filed on 15 January 2004;
HEREBY DECIDES the Motion.

INTRODUCTION

1. The Accused was arrested in Senegal on 27 November 2001 in response to an Order of this Tribunal for his provisional detention and transfer, issued under Rule 40 *bis*. On 9 March 2002, having exhausted legal proceedings before the courts of Senegal, the Accused was remanded into the custody of officials of the Tribunal and arrived at the detention unit in Arusha on 11 March 2002, where he has remained in custody to this day. He made his initial appearance on 18 March 2002, pleading not guilty to all four counts in an Indictment confirmed on 8 January 2002.

2. On 31 October 2002, the Defence filed two separate motions, one for the provisional release of the Accused based on an alleged violation of Rule 40 *bis*, and another alleging defects in the form of the Indictment. The Prosecution filed responses to these motions on 5 December 2002 and, after being granted an extension of time, on 18 February 2003, respectively. The Defence filed replies in respect of the two motions on 2 January 2003 and 6 June 2003.

3. On 28 November 2003, the Prosecution filed a motion requesting leave to amend its Indictment and the Defence responded on 15 January 2004, opposing the amendments.

4. On 15 January 2004, a Status Conference was held before the Chamber to discuss the readiness of the parties for trial and the possible timing of its commencement.

SUBMISSIONS

5. The Prosecution characterizes the amendments to the Indictment as serving two purposes. First, to provide additional and more precise information of the alleged criminal conduct of the Accused; and second, to allege that criminal liability under Article 6 (1) is based on acts committed "in concert with others as part of a common scheme, strategy or plan". The additional information is said to be derived from Prosecution investigations undertaken since the confirmation of the Indictment and, in particular, reflect the content of six additional witness statements. These additions more accurately reflect the totality of the evidence to be adduced against the Accused at trial. In its submissions, the Prosecution also stated that "the proposed amendment is an effort by the Prosecution, partly in response to the Defense request for specificity in pre-trial motions"[1]. The addition of the language charging responsibility under Article 6 (1) is said to be a response to legal developments at

[1] Prosecutor's Request for Leave to File an Amended Indictment, 28 November 2003, para. 6 (ii).

VU le mémoire de la défense en réponse, déposée le 15 janvier 2004,

STATUE ci-après sur ladite requête.

INTRODUCTION

1. En exécution d'une ordonnance rendue par le Tribunal de céans en vertu de l'article 40 *bis* du Règlement de procédure et de preuve pour son arrestation, son placement en détention et son transfert, l'accusé a été arrêté au Sénégal le 27 novembre 2001. Après l'accomplissement de toutes les formalités judiciaires au Sénégal, l'accusé a été confié à la garde des autorités du Tribunal de céans le 9 mars 2002 et est arrivé au Centre de détention d'Arusha le 11 mars 2002 où il est demeuré en détention jusqu'à ce jour. À sa comparution initiale, le 18 mars 2002, il a plaidé non coupable à tous les quatre chefs d'accusation retenus contre lui dans un acte d'accusation qui avait été confirmé le 8 janvier 2002.

2. Le 31 octobre 2002, la défense a déposé deux requêtes distinctes pour d'une part, solliciter la libération provisoire de l'accusé pour cause d'une violation présumée de l'article 40 *bis* du Règlement et, d'autre part, dénoncer les vices de forme que présenterait l'acte d'accusation. Le Procureur a déposé ses réponses à ces requêtes le 5 décembre 2002 et, après l'obtention de la prorogation des délais impartis, le 18 février 2003 respectivement. La défense a déposé ses répliques aux deux réponses du Procureur le 2 janvier 2003 et le 6 juin 2003.

3. Le 28 novembre 2003, le Procureur a déposé une requête en modification de l'acte d'accusation, et la défense a déposé sa réponse le 15 janvier 2004 pour s'opposer aux modifications envisagées de l'acte d'accusation.

4. Le 15 janvier 2004, la Chambre de première instance a tenu une conférence de mise en état pour examiner l'état des préparatifs des parties au procès et la fixation éventuelle de sa date d'ouverture.

ARGUMENTATION DES PARTIES

5. Selon le Procureur, les modifications de l'acte d'accusation visent deux objectifs : d'une part, apporter des informations complémentaires et plus détaillées sur la conduite criminelle présumée de l'accusé et, d'autre part, alléguer que la responsabilité pénale individuelle au titre de l'article 6 (1) du Statut se fonde sur les actes commis «de concert avec d'autres personnes dans le cadre d'une entreprise, d'une stratégie ou d'un plan communs.» Le Procureur fait valoir que les informations complémentaires proviennent des enquêtes qu'il a menées depuis la confirmation de l'acte d'accusation et prennent en particulier en considération la teneur de six déclarations de témoins supplémentaires. Ces ajouts permettent d'avoir une image plus précise de l'ensemble des moyens à charge qui seront présentés à la barre. Le Procureur fait également valoir que «la modification proposée participe d'un effort tendant à donner suite en partie à la demande de précision que la défense a faite dans ses requêtes préalables au procès[1].»

[1] Requête du Procureur en modification d'un acte d'accusation, 28 novembre 2003, para. 6 (ii).

the International Criminal Tribunal for the Former Yugoslavia ("the ICTY") on the manner of alleging individual criminal responsibility. The Prosecution argues that the right of the Accused to be tried without undue delay under Article 19 (1) and 20 (4) (c) of the Statute will not be impaired by these amendments. No new charge is laid which would permit the Defence to raise preliminary objections. Any delay that might be occasioned is speculative, in light of the absence of date set for trial. Further, the need to set out critical details of the case against the Accused is, itself, a fundamental interest which must be taken into account in deciding whether to permit amendments.

6. The Defence opposes the amendments on three grounds. First, the defects in the Indictment, which are the object of a pending motion, should be addressed not by the Prosecution but the Chamber. The motion is said to be, in effect, an effort to divest the Chamber of jurisdiction. Second, no new disclosure has been made to the Defence since the confirmation of the Indictment to justify the Prosecution claim that the amendments reflect new evidence. The amendments do not reflect new evidence but merely remedy a defective Indictment. Third, the amendments impair the right of the Accused to trial without delay. The Prosecution's lengthy delay since its last submissions on the Defence motion for defects in the Indictment was negligent, warrants sanctions, and will abridge the right of the Accused to be tried within a reasonable period.

DELIBERATIONS

7. Rule 50 provides that after the initial appearance of the Accused, "an amendment of an Indictment may only be made by leave granted by a Trial Chamber", pursuant to a motion filed. A Chamber of the ICTY, applying virtually identical language in its Rules, has comprehensively described the applicable principles as follows :

> The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the accused unfairly. The word 'unfairly' is used in order to emphasize that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction. To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not otherwise prejudice the accused unfairly in the conduct of his defence. There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case. Whether any delay resulting from the amendment denies the accused his right to be tried without undue delay will depend

L'ajout au libellé de la responsabilité pénale individuelle en vertu de l'article 6 (1) du Statut, dit-il, est une adaptation à l'évolution de la jurisprudence au Tribunal pénal international pour l'ex-Yougoslavie («le TPIY») sur la façon d'imputer la responsabilité pénale individuelle. Le Procureur soutient que ces modifications ne porteront pas atteinte au droit de l'accusé à être jugé sans retard excessif en vertu des articles 19 (1) et 20 (4) (c) du Statut. Il n'y a pas de nouveau chef d'accusation pouvant permettre à la défense de soulever des exceptions préjudicielles. La date du procès n'étant pas fixée, tout retard pouvant résulter de la modification de l'acte d'accusation relève de la spéculation. Par ailleurs, la nécessité d'apporter des précisions essentielles sur ce qui est reproché à l'accusé présente en soi un intérêt fondamental qui doit être pris en compte dans la décision d'autoriser ou non les modifications.

6. La défense s'élève contre les modifications pour trois raisons. Premièrement, les vices de forme que présente l'acte d'accusation et qui font l'objet d'une requête pendante doivent être examinés par la Chambre et non par le Procureur. En effet, la requête est considérée comme une tentative visant à dépouiller la Chambre de sa compétence. Deuxièmement, aucun nouvel élément n'a été communiqué à la défense depuis la confirmation de l'acte d'accusation pour justifier l'allégation du Procureur selon laquelle les modifications envisagées prennent en considération de nouveaux éléments de preuve. Plutôt que de prendre en compte de nouveaux éléments de preuve, ces modifications sont un simple palliatif aux lacunes de l'acte d'accusation. Troisièmement, les modifications portent atteinte au droit de l'accusé à être jugé sans retard. Le long retard accusé par le Procureur depuis qu'il a fait connaître ses derniers arguments relatifs à la requête de la Défense dénonçant les lacunes de l'acte d'accusation participait d'une négligence qui mérite des sanctions et portera atteinte au droit de l'accusé à être jugé dans un délai raisonnable.

DÉLIBÉRATION

7. L'article 50 prévoit qu'après la comparution initiale de l'accusé, «un acte d'accusation ne peut être modifié qu'avec l'autorisation d'une Chambre de première instance» donnant suite à une requête déposée à cet effet. L'une des Chambres du Tribunal pénal international pour l'ex-Yougoslavie (TPIY), reprenant virtuellement les termes utilisés dans son Règlement de procédure et de preuve, a décrit de manière exhaustive les principes applicables comme suit :

> Il est fondamental, avant d'autoriser une modification de l'acte d'accusation, de se demander si la modification sera injustement préjudiciable à l'accusé. Le mot «injuste» vise à souligner le fait que la modification ne sera pas refusée simplement parce qu'elle aide l'accusation à obtenir, en toute équité, une condamnation. Pour être pertinent, le préjudice infligé à un accusé devrait normalement nuire à l'équité du procès. Quand une modification est demandée pour s'assurer que les questions réellement en jeu en l'espèce soient tranchées, la Chambre de première instance exercera, en principe, son pouvoir discrétionnaire pour l'autoriser, dans la mesure où elle ne cause aucune injustice à l'accusé, et où elle ne nuit pas injustement à sa défense. L'accusé ne devrait subir aucune injustice s'il lui est donné la possibilité de préparer convenablement une défense effective à l'acte d'accusation modifiée. Pour répondre à la question de savoir si tout délai [retard] résultant de la modification enfreint le droit de l'accusé à

> upon (i) the circumstances of the particular case, including any improper tactical advantage sought by the prosecution, and (ii) the exceptional character of criminal proceedings involving war crimes, including the general complexity and difficulties necessarily inherent in the investigation of such crimes. There is a need for reasonable judicial flexibility in relation to such amendments[2].

8. The right to be tried without undue delay, guaranteed by Article 20 (4) (c) of the Statute, must be considered in conjunction with other rights of the Accused, including the right to be informed in detail of the nature and cause of the charges brought.[3] In discussing an amendment that, as here, added allegations of fact to existing charges, the ICTR Appeals Chamber explained the relationship between an Indictment that more accurately reflects the Prosecution evidence and the right to trial without undue delay :

> Compared to the more general allegations in the Current Indictment, the added particulars in the Amended Indictment better reflect the case that the Prosecution will seek to present at trial and provide further notice to the Accused of the nature of the charges against them. Likewise, the specific allegation of a joint and criminal enterprise gives the Accused clear notice that the Prosecution intends to argue this theory of commission of crimes. Particularized notice in advance of trial of the Prosecution's theory of the case does not render proceedings unfair; on the contrary, it enhances the ability of the Accused to prepare to meet that case. Granting leave to file the Amended Indictment would therefore enhance the fairness of the actual trial by clarifying the Prosecution's case and eliminating general allegations that the Prosecution does not intend to prove at trial. These amendments will very likely streamline both trial and appeal by eliminating objections that particular events are beyond the scope of the Indictment[4].

9. In summary, the factors to be weighed in determining whether to grant leave to amend an Indictment include : the ameliorating effect of the changes on the clarity and precision of the case to be met; the diligence of the Prosecution in making the amendment in a timely manner that avoids creating an unfair tactical advantage; and

[2] *Prosecutor v. Brdanin and Talic*, Case N° IT-99-36, Decision on Filing of Replies (TC), 7 June 2001, para. 3 [footnotes omitted]; adopted in ICTR caselaw by *Prosecutor v. Zigiranyirazo*, Case N° ICTR-2001-73-I, Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment (TC), 15 October 2003, para. 19.

[3] *Prosecutor v. Karemera et al.*, Case N° ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2003, para. 13.

[4] *Ibid.*, para. 27.

être jugé sans retard excessif, il conviendra de prendre en considération (i) les circonstances de l'espèce y compris de tout avantage tactique indu recherché par l'accusation, et (ii) la nature exceptionnelle des procédures pénales qui portent sur des crimes de guerre, y compris la complexité et les difficultés générales inhérentes aux enquêtes menées sur ces crimes. Ces modifications doivent être approchées avec une souplesse raisonnable[2].

8. Le droit à être jugé sans retard excessif, qui est garanti par l'article 20 (4) (c) du Statut du Tribunal, doit être mis en balance avec d'autres droits de l'accusé, notamment celui d'être informé de manière détaillée sur la nature et les motifs des accusations retenues contre lui[3]. Saisie d'une modification qui, comme ici, fait état de charges nouvelles ajoutées à celles déjà existantes, la Chambre d'appel a explicité en ces termes le lien qui existe entre un acte d'accusation qui renseigne de manière plus complète sur les éléments de preuve à charge et le droit de l'accusé à être jugé sans retard excessif :

> Par comparaison avec les allégations à caractère plus général invoquées dans l'acte d'accusation actuel, les précisions supplémentaires insérées dans l'acte d'accusation modifié explicitent encore mieux la thèse que le Procureur cherchera à défendre au procès tout en éclairant davantage sur la nature des accusations retenues contre eux. De même, l'allégation précise relative à une entreprise criminelle conjointe fait clairement savoir aux accusés que le Procureur a l'intention de défendre cette théorie relative à la perpétration des crimes. Un préavis exposant en détail avant l'ouverture d'un procès la thèse que le Procureur entend y défendre ne rendra pas le procès inéquitable; bien au contraire, un tel préavis permettra aux accusés de mieux préparer leur défense contre les accusations retenues contre eux. Autoriser le Procureur à déposer l'acte d'accusation modifié contribuerait donc à rendre le procès, à proprement parler, plus équitable vu que la nouvelle version de l'acte d'accusation explicitera la thèse que le Procureur entend défendre tout en éliminant les allégations à caractère général qu'il n'a pas l'intention de prouver au procès. Ces modifications vont clairement rationaliser le déroulement du procès et de l'appel en éliminant les objections comme quoi tel ou tel événement dépasse le cadre de l'acte d'accusation[4].

9. En résumé, les éléments que la Chambre doit peser aux fins de savoir s'il convient d'autoriser ou non la modification d'un acte d'accusation comprennent : l'effet positif que les modifications peuvent avoir sur la clarté et la précision de l'affaire en jugement, la diligence dont doit faire preuve le Procureur en procédant sans retard à ses modifications, diligence dont le défaut serait de nature à lui procurer

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[2] *Le Procureur c. Brdanin et Talic*, affaire n° IT-99-36, Décision de la Chambre de première instance sur le dépôt des répliques, 7 juin 2001, para. 3 [omission de notes en bas de page]; adoptée par la jurisprudence au TPIR dans *Le Procureur c. Zigiranyirazo*, affaire n° ICTR-2001-73-I, Décision de la Chambre de première instance relative à la requête du Procureur en modification de l'acte d'accusation et à la requête urgente de la défense en communication des documents appuyant la requête du Procureur en modification de l'acte d'accusation, 15 octobre 2003, para. 19.

[3] *Le Procureur c. Karemera et consorts*, affaire n° ICTR-98-AR73, Décision relative à l'appel interlocutoire interjeté par le Procureur de la décision rendue le 8 octobre 2003 par la Chambre de première instance III refusant d'autoriser le dépôt d'un acte d'accusation modifié (Chambre d'appel), 19 décembre 2003, para. 13.

[4] *Ibid*. para. 27.

the likely delay or other possible prejudice to the Defence, if any, caused by the amendment.

10. The amendments proposed by the Prosecution clarify the case to be met by the Defence. Indeed, the amendments to the Indictment correspond significantly to the objections raised by the Defence in its motion alleging defects in the form of the Indictment, in particular its objection that the allegations are vague and that certain names were redacted[5]. The amended Indictment describes in meaningful detail additional incidents, and gives additional details of events only very generally described in the current Indictment, including names of victims and accomplices that are redacted in the current Indictment. Regardless of whether the Defence has notice of these incidents through disclosure of witness statements, their inclusion in the Indictment makes clear that they are part of the Prosecution case to which the Defence must respond, and enhances the fairness of the trial. Further, the additional allegation that the Accused is engaged in a joint and criminal enterprise clarifies the Prosecution's theory of liability.

11. The Defence complains that the Prosecution has made no disclosures justifying its claim that the amendments are based on newly discovered evidence. On 15 January 2004, however, on the date of a status conference in the case, the Prosecution disclosed statements from fourteen witnesses, some dated as late as November 2003, containing allegations which are reflected in the amendments to the Indictment.

12. It is important to emphasize that the amendments do not introduce new charges, but rather bring specificity to allegations that were hitherto, in some respects, generally described. Those general descriptions would have led to disputes at trial as to adequacy of notice and the relevance of evidence led by the Prosecution. No trial date has yet been set, although the Presiding Judge of the Status Conference held on 15 January 2004 indicated that the trial would start between 15 March 2004 and the end of July 2004. The Chamber is of the view, given the scope and nature of the amendments, that the remaining period before the earliest possible start of the trial is sufficient to permit adequate preparation by the Defence, and that the amendment of the Indictment clarifies issues that would otherwise remain vague and subject to considerable dispute at trial.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution motion to amend its Indictment in accordance with Annex B of its motion;

[5] Defence Preliminary Motion for Defects in the Form With Respect to Four Counts and for Lack of Jurisdiction (Rule 72 (A), (B) (i) and (ii) and (H) (iv) of the Rules, 31 October 2002; Defence Reply to the Prosecutor's Response to the Defence Preliminary Motion for Defects in the Form With Respect to Four Counts and for Lack of Jurisdiction.

un avantage indu; et le retard susceptible d'être enregistré relativement à l'ouverture du procès ou tout autre préjudice éventuel qui pourrait découler pour la défense de cette modification.

10. Les modifications proposées par le Procureur clarifient la thèse à laquelle la défense aura à faire face. En effet, les modifications de l'acte d'accusation répondent dans une large mesure aux griefs exprimés dans la requête de la défense dénonçant les vices de forme présumés de l'acte d'accusation, notamment le grief que les allégations sont vagues et que certains noms ont été caviardés[5]. L'acte d'accusation modifié décrit avec assez de précision les incidents supplémentaires et apporte des précisions supplémentaires sur les faits qui n'étaient présentés que de façon très sommaire dans l'actuel acte d'accusation, y compris les noms des victimes et des complices caviardés dans l'actuel acte d'accusation. Indépendamment de la notification de ces faits à la défense par voie de communication des déclarations des témoins, leur insertion dans l'acte d'accusation fait clairement en sorte qu'ils font partie intégrante de la thèse du Procureur à laquelle la défense doit réagir, et renforce l'équité du procès. En outre, l'allégation supplémentaire selon laquelle l'accusé est engagé dans une entreprise criminelle conjointe renseigne clairement sur la thèse du Procureur en matière de responsabilité.

11. La défense se plaint de ce que le Procureur n'a communiqué aucun élément étayant son allégation que les modifications se fondent sur de nouveaux éléments de preuve. Mais à une conférence de mise en état le 15 janvier 2004, le Procureur a divulgué les déclarations de 14 témoins, dont certaines avaient été recueillies aussi récemment qu'en novembre 2003, contenant des allégations qui ont été prises en considération dans les modifications de l'acte d'accusation.

12. Il importe de souligner que, plutôt que d'ajouter de nouveaux chefs d'accusation, les modifications précisent les allégations qui, à certains égards, étaient présentées en termes généraux. Cette présentation en termes généraux aurait suscité la controverse au procès sur le caractère suffisant ou non du préavis et la pertinence des éléments de preuve à charge. La date du procès n'a pas encore été fixée bien que le Président de la conférence de mise en état du 15 janvier 2004 ait indiqué que le procès pourrait s'ouvrir entre le 15 mars et la fin juillet 2004. Compte tenu de la portée et de la nature des modifications, la Chambre estime que le délai qui reste avant l'ouverture du procès le plus tôt possible est suffisant pour permettre à la Défense de bien se préparer et que la modification de l'acte d'accusation apporte des précisions sur des questions qui autrement seraient restées vagues et susceptibles de nourrir beaucoup de controverse au procès.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la Requête du Procureur en modification de l'acte d'accusation;

[5] Requête de la défense en exceptions préjudicielles pour vices de forme des quatre chefs d'accusation et en incompétence [Art. 72 (A), (B) (i) et (ii) et (H) (iv) du Règlement], 31 octobre 2002; Réplique de la défense à la réponse du Procureur à la requête de la défense en exceptions préjudicielles pour vices de forme des quatre chefs d'accusation et en incompétence.

ORDERS that the amended Indictment be filed by the Prosecution with the Registry immediately.

Arusha, 26 January 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on Motion for Commencement of Trial or Release 26 January 2004 (ICTR-2001-76-I)

(Original : English)

Trial Chamber I

Judges : Judge Erik Møse, Presiding Judge; Jai Ram Reddy; Sergey Alekseevich Egorov

Aloys Simba – commencement of trial or release – trial scheduled – motion moot

International Instruments Cited : Rules of Procedure and Evidence, Rules 40 bis *– Statute, Art. 19 (1) and 20 (4) (c)*

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergey Alekseevich Egorov ("the Chamber");

BEING SEISED of the Defence "Requête en extrême urgence…en vue d'obtenir l'ouverture du procès de l'accusé ou sa mise en liberté d'office", filed on 8 December 2003;

CONSIDERING the Prosecution "Response" thereto, filed on 15 December 2003;

HEREBY DECIDES the Motion.

INTRODUCTION

1. The Accused was arrested in Senegal on 27 November 2001 in response to an Order of this Tribunal for his provisional detention and transfer, issued under Rule 40 *bis*. On 9 March 2002, having exhausted legal proceedings before the courts of Senegal, the Accused was remanded into the custody of officials of the Tribunal and arrived at the detention unit in Arusha on 11 March 2002, where he has remained in

ORDONNE au Procureur de déposer immédiatement son projet d'acte d'accusation modifié.

[Signé] : Erik Møse; Sergei Alekseevich Egorov; Jai Ram Reddy

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Décision relative à la requête de la défense en vue de l'ouverture du procès de l'accusé ou de sa mise en liberté 26 janvier 2004 (ICTR-2001-76-I)

(Original : Anglais)

Chambre de première instance I

Judges : Erik Mose, Président de Chambre; Jai Ram Reddy; Sergey Alekseevich Egorov

Aloys Simba – ouverture du procès ou mise en liberté – procès programmé – requête sans objet

Instruments internationaux cités : Règlement de procédure et de preuve, art. 40 bis *– Statut, art. 19 (1) et 20 (4) (c)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»)

SIÉGEANT en la Chambre de première instance I, composée des juges Mose, Président de Chambre, Jai Ram Reddy et Sergey Alekseevich Egorov (la «Chambre»),

SAISI de la «Requête en extrême urgence de la défense en vue d'obtenir l'ouverture du procès de l'accusé ou sa mise en liberté d'office», déposée le 8 décembre 2003,

Vu la «Réponse» du Procureur déposée le 15 décembre 2003,

STATUE COMME SUIT :

INTRODUCTION

1. L'accusé a été arrêté le 27 novembre 2001 au Sénégal en exécution d'une ordonnance du Tribunal de céans prescrivant son arrestation, son placement en détention provisoire et son transfert, conformément à l'article 40 *bis* du Règlement de procédure et de preuve. Le 9 mars 2002, à l'issue de la procédure judiciaire engagée devant les tribunaux du Sénégal, l'accusé a été remis aux autorités du Tribunal et est arrivé le

custody to this day. He made his initial appearance on 18 March 2002, pleading not guilty to all four courts in an Indictment confirmed on 8 January 2002.

2. On 31 October 2002, the Defence filed two separate motions, one for the provisional release of the Accused based on an alleged violation of Rule 40*bis*, and another alleging defects in the form of the Indictment. The Prosecution filed responses to these motions on 5 December 2002 and, after being granted an extension of time, on 18 February 2003, respectively. The Defence filed replies in respect of the two motions on 2 January 2003 and 6 June 2003.

3. On 18 November 2003, the Prosecution filed a motion requesting leave to amend its indictment. In its submissions, the Prosecution stated that the proposed amendment is an effort by the Prosecution, partly in response to the Defence request for specificity in pre-trial motions[1]. On 15 January 2004, the Defence filed a response opposing the amendments.

4. On 15 January 2004, a status conference was held before the Chamber to discuss the readiness of the parties for trial and the possible timing of its commencement.

SUBMISSIONS

5. The Defence requests that the trial of the Accused commence without delay or, in the alternative, that he be released. The Defence's preliminary motions have been pending for a long period, during which the Accused has been detained. The right to be tried without undue delay enshrined in Articles 19 (1) and 20 (4) (c) require that the case be heard without further delay or, if the Tribunal is unable to do so, that the Accused be released. The Defence further requested that the Chamber decide all pending motions.

6. The Prosecution agrees that the Chamber should decide all pending motions. Though the Prosecution also wishes the start of the trial, it submits that the timing of the commencement of the trial must depend on the capacity of the Tribunal and the status of other cases. The release of the Accused would not be an appropriate remedy for him or for all other Accused awaiting trial.

DELIBERATIONS

7. The purpose of the status conference held on 15 January 2004 was to determine the readiness of the parties for trial and discuss the date on which it could commence. The Presiding Judge indicated that the trial would start during the time period from 15 March 2004 to July 2004, based on the availability of judges and courtroom time.

[1] Prosecutor's Request for Leave to File an Amended Indictment, 28 November 2003, para. 6 (i).

11 mars 2002 au quartier pénitentiaire où il est en détention provisoire jusqu'à ce jour. A sa comparution initiale, le 18 mars 2002, il a plaidé non coupable des quatre chefs d'accusation portés contre lui dans l'acte d'accusation confirmé le 8 janvier 2002.

2. Le 31 octobre 2002, la défense a déposé deux requêtes dont l'une aux fins de la mise en liberté de l'accusé pour cause de violation présumée de l'article 40 *bis* et l'autre dénonçant des vices de forme présumés dans l'acte d'accusation. Le Procureur a déposé ses réponses aux deux requêtes respectivement le 5 décembre 2002 et, après avoir bénéficié d'une prorogation de délai, le 18 février 2003. La défense a déposé ses répliques à ces deux réponses le 2 janvier et le 6 juin 2003 respectivement.

3. Le 18 novembre 2003, le Procureur a déposé une requête en modification de l'acte d'accusation. Dans ses arguments, le Procureur a déclaré que la modification proposée visait en partie à satisfaire à l'exigence de précision, formulée par la défense dans ses requêtes préalables au procès[1]. Le 15 janvier 2004, la défense a déposé sa réponse dans laquelle elle s'oppose aux modifications proposées dans l'acte d'accusation.

4. Le 15 janvier 2004, la Chambre a tenu une conférence de mise en état en vue d'examiner l'état des préparatifs des parties à l'ouverture du procès et la fixation d'une date éventuelle pour cette ouverture.

ARGUMENTS DES PARTIES

5. La défense demande que le procès de l'accusé s'ouvre sans délai ou à défaut, que celui-ci soit remis en liberté. Les requêtes formées par la défense en exceptions préjudicielles sont pendantes devant la Chambre depuis longtemps et l'accusé est maintenu en détention pendant tout ce temps. Le droit de l'accusé à un procès sans retard excessif tel que garanti par les articles 19 (1) et 20 (4) (c) du Statut requiert que sa cause soit examinée sans délai ou, si le Tribunal ne peut le faire, qu'il soit remis en liberté. La défense invite en outre la Chambre à statuer sur toutes les requêtes pendantes.

6. Le Procureur convient que la Chambre devrait statuer sur toutes les requêtes pendantes. Tout en souhaitant également voir s'ouvrir le procès, le Procureur fait valoir que la fixation de la date d'ouverture du procès dépend des capacités du Tribunal et de l'état d'avancement des autres affaires devant le Tribunal. Selon le Procureur, la libération de l'accusé ne serait pas une solution opportune, ni pour l'intéressé, ni pour tous les autres accusés qui attendent d'être jugés.

DÉLIBÉRATION

7. Le but de la conférence de mise en état du 15 janvier 2004 était d'évaluer l'état des préparatifs des parties à l'ouverture du procès et de fixer la date de cette ouverture. Le juge qui présidait la conférence a indiqué que le procès pourrait s'ouvrir au cours de la période allant du 15 mars à juillet 2004, tout dépendant de la disponibilité

[1] Requête du Procureur en modification de l'acte d'accusation, 28 novembre 2003, para. 6 (i).

The Prosecution indicated its willingness to proceed within that time-frame. The precise start-date for the trial will be determined based on the parties' readiness for trial, and the timing of two other cases which are nearing trial. The Chamber considers, therefore, that the start of the trial is imminent and satisfies the Defence request for the start of trial without delay. Having granted the first Defence request, and as the release of the Accused is sought as an alternative remedy, the Chamber does not consider it necessary to consider the latter request.

8. The pending motion for amendment of the Indictment, which may have some bearing on the preparedness of the parties for trial, is also decided by the Chamber today.

FOR THE ABOVE REASONS, THE CHAMBER

DECLARES the motion moot as trial has already been scheduled to proceed without delay.

Arusha, 26 January 2003

[Signed] : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergey Alekseevich Egorov

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Corrigendum *to Decision on Release of Aloys Simba Pursuant to Rules 40* **bis** *(H) and 40* **bis** *(K) 27 January 2004 (ICTR-01-76-I)*

(Original : Not specified)

Trial Chamber I

Judges : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

Aloys Simba – corrigendum – *mistake in the name of the requested country*

International Instrument Cited : Rules of Procedure and Evidence, Rules 40 bis *(H) and 40* bis *(K)*

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov ("the Chamber");

des juges et des horaires d'audience. Le Procureur a fait savoir qu'il serait prêt pour la période indiquée. La date exacte de l'ouverture du procès sera arrêtée en fonction de l'état des préparatifs des parties et du calendrier des deux autres procès qui s'apprêtent à s'ouvrir. La Chambre considère par conséquent que l'ouverture du procès est imminente, comblant de ce fait le voeu de la demande de la défense de voir s'ouvrir le procès sans délai. Ayant fait droit à la première mesure sollicitée par la défense, la Chambre ne juge pas nécessaire d'examiner la mesure subsidiaire demandant la mise en liberté de l'accusé.

8. La Chambre statue également aujourd'hui sur la requête pendante en modification de l'acte d'accusation qui pourrait avoir une incidence sur l'état des préparatifs des parties à l'ouverture du procès.

PAR CES MOTIFS, LA CHAMBRE

DÉCLARE la requête sans objet, le procès étant programmé pour s'ouvrir sans délai.

Arusha, le 26 janvier 2004

[Signé] :Erik Mose; Jai Ram Reddy; Sergey A. Egorov

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Rectificatif de la décision relative à la requête de la défense en vue de la mise en liberté d'Aloys Simba sur le fondement de l'article 40 bis *(H) et (K) 27 janvier 2004 (ICTR-01-76-I)*

(Original : Non spécifié)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergey Alekseevich Egorov

Aloys Simba – rectificatif – erreur dans le nom du pays

Instrument international cité : Règlement de procédure et de preuve, art. 40 bis *(H) et 40* bis *(K)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergey Alekseevich Egorov (la «Chambre»),

NOTING its "Decision on the Defence Motion to Release Aloys Simba Pursuant to Rules 40 *bis* (H) and 40 *bis* (K)", filed on 26 January 2004;

DECLARES that the words "Government of Cameroon" in paragraph 8 of the decision shall be replaced by the words "Government of Senegal".

Arusha, 27 January 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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VU sa «Décision relative à la requête de la défense en vue de la mise en liberté d'Aloys Simba sur le fondement de l'article 40 *bis* (H) et (K) du Règlement de procédure et de preuve, rendue le 26 janvier 2004,

DÉCLARE qu'au lieu de «Gouvernement du Cameroun», au paragraphe 8 de la décision, il faut lire «Gouvernement du Sénégal».

Arusha, le 27 janvier 2004

[Signé] : Erik Møse; Jai Ram Reddy; Sergey A. Egorov

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Order of the Presiding Judge to Assign Judges 9 February 2004 (ICTR-01-76-AR72)

(Original : not specified)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

Aloys Simba – Appeals Chamber – judges – composition

International Instruments Cited : Document IT/222 of the International Criminal Tribunal for the former Yugoslavia – Statute, Art. 11(3) and 13(4)

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Requête en extrême urgence de la défense en vue d'obtenir une autorisation à répliquer à date fixe ou une prorogation des délais pour le dépôt de son recours en appel contre la décision en date du 26 janvier 2004 rendue par la première chambre du TPIR relative à la requête de la défense en exception préjudicielle pour vices de forme des quatre chefs d'accusation et en incompétence," filed by Aloys Simba on 3 February 2004;

CONSIDERING the composition of the Appeals Chamber of the International Tribunal set out in Document IT/222 of the International Criminal Tribunal for the former Yugoslavia, dated 17 November 2003;

NOTING Articles 11(3) and 13(4) of the Statute of the International Tribunal;

FOR THE FOREGOING REASONS,

ORDER that, in the case of *Aloys Simba v. Prosecutor,* Case N° ICTR-01-76-AR72, the Appeals Chamber be composed as follows :

Judge Theodor Meron

Judge Florence Mumba

Judge Mehmet Güney

Judge Wolfgang Schomburg

Judge Inés Mónica Weinberg de Roca.

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

Done this 9th day of February 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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Decision on Motion for Extension of Time 11 February 2004 (ICTR-2001-76-1)

(Original : English)

Trial Chamber I

Judge : Erik Mose

Aloys Simba – extension of time – communication of documents in a language that the Defence understands – motion granted in part

International Instrument Cited : Rules of Procedure and Evidence, Rules 73, 73 (A) and 73 (D)

International Cases Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Aloys Simba, *Decision on Urgent Request for Extension of Time, 11 December 2003 (ICTR-2001-76-I,* Reports 2003, *p. 3998) – Trial Chamber I,* The Prosecutor v. Aloys Simba, *Decision on Motion to Amend Indictment, 26 January 2004, (ICTR-2001-76-I,* Reports 2004, *p. XXX)*

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

SITTING as Trial Chamber I, composed of Judge Erik Mose, designated by the Chamber in accordance with Rule 73 (A);

BEING SEISED of the Defence "Requête en extrême urgence de la défense en vue d'obtenir une autorisation à produire à date fixe ou une prorogation des délais pour le dépôt d'une requête suite à la décision de la première chambre (Article 73 D du RPP)", filed on 3 February 2004;

CONSIDERING the Prosecution "Response" thereto, filed on 4 February 2003; and the defense "Réplique" thereto filed on 9 February 2004;

HEREREBY DECIDES the Motion.

1. By decision filed in English on 26 January 2004, the Chamber granted a Prosecution motion to amend the Indictment of the Accused Aloys Simba, "in accordance with Annex B of the motion"[1]. The Defence requests that the time periods specified in Rule 73 (D) should commence only once the French translation of the decision has been received by the Defence, the language understood by the Accused and by Lead Counsel.

2. The basis of the motion is unclear. Rule 73 (D) concerns deadlines that arise when a date has been set for the hearing of a motion. As no date has been set for the hearing of any motion in this case, the Rule appears to have no application whatsoever.

[1] *Simba*, Decision on Motion to Amend Indictment, p. 5.

Décision relative à la requête en prorogation de délai 11 février 2004 (ICTR-2001-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juge : Erik Møse, Président de Chambre

Aloys Simba – prorogation de délai – communication des documents dans une langue que la défense comprend – requête acceptée en partie

Instrument international cité : Règlement de procédure et de preuve, art. 73, 73 (A) et 73 (D)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Aloys Simba, *Décision relative à la requête en extrême urgence pour la prorogation des délais, 11 décembre 2003 (ICTR-2001-76-I,* Recueil 2003, *p. 3998) – Chambre de première instance I,* Le Procureur c. Aloys Simba, *Décision relative à la requête en modification de l'acte d'accusation, 26 janvier 2004 (ICTR-2001-76-I,* Recueil 2004, *p. XXX)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée du juge Eric Møse désigné par la Chambre en vertu de l'article 73 (A),

SAISI de la «Requête en extrême urgence de la défense en vue d'obtenir une autorisation à produire à date fixe ou une prorogation des délais pour le dépôt d'une requête suite à la décision de la première Chambre» (article 73 (D) du *Règlement de procédure et de preuve*), déposée le 3 février 2004,

VU la réponse du Procureur à ladite requête déposée le 4 février 2004 et la réplique de la défense déposée le 9 février 2004,

STATUE CI-APRÈS SUR LADITE REQUÊTE

1. Par sa décision en langue anglaise déposée le 26 janvier 2004, la Chambre a fait droit à une requête du Procureur en modification de l'acte d'accusation d'Aloys Simba, «conformément à l'annexe B de ladite requête[1]». La défense demande que les délais prévus à l'article 73 (D) ne commencent à courir qu'une fois qu'elle aura reçu la traduction en langue française de la requête car c'est la langue que maîtrisent l'accusé et son conseil principal.

2. Le fondement de la présente requête n'est pas clair. L'article 73 (D) s'applique aux délais impartis quand une date a été fixée pour l'audition d'une requête. Étant donné qu'aucune date n'a été fixée pour l'audition de quelque requête que ce soit relative à cette affaire, cet article ne semble pas du tout applicable en l'espèce.

[1] *Simba*, Décision relative à la requête en modification de l'acte d'accusation.

3. Be that as it may, the time-limits prescribed by Rule 73 may be tolled until such time as documents have been communicated to the Defence in a language of the Tribunal which it understands[2]. In substance, this appears to be the request of the Defence. The Chamber has been advised by the Registry that the French translation of the decision was filed, and communicated to the Defence by email, on 6 February 2004. Consequently, any deadlines prescribed by Rule 73 for filings by the Defence in relation to the Decision on Motion to Amend Indictment shall be deemed to have commenced on that date.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part.

Arusha, 11 February 2004

[Signed] : Erik Mose

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[2] See e g. *Simba*, Decision on Urgent Motion (TC), 11 December 2003, p. 2.

3. En tout état de cause, les délais prescrits par l'article 73 peuvent être prorogés jusqu'à ce que tous les documents aient été communiqués à la défense dans une langue du Tribunal qu'elle comprend[2]. C'est en substance ce que sollicite la défense. Le Greffe a informé la Chambre que la traduction de la requête en français a été déposée et communiquée à la défense, par courrier électronique, le 6 février 2004. Par conséquent, tout délai prescrit par l'article 73 à la défense pour le dépôt de ses requêtes portant sur la décision relative à la requête en modification de l'acte d'accusation sera considéré comme ayant commencé à courir à compter de cette date.

PAR CES MOTIFS, LA CHAMBRE

FAIT PARTIELLEMENT DROIT à la requête.

Arusha, le 11 février 2004

[Signé] : Erik Møse

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[2] Voir *Simba*, Décision relative à la requête en extrême urgence pour la prorogation des délais (Chambre), 11 décembre 2003, p. 2.

Decision on Motion for Extension of Time 12 February 2004 (ICTR-2001-76-I)

(Original : English)

Trial Chamber I

Judge : Erik Møse

Aloys Simba – extension of time – communication of documents in a language that the Defence understands – motion granted in part

International Instrument Cited : Rules of Procedure and Evidence, Rules 73, 73 (A) and 73 (D)

International Cases Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Aloys Simba, *Decision on Urgent Request for Extension of Time, 11 December 2003 (ICTR-2001-76-I,* Reports 2003, *p. 3998) – Trial Chamber I,* The Prosecutor v. Aloys Simba, *Decision on Motion to Amend Indictment, 26 January 2004, (ICTR-2001-76-I,* Reports 2004, *p. XXX)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, designated by the Chamber in accordance with Rule 73 (A);

BEING SEISED of the Defence "Requête en extrême urgence de la défense en vue d'obtenir une autorisation à produire à date fixe ou une prorogation des délais pour le dépôt d'une requête suite à la décision de la première chambre (article 73 D du RPP)", filed on 3 February 2004;

CONSIDERING the Prosecution "Response" thereto, filed on 4 February 2003; and the Defense "Réplique" thereto filed on 9 February 2004;

HEREBY DECIDES the Motion.

1. By decision filed in English on 26 January 2004, the Chamber granted a Prosecution motion to amend the Indictment of the Accused Aloys Simba, "in accordance with Annex B of the motion"[1]. The Defence requests that the time periods specified in Rule 73 (D) should commence only once the French translation of the decision has been received by the Defence, the language understood by the Accused and by Lead Counsel.

2. The basis of the motion is unclear. Rule 73 (D) concerns deadlines that arise when a date has been set for the hearing of a motion. As no date has been set for the hearing of any motion in this case, the Rule appears to have no application whatsoever.

[1] *Simba*, Decision on Motion to Amend Indictment (TC), p. 5.

3. Be that as it may, the time-limits prescribed by Rule 73 may be tolled until such time as documents have been communicated to the Defence in a language of the Tribunal which it understands[2]. In substance, this appears to be the request of the Defence. The Chamber has been advised by the Registry that the French translation of the decision was filed, and communicated to the Defence by email, on 6 February 2004. Consequently, any deadlines prescribed by Rule 73 for filings by the Defence in relation to the Decision on Motion to Amend Indictment shall be deemed to have commenced on that date.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part.

Arusha, 12 February 2004

[Signed] : Erik Møse

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[2] See e.g. *Simba*, Decision on Urgent Motion for Extension of Time (TC), 11 December 2003, p. 2.

Decision on Aloys Simba's Motion for an extension of Time 13 February 2004 (ICTR-01-76-AR72)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Florence Mumba; Mehmet Güney; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Aloys Simba – extension of time, appeal – translation of the impugned decision, working language of the Defence – good cause – motion granted

International Instrument Cited : Rules of Procedure and Evidence, Rules 72, 72 (a), 72 (B) (i), 72 (H) (iv), 116 (A) and 116 (B)

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "International Tribunal", respectively),

BEING SEISED OF the "Requête en extrême urgence de la défense en vue d'obtenir une autorisation à répliquer à date fixe ou une prorogation des délais pour le dépôt de son recours en appel contre la décision en date du 26 janvier 2004 rendue par la première chambre du TPIR relative à la requête de la défense en exception préjudicielle pour vices de forme des quatre chefs d'accusation et en incompétence (Articles 72 (a), B (i) et H (iv) du RPP)", filed on 3 February 2004 ("Motion");

NOTING Trial Chamber I's "Decision on Defence Motion alleging Defects in the Form of the Indictment" dated 26 January 2004 ("Impugned Decision");

NOTING that, pursuant to Rule 72 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), appeals in the case of motions challenging jurisdiction shall be filed within fifteen days of filing of the Impugned Decision;

NOTING that the Motion seeks an extension of time within which to file an appeal following receipt of the French translation of the Impugned Decision;

NOTING that the Prosecution has not filed a response to the Motion;

CONSIDERING that the working language of the Defence is French;

CONSIDERING that Rule 116 (A) of the Rules permits the Appeals Chamber to grant a motion to extend a time limit "upon a showing of good cause";

Décision relative à la requête d'Aloys Simba en vue d'obtenir une prorogation de délais pour le dépôt de son recours en appel 13 février 2004 (ICTR-01-76-AR72)

(Original : Anglais)

Chambre d'appel

Juges : Theodor Meron, Président de Chambre; Florence Mumba; Mehmet Güney; Wolfgang Schomburg; Inès Monica Weinberg de Roca

Aloys Simba – prorogation de délai, recours en appel – traduction de la décision contestée, langue de travail de la défense – motif valable – requête acceptée

Instrument international cité : Règlement de procédure et de preuve, art. 72, 72 (a), 72 (B) (i), 72 (H) (iv), 116 (A) et 116 (B)

LA CHAMBRE D'APPEL du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994 («Chambre d'appel» et le «Tribunal international», respectivement);

SAISIE DE la Requête en extrême urgence de la défense en vue d'obtenir une autorisation à répliquer à date fixe ou une prorogation des délais pour le dépôt de son recours en appel contre la décision en date du 26 janvier 2004 rendue par la première Chambre du TPIR relative à la Requête de la défense en exceptions préjudicielles pour vices de forme des quatre chefs d'accusation et en incompétence (Articles 72 (a), B (i) et H (iv) du RPP), déposée le 3 février 2004 (la «Requête»);

VU la décision de la Chambre de première instance intitulée : Décision relative à la Requête de la défense en exceptions préjudicielles pour vices de forme des quatre chefs d'accusation en date du 26 janvier 2004 (la «Décision contestée»);

NOTANT que, conformément à l'article 72 du Règlement de procédure et de preuve du Tribunal international (le «Règlement»), les appels interjetés au titre d'exceptions d'incompétence doivent être déposés dans les quinze jours suivant la date de dépôt de la Décision contestée;

NOTANT que dans sa Requête, la défense sollicite la prorogation des délais qui lui sont impartis pour le dépôt de son acte d'appel à partir de la traduction en français de la décision contestée;

NOTANT que le Procureur n'a pas déposé de réponse à ladite Requête;

ATTENDU QUE la langue de travail de la défense est le français;

ATTENDU QUE l'article 116 (A) du Règlement autorise la Chambre d'appel à faire droit à une demande de report de délais si elle considère que des motifs valables le justifient;

CONSIDERING that, in light of Rule 116 (B) of the Rules, good cause has been shown for granting an extension of time pursuant to Rule 116 (A) of the Rules;

FOR THE FOREGOING REASONS,

HEREBY GRANTS the Motion;

ORDERS that Defendant Aloys Simba's appeal may be filed within fifteen days of receipt the French translation of the Impugned Decision; and

DIRECTS the Registrar to ensure that the French translation of the Impugned Decision is forwarded without delay to the Defendant, if he has not already done so.

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

Done this 13th day of February 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

***

ATTENDU QU'IL RÉSULTE de l'article 116 (B) du Règlement, qu'il existe des motifs valables pour que la Chambre d'appel accorde à l'accusé une prorogation de ses délais de dépôt, conformément à l'article 116 (A) du Règlement;

POUR CES MOTIFS

FAIT DROIT à la Requête;

DIT que l'acte d'appel d'Aloys Simba pourra être déposé dans les quinze jours suivant la date de réception de la traduction en français de la Décision contestée; et

ENJOINT au Greffier, s'il ne l'a pas encore fait, de veiller à ce que la traduction en français de la Décision contestée soit transmise dans les meilleurs délais à l'appelant.

Fait en français et en anglais, le texte anglais faisant foi.

La Haye (Pays-Bas), le 13 févier 2004

[Signé] : Theodor Meron

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Order for Transfer of Witnesses (Rule 90 bis*)*
24 February 2004 (ICTR-2001-76-I)

(Original : English)

Trial Chamber I

Judge : Erik Mose

Aloys Simba – transfer of detained witnesses – Rwanda – absence of any response from the government of the requested State – informal assurances, presence of the detained witness not required for any criminal proceedings in progress in the requested State, no extension of the period of the detention as foreseen by the requested State – motion granted

International Instrument Cited : Rules of Procedure and Evidence, Rules73 (A), 90 bis *and 90* bis *(B)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, designated by the Chamber in accordance with Rule 73 (A) of the Rules of Procedure and Evidence;

BEING SEIZED of the Prosecution's "Request for an Order Transferring Detained Witnesses Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence ", filed on 22 January 2004;

HEREBY DECIDES the motion.

1. Pursuant to Rule 90 *bis* (A) of the Rules "[a]ny detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Union of the Tribunal, conditional on his return within the period decided by the Tribunal". Rule 90 *bis* (B) requires prior verification of two conditions for such an order :

(i) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

(ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State.

2. The Prosecution moves the Trial Chamber for an order authorizing the transfer of eight of its witnesses known by the pseudonyms KDD, KEC, KSD, XXG, YA, YC, YG, and YI, currently detained in Rwanda. In relation to the requirements of Rule 90 *bis* (B), the motion includes as an annex a letter from the Prosecutor to an official of the Ministry of Justice of Rwanda which requests confirmation that the witnesses will not be subject to prosecution during the period 1 May and 30 June 2004. The motion itself, however, requests an order for the period from the end of March through the end of July 2004. Further, the letter does not request any assurance that the transfer will not extend the witness's detention.

3. In the absence of any response from the government of Rwanda, the Prosecution made further *ex parte* submissions to the effect that it had received informal assurances that these witnesses would not be needed for any judicial proceedings in Rwanda between April and the end of June 2004, and that the transfer of the witnesses would not extend their detention.

4. The Chamber recalls that the Prosecution has the burden of providing specific information that the conditions in Rule 90 *bis* (B) are fulfilled. Though the information provided is less than ideal, the Chamber is satisfied, given the assurances of the Prosecution, that the conditions for an order under Rule 90 *bis* (B) are met in relation to these witnesses.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS, pursuant to Rule 90*bis* of the Rules, that the individuals designated under the pseudonyms KDD, KEC, KSD, XXG, YA, YC, YG, and YI be transferred no earlier than 1 April 2004 to the Detention Unit in Arusha, and returned to Rwanda no later than the end of June 2004;

REQUESTS the Government of Rwanda to comply with this order and to arrange for the transfer in cooperation with the Registrar and the Tanzanian Government;

INSTRUCTS the Registrar to :

A) Transmit this decision to the Governments of Rwanda and Tanzania;

B) Ensure the proper conduct of the transfer, including the supervision of the witnesses in the Tribunal's detention facilities;

C) Remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the temporary detention, and as soon as possible, inform the Trial Chamber of any such change.

Arusha, 24 February 2004

[Signed] : Erik Møse

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Decision on Prosecution Request for Protection of Witnesses 4 March 2004 (ICTR-2001-76-I)

(Original : Not specified)

Trial Chamber I

Judge : Erik Møse

Aloys Simba – protective measures for witnesses – real and objective fears – accommodation of the rights of the Accused and the interests of the witnesses – disclosure of the witness's identity – prohibition for the Accused or any member of the Defence to disclose any identifying information, diligence of Defence Counsel in notifying and reminding the Accused that he is personally subject to the terms of the order – motion granted in part

International Instruments Cited : Rules of Procedure and Evidence, Rules 66 (A), 66 (A) (ii), 69, 73 (A) and 75 – Statute, Art. 19, 20 and 21

International Cases Cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Emmanuel Ndindabahizi, *Order for Non-Disclosure, 3 October 2001 (ICTR-2001-71-I,* Reports 2001*, p. 2812) – Trial Chamber XXX,* The Prosecutor v. Aloys Simba*, Decision on the Prosecutor's* Ex Parte *Application for Review and Confirmation of the Indictment and Other Related Orders, 8 January 2002 (ICTR-2001-76-I,* Reports 2002*, p XXX) – Trial Chamber XXX,* The Prosecutor v. Jean Mpambara, *Decision (Prosecutor's Motion for Protective Measures for Prosecution Witnesses), 29 May 2002 (ICTR-2001-65-XXX,* Reports 2002, *p XXX) – Trial Chamber XXX,* The Prosecutor v. Hormisdas Nsengimana, *Decision on the Prosecutor's Motion for Protective Measures for Witnesses, 2 September 2002(ICTR-2001-69-XXX,* Reports 2002, *p XXX) – Trial Chamber I,* The Prosecutor v. Athanase Seromba, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 30 June 2003 (ICTR-2001-66-I,* Reports 2003, *p. 3990) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003 (ICTR-98-41-T,* Reports 2003, *p.97) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Bagosora Motion for Protection of Witnesses, 1 September 2003 (ICTR-2001-98-41-T,* Reports 2003, *p. 108) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Kabiligi Motion for Protection of Witnesses, 1 September 2003 (ICTR-2001-98-41-T,* Reports 2003, *p. 118) – Trial Chamber I,* The Prosecutor v. Emmanuel Ndindabahizi, *15 September 2003 (ICTR-2001-71-I,* Reports 2003, *p. 2426) – Trial Chamber XXX,* The Prosecutor v. Jean-Baptiste Gatete, *Decision on Prosecution Request for Protection of Witnesses, 11 February 2004 (ICTR-2000-61- XXX,* Reports 2004, *p XXX)*

Décision relative à la requête du Procureur en prescription de mesures de protection de témoins 4 mars 2004 (ICTR- 2001-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juge : Erik Mose

Aloys Simba – mesures de protection de témoins – craintes réelles et objectives – conciliation des droits de l'accusé avec les intérêts des témoins, communication de l'identité des témoins – interdiction pour l'accusé ou toute personne de la défense de communiquer tout renseignement permettant d'identifier les témoins, diligence du conseil de la défense à dire et à redire à l'accusé qu'il est personnellement tenu de se conformer à la présente décision – requête acceptée en partie

Instruments internationaux cités : Règlement de procédure et de preuve, art. 66 (A), 66 (A) (ii), 69, 73 (A) et 75 – Statut, art. 19, 20 et 21

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Emmanuel Ndindabahizi, *Order for Non-Disclosure, 3 octobre 2001 (ICTR-2001-71-I,* Recueil 2001, *p. 2813) – Chambre de première instance XXX,* Le Procureur c. Aloys Simba*, Décision relative à la requête du Procureur aux fins d'examen et de confirmation de l'acte d'accusation et d'ordonnances connexes, 8 janvier 2002 (ICTR-2001-76-I,* Recueil 2002, *p XXX) – Chambre de première instance XXX,* Le Procureur c. Jean Mpambara, *Décision (Requête du Procureur aux fins de mesures de protection des témoins à charge), 29 mai 2002 (ICTR-2001-65- XXX,* Recueil 2002, *p XXX) – Chambre de première instance XXX,* Le Procureur c. Hormisdas Nsengimana, *Décision relative à la requête du Procureur en prescription de mesures de protection de victimes et de témoins, 2 septembre 2002 (ICTR-2001-69- XXX,* Recueil 2002, *p XXX) – Chambre de première instance I,* Le Procureur c. Athanase Seromba, *Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins, 30 juin 2003 (ICTR-2001-66-I,* Recueil 2003, *p. 3991) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts, *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 juillet 2003 (ICTR-98-41-T,* Recueil 2003, *p. 97) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts, *Décision sur la requête de Bagosora en prescription de mesures de protection de témoins, 1er septembre 2003 (ICTR-2001-98-41-T,* Recueil 2003, *p. 109) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts, *Décision relative à la requête de Kabiligi aux fins de protection de témoins, 1er septembre 2003 (ICTR-2001-98-41-T,* Recueil 2003, *p. 119) – Chambre de première instance I,* Le Procureur c. Emmanuel Ndindabahizi, *Décision relative à la requête de la défense en prescription de mesures de protection pour les témoins, 15 septembre 2003 (ICTR-2001-71-I,* Recueil 2003, *p. 2427) – Chambre de première instance XXX,* Le Procureur c. Jean-Baptiste Gatete, *Decision on Prosecution Request for Protection of Witnesses, 11 février 2004 (ICTR-2000-61- XXX,* Recueil 2004, *p XXX)*

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

SITTING as Judge Erik Møse, designated by Trial Chamber I in accordance with Rule 73 (A);

BEING SEIZED OF the Prosecution "Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment", filed on 16 February 2004;

CONSIDERING that there has been no response from the Defence;

HEREBY DECIDES the motion.

INTRODUCTION

1. The present motion is brought under Rule 69 of the Rules of Procedure and Evidence ("the Rules") seeking modification of the Prosecution obligation to disclose complete statements of its witnesses no later than 60 days before the start of trial, as required by Rule 66 (A) (ii)[1].

SUBMISSIONS

2. The Prosecution claims that its potential witnesses face a real and substantial danger of being threatened, assaulted, or killed if their identities are revealed. That claim is supported by statements of investigators of the Tribunal; a memorandum from the Witness and Victims Support Section; a statement from the Chief of Security in Kigali, Rwanda; newspaper articles; and reports of journalists, human rights organizations, and organs of the United Nations, all of which are appended to the Motion. The Prosecution requests permission to disclose the name of each of its witnesses, and portions of statements that may serve to identify the witness, until a fixed period before the testimony of each witness, also known as "rolling disclosure." Rolling disclosure twenty-one days prior to the date of each witness's testimony is said to have "crystallized as the Tribunal's practice"[2]. The Prosecution also requests a variety of measures to ensure that this information is not disclosed to the public.

[1] A previous decision relieved the Prosecution of some of its disclosure obligations under Rule 66 (A) (i). *Simba*, Decision on the Prosecutor's *Ex Parte* Application for Review and Confirmation of the Indictment and Other Related Orders (TC), 8 January 2002, pp. 3-4.

[2] Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, para. 36.

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la personne du juge Erik Møse, désigné par la Chambre de première instance I en vertu de l'article 73 (A) du Règlement de procédure et de preuve (le «Règlement»),

SAISI de la requête du Procureur en prescription de mesures de protection de victimes et de témoins intitulée *Motion for Protective Measures for Victims and Witnesses to Crimes of Alleged in the Indictment*, déposée le 16 février 2004,

ATTENDU que la défense n'a pas répondu à ladite requête,

STATUE CI-APRÈS sur la requête du Procureur.

INTRODUCTION

1. Par la présente requête fondée sur l'article 69 du Règlement, le Procureur sollicite une modification de l'obligation qui lui est faite par l'article 66 (A) (ii) du Règlement de communiquer toutes les déclarations des témoins à charge au plus tard 60 jours avant la date fixée pour le début du procès[1].

ARGUMENTS DU PROCUREUR

2. Le Procureur soutient que les témoins qu'il entend appeler à la barre risquent de façon réelle et grave de faire l'objet de menaces ou de voies de fait, voire d'être tués, si leur identité est révélée. À l'appui de cette affirmation, il joint à sa requête des déclarations d'enquêteurs du Tribunal, un mémoire de la Section d'aide aux victimes et aux témoins, une déclaration du Chef du service de la sécurité en poste à Kigali (Rwanda), des articles de journaux, des dépêches d'agences de presse et des rapports émanant d'organisations des droits de l'homme et d'organes de l'Organisation des Nations Unies. Le Procureur demande l'autorisation de ne communiquer le nom de chaque témoin à charge et les parties de ses déclarations permettant de l'identifier que dans un délai déterminé avant sa comparution, c'est-à-dire de suivre la procédure connue sous le nom d'«étalement de la communication des pièces», de «communication graduelle des pièces» ou «de communication des pièces par étapes». La communication des pièces par étapes dans un délai de 21 jours avant la date fixée pour la comparution de chaque témoin «serait devenue la pratique consacrée devant le Tribunal»[2]. Le Procureur demande également à la Chambre de prescrire une série de mesures tendant à éviter la divulgation des renseignements en question au public.

[1] Une décision rendue précédemment a en partie dégagé le Procureur de l'obligation de communication mise à sa charge par l'article 66 (A) (i) du Règlement. Voir l'affaire *Le Procureur c. Simba*, Décision relative à la requête du Procureur aux fins d'examen et de confirmation de l'acte d'accusation et d'ordonnances connexes, 8 janvier 2002, pp. 3 et 4.

[2] Voir la présente requête du Procureur intitulée Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, para. 36.

DELIBERATIONS

3. Rule 66 (A) provides that :

> The Prosecutor shall disclose to the Defence :
>
> …
>
> (ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial.
>
> Under Rule 69, "Protection of Victims and Witnesses", however :
>
> (A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.
>
> …
>
> (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the prosecution and the Defence.

4. Established jurisprudence requires that the witnesses for whom protective measures are sought must have a real fear for the safety of the witness or her or his family, which must be objectively justified. The evidence of the volatile security situation in Rwanda, and of potential threats against Rwandans living in other countries, indicates that witnesses could justifiably fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security. These submissions have not been contradicted by the Defence. Accordingly, exceptional circumstances have been established.

5. Rule 75 describes the measures that may be taken to "safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused". These measures include the non-disclosure to the public of the name of the witness or any other identifying information. Rule 75 does not diminish the Prosecution obligation under Rule 69 to, at some point, disclose the identity and prior statements of the witness to the Defence. Rule 69 simply permits deferred disclosure, displacing the fixed rule of sixty days before trial with a more flexible standard of an "adequate time for preparation…of the Defence". What is "adequate" must be assessed in light of the rights of the Accused set out in Articles 19 and 20 of the Statute while also considering the needs and vulnerability of witnesses expressed in Article 21 of the Statute. Article 19 expressly requires accommodation of the rights of the Accused and the interests of witnesses and victims.

3. L'article 66 (A) du Règlement est ainsi libellé :

> Le Procureur communique à la défense :
>
> …
>
> ii) Au plus tard soixante jours avant la date fixée pour le début du procès, copie des dépositions de tous les témoins que le Procureur entend appeler à la barre.

En revanche, l'article 69 du Règlement intitulé «Protection des victimes et des témoins» se lit comme suit :

> A) Dans des cas exceptionnels, chacune des deux parties peut demander à la Chambre de première instance d'ordonner la non-divulgation de l'identité d'une victime ou d'un témoin pour empêcher qu'ils ne courent un danger ou des risques, et ce, jusqu'au moment où la Chambre en décidera autrement.
>
> …
>
> C) Sous réserve de l'article 75, l'identité des victimes ou des témoins doit être divulguée dans des délais prescrits par la Chambre de première instance, pour accorder au Procureur et à la défense le temps nécessaire à leur préparation.

4. La jurisprudence dominante requiert que les témoins dont la protection est sollicitée aient des raisons réelles de craindre pour leur sécurité ou celle de membres de leur famille et que la crainte éprouvée repose sur des bases objectives. Les éléments de preuve tendant à établir la précarité de la sécurité au Rwanda et l'existence de menaces potentielles pesant sur les ressortissants rwandais vivant dans d'autres pays, portent à croire que les témoins pourraient à juste titre craindre que la divulgation de leur participation aux procès intentés devant le Tribunal ne mette en danger leur sécurité. La défense n'a pas réfuté ces arguments. En conséquence, l'existence de circonstances exceptionnelles a été établie.

5. L'article 75 du Règlement énonce les mesures susceptibles d'être prises pour «protéger la vie privée et la sécurité des victimes ou des témoins, à condition toutefois que lesdites mesures ne portent pas atteinte aux droits de l'accusé». Parmi ces mesures figure la non-divulgation au public du nom du témoin ou de toute autre information permettant de l'identifier. L'article 75 n'allège pas l'obligation faite au Procureur par l'article 69 de communiquer à un moment donné l'identité et les déclarations antérieures du témoin à la défense. L'article 69 autorise simplement le report de la communication des pièces, en remplaçant le délai réglementaire fixe de 60 jours avant le début du procès par une norme plus souple, à savoir «le temps nécessaire» à [la] préparation [de la défense]». La détermination du temps «nécessaire» doit s'effectuer en tenant compte non seulement des droits de l'accusé prévus aux articles 19 et 20 du Statut du Tribunal, mais aussi des besoins et de la vulnérabilité des témoins visés à l'article 21 dudit Statut. L'article 19 du Statut prescrit expressément de concilier les droits de l'accusé avec les intérêts des victimes et des témoins.

6. Contrary to the assertion of the Prosecution, rolling disclosure twenty-one days prior to the testimony of the witness has not crystallized as the Tribunal's practice. Full disclosure before trial is still often required[3]. Not only does rolling disclosure shorten the period of preparation for the Defence provided for in Rule 66(A)(ii), its effect is that the trial will begin, and Prosecution witnesses will be heard, before the Defence knows the names of all Prosecution witnesses or is informed of the entirety of their statements.

7. The Prosecution case is to be short in comparison with some of the longer trials before the Tribunal in which rolling disclosure has been ordered[4]. Indeed, the Prosecution has stated that it intends to call no more than twenty witnesses[5]. As a practical matter, rolling disclosure would not, under these circumstances, significantly enhance the protection afforded to witnesses. Based on a concrete evaluation of the present case, the Chamber shall order complete disclosure of the witness statements to the Defence, without redactions to protect the identity of the witness, thirty days prior to the commencement of trial.

8. Most of the other measures sought by the Prosecution are substantially identical to those ordered in previous cases, and are granted below in language customarily adopted in such orders[6]. A novel request, however, is a prohibition on "the Accused both individually or through any person working for the Defence from personally pos-

[3] *Gatete*, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004; *Seromba*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003 ("Seromba Decision"); *Nsengimana*, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (TC), 2 September 2002, p. 7. See also *Bagosora et al.*, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003 (requiring immediate disclosure of identifying information of all Prosecution witnesses) ("Reconsideration Decision"). Similarly, disclosure of the complete statements of Defence witnesses has also been required before the start of the Defence case. *Ndindabahizi,* Decision on the Defence Motion for Protection of Witnesses (TC), 15 September 2003, p. 4; *Bagosora et al.,* Decision on Kabiligi Motion for Protection of Witnesses (TC), 1 September 2003, p. 4. These decisions were all rendered after 6 July 2002 when Rule 69 (C), which had formerly required disclosure before trial, was amended to permit rolling disclosure at the Chamber's discretion. The numerous decisions prior to that date requiring disclosure before trial are omitted.

[4] Reconsideration Decision, para. 2; *Seromba* Decision, para. 7.

[5] *Simba*, Transcript, 15 January 2004, p. 22.

[6] *Ndindabahizi*, Order for Non-Disclosure (TC), 3 October 2001; *Bagosora et al*., Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003; *Gatete*, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004.

6. Contrairement aux affirmations du Procureur, la communication des pièces par étapes dans un délai de 21 jours avant la comparution des témoins n'est pas devenue la pratique consacrée devant le Tribunal. En effet, le Tribunal exige encore souvent que toutes les pièces soient communiquées avant la date fixée pour l'ouverture du procès[3]. L'établissement de la communication des pièces en fonction des dates de comparution non seulement diminue la durée de la préparation de la défense prévue à l'article 66 (A) (ii) du Règlement, mais aussi met la défense dans l'impossibilité de connaître les noms de tous les témoins à charge ou d'être informée de l'ensemble de leurs déclarations tant que l'ouverture du procès et l'audition de ces témoins n'ont pas eu lieu.

7. À la différence de certains des longs procès engagés devant le Tribunal dans lesquels la communication de pièces par étapes a été ordonnée[4], la présentation des moyens à charge sera de courte durée en l'espèce. En effet, le Procureur a affirmé qu'il n'entendait pas appeler à la barre plus de 20 témoins[5]. Dans ces circonstances, l'étalement de la communication des pièces ne renforcerait pas très concrètement la protection offerte aux témoins. Après une analyse pratique de la situation en l'espèce, la Chambre ordonne de communiquer toutes les déclarations de témoins à la défense, sans les caviarder pour protéger l'identité des témoins, 30 jours avant le début du procès.

8. La plupart des autres mesures sollicitées par le Procureur sont largement identiques à celles ordonnées précédemment dans d'autres affaires. Cela étant, la Chambre les accorde ci-après en employant les termes communément adoptés pour les prescrire dans ces affaires[6]. Le Procureur présente cependant une demande inhabituelle lorsqu'il

[3] *Le Procureur c. Gatete*, Decision on Prosecution Request for Protection of Witnesses (Chambre de première instance), 11 février 2004; *Le Procureur c. Seromba*, Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins (Chambre de première instance), 30 juin 2003 (ci-après dénommée la «Décision Seromba»; *Le Procureur c. Nsengimana*, Décision relative à la requête du Procureur en prescription de mesures de protection de victimes et de témoins (Chambre de première instance), 2 septembre 2002, p. 8. Voir également l'affaire *Le Procureur c. Bagosora et consorts*, *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001* (Chambre de première instance), 18 juillet 2003 (decision qui demande la communication immédiate des renseignements permettant d'identifier tous les témoins à charge) (ci-après dénommée la «Décision de révision»). De même, le Tribunal a eu à demander à la défense de communiquer toutes les déclarations des témoins à décharge avant le début de la présentation de ses moyens. Voir à cet égard les décisions suivantes : *Le Procureur c. Ndindabahizi*, Décision relative à la requête de la défense en prescription de mesures de protection pour les témoins (Chambre de première instance), 15 septembre 2003, p. 4; *Le Procureur c. Bagosora et consorts*, *Decision on Kabiligi Motion for Protection of Witnesses* (Chambre de première instance), 1er septembre 2003, p. 4. Toutes ces décisions ont été rendues après le 6 juillet 2002, date à laquelle l'article 69 (C) du Règlement qui exigeait que la communication des pièces se fasse avant l'ouverture du procès a été modifié pour permettre de l'étaler dans le temps en fonction de la date du comparution du témoin si la Chambre le juge opportun. Les nombreuses décisions antérieures à cette date qui faisaient obligation de communiquer les pièces avant l'ouverture du procès ont été omises.

[4] Décision de révision, para. 2; Décision *Seromba*, para. 7.

[5] *Le Procureur c. Simba*, compte rendu de l'audience du 15 janvier 2004, p. 24.

[6] . *Le Procureur c. Ndindabahizi*, *Order for Non-Disclosure* (Chambre de première instance), 3 octobre 2001; *Le Procureur c. Bagosora et consorts*, Décision sur la requête de Bagosora en prescription de mesures de protection de témoins (Chambre de première instance), 1er septembre 2003; *Le Procureur c. Gatete*, *Decision on Prosecution Request for Protection of Witnesses* (Chambre de première instance), 11 février 2004.

sessing any material that contains any Identifying Information, including but not limited to, any copy of a witness statement even if the statement is in redacted form, unless the Accused is, at the time in possession, in the presence of Counsel." The Prosecution argues that this measure is needed to prevent sharing of witness identities amongst co-detainees, as has occurred in the past, in violation of witness protection orders. The Chamber is concerned by the examples cited by the Prosecution, but is not persuaded that the measure will achieve the desired objective. A more effective remedy is the diligence of Defence Counsel in notifying and reminding the Accused that he is personally subject to the terms of the present order, and that any violation hereof is a serious matter.[7]

FOR THE ABOVE REASONS, THE CHAMBER

HEREBY ORDERS that :

1. The names, addresses, whereabouts, and other identifying information ("identifying information") of any witness for whom the Prosecution claims the application of this order ("protected witness") shall be kept confidential by the Registry and not included in any non-confidential Tribunal records, or otherwise disclosed to the public. If any such information does appear in the Tribunal's non-confidential records, it shall be expunged.

2. The Prosecution shall assign a pseudonym to each protected witnesses for whom it claims the application of this order. The identifying information of each protected witness, with a corresponding pseudonym, shall be forwarded by the Prosecution to the Registry in confidence, and shall not be disclosed by the Registry to the Defence unless otherwise ordered. Where necessary to ensure non-disclosure of identifying information, the pseudonym shall be used in trial proceedings, discussions between the Parties in proceedings, and in statements disclosed in redacted form to the Defence.

3. Making or publicizing photographs, sketches, or audio or video recordings of protected witnesses while at, or travelling to or from, the Tribunal, without leave of the Chamber or the protected witness, is prohibited.

4. Neither the Defence nor the Accused shall contact, or attempt to contact or influence, whether directly or indirectly, any protected witness in any manner, or encourage any person to do so, without first notifying the Prosecution which shall, if appropriate, make arrangements for such contacts.

5. The Defence shall provide the Registry with a designation of all persons working on the Defence team who will have access to any identifying information concerning any protected witness, and shall notify the Registry in writing

[7] See Mpambara, Decision (Prosecutor's Motion for Protective Measures for Prosecution Witnesses) (TC), 29 May 2002, paras. 2 1-24.

invite la Chambre à interdire «à l'accusé de posséder personnellement, d'une manière directe ou par l'intermédiaire de l'un quelconque des membres de l'équipe de la défense, tout document contenant des renseignements permettant d'identifier les témoins, notamment toute copie, même caviardée, d'une déclaration de témoin, pour ne citer que cet exemple, à moins que l'accusé ne soit en présence de son conseil au moment où il est en possession d'un tel document». Au dire du Procureur, cette mesure est nécessaire pour éviter que des codétenus ne se communiquent l'identité de témoins, comme par le passé, en violation d'autres mesures de protection de témoins prescrites. La Chambre se déclare préoccupée par les exemples que le Procureur a cités, mais elle n'est pas persuadée qu'une telle mesure atteindra l'objectif visé. Pour régler le problème, il serait plus efficace que le conseil de la défense s'emploie à dire et à redire à l'accusé qu'il est personnellement tenu de se conformer à la présente décision et que toute violation de celle-ci constitue un acte grave[7].

PAR CES MOTIFS, LA CHAMBRE

PRESCRIT LES MESURES SUIVANTES :

1. Le nom de tout témoin auquel le Procureur demande d'appliquer la présente mesure (ci-après dénommé «témoin protégé»), son adresse, le lieu où il se trouve et toutes autres informations permettant de l'identifier (ci-après dénommés «éléments d'identification») doivent être gardés secrets par le Greffe; ils ne doivent être inscrits dans aucun dossier non confidentiel du Tribunal ou d'aucune autre manière divulgués au public, et tout renseignement de cette nature qui figurerait dans les dossiers non confidentiels du Tribunal doit en être supprimé;

2. Le Procureur doit attribuer un pseudonyme à chaque témoin protégé auquel il demande d'appliquer la présente mesure et communiquer au Greffe sous le sceau du secret les éléments d'identification de l'intéressé, ainsi que le pseudonyme correspondant; le Greffe doit s'abstenir de communiquer ces éléments à la défense, sauf prescriptions contraires, et le pseudonyme du témoin doit être utilisé au procès, dans les discussions entre les parties lors du déroulement de l'instance et dans les déclarations caviardées communiquées à la défense lorsque la non-divulgation de ses éléments d'identification s'impose;

3. Il est interdit de photographier des témoins protégés, de les dessiner, d'enregistrer leurs propos sur un support audio ou de les filmer lorsqu'ils se trouvent au Tribunal, s'y rendent ou en reviennent, ou de publier les photos, dessins et enregistrements audio ou vidéo ainsi réalisés, sans l'autorisation de la Chambre ou du témoin protégé concerné;

4. Il est interdit tant à la défense qu'à l'accusé d'avoir recours à quelque méthode que ce soit pour se mettre en rapport avec un témoin protégé, tenter de se mettre en rapport avec lui ou l'influencer, directement ou indirectement, ou d'encourager quiconque à agir de la sorte, sans en avoir avisé au préalable le Procureur qui prend en ce cas les dispositions nécessaires pour assurer ces contacts s'il y a lieu;

5. La défense doit indiquer au Greffe tous les membres de son équipe qui auront accès à tout élément d'identification d'un témoin protégé, l'en aviser par écrit lors-

[7] Voir l'affaire *Le Procureur c. Mpambara*, Décision (Requête du Procureur aux fins de mesures de protection des témoins à charge) (Chambre de première instance), 29 mai 2002, paras. 21 à 24.

of any persons leaving the Defence team and to confirm in writing that such person has remitted all material containing identifying information.

6. Neither the Defence nor the Accused shall attempt to make an independent determination of the identity of any protected witness, nor encourage or otherwise aid any person in so doing.

7. The Defence and the Accused shall keep confidential to themselves all identifying information of any protected witness, and shall not distribute or disseminate to any person not designated as part of the Defence team in accordance with paragraph 5 above, or make public, identifying information in any form.

8. The Prosecution is authorised to withhold disclosure of identifying information to the Defence, and to temporarily redact their names, addresses, locations and other identifying information as may appear in witness statements or other material disclosed to the Defence.

9. The identifying information withheld by the Prosecution in accordance with this order shall be disclosed by the Prosecution to the Defence no later than thirty days before the commencement of trial.

Arusha, 4 March 2004

[Signed] : Erik Møse

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Decision on defence Motion for New Initial Appearance 5 March 2004 (ICTR-01-76-I)

(Original : Not specified)

Trial Chamber I

Judges : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

Aloys Simba – motion for new initial appearance – significant and material facts that alter the Prosecution's case, fair trial, absence of any prejudice for the Prosecution – motion granted

International Instruments Cited : Rules of Procedure and Evidence, Rules 50, 50 (B), 72 and 73 (a) – Statute, Art. 19 (3) and 20 (4) (a)

International Cases Cited :

qu'une personne est appelée à quitter ladite équipe et confirmer également par écrit que cette personne a restitué toutes les pièces contenant des éléments d'identification;

6. Il est interdit tant à la défense qu'à l'accusé de tenter de découvrir par ses propres moyens l'identité d'un témoin protégé ou d'encourager ou aider de toute autre manière une personne à le faire;

7. La défense et l'accusé doivent garder pour eux tous les éléments d'identification des témoins protégés et s'abstenir d'user de quelque forme que ce soit pour communiquer ou faire connaître des éléments d'identification à toute personne qui n'a pas été déclarée membre de l'équipe de la défense conformément aux dispositions de l'alinéa *5* ci-dessus ou pour publier lesdits éléments;

8. Le Procureur est autorisé à différer la communication des éléments d'identification des témoins protégés à la défense et caviarder pour un temps leurs noms, leurs adresses, les lieux où ils se trouvent et toute autre information permettant de les identifier qui figureraient dans leurs déclarations ou d'autres pièces qu'il doit communiquer à la défense;

9. Le Procureur doit communiquer à la défense les éléments d'identification qu'il s'est abstenu de révéler en application de la présente mesure au plus tard 30 jours avant l'ouverture du procès.

Arusha, le 4 mars 2004

[Signé] : Erik Møse

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Décision relative à la requête de la défense aux fins d'obtenir une nouvelle comparution initiale 5 mars 2004 (ICTR-01-76-I)

(Original : Not specified)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

Aloys Simba – requête pour obtenir une nouvelle comparution initiale – faits importants et pertinents qui modifient les moyens à charge, équité du procès, absence de préjudice pour le Procureur – requête acceptée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 50, 50 (B), 72 et 73 (A) – Statut, art. 19 (3) et 20 (4) (a)

Jurisprudence internationale citée :

I.C.T.R. : Trial Chamber II, The Prosecutor v. Juvénal Kajelijeli, *Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File an Amended Indictment, 25 January 2001 (ITCR-98-44A-T,* Reports 2001, *p. 1594)*

I.C.T.Y. : Trial Chamber II, The Prosecutor v. Krnojelac, *Decision on Prosecutor's Response to Decision of 24 February 1999, 20 May 1999 (IT-97-25)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Requête de la défense aux fins d'obtenir une nouvelle comparution de l'accusé suite à la décision du 26/01/04 relative à la modification de l'acte d'accusation initial articles 50, 72 et 73 (a) du RPP", filed on 12 February 2004;

CONSIDERING the "Prosecutor's Response to Defence Motion", filed on 18 February 2004; and the "Réplique de la défense", filed on 29 February 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. By a decision dated 26 January 2004, the Chamber granted the Prosecution's motion to amend the Indictment, citing as its reasons the nature of the amendments, which did not contain new charges but were intended to clarify the case against the Defence. The amended Indictment was subsequently filed on 16 February 2004.

SUBMISSIONS

2. The Defence requests a new initial appearance for the Accused to plead to the amended Indictment as it contains new charges, in that it alleges a joint criminal enterprise, and names a new victim in the charge of murder against the Accused.

3. The Prosecution objects to the motion, arguing that the Defence are trying to obtain an appeal of the decision from the same Chamber and out of time.

4. The Defence argues in its Reply that it was not seeking an appeal on the decision to amend the Indictment but on the contrary was requesting an initial appearance based on the amended Indictment. The Defence notes that the decision does not preclude the operation of Rule 50 (B).

T.P.I.R : Chambre de première instance II, Le Procureur c. Juvénal Kajelijeli, *Décision relative à la requête du Procureur en rectification de l'acte d'accusation daté du 22 décembre 2000 et à la requête en modification de l'acte d'accusation, 25 janvier 2001 (ICTR-98-44A-T,* Recueil 2001, *p. 1595)*

T.P.I.Y. : Chambre de première instance II, Le Procureur c. Krnojelac, *Décision relative à la réponse du Procureur concernant la décision du 24 février 1999, 20 mai 1999 (IT-97-25)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la Requête de la défense aux fins d'obtenir une nouvelle comparution de l'accusé suite à la décision du 26/01/04 relative à la modification de l'acte d'accusation initial (articles 50, 72 et 73 A) du Règlement de procédure et de preuve), déposée le 12 février 2004,

VU la Réponse du Procureur à la requête de la défense, déposée le 18 février 2004, et la réplique de la défense, déposée le 29 février 2004,

STATUE CI-APRÈS sur ladite requête.

INTRODUCTION

1. Par une décision en date du 26 janvier 2004, la Chambre a fait droit à la requête du Procureur en modification de l'acte d'accusation, au motif que les modifications proposées ne comportaient pas de nouveaux chefs d'accusation, mais visaient à préciser les faits reprochés à l'accusé. L'acte d'accusation modifié a été déposé par la suite le 16 février 2004.

ARGUMENTS DES PARTIES

2. La défense demande une nouvelle comparution initiale de l'accusé afin qu'il puisse plaider coupable ou non coupable des faits retenus dans l'acte d'accusation modifié, motif pris de ce que celui-ci contient de nouvelles accusations résidant dans le fait que le Procureur y reproche à l'accusé d'avoir participé à une entreprise criminelle commune et lui impute le meurtre d'une nouvelle victime nommément citée sous le chef d'assassinat.

3. Le Procureur s'oppose à la requête, au motif que la défense tente ainsi d'attaquer la décision susvisée devant la Chambre même qui l'a rendue et qu'elle est forclose.

4. Dans sa réplique, la défense fait valoir qu'elle ne cherchait pas à attaquer la décision relative à la requête en modification de l'acte d'accusation, mais qu'au contraire elle demandait une nouvelle comparution initiale sur la base de l'acte d'accusation modifié. La Défense relève que cette décision ne fait pas obstacle à l'application de l'article 50 (B) du Règlement.

DELIBERATIONS

5. Rule 50 (B) provides for a further appearance by the Accused where an Amended Indictment contains new charges. The Amended Indictment does not contain new charges but makes new allegations of the Accused's involvement in a joint criminal enterprise and the killing of a Tutsi gendarme named Ndagijimana.

6. In *Prosecutor v. Kajelijeli*, the Trial Chamber, citing *Prosecutor v. Krnojelac*, noted that entirely new factual situations in support of existing counts may nevertheless amount effectively to new charges[1].

7. While the allegations of a joint criminal enterprise and a killing in support of the existing charge of murder are not new charges, they represent significant and material facts that alter the Prosecution's case, which the Defence is to answer. In addition, the Chamber notes that pursuant to Article 19 (3), it is the Chamber's responsibility to confirm that the Accused understands the Indictment and to instruct the Accused to enter a plea. Article 20 (4) (a) ensures that the Accused will be informed of "the nature and cause of the charge against him". Accordingly, it would be in the interests of a fair trial for the Accused that he be allowed to plead to the new allegations in a further appearance. Moreover, the Chamber considers that no prejudice is caused to the Prosecution in ordering a further appearance of the Accused.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion;

INSTRUCTS the Registry to organize a further appearance as soon as possible, preferably on Wednesday 10 March 2004.

Arusha, 5 March 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[1] *Krnojelac*, Decision on Prosecutor's Response to Decision of 24 February 1999 (TC), 20 May 1999, para. 20; *Kajelijeli*, Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File an Amended Indictment (TC), 25 January 2001, paras. 29-31.

DÉLIBÉRATION

5. L'article 50 (B) du Règlement prévoit une nouvelle comparution de l'accusé lorsque l'acte d'accusation modifié comporte de nouveaux chefs d'accusation. En l'espèce, l'acte d'accusation modifié ne comporte pas de nouveaux chefs, mais de nouvelles allégations selon lesquelles l'accusé aurait participé à une entreprise criminelle commune et tué un gendarme tutsi du nom de Ndagijimana.

6. Dans l'affaire *Le Procureur c. Kajelijeli*, la Chambre de première instance, citant une décision rendue dans l'affaire *Le Procureur c. Krnojelac,* a relevé que des faits entièrement nouveaux présentés à l'appui de chefs d'accusation existants pourraient néanmoins constituer de véritables nouveaux chefs d'accusation[1].

7. Certes, les allégations de participation à une entreprise criminelle commune et de meurtre faites à l'appui du chef d'assassinat existant ne sont pas de nouveaux chefs d'accusation, mais elles constituent des faits importants et pertinents qui modifient les moyens à charge auxquels la défense doit répondre. De plus, la Chambre de première instance relève qu'aux termes de l'article 19 (3) du Statut, c'est à elle qu'il incombe de confirmer que l'accusé a compris le contenu de l'acte d'accusation et de l'inviter à plaider coupable ou non coupable. L'article 20 (4) (a) du Statut garantit le droit de l'accusé d'être informé de la «nature et des motifs de l'accusation portée contre [lui]». Le souci de l'équité du procès commande donc de permettre à l'accusé de comparaître de nouveau pour dire s'il plaide coupable ou non coupable des nouvelles allégations formulées contre lui. Qui plus est, la Chambre estime que le Procureur ne subira aucun préjudice si elle ordonne une nouvelle comparution de l'accusé.

PAR CES MOTIFS, LA CHAMBRE FAIT DROIT à la requête;

DONNE INSTRUCTION au Greffier d'organiser, dès que possible, une nouvelle comparution de l'accusé, de préférence pour le mercredi 10 mars 2004.

Arusha, le 5 mars 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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[1] Affaire *Krnojelac*, Décision relative à la réponse du Procureur concernant la décision du 24 février 1999 (Chambre de première instance), 20 mai 1999, para. 20; affaire *Kajelijeli*, Décision relative à la requête du Procureur en rectification de l'acte d'accusation daté du 22 décembre 2000 et à la requête en modification de l'acte d'accusation (Chambre de première instance), 25 janvier 2001, paras. 29 à 31.

Decision on the Defence's Extremely Urgent Motion for a Deposition 11 March 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

Aloys Simba – deposition of a witness, France – exceptional circumstance, rapidly deteriorating health of the witness – statement of the matters on which the person is to be examined, information vague and not sufficiently precise – if additional information, deposition at the seat of the Tribunal at The Hague– motion denied

International Instrument Cited : Rules of Procedure and Evidence, Rules 71, 71 (A), 71 (B) and 73

International Cases Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean Bosco Barayagwiza, *Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001 (ITCR-99-52-I,* Reports 2001*, p. 1202) – Trial Chamber III,* The Prosecutor v. Théoneste Bagosora et al, *Decision on Prosecutor's Motion for Deposition of Witness OW, 5 December 2001 (ITCR-98-41-I,* Reports 2001*, p. 1112) – Trial Chamber I,* The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean Bosco Barayagwiza, *Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition, 10 April 2003 (ITCR-99-52-I,* Reports 2003*, p. 319) – Trial Chamber I,* The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean Bosco Barayagwiza, *Decision on the Second Motion to Reconsider the Scheduling Order Dated 26 March 2003 on the Testimony of Roger Shuy, 10 April 2003 (ITCR-99-52-T,* Reports 2003*, p. 322) – Trial Chamber I,* The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean Bosco Barayagwiza, *Decision on the Defence Motion for the Deposition of the Testimony of Dr Ferdinand Goffioul, 25 April 2003 (ICTR-99-52-T,* Reports 2003, *p. 332)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF a Defence motion titled "Defence Extremely Urgent Motion to Take a Deposition, Rules 71 and 73 of the Rules", filed on 7 January 2004;

CONSIDERING the Prosecution's response, filed on 14 January 2004;

HEREBY DECIDES the motion.

Décision relative à la requête en extrême urgence de la défense aux fins de recueillir une déposition 11 mars 2004 (ICTR-2001-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juges : Erik Møse; Jai Ram Reddy; Sergei Alekseevich

Aloys Simba – déposition d'un témoin, France– circonstance exceptionnelle, détérioration rapide de la santé du témoin – objet de la déposition du témoin, informations trop vagues et imprécises – si informations supplémentaires, deposition au siège du Tribunal de La Haye – requête rejetée

Instrument international cité : Règlement de procédure et de preuve, art. 71, 71 (A), 71 (B) et 73

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Ferdinand Nahimana, Hassan Ngeze et Jean Bosco Barayagwiza, *Décision sur la requête du Procureur aux fins d'ajouter le témoin X à sa liste de témoins et de se voir accorder des mesures de protection, 14 septembre 2001 (ICTR-99-52-I,* Recueil 2001, *p. 1203) – Chambre de première instance III,* Le Procureur c. Théoneste Bagosora et al, *Décision relative à la requête du Procureur visant à faire recueillir la déposition du témoin OW, 5 décembre 2001 (ITCR-98-41-I,* Recueil 2001, *p. 1113) – Chambre de première instance I,* Le Procureur c. Ferdinand Nahimana, Hassan Ngeze et Jean Bosco Barayagwiza, *Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition, 10 avril 2003 (ITCR-99-52-I,* Recueil 2003, *p. 319) – Chambre de première instance I,* Le Procureur c. Ferdinand Nahimana, Hassan Ngeze et Jean Bosco Barayagwiza, *Decision on the Second Motion to Reconsider the Scheduling Order dated 26 March 2003 on the Testimony of Roger Shuy, 10 avril 2003 (ICTR-99-52-T,* Recueil 2003, *p. 322) – Chambre de première instance I,* Le Procureur c. Ferdinand Nahimana, Hassan Ngeze et Jean Bosco Barayagwiza, *Decision on the Defence Motion dated 26 March 2003 on the Testimony of Dr. Ferdinand Goffioul, 25 avril 2003 (ICTR-99-52-T,* Recueil 2003, *p. 332)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Eric Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la Requête en extrême urgence de la défense aux fins de recueillir une déposition conformément aux articles 71 et 73 du Règlement de procédure et de preuve déposée le 7 janvier 2004,

VU la réponse du Procureur à ladite requête déposée le 14 janvier 2004,

STATUANT CI-APRÈS SUR LADITE REQUÊTE :

INTRODUCTION

1. The Indictment against the Accused, dated 2 January 2002, was filed on 4 January 2002 and confirmed by Judge Winston C. Matanzima Maqutu on 8 January 2002.

2. On 28 November 2003, the Prosecution filed a "Request for Leave to Amend the Indictment of 4 January 2002". On 15 January 2004, a status conference was held to discuss the progress of the case. The issue of the deposition of the testimony of an anticipated Defence witness residing in Paris, France, was among the issues discussed.

3. On 26 January 2004, the Trial Chamber rendered a decision granting the Prosecutor leave to file an Amended Indictment. It was subsequently filed on 27 January 2004.

SUBMISSIONS

4. The Defence seeks the deposition of the witness on the basis that he is in very bad health. A medical certificate dated 7 January 2004 from Dr. Philippe Bertaud states that the witness is in a state of health that prevents long travel. The Defence requests that the deposition take place in Paris before a Judge designated by the Tribunal or a French judge.

5. The Prosecution does not oppose the motion, but argues that the Defence has not shown exceptional circumstances warranting the deposition, and has not substantiated the claim of ill-health. Further, the Defence has not made a clear statement of the matters upon which examination of the witness is sought. If a deposition is granted, the Prosecution submits that a Presiding Officer from the Tribunal should be appointed.

DELIBERATIONS

6. Rule 71 (A) provides the Chamber with the discretion to grant the taking of depositions where exceptional circumstances exist and where it would be in the interests of justice. In addition, Rule 71 (B) stipulates certain requirements with which the request for deposition must comply : it must state the name and whereabouts of the witness, the date and place of deposition, a statement of matters for examination and of the exceptional circumstances justifying the deposition.

7. The rapidly deteriorating health of the witness, as attested to by Defence Counsel and the witness himself, constitutes, in the present case, an exceptional circumstance justifying the taking of a deposition[1]. It would have been preferable to have more

[1] See eg. *Nahimana, Ngeze and Barayagwiza*, Decision on the Defence Request to Hear the Evidence of Witness Y by Deposition (TC), 10 April 2003, para. 8; *Bagosora et al*, Decision on Prosecutor's Motion for Deposition of Witness OW (TC), 5 December 2001, para. 12.

INTRODUCTION

1. L'acte d'accusation dressé le 2 janvier 2002 contre l'accusé a été déposé le 4 janvier 2002 et confirmé le 8 janvier 2002 par le Juge Winston C. Matanzima Maqutu.

2. Le 28 novembre 2003, le Procureur a déposé une Requête aux fins de modification de l'acte d'accusation du 4 janvier 2004. Le 15 janvier 2004, une conférence de mise en état a été organisée pour discuter de l'état d'avancement de l'affaire. La question de la déposition d'un témoin potentiel à décharge résidant à Paris (France) a également été débattue.

3. Le 26 janvier 2004, la Chambre a rendu une décision autorisant le Procureur à déposer un acte d'accusation modifié. Cet acte modifié a subséquemment été déposé le 27 janvier 2004.

ARGUMENTS DES PARTIES

4. La défense demande à être autorisée à faire recueillir la déposition du témoin, motif pris de ce qu'il est gravement malade. Il ressort d'un certificat médical du 7 janvier 2004 établi par le docteur Philippe Bertaud que l'état de santé du témoin ne lui permet pas d'entreprendre un long voyage. La Défense demande que la déposition dudit témoin soit recueillie à Paris devant un juge désigné par le Tribunal ou un juge français.

5. Le Procureur ne s'oppose pas à ce qu'il soit fait droit à la requête mais avance que la défense n'a pas démontré l'existence de circonstances exceptionnelles justifiant une telle déposition, et qu'elle n'a pas davantage établi la thèse de la maladie du témoin. Par ailleurs, la défense n'a pas clairement indiqué les questions sur lesquelles elle entendait interroger le témoin. Le Procureur fait valoir qu'au cas où cette déposition serait autorisée, il appartiendrait au Tribunal de désigner un officier instrumentaire.

DÉLIBÉRATIONS

6. L'article 71 (A) prévoit que la Chambre de première instance peut ordonner qu'une déposition soit recueillie, en raison de circonstances exceptionnelles et dans l'intérêt de la justice. En outre, l'article 71 (B) fixe les conditions dans lesquelles une requête visant à recueillir une déposition peut être déposée : elle doit faire mention du nom et de l'adresse du témoin, de la date, du lieu et de l'objet de la déposition ainsi que des circonstances exceptionnelles qui la justifient.

7. La détérioration rapide de la santé du témoin, telle qu'attestée par le conseil de la défense et par le témoin lui-même, constitue en l'espèce une circonstance exceptionnelle justifiant le recueil d'une déposition[1]. Il eût été préférable de disposer de

[1] Voir par exemple, *Nahimana, Ngeze et Barayagwiza*, «Decision on Defense Request to Hear Evidence of Witness Y by Deposition», du 10 avril 2003, para. 8; *Bagosora et al.*, «Decision on Prosecutor's Motion for Deposition of Witness 0W», du 5 décembre 2001, para. 12.

details about the witness's condition. However, attempts by the Chamber to obtain further details have been unsuccessful, and the trial is scheduled to commence on 10 May 2004.

8. A second condition is that the motion should include "a statement of the matters on which the person is to be examined". In the motion, Defence Counsel states that the witness "has invaluable knowledge about the Rwanda tragedy" and would testify to "events that took place in Gikongoro *préfecture* during the Rwandan tragedy of 1994". During the Status Conference, Defence Counsel explained that the witness would testify to all the activities of the Accused as *conseiller* from 18 May to 17 July 1994[2]. The information provided is vague and not sufficiently precise so as to constitute a statement of the matters for examination. The other party, in deposition applications in particular, is entitled to know what the witness will testify to, given that deposition is an exceptional measure.

9. The Chamber is, however, prepared to reconsider the issue of deposition should the Defence provide the additional information required. In that event, the Chamber considers that it would appear more practical for the deposition to take place at the seat of the Appeals Chamber of the Tribunal in The Hague[3].

10. An alternative solution could be to have the witness testify before the full Bench via video-link conference from The Hague[4]. However, this option would imply that the witness could only be heard in the course of the trial.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 11 March 2004

[Signed] : Erik Møse Jai Ram Reddy Sergei Alekseevich Egorov

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[2] Transcript 15 January 2004, pp. 9-11.

[3] See eg. *Nahimana, Ngeze and Barayagwiza*, Decision on the Second Motion to Reconsider the Scheduling Order Dated 26 March 2003 on the Testimony of Roger Shuy (TC), 10 April 2003, and Decision on the Defence Motion for the Deposition of the Testimony of Dr Ferdinand Goffioul (TC), 25 April 2003.

[4] See eg. *Nahimana, Ngeze and Barayagwiza*, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures (TC), 14 September 2001.

plus de précisions sur l'état de santé du témoin. Toutefois, toutes les tentatives de la Chambre visant à obtenir des précisions supplémentaires se sont avérées vaines, et l'ouverture du procès a été fixée au 10 mai 2004.

8. Une deuxième condition exigée pour le recueil d'une déposition est que «la requête indique l'objet de la déposition du témoin». Dans sa requête, le conseil de la défense fait savoir que le témoin «dispose d'informations très importantes sur la tragédie du Rwanda» et déposerait sur «les événements qui se sont déroulés dans la préfecture de Gikongoro lors de la tragédie [qui a eu lieu au] Rwanda [en] 1994». Lors de la conférence de mise en état, le conseil de la défense a indiqué que la déposition du témoin porterait sur toutes les activités menées par l'accusé en sa qualité de conseiller entre le 18 mai et le 17 juillet 1994[2]. Les informations ainsi fournies sont trop vagues et imprécises pour renseigner sur les questions à examiner. La partie adverse, en particulier s'agissant d'une requête aux fins de déposition, a le droit d'être instruite des questions sur lesquelles le témoin entend déposer, dès lors qu'une telle déposition est une mesure exceptionnelle.

9. Toutefois, sous réserve que la défense fournisse les informations supplémentaires requises, la Chambre est disposée à réexaminer la question de la déposition du témoin. La Chambre considère que, dans une telle éventualité, il serait beaucoup plus pratique de recueillir la déposition au siège de la Chambre d'appel du Tribunal à La Haye[3].

10. À défaut de cela, le témoin pourrait déposer par vidéoconférence depuis La Haye devant la Chambre siégeant en formation ordinaire[4]. Toutefois, cela signifierait que le témoin ne serait entendu que lors du procès.

PAR CES MOTIFS, LA CHAMBRE

REJETTE ladite REQUÊTE.

Fait à Arusha, le 11 mars 2003

[Signé] : Eric Møse; Jai Ram Reddy; Sergei A. Egorov

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[2] Compte rendu de l'audience du 15 janvier 2004, pp. 9 à 11.

[3] Voir *Nahimana, Ngeze et Barayagwiza*, «Decision on the Second Motion to Reconsider the Scheduling Order dated 26 March 2003 on the Testimony of Roger Shuy», du 10 avril 2003, et «Decision on the Defence Motion dated 26 March 2003 on the Testimony of Dr. Ferdinand Goffioul», 25 avril 2003.

[4] Voir *Nahimana, Ngeze et Barayagwiza*, «Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures», du 14 septembre 2001.

Decision on Aloys Simba's Interlocutory Appeal regarding Defects in the Form of the Indictment 24 March 2004 (ICTR-01-76-AR72)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Florence Mumba; Mehmet Güney; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Aloys Simba – appeal – lack of appellate jurisdiction – motion denied

International Instruments Cited : Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal – Rules of Procedure and Evidence, Rules 72 (B) (i), 72 (B) (ii), 72 (D) and 73 (B)

International Case Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Aloys Simba, *Decision on Motion to Amend Indictment, 26 January 2004 (ICTR-2001-76-I,* Reports 2004, *p. XXX)*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("International Tribunal"),

BEING SEISED OF the "Acte d'appel contre la décision du 26 janvier 2004 déclarant sans objet la requête de la défense en exceptions préjudicielles et en incompétence du 31 octobre 2002", filed on 26 February 2004 by counsel for Aloys Simba ("Appeal" and "Appellant," respectively);

NOTING Trial Chamber I's "Decision on Defence Motion alleging Defects in the Form of the Indictment" dated 26 January 2004 ("Decision"), which dismissed as moot the Appellant's "Defence Preliminary Motion for Defects in the Form with Respect to Four Counts and for Lack of Jurisdiction," dated 31 October 2002 ("Motion");

CONSIDERING that the Prosecution has not filed a response within the ten-day period allowed under paragraph 2 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal dated 16 September 2002;

CONSIDERING that the Decision dismissed the Motion as moot because (1) the Trial Chamber granted the Prosecution leave to amend the indictment[1], which amend-

[1] Decision on Motion to Amend Indictment, 26 January 2004.

ments substantially altered the basis of the Motion and rendered it moot in respect of three of the four counts; and (2) with respect to the remaining count, the Trial Chamber held that it lacked jurisdiction to decide a motion in respect of an indictment that had been superseded;

CONSIDERING that, under Rule 72 (B) (ii) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), preliminary motions other than motions challenging jurisdiction, including motions that assert defects in the form of the indictment, are without interlocutory appeal unless certification to appeal has been granted by the Trial Chamber;

CONSIDERING that the Appellant has not shown that he has obtained certification to appeal the Decision under Rule 72 (B) (ii) of the Rules;

CONSIDERING that, although the Motion is styled in part as a motion asserting a lack of jurisdiction, the Appellant's submissions regarding jurisdiction are inseparable from his challenges to the form of the indictment and do not raise any independent argument challenging the jurisdiction of the International Tribunal, as would be required for an appeal as of right under Rule 72 (B) (i) and (D) of the Rules;

NOTING that the Decision permits the Appellant to preserve his objections, should he wish to do so, by filing a new preliminary motion directed to the amended indictment;

CONSIDERING that the Appeal purports to challenge the Trial Chamber's decision granting leave to amend the indictment, even though such decision is not subject to interlocutory appeal under Rule 72 of the Rules and has not been certified for appeal under Rule 73 (B) of the Rules;

FOR THE FOREGOING REASONS,

HEREBY DISMISSES the Appeal in its entirety for lack of appellate jurisdiction.

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

Done this 24th day of March 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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Decision on Defence motion to Reschedule Commencement of Trial 28 April 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Erik Mose, presiding; Jai Rarn Reddy; Sergei Akkseevich Egorov

Aloys Simba – rescheduling of the commencement of the trial – relevant date of disclosure, date of receipt of the documents – form of the disclosure (CD-ROM) – motion granted in part

International Instruments Cited : Rules of Procedure and Evidence, Rules 66 and 73 – Statute, Art. 20

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

SITTING as Trial Chamber I, composed of Judge Erik Mose, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Urgent Defense Motion to Re-schedule Commencement of Trial, Based on the Untimely Disclosure by the Prosecutor's Office, and the Tribunal's Failure to Insure the Accused's Rights Pursuant to Article 20 Statute (Article 73 RPP)", filed on 19 April 2004; and the "Addition to Urgent Defence Motion", filed on 20 April 2004;

CONSIDERING the "Prosecutor's Response to Defence Motion", filed on 22 April 2004; and the "Defence Reply to Prosecutor's Response", filed on 28 April 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Indictment against the Accused, dated 2 January 2002, was filed on 4 January 2002, and confirmed on 8 January 2002. An amended Indictment was subsequently filed on 16 February 2004. The Prosecution was ordered by a decision dated 4 March 2004 ("the decision") to disclose identifying information of protected witnesses to the Defence no later than thirty days before the commencement of trial. The trial is scheduled to commence on 10 May 2004.

SUBMISSIONS

2. The Defence submits that the disclosure by the Prosecution of identifying information on 14 April 2004 was untimely based on the date of 10 May 2004 as the

Décision relative à la requête tendant au report de la date de commencement du procès 28 avril 2004 (ICTR-01-76-I)

(Original : Anglais)

Trial Chamber I

Judges : Erik Mose, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

Aloys Simba – report de la date de commencement du procès – date de communication à prendre en considération, date de réception des documents – forme de la divulgation (CD-ROM) – requête acceptée en partie

Instruments internationaux cités : Règlement de procédure et de preuve, art. 66 et 73 – Statut, art. 20

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Mose, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la «Requête urgente en modification de la date de commencement du procès en conséquence de la communication tardive de pièces par le Bureau du Procureur et de l'incapacité du Tribunal de garantir les droits de l'accusé conformément à l'article 20 du Statut (article 73 du Règlement de procédure et de preuve)», déposée le 19 avril 2004; et du «Complément à la Requête urgente», déposé le 20 avril 2004,

VU la «Réponse du Procureur à la requête de la défense», déposée le 22 avril 2004, et la «Réplique de la défense à la réponse du Procureur», déposée le 28 avril 2004,

STATUE sur la requête.

INTRODUCTION

1. L'acte d'accusation contre l'accusé, daté du 2 janvier 2002, a été déposé le 4 janvier 2002 et confirmé le 8 janvier 2002. Un acte d'accusation modifié a été déposé par la suite le 16 février 2004. Il avait été demandé au Procureur, par une décision datée du 4 mars 2004 (la «décision») de communiquer à la défense, et ce, au plus tard dans les 30 jours avant le commencement du procès, les informations permettant d'identifier les témoins protégés. Le début du procès est prévu pour le 10 mai 2004.

ARGUMENTS

2. La défense soutient que si l'on tient compte du fait que le début du procès est prévu pour le 10 mai 2004, la communication par le Procureur des informations per-

date of commencement of the trial. In addition, disclosure is inadequate as Co-Counsel has not been provided with a copy. The Defence further submits that disclosure via CD-ROM is not acceptable and hard copies should be provided, and argues that CD-ROMs pose a problem in ascertaining authenticity. The Defence submits that the result is that the Accused's right to be represented by a fully prepared Defence team has been prejudiced.

3. The Prosecution objects to the motion and submits that it should be dismissed without costs. The Prosecution argues that disclosure took place on 6 April 2004, the date on which the Prosecution filed the CD-ROMs with the Registry for onward transmission to the Defence, and was therefore timely. The Prosecution also submits that its disclosure obligation relates to the Defence team, not to individual members of the team. Regarding disclosure in CD-ROM format, the Prosecution submits that it has been accepted by the Trial Chambers in other cases and by the Simba Defence team on prior occasions. On the issue of authenticity, the Prosecution submits that the hard copies are available for inspection by the Defence, and that authenticity issues should be raised only when the admission of the document into evidence is requested at trial. Finally, the Prosecution submits that no prejudice has been suffered by the Accused. The Defence maintains its position in its Reply.

DELIBERATIONS

4. The issue of timeliness of the disclosure by the Prosecution turns on whether the date of disclosure refers to the date on which the documents to be disclosed are dispatched by the Prosecution, or whether it refers to the date of receipt of the documents by the Defence. According to service records of the Registry, the CD-ROMs were dispatched by DHL from Arusha on 7 April 2004, and arrived at its destination of Cotonou on 13 April 2004 (see Annex 1).

5. Both the Rules and the decision are silent as to the timing of service of documents for disclosure, and merely refer to "disclosure to the Defence". The plain meaning of this phrase suggests that disclosure is only effected when the Defence receives the documents. Therefore, the relevant date of disclosure is the date of receipt of the documents, rather than the date on which the Prosecution sends the documents to the Registry for transmission to the Defence, that is, 13 April 2004. Taking into account the terms of the decision, the date for commencement of trial would be thirty days following disclosure, that is, 13 May 2004.

6. Neither the decision of 4 March 2004, nor Rule 66 relating to disclosure by the Prosecution, stipulates the form in which disclosure of redacted identifying material should be made. The Chamber notes that disclosure via CD-ROM has been accepted in other cases by the parties and considers such disclosure to be acceptable in the present case. Any issues relating to authenticity should be resolved via inspection by the Defence of the Prosecution's documents, and after arguments at the stage of

mettant d'identifier les témoins protégés, le 14 avril 2004, était tardive. En outre, cette communication est incomplète puisqu'une copie n'a pas été fournie au co-conseil. La défense soutient en outre que la communication de ces informations sur support CD-ROM est inacceptable et que le Procureur devrait fournir des copies papier car les CD-ROM posent un problème d'établissement de l'authenticité des informations qu'ils contiennent et qu'en conséquence le droit de l'accusé à être représenté par une équipe de défense pleinement préparée n'a pas été respecté.

3. Le Procureur s'oppose à la requête et soutient que celle-ci devrait être rejetée sans dépens. Le Procureur fait valoir que la communication desdites informations a eu lieu le 6 avril 2004, date à laquelle il a déposé les CD-ROM auprès du Greffe pour transmission à la défense, et qu'elle a donc été faite dans les délais. Le Procureur soutient également que c'est par rapport à l'équipe de la défense, et non à tel ou tel membre de celle-ci, qu'obligation lui est faite de communiquer. En ce qui concerne la communication des informations sur support CD-ROM, le Procureur soutient que cette forme de communication a toujours été acceptée par les Chambres de première instance dans d'autres affaires et par l'équipe de la défense de Simba à d'autres occasions antérieures. Quant à la question de l'authenticité des informations contenues dans ces CD-ROM, le Procureur fait savoir qu'il tient à la disposition de la défense, pour tout contrôle éventuel, des copies papier, et que, d'autre part, les questions relatives à leur authenticité ne doivent être soulevées que lorsque l'admission du document comme moyen de preuve est demandée au procès. Enfin, le Procureur soutient qu'aucun préjudice n'a été causé à l'accusé. La défense maintient sa position dans sa réplique.

DÉLIBÉRATION

4. La question du respect des délais pour la communication par le Procureur passe par celle de savoir si par la date de la communication on entend la date à laquelle les documents à communiquer sont expédiés par le Procureur, ou celle à laquelle ils sont effectivement reçus par la défense. D'après le registre des significations de pièces, tenu par le Greffe, les CD-ROM sont partis d'Arusha par DHL le 7 avril 2004 et arrivés à destination à Cotonou le 13 avril 2004 (voir l'annexe 1).

5. Le Règlement, comme la décision, est muet sur la question du délai de signification des documents à communiquer et ne parle que de «communication à la défense». Le sens ordinaire de cette expression est que la communication n'est faite que lorsque la défense reçoit les documents en question. En conséquence, la date de communication à prendre en considération est celle à laquelle les documents sont reçus, et non celle à laquelle le Procureur les envoie au Greffe pour transmission à la défense, c'est-à-dire le 13 avril 2004. Prenant en considération les termes de la décision, la date de commencement du procès serait de 30 jours après la date de communication, c'est-à-dire le 13 mai 2004.

6. Ni la décision du 4 mars 2004, ni l'article 66 du Règlement de procédure et de preuve relatif à la communication de pièces par le Procureur ne spécifient la forme sous laquelle les informations dont sont expurgés tous renseignements permettant d'identifier des témoins doivent être communiquées. La Chambre fait observer que la communication au moyen de CD-ROM a été acceptée par les parties dans d'autres affaires et considère que cette forme de communication est acceptable en l'espèce.

admission of the documents into evidence at trial. The Chamber further considers that disclosure is to be made to the Defence team as a whole, rather than individually to both Lead and Co-Counsel, or any other members of the team.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part by deferring the commencement of trial to 13 May 2004.

Arusha, 28 April 2004

[Signed] : Erik Mose; Jai Rarn Reddy; Sergei Akkseevich Egorov

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Decision on Urgent defence Motion for Prosecution Statements in Prosecutor v. Ndayambaje et al. 4 May 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Aloys Simba – communication of Prosecution statements made by a protected witness in another case – all the witness's statements already disclosed – the Trial Chamber that ordered the protective measures is the only body with the authority to vary the protective measures order – motion denied

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Requête en extrême urgence de la défense en vue d'autoriser le greffe à lui communiquer les déclarations de l'accusation dans l'affaire : *Procureur contre Ndayambaje et consorts*", filed on 19 April 2004;

CONSIDERING the Prosecutor's response filed on 23 April 2004; and the "Réplique de la défense" filed on 27 April 2004;

HEREBY DECIDES the motion.

Tout différend relatif à l'authenticité des pièces devra être tranché par un contrôle, de la part de la défense, des documents en possession du Procureur, et ce, après débat au stade de l'admission des documents comme moyens de preuve au procès. La Chambre considère en outre que la communication doit être faite à l'équipe de la défense dans son ensemble et non individuellement au conseil principal et au co-conseil, ou à tout autre membre de l'équipe.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT en partie à la requête en reportant la date d'ouverture du procès au 13 mai 2004.

Arusha, le 28 avril 2004

[Signé] : Erik Mose; Jai Ram Reddy; Sergei Alekseevich Egorov

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Décision relative à la «Requête en extrême urgence de la défense en vue d'autoriser le Greffe à lui communiquer les déclarations de l'accusation dans l'affaire le Procureur contre Ndayambaje et consorts» 4 mai 2004 (ICTR-01-76-I)

(Original : non spécifié)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

Aloys Simba – communication des déclarations de l'accusation faites par un témoin protégé dans une autre affaire – toutes les déclarations du témoin concerné déjà communiquées – la Chambre de première instance qui a ordonné les mesures protectrices est le seul organe habilité à modifier la décision prescrivant ces mesures – requête rejetée

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la Requête en extrême urgence de la défense en vue d'autoriser le Greffe à lui communiquer les déclarations de l'accusation dans l'affaire : *Procureur contre Ndayambaje et consorts*, déposée le 19 avril 2004,

VU la réponse du Procureur déposée le 23 avril 2004 et la Réplique de la défense déposée le 27 avril 2004,

STATUE CI-APRÈS sur la requête.

1. The Defence requests disclosure of unredacted statements made by Witness FAI in *Prosecutor v. Ndayambaje et al*. to Prosecution investigators, as well as transcripts from closed session hearings before Trial Chamber II. It is argued that Witness FAI is Witness YC who will testify in the present case, and such disclosure is relevant to credibility issues. The Prosecution does not object, but maintains that all statements made by the witness to the Prosecution have already been disclosed to the Defence, and that such a request should be addressed to Trial Chamber II, which is seized of *Ndayambaje et al*. The Defence responds that the latter issue can be resolved administratively between Trial Chamber I and II and by the President of the Tribunal.

2. The Chamber notes that the Prosecution contends that all the witness's statements have already been disclosed. However, if the Defence wishes to pursue the matter, the request is properly to be placed before Trial Chamber II, which ordered the protective measures in respect of Witness FAI, and therefore is the only body with the authority to vary the protective measures order, to permit disclosure of unredacted statements and transcripts that contain identifying information of Witness FAI.

FOR THE ABOVE REASONS, THE CHAMBER
DENIES the motion.

Arusha, 4 May 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on Defence Motion for Extension of Time 4 May 2004 (ICTR-01-76-I)

(Original : Not specified)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Aloys Simba – extension of time – working language of the Defence Counsel – language of the Defence co-counsel and motions – absence of new elements in the response of the Prosecution – motion denied

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

1. La défense demande que lui soient communiquées en version non caviardée les déclarations faites par le témoin FAI devant les enquêteurs du Bureau du Procureur dans le cadre de l'affaire *Le Procureur c. Ndayambaje et consorts*, ainsi que les comptes rendus d'audiences à huis clos tenues par la Chambre de première instance II. Selon ses dires, le témoin FAI n'est autre que le témoin YC appelé à déposer dans la présente affaire, et la communication des pièces susmentionnées est nécessaire pour apprécier la crédibilité de l'intéressé. Le Procureur n'y voit pas d'objection, mais soutient que toutes les déclarations du témoin concerné qu'il a recueillies ont déjà été communiquées à la défense et qu'une telle demande devrait être plutôt adressée à la Chambre de première instance II qui est saisie de l'affaire *Ndayambaje et consorts*. La défense réplique que cette dernière question peut être réglée par voie administrative entre les Chambres de première instance I et II et par le Président du Tribunal.

2. La Chambre retient qu'au dire du Procureur, toutes les déclarations du témoin concerné ont déjà été communiquées. Toutefois, si la défense ne souhaite pas abandonner ses prétentions, les circonstances commandent qu'elle adresse sa demande à la Chambre de première instance II qui a ordonné les mesures de protection dont bénéficie le témoin FAI et est donc le seul organe habilité à modifier la décision prescrivant ces mesures pour permettre de communiquer des déclarations non caviardées et des comptes rendus d'audience contenant des renseignements propres à l'identification dudit témoin.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête.

Arusha, le 4 mai 2004

[Signé] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Décision relative à la requête de la défense en prorogation de délai 4 mai 2004 (ICTR-01-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevitch Egorov

Aloys Simba – prorogation de délai – langue de travail des conseils de l'accusé – langue du co-conseil de l'accusé et des requêtes – absence d'élément nouveau dans la réponse du Procureur – requête rejetée

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Requête en extrême urgence de la défense en vue d'obtenir une autorisation à répliquer à date fixe ou une prorogation des délais pour le dépôt de sa réplique à la réponse du procureur à la requête en exceptions préjudicielles et en incompétence pour vice de forme substantiels contre l'acte d'accusation modifié en date du 28 Novembre 2003", filed on 28 April 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Indictment against the Accused was confirmed on 8 January 2002. The Defence filed a motion alleging defects in the form of the Indictment on 31 October 2002. Prior to a decision having been rendered on the motion, the Prosecution on 28 November 2003 requested leave to file an amended Indictment. Leave was granted by the Chamber on 26 January 2004 and on the same day, the Chamber declared moot the motion regarding defects in the form of the Indictment. The amended Indictment was filed on 27 January 2004. On 3 February 2004, the Defence sought an extension of time to file an appeal against the decision on defects in the form of the Indictment, arguing that a French translation had not been made available to the Defence. The extension was granted on 13 February 2004 and the Defence lodged its appeal on 26 February 2004. On 24 March 2004, the Appeals Chamber dismissed the appeal for lack of appellate jurisdiction. The commencement of the trial has been fixed for 13 May 2004.

SUBMISSIONS

2. The Defence submits that an extension of time is required to reply to the Prosecution's response, namely five days after a French translation has been made available to the Defence as it is the language of both Counsel and the Accused.

DELIBERATIONS

3. The Chamber notes that Co-Counsel is English-speaking and that the Defence itself has filed motions in English, for example, the motion seeking rescheduling of the commencement of trial filed on 19 April 2004, which was signed by both Lead and Co-Counsel. The Chamber considers that Co-Counsel can advise both Lead Counsel and the Accused on the contents of the Prosecution's response in English, and Lead and Co-Counsel should cooperate more on the issue of translations. Further, the Defence has expressed its views in its motion, and the Prosecution response does not contain any new elements.

SIÉGEANT en la Chambre de première instance I composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevitch Egorov,

SAISI de la Requête en extrême urgence de la défense en vue d'obtenir une autorisation à répliquer [sic] à date fixe ou une prorogation des délais pour le dépôt de sa réplique à la réponse du Procureur à la requête en exceptions préjudicielles et en incompétence pour vices de forme substantiels contre l'acte d'accusation modifié en date du 28 novembre 2003, déposée le 28 avril 2004,

STATUE CI-APRÈS sur ladite requête.

INTRODUCTION

1. L'acte d'accusation établi contre Aloys Simba a été confirmé le 8 janvier 2002. Le 31 octobre 2002, la défense a déposé une requête reprochant à cet acte d'accusation d'être entaché de vices de forme. Le 28 novembre 2003, avant que le Tribunal ne se soit prononcé sur ladite requête, le Procureur a sollicité l'autorisation de déposer un acte d'accusation modifié. La Chambre lui a accordé cette autorisation le 26 janvier 2004 et, le même jour, elle a déclaré sans objet la requête relative aux vices de forme de l'acte d'accusation. Le 27 janvier 2004, l'acte d'accusation modifié a été déposé. Le 3 février 2004, la défense a demandé une prorogation du délai imparti pour faire appel de la décision relative aux vices de forme de l'acte d'accusation, au motif que la version française du texte ne lui avait pas été communiquée. La prorogation a été acceptée le 13 février 2004 et la défense a formé son appel le 26 février 2004. Le 24 mars 2004, la Chambre d'appel a décliné sa compétence et rejeté de ce fait le recours de la défense. L'ouverture du procès a été fixée au 13 mai 2004.

ARGUMENTATION DE LA DÉFENSE

2. La défense fait valoir qu'il lui faut un délai supplémentaire pour déposer sa réplique à la réponse du Procureur et demande concrètement que ce délai soit de cinq jours à compter de la date à laquelle elle aura reçu la version française de ladite réponse, le français étant la langue de travail des conseils de l'accusé.

DÉLIBÉRATION

3. La Chambre relève que le co-conseil est anglophone et que la défense elle-même a déjà déposé des requêtes en anglais : tel est le cas de sa requête tendant à faire reporter la date d'ouverture du procès qui a été déposée le 19 avril 2004, sous la signature du conseil principal et du co-conseil. La Chambre estime que le co-conseil peut expliquer la teneur de la version anglaise de la réponse du Procureur au conseil principal et à l'accusé et que le conseil principal et le co-conseil devraient coopérer davantage au sujet des traductions. Au demeurant, la défense a exprimé ses points de vue dans sa requête et la réponse du Procureur ne contient aucun élément nouveau.

FOR THE ABOVE REASONS, THE CHAMBER
DENIES the motion.

Arusha, 4 May 2004

[Signed] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment 6 May 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Jai Ram Reddy; Sergei Alekseevich Egorov

Aloys Simba – defaults of the indictment – vagueness and imprecision of the indictment, specific examples – ratione temporis *jurisdiction of the Tribunal, pre-1994 evidence, evidence providing a context – joint criminal enterprise, individual criminal responsibility, the* mens rea *element, the* mens rea *element of joint criminal enterprise – extermination as a crime against humanity, similar factual allegations can substantiate different legal elements of different offences – murder as a crime against humanity – motion granted in part*

International Instruments Cited : Statute of the I.C.T.R., Art. 3 and 6 (1) – Statute of the I.C.T.Y., Art. 7 (1)

International Cases Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Ferdinand Nahimana et al., *Judgement and Sentence, 3 December 2003 (ICTR-99-52-T,* Reports 2003, *p. 376) – Trial Chamber I*, The Prosecutor v. Théoneste Bagosora et al., *Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, (ICTR-98-41-T,* Reports 2003*, p.148) – Trial Chamber XXX*, The Prosecutor v. Jean-Baptiste Gatete, *Decision on Defence Preliminary Motion, 29 March 2004 (ICTR-2000-61-XXX,* Reports 2004, *p. XXX)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Dusko Tadic, *Judgement, 15 July 1999 (IT-94-1) – Trial Chamber II,* The Prosecutor v. Radoslav Brdanin et Momir Talic *Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 (IT-99-36)*

PAR CES MOTIFS, LA CHAMBRE
REJETTE la requête.

Fait à Arusha, le 4 mai 2004

[Signé] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Décision relative à la requête de la défense en exceptions préjudicielles pour vices de forme de l'acte d'accusation 6 mai 2004 (ICTR-01-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Jai Ram Reddy; Sergei Alekseevich Egorov

Aloys Simba – carences de l'acte d'accusation – caractère vague et imprécis de l'acte d'accusation, exemples précis – compétente ratione temporis *du Tribunal, éléments de preuve antérieurs à 1994, éléments de preuve contextuels – entreprise criminelle conjointe, responsabilité pénale individuelle, intention coupable, intention coupable de participer à l'entreprise criminelle conjointe – extermination constitutive de crime contre l'humanité, des allégations factuelles similaires peuvent servir à étayer les éléments juridiques d'infractions différentes – assassinat constitutif de crime contre l'humanité – requête acceptée en partie*

Instruments internationaux cités : Statut du T.P.I.R., art. 3 et 6 (1) – Statut du T.P.I.Y., art. 7 (1)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Ferdinand Nahimana et consorts, *Jugement et sentence, 3 décembre 2003 (ICTR-99-52-T,* Recueil 2003, *p. 377) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts, *Décision relative à l'admissibilité de la déposition envisagée du témoin DBY, 18 septembre 2003 (ICTR-98-41-T,* Recueil 2003*, p. 149) – Chambre de première instance XXX,* Le Procureur c. Jean-Baptiste Gatete, *Decision on Defence Preliminary Motion, 29 mars 2004 (ICTR-2000-61-XXX,* Recueil 2004, *p. XXX)*

T.P.I.Y. : Chambre d'appel, Le Procureur c. Dusko Tadic, *arrêt, 15 juillet 1999 (IT-94-1) – Chambre de première instance II,* Le Procureur c. Radoslav Brdanin et Momir Talic, *Décision relative à la forme du nouvel acte d'accusation modifé et à la requête de l'accusation aux fins de modification dudit acte, 26 juin 2001 (IT-99-36)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Requête de la défense en exceptions préjudicielles et en incompétence pour vices de forme substantiels contre l'acte d'accusation modifié en date du 28 Novembre 2003", filed on 16 April 2004; and the corrigendum thereto, filed on 20 April 2004;

CONSIDERING the Prosecution's Response, filed on 27 April 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Indictment against the Accused was confirmed on 8 January 2002. The Defence filed a motion alleging defects in the form of the Indictment on 31 October 2002. Prior to a decision having been rendered on the motion, the Prosecution on 28 November 2003 requested leave to file an amended Indictment. Leave was granted by the Chamber on 26 January 2004 and on the same day, the Chamber declared moot the motion regarding defects in the form of the Indictment. The amended Indictment was filed on 27 January 2004. The Defence lodged an appeal against the decision on defects in the form of the Indictment on 26 February 2004. On 24 March 2004, the Appeals Chamber dismissed the appeal for lack of appellate jurisdiction. The commencement of the trial has been fixed for 13 May 2004.

SUBMISSIONS

2. The Defence submits that the amended Indictment is defective as it is vague and imprecise; contains allegations falling outside the Tribunal's temporal jurisdiction; and the charge of joint criminal enterprise is inadequately pleaded. The Defence argues that the count of extermination is badly pleaded, and also objects to the count of murder in respect of the killing of a gendarme as he was not a civilian.

3. The Prosecution contends that the motion should be dismissed. Regarding the issue of vagueness and imprecision, the Prosecution responds that these concerns have been addressed in the amended Indictment. With respect to the issue of temporal jurisdiction, the Prosecution submits that the allegations provide a historical context and relate to continuing crimes. The Prosecution argues that the pleading of joint criminal enterprise in the amended Indictment conforms to legal requirements. In respect of the count of extermination, the Prosecution points out that the arguments were also raised in the previous motion alleging defects in the form of the Indictment and was decided in the decision thereto. As for the killing of the gendarme, the Prosecution cites legal support for the proposition that a soldier may be a victim of a crime against humanity.

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I (la «Chambre») composée des juges Erik Møse, Président de Chambre, Jai Ram Reddy et Sergei Alekseevich Egorov,

SAISI de la «Requête de la défense en exceptions préjudicielles et en incompétence pour vices de forme substantiels contre l'acte d'accusation modifié en date du 28 novembre 2003» déposée le 16 avril 2004, et du *corrigendum* y joint déposé le 20 avril 2004,

VU la réponse du Procureur déposée le 27 avril 2004,

STATUE CI-APRÈS SUR LADITE REQUÊTE :

INTRODUCTION

1. L'acte d'accusation dressé contre l'accusé a été confirmé le 8 janvier 2002. Le 31 octobre 2002, la défense a déposé une requête en exceptions préjudicielles pour vices de forme dudit acte. Le 28 novembre 2003, avant qu'une décision n'ait été rendue sur cette requête, le Procureur a demandé l'autorisation de déposer un acte d'accusation modifié. Le 26 janvier 2004, La Chambre a fait droit à la demande du Procureur et déclaré sans objet la requête de la défense en exceptions préjudicielles pour vices de forme de l'acte d'accusation. Le 27 janvier 2004, l'acte d'accusation modifié a été déposé. Le 26 février 2004, la défense a interjeté appel contre la décision relative à la requête en exceptions préjudicielles pour vices de forme de l'acte d'accusation. Le 24 mars 2004, la Chambre d'appel s'est déclarée incompétente et a rejeté l'appel. L'ouverture du procès est fixée au 13 mai 2004.

ARGUMENTATION DES PARTIES

2. La défense fait valoir que l'acte d'accusation modifié recèle des carences : il est vague, imprécis, comporte des allégations ne relevant pas de la compétence *ratione temporis* du Tribunal, et le chef d'entreprise criminelle conjointe n'est pas suffisamment étayé. Le chef d'extermination n'est pas dûment étayé et la défense conteste celui d'assassinat en ce qui concerne le meurtre d'un gendarme car la victime n'était pas un civil.

3. Le Procureur estime que la requête doit être rejetée. S'agissant du caractère vague et imprécis de l'acte d'accusation, le Procureur affirme que l'acte d'accusation modifié a comblé cette lacune. Quant à la compétence temporelle du Tribunal, le Procureur fait valoir que les allégations retracent le contexte historique et se rapportent à des infractions continues. Il ajoute que l'imputation du chef d'entreprise criminelle conjointe dans l'acte d'accusation modifié est conforme à la loi. En ce qui concerne le chef d'extermination, le Procureur fait observer que les mêmes arguments ont été avancés dans la requête antérieure en exceptions préjudicielles pour vices de forme de l'acte d'accusation et qu'une décision a été rendue à ce sujet. Quant à l'assassinat du gendarme, le Procureur invoque le fondement juridique étayant sa thèse selon laquelle un militaire peut être victime d'un crime contre l'humanité.

DELIBERATIONS

Vagueness and imprecision

4. This argument was raised in the Defence's earlier motion alleging defects in the form of the Indictment, filed on 31 October 2002. The Chamber observes that in its decision dated 26 January 2004, it noted that the amended Indictment remedied the vagueness and imprecision in the Indictment. However, the previous motion made a more general allegation of vagueness and imprecision, whereas the present motion raises such vagueness or imprecision in more detail and with references to specific paragraphs and alleged defects in the amended Indictment. In light of this, the Chamber notes that in paragraphs 16-17, no dates are given for the events alleged, other than the general time frame of "between 1991 and June 1994" mentioned in paragraph 15. The Chamber considers that the Prosecution should, if it is in a position to do so, provide more information (dates or periods). In the same vein, the Chamber notes that no date is provided in paragraph 24 (c), whereas dates were provided for paragraphs 24 (a) and (b). Again, the Chamber considers that the Prosecution should, if it is in a position to do so, provide a specific date in respect of paragraph 24 (c).

5. The Defence additionally points out that in section II of the amended Indictment, it is stated that the Accused is a "coordinator" but later in paragraph 10, he is referred to as a "conseiller". The Chamber considers that the Prosecution should clarify its description of the Accused's position.

Temporal Jurisdiction

6. The Defence has not previously raised the issue of temporal jurisdiction. The Chamber recalls its judgement in *Nahimana et al*. dated 3 December 2003 wherein it was held that :

> A Separate Opinion of Judge Shahabuddeen concurring with the Appeals Chamber decision suggested more specifically that evidence dating to a time prior to 1 January 1994 can provide a basis from which to draw inferences, for example with regard to intent or other required elements of crimes committed within the limits of the temporal jurisdiction of the Tribunal. Moreover, evidence of prior crimes can be relied on to establish a "pattern, design or systematic course of conduct by the accused." With regard to the charge of conspiracy, where the conspiracy agreement might date back to a time prior to 1 January 1994, Judge Shahabuddeen expressed the view that so long as the parties continue to adhere to the agreement, they may be regarded as constantly renewing it up to the time of the acts contemplated by the conspiracy. Therefore a conspiracy agreement made prior to but continuing into the period of 1994 can be considered as falling within the jurisdiction of the Tribunal.[1]

[1] *Nahimana et al*., Judgement and Sentence (TC), 3 December 2003, para. 101; see also *Gatete*, Decision on Defence Preliminary Motion (TC), 29 March 2004, para. 6.

DÉLIBÉRATION

Sur le caractère vague et imprécis

4. Cet argument a été avancé dans la requête antérieure de la défense en exceptions préjudicielles pour vices de forme de l'acte d'accusation déposée le 31 octobre 2002. La Chambre relève que dans sa décision du 26 janvier 2004, elle a indiqué que l'acte d'accusation modifié remédiait à l'imprécision et au caractère vague de l'acte d'accusation initial. Toutefois, contrairement à la requête antérieure qui dénonçait en termes généraux le caractère vague et imprécis de l'acte d'accusation, la présente requête en fait état de manière plus détaillée en se référant à des paragraphes précis et à des lacunes spécifiques de l'acte d'accusation modifié. C'est ainsi que la Chambre relève que les paragraphes 16 et 17 ne donnent aucune indication quant aux dates auxquelles les faits présumés se sont produits autre que la période généralement comprise «entre 1991 et juin 1994» mentionnée au paragraphe 15. La Chambre estime que le Procureur doit, si possible, préciser davantage les dates ou les périodes concernées. De même, la Chambre relève que, contrairement aux paragraphes 24 (a) et (b), le paragraphe 24 (c) ne comporte aucune date. Aussi estime-t-elle que le Procureur doit, si possible, préciser la date pertinente au paragraphe 24 (c).

5. La défense relève par ailleurs que dans la deuxième partie de l'acte d'accusation modifié, l'accusé est présenté comme étant un «coordonnateur», alors que plus loin, au paragraphe 10, il est identifié comme étant un «conseiller». La Chambre estime que le Procureur devrait préciser le statut de l'accusé.

Sur la compétence *ratione temporis*

6. L'exception d'incompétence *ratione temporis* du Tribunal soulevée par la défense ne figurait pas dans sa requête antérieure. Toutefois, la Chambre rappelle sa décision en l'affaire *Nahimana et consorts* en date du 3 décembre 2003 qui dit :

> «Une opinion distincte du juge Shahabuddeen approuvant la décision de la Chambre d'appel suggérait plus spécifiquement que les éléments de preuve antérieurs au 1er janvier 1994 constituaient une base dont on pouvait tirer des indices relatifs, par exemple, à l'intention ou d'autres éléments constitutifs des crimes commis dans les limites de la compétence temporelle du Tribunal. De plus, on peut s'appuyer sur la preuve de crimes antérieurs pour établir un «plan, un modèle ou une conduite systématique de la part de l'accusé.» En ce qui concerne le chef d'entente, lorsque l'accord d'entente peut remonter à une période antérieure au 1er janvier 1994, le juge Shahabuddeen a exprimé le point de vue que tant que les parties continuent à adhérer à l'entente, on peut considérer qu'ils la renouvellent constamment jusqu'au moment de la commission des actes envisagés lors de celle-ci. En conséquence, une entente conclue avant mais se poursuivant en 1994 peut être considérée comme relevant de la compétence du Tribunal»[1].

[1] *Nahimana et consorts*., Jugement et sentence (Chambre de première instance), 3 décembre 2003, para. 101; voir également *Gatete*, Decision on Defence Preliminary Motion (Chambre de première instance), 29 mars 2004, para. 6.

7. In *Bagosora et al*., the Chamber held that there are three bases of relevance for such pre-1994 evidence, which are exceptions to the general inadmissibility of pre-1994 evidence : (i) evidence relevant to an offence continuing into 1994; (ii) evidence providing a context or background; and (iii) similar fact evidence.[2]

8. The Chamber notes that the Accused is not charged with any "continuing" offences, such as conspiracy, as argued by the Prosecution. However, the impugned paragraphs (4, 12, 15, 18, 22, 23) provide a context or background and may be a basis on which to draw inferences as to intent or other elements of the crimes alleged to have been committed within the temporal jurisdiction.

Joint Criminal Enterprise

9. The Defence argues that the Statute does not provide for joint criminal enterprise and that such a charge was unfair against a single Accused. The Chamber notes that the Appeals Chamber in *Tadic* held that Article 7 (1) of the ICTY Statute included criminal participation as part of a joint criminal enterprise.[3] The provision is similar to Article 6 (1) of the ICTR Statute, which also implicitly encompasses individual criminal responsibility for acts carried out pursuant to a joint criminal enterprise.

10. The Chamber notes that joint criminal enterprise was not pleaded in the original Indictment and was added to the amended Indictment, although allegations relevant to joint criminal enterprise, for example, those contained in paragraphs 14-25 of the amended Indictment, existed in the original Indictment, albeit with some differences. The Chamber recalls that in its decision granting leave to the Prosecution to file the amended Indictment, it held that the addition of joint criminal enterprise did not constitute a new charge.

11. The Defence argues that the charge is insufficiently pleaded, in particular, the *mens rea* element. In *Prosecutor v. Brdnanin and Talic*, an ICTY Trial Chamber held that generally, the state of mind of the Accused when carrying out the acts alleged must be pleaded.[4] More specifically, in relation to joint criminal enterprise, the Chamber stated that the Prosecution must plead that the Accused had the state of mind required in respect of crimes falling within the agreed object of the enterprise.[5]

[2] *Bagosora et al*., Decision on Admissibility of Proposed Testimony of Witness DBY (TC), 18 September 2003.

[3] *Tadic*, Judgement (AC), 15 July 1999, paras. 189-193.

[4] *Brdnanin and Talic*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (TC), 26 June 2001, para. 33.

[5] *Ibid*., paras. 34-41.

7. Dans l'affaire *Bagosora et consorts,* la Chambre a établi trois catégories de preuves permettant de statuer sur la pertinence des éléments de preuve antérieurs à 1994 comme exceptions à la règle générale d'inadmissibilité des moyens de preuve antérieurs à cette date, à savoir qu'il doit s'agir : (i) d'éléments de preuve pertinents pour des infractions dont la commission s'est poursuivie en 1994; (ii) d'éléments de preuve contextuels ou historiques; et (iii) de preuve tirée de faits similaires[2].

8. Contrairement à ce qu'affirme le Procureur, la Chambre relève qu'il n'est reproché à l'accusé aucune «infraction continue» telle que l'entente en vue de commettre le génocide. Toutefois, les paragraphes attaqués (4, 12, 15, 18, 22 et 23) situent le contexte à partir duquel peut se déduire l'intention coupable ou d'autres éléments constitutifs des crimes allégués avoir été commis au cours de la période relevant de la compétence *ratione temporis* du Tribunal.

Sur l'entreprise criminelle conjointe

9. Selon la défense, le Statut ne prévoit pas le crime d'entreprise criminelle conjointe et ce ne serait pas équitable de retenir une telle charge contre un seul accusé. La Chambre relève que dans l'affaire *Tadic*, la Chambre d'appel a estimé que la participation ou la contribution à la réalisation d'un but criminel commun est constitutive du crime d'entreprise criminelle conjointe prévu à l'article 7 (1) du Statut du TPIY[3]. Cette disposition s'apparente à l'article 6 (1) du Statut du TPIR qui reconnaît implicitement la responsabilité pénale individuelle pour des actes commis dans le cadre d'une entreprise criminelle conjointe.

10. La Chambre relève que la charge d'entreprise criminelle conjointe ne figurait pas dans l'acte d'accusation initial, et qu'elle a été ajoutée au texte modifié, mais les allégations relatives à cette qualification, à l'instar de celles mentionnées aux paragraphes 14 à 25, à quelques différences près, figuraient déjà dans l'acte d'accusation initial. La Chambre rappelle que dans sa décision autorisant le Procureur à déposer un acte d'accusation modifié, elle a estimé que l'adjonction du chef d'entreprise criminelle conjointe ne constituait nullement une nouvelle charge.

11. La défense fait valoir que cette accusation n'est pas assez étayée, notamment en ce qui concerne l'intention coupable. Dans l'affaire *Le Procureur c. Brdnanin et Talic*, une Chambre de première instance du TPIY a estimé qu'en général il faut donner des indications sur l'état d'esprit de l'accusé au moment de l'exécution des actes allégués[4]. S'agissant plus précisément de l'entreprise criminelle conjointe, ladite Chambre a indiqué que le Procureur doit établir que l'accusé était animé de l'état d'esprit conduisant à la commission des actes constitutifs du crime d'entreprise criminelle conjointe[5].

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[2] *Bagosora et consorts*, Décision relative à l'admissibilité de la déposition envisagée du témoin DBY (Chambre de première instance), 18 septembre 2003.

[3] *Tadic*, arrêt (Chambre d'appel), 15 juillet 1999, paras. 189 à 193.

[4] *Brdnanin et Talic*, Décision relative à la forme du nouvel acte d'accusation modifé et à la requête de l'accusation aux fins de modification dudit acte (Chambre de première instance), 26 juin 2001, para. 33.

[5] *Ibid*., paras. 34 à 41.

12. The amended Indictment does not specifically plead the state of mind of the Accused or his alleged partners in the joint criminal enterprise. The Chamber considers that the amended Indictment should be amended to plead the *mens rea* element of joint criminal enterprise.

Extermination as a Crime Against Humanity

13. The Defence submits that the same allegations used in respect of the counts of genocide and complicity in genocide are used for the count of extermination as well, which fails to appreciate the substantive difference between the elements of the two offences. Although this issue was raised in the previous motion by the Defence, it was not decided by the Chamber as the issue was superseded by the filing of the amended Indictment.

14. The Chamber sees no merit in this argument. Similar factual allegations can substantiate different legal elements of different offences. In addition, the Chamber notes that the amended Indictment does not merely recapitulate the same allegations, but goes on to make allegations specific to the different elements in extermination, which are not elements of genocide, for example, the requirement of a widespread or systematic attack against a civilian population on discriminatory grounds.

Murder as a Crime Against Humanity

15. The Defence contends that the link between the systematic attacks and alleged murders has not been established in the amended Indictment, and objects to the allegation of the murder of a gendarme.

16. The Chamber notes that the element of widespread or systematic attack is alleged by the inclusion of paragraphs 1-57 in respect of the count of extermination, but not for murder. The Chamber considers that, at the very least, the Prosecution should incorporate these paragraphs in the statement of facts for murder as well, to show the link to a widespread or systematic attack.

17. With respect to the allegation of the murder of a gendarme, it is true that under Article 3 of the Statute, murder as a crime against humanity must be committed "against any civilian population". However, case law has given a liberal interpretation to the term "civilian".[6] The evidence adduced during trial will clarify the circumstances under which the gendarme was allegedly murdered, and hence whether Article 3 (a) is applicable. However, the Chamber considers that the Prosecution should plead in the Indictment that the gendarme was part of a civilian population.

[6] See Cassese, *International Criminal Law* (2003), in particular, pp. 86-89.

12. L'acte d'accusation modifié ne fournit pas d'indications précises sur l'état d'esprit de l'accusé ou celui de ses présumés coauteurs dans le cadre de l'entreprise criminelle conjointe. La Chambre estime que l'acte d'accusation modifié doit être modifié de nouveau en vue de mettre en exergue l'existence de l'intention coupable de participer à l'entreprise criminelle conjointe.

Sur l'extermination constitutive de crime contre l'humanité

13. La défense soutient que le Procureur se fonde sur les mêmes allégations à l'appui des chefs de génocide et de complicité dans le génocide pour étayer le chef d'extermination, sans tenir compte de la différence fondamentale entre les éléments constitutifs de ces deux chefs d'accusation. Bien qu'elle ait été soulevée dans la précédente requête de la défense, cette question n'a pas été tranchée par la Chambre, le Procureur ayant déposé l'acte d'accusation modifié qui l'a rendue sans objet.

14. La Chambre de première instance estime que cet argument n'est pas fondé. Des allégations factuelles similaires peuvent servir à étayer les éléments juridiques d'infractions différentes. De plus, la Chambre relève que l'acte d'accusation modifié ne se contente pas de faire un récapitulatif des mêmes allégations, mais va plus loin en mentionnant les faits précis relatifs aux éléments constitutifs du crime d'extermination qui sont différents de ceux constitutifs du crime de génocide, par l'exemple, l'exigence d'une attaque généralisée et systématique dirigée de façon discriminatoire contre une population civile.

Sur l'assassinat constitutif de crime contre l'humanité

15. La défense soutient que l'acte d'accusation modifié n'établit pas le lien entre les attaques systématiques et les meurtres allégués, et conteste l'allégation d'assassinat d'un gendarme.

16. La Chambre relève qu'il est fait état de l'élément caractéristique des attaques généralisées et systématiques dans les paragraphes 1 à 57 en appui au chef d'extermination et que ce n'est pas le cas pour le chef d'assassinat. La Chambre estime que le Procureur doit au moins insérer lesdits paragraphes dans la relation des faits étayant le chef d'assassinat pour établir le lien avec les attaques généralisées et systématiques.

17. S'agissant de l'assassinat d'un gendarme, la Chambre reconnaît qu'aux termes de l'article 3 du Statut, l'assassinat, constitutif de crime contre l'humanité, doit être perpétré contre «une population civile». Mais la jurisprudence a donné une interprétation plus large au terme «civile»[6], et les moyens de preuve présentés au cours du procès permettront d'élucider les circonstances entourant l'assassinat, tel qu'allégué, du gendarme et de décider de l'applicabilité ou non de l'article 3 en l'espèce. Cependant, la Chambre estime que le Procureur doit établir dans l'acte d'accusation que le gendarme faisait partie de la population civile.

[6] Voir Cassese, International Criminal Law (2003), en particulier pp. 86 à 89.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part, and orders the Prosecution to amend the amended Indictment by providing, if it is in a position to do so, details in relation to paragraphs 16, 17 and 24 (c) and with respect to the *mens rea* element of joint criminal enterprise, and to make the required amendments to the statement of facts relating to the count of murder;

ORDERS the Prosecution to file the new amended Indictment by 10 May 2004.

Arusha, 6 May 2004

[Signed] : Erik Møse, Presiding Judge; Jai Ram Reddy; Sergei Alekseevich Egorov

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Amended Indictment pursuant to 6 May 2004 Decision 10 May 2004 (ICTR-2001-76-I)

(Original : English)

1. The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda (the "Statute of the Tribunal") charges :

Aloys Simba

With :

1. GENOCIDE, or in the alternative
2. COMPLICITY in GENOCIDE
3. EXTERMINATION as a CRIME AGAINST HUMANITY and
4. MURDER as a crime AGAINST HUMANITY

Offences stipulated in Article 2 and 3 of the Statute of the Tribunal, as set forth below :

II. The Accused

Aloys Simba was born on 28 February 1938 in Musebeya *commune*, Gikongoro prefecture, in the Republic of Rwanda. At the time of the events referred to in this indictment, Aloys Simba was a retired Lt. Colonel of the *Forces Armées du Rwanda*. After retiring from the Army in December 1988, was elected as a *Deputé* in the National Assembly where he served from 1989 – 1993. Aloys Simba was the president of MRND in Gikongoro prefecture from 5 July 1991 – 12 September 1993. He

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT À LA REQUÊTE EN PARTIE et ORDONNE au Procureur de modifier de nouveau l'acte d'accusation modifié en fournissant, si possible, des précisions aux paragraphes 16, 17 et 24 (c) et relativement à l'intention coupable de l'accusé dans le cadre de l'entreprise criminelle conjointe et de porter les modifications requises à la relation des faits relatifs au chef d'accusation d'assassinat;

AU SURPLUS, ORDONNE au Procureur de déposer le nouvel acte d'accusation modifié au plus tard le 10 mai 2004.

Arusha, le 6 mai 2004

[Signé] : Erik Møse; Jai Ram Reddy; Sergei Alekseevich Egorov

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Acte d'accusation modifié conformément à la décision du 6 mai 2004 10 mai 2004 (ICTR-2001-76-I)

(Original : Anglais)

I. Le Procureur du Tribunal pénal international pour le Rwanda, en vertu des pouvoirs qui lui sont conférés par l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le «Statut du Tribunal») accuse :

Aloys SIMBA

1. de GÉNOCIDE ou, à titre subsidiaire,

2. de COMPLICITÉ dans le GÉNOCIDE, ainsi que

3. d'EXTERMINATION constitutive de CRIME CONTRE L'HUMANITÉ et

4. d'ASSASSINAT constitutif de CRIME CONTRE L'HUMANITÉ, infractions prévues aux articles 2 et 3 du Statut du Tribunal, et tel qu'il est indiqué ci-après :

II. L'ACCUSÉ

(Nouveau) Aloys Simba est né le 28 février 1938 dans la commune de Musebeya, préfecture de Gikongoro, en République rwandaise. Lieutenant-colonel dans les Forces années du Rwanda, il était retraité à l'époque des faits visés dans le présent acte d'accusation. À son départ de l'armée en décembre 1988, il a été élu député à l'Assemblée nationale et a exercé cette fonction de 1989 à 1993. Il a été Président du MRND dans la préfecture de Gikongoro du 5 juillet 1991 au 12 septembre 1993.

was designated by the Minister of Defence of the interim government as *Conseiller* of the civil defense for Gikongoro and Butare prefectures from mid- May 1994.

III. CHARGES, INCLUDING A CONSISE STATEMENT OF FACTS :

Count 1 : Genocide

The Prosecutor of the International Criminal Tribunal for Rwanda charges Aloys Simba with GENOCIDE, a crime stipulated in Article 2 (3) (a) and 2 (2) (a) and (b) of the Statute, in that on or between the dates of 7 April 1994 and 30 May 1994 in Gikongoro and Butare prefectures, Rwanda, Aloys Simba was responsible for killing or causing serious bodily harm to members of the Tutsi population, with intent to destroy, in whole or in part, a racial or ethnic group.

Pursuant to Article 6 (1) of the Statute : by virtue of his affirmative acts in planning, instigating, ordering, cornmitting or otherwise aiding and abetting in the planning, preparation or execution of the crime charged, in concert with others as part of a joint criminal enterprise.

and /or

Pursuant to Article 6 (3) of the Statute : by virtue of his actual and constructive knowledge of the acts and omissions of *Interahamwe*, militiamen and civilians acting under his authority, and his failure to take necessary and reasonable measures to stop or prevent them, or to discipline and punish them, for their acts in the preparation and execution of the crime charged.

Or alternatively,

Count 2 : Complicity in Genocide :

The Prosecutor of the International Criminal Tribunal for Rwanda charges Aloys Simba with COMPLICITY in GENOCIDE a crime stipulated in Article 2 (3) (e) and 2 (2) (a) and (b) of the Statute, in that on or between the dates of 7 April 1994 and 30 May 1994 in Gikongoro and Butare prefectures, Aloys Simba was responsible for killing or causing serious bodily or mental harm to members of the Tutsi population with intent to destroy in whole or in part a racial or ethnic group.

Pursuant to Article 6 (1) of the Statute : by virtue of his acts in planning, instigating, ordering, cornmitting, or otherwise aiding and abetting the planning, preparation or execution of the crime charged, in concert with others as part of a joint criminal enterprise.

1. Between 1 January and 31 December 1994, Rwandan nationals were severally identified according to the following ethnic or racial classifications : Tutsi, Hutu and Twa.

À la mi-mai 1994, le Ministre de la défense du Gouvernement intérimaire l'a nommé Conseiller de la défense civile dans les préfectures de Gikongoro et Butare.

III. Chefs d'accusation et exposé succinct des faits

Chef 1 : Génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Aloys Simba de GÉNOCIDE, crime prévu aux paragraphes 3 (a) et 2 (a) et (b) de l'article 2 du Statut, en ce que le 7 avril et le 30 mai 1994 ou entre ces deux dates, dans les préfectures de Gikongoro et Butare au Rwanda, Aloys Simba a été responsable du meurtre de membres de la population tutsie ou d'atteintes graves a leur intégrité physique ou mentale, commis dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique;

En application du paragraphe 1 de l'article 6 du Statut, a raison des actes positifs de l'accusé, en ce sens qu'il a planifié, incité a commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime qui lui est reproché, de concert avec d'autres personnes, dans le cadre d'une entreprise criminelle commune, et/ou

En application du paragraphe 3 de l'article 6 du Statut, en ce que l'accusé connaissait effectivement et était censé connaître les actes et omissions des *Interahamwe*, des miliciens et des civils agissant sous son autorité, mais n'a pas pris les mesures nécessaires et raisonnables soit pour y mettre fin ou les prévenir, soit pour en discipliner les auteurs et les punir de leur participation a la préparation et à l'exécution du crime qui lui est reproché.

Ou, à titre subsidiaire,

Chef 2 : Complicité dans le génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Aloys Simba de COMPLICITÉ dans le GÉNOCIDE, crime prévu aux paragraphes 3 (e) et 2 (a) et (b) de l'article 2 du Statut, en ce que le 7 avril et le 30 mai 1994 ou entre ces deux dates, dans les préfectures de Gikongoro et de Butare, Aloys Simba a été responsable du meurtre de membres de la population tutsie ou d'atteintes graves a leur intégrité physique ou mentale, commis dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique;

En application du paragraphe 1 de l'article 6 du Statut, a raison des actes de l'accusé, en ce sens qu'il a planifié, incité à commettre, ordonné, commis ou de toute manière aidé et encouragé a planifier, préparer ou exécuter le crime qui lui est reproché, de concert avec d'autres personnes, dans le cadre d'une entreprise criminelle commune.

1. Entre le 1er janvier et le 31 décembre 1994, une distinction était faite entre les citoyens rwandais selon la classification ethnique ou raciale suivante : Tutsis, Hutus et Twas.

2. The victims referred to in this indictment were Tutsi and moderate Hutu civilians from Gikongoro and Butare Prefectures, and other civilians who sought refuge in Gikongoro and Butare prefectures.

Concise Statements of Fact for Counts 1 and 2 :

3. Aloys Simba was a retired Lt. Colonel of the Rwandan Armed Forces (FAR). However, during the events described in this indictment, Aloys Simba conducted himself as if he were still in active service. In April and May 1994 Aloys Simba wore military uniform in public. On occasion, he rode in military vehicles.

4. As military and political leader in his community, in January 1993, Aloys Simba directed a rally against the Anisha Accords in the town of Gikongoro while other MRND and CDR leaders were directing violence elsewhere in the country to block the peace process.

5. As a high ranking military officer, Aloys Simba, was not subordinate to the prefect in the same way as civilian leaders.

6. Between April and July 1994, Aloys Simba co-chaired prefectoral security meetings in Gikongoro prefecture with Laurent Bucyibaruta.

7. Aloys Simba was a *Deputé* in the Rwandan parliament and a well-known politician in Gikongoro prefecture.

8. Aloys Simba also derived authority from his close association with President Habyarimana. The history of Rwanda as taught in schools, from around 1975 through the 1980s, portrayed him as a national hero, who had helped bring President Habyarimana to power in 1973.

9. Gikongoro was one of the poorest prefectures of Rwanda and Aloys Simba was one of its wealthiest citizens.

10. Aloys Simba had *de facto* command and control over soldiers, gendarmes, reservists, *interahamwe* militiamen and Hutu civilians in Gikongoro prefecture and parts of Butare prefecture. His *de facto* power was confirrned by the Interim Govemment when the Ministry of Defence appointed him 'conseiller' of civil defence for Gikongoro and Butare prefectures, in May 1994.

11. Aloys Simba had access to the scarce commodity of fuel. This gave him additional power in the Musebeya commune.

12. Aloys Simba had prepared for the genocide in Gikongoro and Butare for at least a year prior to 1994.

13. At a public rally in Kirambi Market, Rukondo *Commune*, in April 1994, a few days before the death of President Habyarimana, Aloys Simba raised funds in order to purchase weapons to fight the "inyenzi". A substantial amount of money was collected.

14. In preparing and planning the massacres, which occurred in Gikongoro and Butare prefectures in April and May 1994, Aloys SIMBA acted in concert with :

2. Les victimes visées en l'espèce étaient des civils Tutsis et des civils hutus modérés des préfectures de Gikongoro et de Butare, ainsi que d'autres civils qui s'étaient réfugiés dans lesdites préfectures.

Exposé succinct des faits relatifs aux chefs 1 et 2

3. Aloys Simba était lieutenant-colonel retraité des Forces armées rwandaises (FAR). Toutefois, il s'est comporté au cours des faits décrits dans le présent acte d'accusation comme s'il était encore sous les drapeaux. En avril et mai 1994, il portait l'uniforme militaire en public. A l'occasion, il se déplaçait en véhicules militaires.

4. En janvier 1993, en sa qualité de chef militaire et de leader politique de sa communauté, Aloys Simba a dirigé un rassemblement d'opposition aux Accords d'Arusha dans la ville de Gikongoro, tandis qu'ailleurs dans le pays, d'autres responsables du MRND et de la CDR dirigeaient des actes de violence destinés à mettre en échec le processus de paix.

5. En tant qu'officier supérieur de l'armée, Aloys Simba n'était pas subordonné au préfet de la même façon que les responsables civils.

6. Entre avril et juillet 1994, Aloys Simba a présidé, avec Laurent Bucyibaruta, les réunions de sécurité de la préfecture de Gikongoro.

7. Député au Parlement rwandais, Aloys Simba était un homme politique bien connu dans la préfecture de Gikongoro.

8. Aloys Simba tirait également son autorité des liens étroits qui l'unissaient au Président Habyarimana. Dans l'histoire du Rwanda enseignée dans les établissements scolaires du pays des alentours de 1975 jusqu'a la fin des années 80, Aloys Simba était décrit comme un héros national qui avait contribué a l'accession du Président Habyarimana au pouvoir en 1973.

9. Gikongoro était l'une des préfectures les plus pauvres du Rwanda et Aloys Simba était l'un de ses fils les plus riches.

10. Aloys Simba exerçait *de facto* son autorité et un contrôle sur les militaires, les gendarmes, les réservistes, les miliciens *Interahamwe* et les civils hutus de la préfecture de Gikongoro et de certaines localités de la préfecture de Butare. Le Gouvernement intérimaire a confirmé le pouvoir qu'il possédait *de facto* avec sa nomination, par le Ministre de la défense, au poste de «conseiller» de la défense civile pour les préfectures de Gikongoro et de Butare en mai 1994.

11. Aloys Simba pouvait se procurer du carburant, produit devenu rare, ce qui augmentait son pouvoir dans la comrnune de Musebeya.

12. Aloys Simba avait passé au moins un an, avant 1994, à préparer le génocide perpétré dans les préfectures de Gikongoro et de Butare.

13. En avril 1994, quelques jours avant la mort du Président Habyarimana, lors d'un rassemblement public tenu au marché de Kirambi, dans la commune de Rukondo, Aloys Simba a collecté des fonds destinés à acheter des armes pour combattre les «inyenzi». Des fonds importants ont ainsi été réunis.

14. Lors de la préparation et de la planification des massacres qui se sont produits dans les préfectures de Gikongoro et de Butare en avril et mai 1994, Aloys Simba a agi de concert avec les personnes suivantes :

Faustin Sebuhura, former *Gendarmerie* Captain, stationed in Gikongoro;

Laurent Bucyibaruta, former *Prefet* of Gikongoro;

Damien Biniga, former *Sous-Prefet* of Munini *sous prefecture*, Gikongoro;

Denys Kamodoka, former Kitabi tea factory director, Gikongoro;

Juvenal Ndabarinzi, former Mata tea factory director, Gokongoro;

Lt. Col Rwamanya Augustin, former officer in charge of Logistics for the ex-FAR;

Joachim Hategekimana, former *Sous-Prefet* of Kaduha, *sous prefecture* Gikongoro;

Charles Munyaneza, former *Bourgmestre* of Kinyamakara *commune*; and

OTHERS not known to the Prosecution.

15. Aloys Simba and all or some of the above met regularly between 1991 and June 1994 to plan the genocide at various locations including, the shop of Israel Nsengiwmva and the bar of Landoauld Karamage, Gasarenda commercial centre, Mudasomwa *commune* and at the *gendarmerie* barracks, Gikongoro town amongst other places. More specifically, during the months of April and May 1994 some or all of the above named persons would meet to pass on their instructions to the leading *Interahamwe*, prior to attacks. They would meet after the attacks for debriefings and celebrations.

16. As part of the planning and preparation of the genocide, in the period from March 1993 – April 1994, at CIPEP in Gikongoro, Aloys Simba with others participated in the recruitment and training of Hutu militiamen, the acquisition and distribution of weapons, and instigated others to kill the Tusti.

17. Aloys Simba in the period from March 1993 – April 1994, at CIPEP in Gikongoro, organised, planned and participated in the recruitment and training of the *Interahamwe* and Hutu youths, who joined in attacks on Kaduha, Kibeho, Murambi and Cyanika, amongst other sites in Gikongoro prefecture and Ruhashya commune in Butare prefecture.

18. More specifically, in or about March 1993, Aloys Simba together with Prefect Laurent Bucyibaruta and Captain Faustin Sebuhura trained the trainers of the militia and initiated a census of all Hutu and Tutsi in the prefecture. As a result of Simba's instructions young Hutu men were recruited from various communes in Gikongoro *prefecture* and received military training in Nyungwe forest and other places. Former soldiers, *communal* policemen and others not known to the Prosecution conducted the training. In particular :

a) In March 1993, Aloys Simba organised and supervised the training of *bourgmesters*, councillors and responsables of Gikongoro Prefecture. The training took place at CIPEP in Gikongoro Town. The course for the responsables concluded with them being given two registers in which they were instruted to register the people of the cellules, one for Hutu and one for Tutsi.

– Faustin Sebuhura, ancien capitaine de gendarmerie alors en poste à Gikongoro,

– Laurent Bucyibaruta, ancien préfet de Gikongoro,

– Damien Biniga, ancien sous-préfet de Munini (Gikongoro),

– Denis Kamodoka, ancien directeur de l'usine à thé de Kitabi (Gikongoro),

– Juvénal Ndabarinzi, ancien directeur de l'usine à thé de Mata (Gikongoro), le lieutenant-colonel Augustin Rwamanya, ancien officier chargé de la logistique au sein des ex-FAR,

– Joachim Hategekimana, ancien sous-préfet de Kaduha (Gikongoro),

– Charles Munyaneza, ancien bourgmestre de la commune de Kinyamakara, d'AUTRES PERSONNES dont le Procureur ignore l'identité.

15. Entre 1991 et juin 1994, Aloys Simba et l'ensemble ou certaines des personnes susvisées se sont régulièrement réunis en divers endroits à l'effet de planifier le génocide, notamment dans la boutique d'Israël Nsengiyumva et le bar de Landoauld Karamage situés au centre commercial de Gasarenda, dans la commune de Mudasomwa et à la caserne de la gendarmerie de la ville de Gikongoro, pour ne citer qu ces lieux-là. Plus précisément, au cours des mois d'avril et mai 1994, toutes les personnes susnommées ou certaines d'entre elles se réunissaient avant les attaques pour communiquer leurs instructions aux chefs de file des *Interahamwe* et se retrouvaient après lesdites attaques pour entendre le compte rendu de leur déroulement et jubiler.

16. Dans le cadre de la planification et de la préparation du génocide, pendant la période allant de mars 1993 à avril 1994, au CIPEP à Gikongoro, Aloys Simba et d'autres individus ont participé au recrutement et à l'entraînement de miliciens hutus, ainsi qu'à l'acquisition et à la distribution d'armes, et ont incité d'autres personnes à tuer les Tutsis.

17. Aloys Simba pendant la période allant de mars 1993 à avril 1994, au CIPEP à Gikongoro, avait participé, après en avoir assuré l'organisation et la planification, au recrutement et à l'entraînement des *Interahamwe* et des jeunes Hutus qui ont pris part aux attaques perpétrées à Kaduha, Kibeho, Murambi et Cyanika, entre autres localités de la préfecture de Gikongoro, ainsi que dans la commune de Ruhashya, préfecture de Butare.

18. Plus précisément, en ou vers mars 1993, Aloys Simba, en collaboration avec le préfet Laurent Bucyibaruta et le capitaine Faustin Sebuhura, a assuré la formation des formateurs de la milice et entrepris le recensement de tous les Hutus et Tutsis de la préfecture. Sur ses instructions, de jeunes gens d'origine hutue ont été recrutés dans diverses communes de la préfecture de Gikongoro et ont reçu un entraînement militaire dans la forêt de Nyungwe et dans d'autres endroits. Les instructeurs qui les entraînaient étaient d'anciens militaires, des agents de la police communale et d'autres personnes dont le Procureur ignore l'identité. En particulier,

a) En mars 1993, Aloys Simba a organisé et supervisé la formation des bourgmestres, des conseillers et des responsables de la préfecture de Gikongoro. À l'issue de cette formation qui a eu lieu au CIPEP, dans la ville de Gikongoro, deux registres ont été remis aux responsables et il leur a été demandé d'y inscrire les noms des habitants des cellules, les Hutus dans l'un et les Tutsis dans l'autre.

b) Aloys Simba established training camps at Kigeme, Nyamagabe *commune* and in Mbuga, Mudasomwa *commune*, where rnilitia were instructed.

c) In January 1994, Aloys Simba ordered the *bourgmestre* and *conseillers* of Kinyamakara *commune* to select young men to be given military training. These men were then trained in Mwogo valley for three weeks.

19. During the events of April through June 1994, Aloys Simba amed militiamen and Hutu civilians who comrnitted the massacres, in Gikongoro and Butare *prefectures*. He distributed fireams to militiamen for the purpose of killing Tutsi, often using the channels of the local administration, distributing to *Bourgmestres* for distribution to conseillers and responsables. In this matter, he worked with the *Gendarmerie* Captain Sebuhura.

20. In the week after the death of the President Habyarimana Aloys Simba brought 3 boxes containing approximately 50 Kalashnikov rifles to Kinyamakara *communal* offices. The weapons were off-loaded from Aloys Simba's vehicle by soldiers and he ordered *communal* policemen and soldiers to assemble and distribute them. The weapons were distributed to militiamen and those Hutu civilians who had been trained to use rifles. These weapons were used immediately to kill unarmed Tutsi civilians in their homes and at shops at Rugongwe trading centre, Ruhashya *commune*, Butare *prefecture*.

21. Aloys Simba also distributed weapons in April 1994 after the death of President Habyarimana, to Rukondo *communal* offices. Approximately 40 AK 47 rifles were distributed through the *Bourgmestre* to *conseillers* who then distributed them to Hutu civilians.

22. In addition to distributing weapons, Aloys Simba sought to import arms as early as April 1993. Together with *Prefet* Bucyibaruta, Capt Sebuhura, *Bourgmestre* Semukwavu, local businessmen and others, he raised funds for the purchase of weapons and ammunition for the *interahamwe* in April and/or May 1994 in Gikongoro *prefecture*. It was Aloys Simba who received this money.

23. Aloys Simba committed the acts described in this indictment with the intent to destroy in whole or in part the Tutsi ethnic group. He publicly expressed his intent to destroy the Tutsis and incited others to do likewise in various rallies and meetings in Gikongoro and Butare prefectures before and during the events of April to July 1994.

a) In April 1993, after a census of Tutsi and Hutu in the *prefectures*, at a public rally in the market in Gikongoro town, Aloys Simba said "Do you see how many Tutsi there are in Gikongoro now? It would be like a lorry full of sand colliding with a small car".

b) In April 1994, a few days before the death of President Habyarimana, at a public rally in Kirambi Market, Rukondo *Commune* Aloys Simba said "You Banyamanda do not know what is coming. Everyone of you should get armed and should always walk with your traditional arms. I want you to remember what

b) Aloys Simba a créé des camps d'entraînement des milices à Kigeme dans la commune de Nyamagabe, et à Mbuga, dans la commune de Mudasomwa.

c) En janvier 1994, Aloys Simba a ordonné au bourgmestre et aux conseillers de la commune de Kinyamakara de choisir de jeunes hommes désireux de recevoir un entraînement militaire. Les hommes retenus dans ce cadre ont été entraînés par la suite pendant trois semaines dans la vallée de Mwogo.

19. Pendant les faits qui se sont produits du mois d'avril jusqu'à la fin du mois de juin 1994, Aloys Simba a armé des miliciens et des civils hutus qui ont commis les massacres dont les préfectures de Gikongoro et de Butare ont été le théâtre. Il a distribué des armes à feu à des miliciens en vue du massacre des Tutsis. Pour ce faire, Aloys Simba utilisait souvent les rouages de l'administration locale, notamment les bourgmestres, à charge pour ceux-ci de distribuer par la suite aux conseillers et aux responsables les armes reçues de lui. Dans ce domaine, il travaillait en collaboration avec le capitaine de gendarmerie Sebuhura.

20. La semaine qui a suivi le décès du Président Habyarimana, Aloys Simba a transporté au bureau communal de Kinyamakara trois caisses contenant une cinquantaine de kalachnikovs. Une fois ces armes déchargées de son véhicule par des militaires, Aloys Simba a ordonné aux agents de la police communale et aux soldats de les assembler pour les distribuer. Lesdites armes ont été distribuées aux miliciens et aux civils hutus formés au maniement des fusils. Elles ont immédiatement été utilisées pour tuer des civils tutsis non armés chez eux ou dans des magasins du centre commercial de Rugogwe dans la commune de Ruhashya (préfecture de Butare).

21. Aloys Simba a également distribué des armes en avril 1994, après le décès du Président Habyarimana, au bureau communal de Rukondo. À cette occasion, une quarantaine de fusils de type AK 47 ont été donnés, par l'intermédiaire du bourgmestre, aux conseillers qui les ont ensuite distribués à des civils hutus.

22. Aloys Simba n'a pas seulement distribué des armes : il s'était lancé dans l'importation d'armes dès avril 1993. En avril et/ou mai 1994, il a recueilli des fonds dans la préfecture de Gikongoro en collaboration avec le préfet Bucyibaruta, le capitaine Sebuhura, le bourgmestre Semukwavu, des hommes d'affaires locaux et d'autres personnes, dans le but d'acheter des armes et des munitions destinées aux *Interahamwe*. C'est Aloys Simba qui a reçu cet argent.

23. Aloys Simba a commis les actes décrits dans le présent acte d'accusation dans l'intention de détruire, en tout ou en partie, le groupe ethnique tutsi. Il a publiquement déclaré son intention de détruire les Tutsis et a incité d'autres personnes à les détruire, lors de divers rassemblements et réunions tenus dans les préfectures de Gikongoro et de Butare avant et pendant les événements qui ont marqué la période d'avril à juillet 1994.

a) En avril 1993, à la suite d'un recensement des Tutsis et des Hutus de la préfecture, Aloys Simba a tenu les propos suivants au cours d'un rassemblement public au marché de la ville de Gikongoro : « Voyez-vous combien de Tutsis il y a à Gikongoro maintenant ? C'est comme si un camion rempli de sable entrait en collision avec une petite voiture. »

b) En avril 1994, quelques jours avant la mort du Président Habyarimana, à l'occasion d'un rassemblement public au marché de Kirambi, dans la commune de Rukondo, Aloys Simba s'est exprimé en ces termes : « Vous Banyarwanda, vous ne savez pas ce qui va arriver. Chacun d'entre vous devrait s'armer et se

happened in the year 1959. Look at my bald head, I was dragged on the ground by the *inyenzi*. It is no longer a question of staying in your homes. You must shut the doors so that the cats do not enter your houses. You must also search for the snakes in the bushes and hit them on the head. For those who find the situation difficult, I advise you to flee. Whoever remains in Rwanda will see for himself how the elephants will fight"

c) On or about 9 April 1994, at the Rugogwe Trading Centre, where he was accompanied by 16 soldiers, Aloys Simba addressing a group of *Interahamwe* militia, said that the Tutsis were the enemy and that they all should be killed.

d) On or about 9 April 1994 at the Gasarenda Trading Centre, after having been informed about the killings in the area, Aloys Simba said to the *Interahamwe* "There are still many Tutsis in Mudasomwa *Commune* who you have not touched. There are very many Tutsis at Kibeho, and although it is not your *commune* you must go and assist your colleagues there".

e) In April 1994, Aloys Simba addressed a gathering at Nzega Centre, Gasaka sector, Nyamagabe *commune*, where he asked why the population was idling and not behaving like their counter parts in other areas.

f) On or about 26 April 1994, at a meeting of local authorities in Gikongoro town, presided over by Aloys Simba, the *Bourgmestre* of Muko *commune* informed the participants that there were still 160 Tutsi seeking refuge at his office. In response, Aloys Simba together with *Sous-prefet* Mushenguzi and Captain Sebuhura said that some people in the *Prefecture* seemed to be ignoring the fact that the President had died, and were idling in their *communes*.

g) On or about 22 May 1994, Aloys Simba attended the inauguration ceremony of Mathieu Ndahimana as *Bourgmestre* of Ntyazo commune, Butare *prefectures*. He urged the participants not to spare a single Tutsi saying when you are killing rats in your home, you do not spare even the pregnant ones.

h) Aloys Simba described the relationship between Hutu and Tutsi as that between cat and rat. Until this time many women, girls, infirm and elderly had been spared, but shortly after, and as a result of his speech, all surviving Tutsi in the area were killed.

24. Aloys Simba's intent to destroy and incite others to destroy the Tutsi, is highlighted by his actions in Musebeya *commune* between April and June 1994 :

a) In April 1994, Aloys Simba returned to Musebeya dressed in uniform and in an MRND car saying "the situation is dangerous. Even I have been recalled tu rnilitary service to help hunt Tutsi".

b) Prior to Aloys Simba's arrival in Musebeya the *Bourgmestre*, Higiro Viateur carried out directives to keep order and prevent attacks. On his arrival Aloys

déplacer à tout moment avec ses armes traditionnelles. Je veux que vous vous rappeliez ce qui s'est passé en 1959. Regardez mon crâne chauve; j'ai été traîné par terre par les *inyenzi*. Il ne suffit plus de rester chez vous. Vous devez fermer les portes pour que les chats n'entrent pas. Vous devez aussi chercher les serpents dans les fourrés et les frapper à la tête. Si vous trouvez la situation difficile, je vous conseille de fuir. Ceux qui resteront aux Rwanda verront d'eux-mêmes comment les éléphants se battront.»

c) Le 9 avril 1994 ou vers cette date, au centre commercial de Rugogwe, où il se trouvait en compagnie de 16 militaires, Aloys Simba a dit à un groupe de miliciens *Interahamwe* que les Tutsis étaient l'ennemi et qu'ils devaient tous être tués.

d) Le 9 avril 1994 ou vers cette date, au centre commercial de Gasarenda, ayant été informé des massacres commis dans la région, Aloys Simba s'est adressé comme suit aux *Interahamwe* : «Il y a encore beaucoup de Tutsis dans la commune de Mudasomwa auxquels vous n'avez pas encore touché. Il y a énormément de Tutsis à Kibeho, et même si ce n'est pas votre commune, vous devez vous y rendre pour prêter main forte à vos collègues.»

e) En avril 1994, Aloys Simba a pris la parole lors d'un rassemblement tenu à Nzega-centre, dans le secteur de Gasaka (commune de Nyamagabe). À cette occasion, il a demandé pourquoi la population se croisait les bras au lieu d'emboîter le pas aux populations des autres régions.

f) Le 26 avril 1994 ou vers cette date, au cours d'une réunion des autorités locales tenue dans la ville de Gikongoro et présidée par Aloys Simba, le bourgmestre de la commune de Muko a fait savoir aux participants que 160 Tutsis étaient encore réfugiés dans les locaux de sa commune. En réponse à cela, Aloys Simba, le sous-préfet Mushenguzi et le capitaine Sebuhura ont dit qu'il existait dans la préfecture des gens qui semblaient ne pas tenir compte du fait que le Président était mort et restaient inactifs dans leurs communes.

g) Le 22 mai 1994 ou vers cette date, Aloys Simba a assisté à la cérémonie d'installation de Mathieu Ndahimana au poste de bourgmestre de la commune de Ntyazo, dans la préfecture de Butare. Aloys Simba a exhorté les participants à ne laisser la vie sauve à aucun Tutsi, précisant que lorsqu'on tue des rats dans sa maison, on n'épargne même pas les femelles pleines. Il a assimilé le rapport entre les Hutus et les Tutsis à celui qui existe entre le chat et le rat. Jusqu'à ce moment, un bon nombre de femmes, de filles, de handicapés et de personnes âgées avaient été épargnés. Mais peu après son intervention et à cause de celle-ci, tous les rescapés tutsis présents dans la région ont été tués.

24. Le fait qu'Aloys Simba était animé de l'intention de détruire les Tutsis et d'inciter d'autres personnes à les détruire est mis en évidence par les actes qu'il a commis dans la commune de Musebeya entre les mois d'avril et de juin 1994 :

a) En avril 1994, Aloys Simba est rentré à Musebeya en uniforme militaire et à bord d'un véhicule du MRND et a déclaré : «La situation est dangereuse. Même moi j'ai été rappelé sous les drapeaux pour aider à traquer les Tutsis.»

b) Avant l'arrivée d'Aloys Simba à Musebeya, le bourgmestre Higiro Viateur avait mis en oeuvre des directives tendant à maintenir l'ordre et à prévenir les

SIMBA countermanded Higiro's directives and led the genocide in Musebeya and the wider area.

c) In June 1994, Aloys Simba incited Hutu to 'work' and he distributed money to young men in payment for their assaults on Tutsi. Administrators did not need to be told 'kill Tutsi' to understand that this was the approved policy.

25. On or about the morning of 7 April 1994, Juvenal Ndabarinze arrived at Gasarenda Centre in Mudasomwa *commune* to meet with other organizers of the killings, including Aloys Simba, Denis Kamodoka, and Damien Biniga. The statement issued by Kamodoka to incite the killing of the Tutsi population explained the purpose of the meeting. On the afternoon of the same day, traditional weapons brought by Colonel Rwamanya were distributed to the rnilitia in the presence of Juvenal Ndabarinze.

26. Between 7 April 1994 and 30 May 1994, thousands of Tutsi and moderate Hutu civilians were attacked in their homes by militiamen. As a result, they were assembled by the local authorities, or fled to, sites where they believed that they would be safe, including amongst other sites in Gikongoro and Butare prefectures :

Kaduha parish and health centre, Karambu *commune*, Gikongoro

Murambi Technical college, Nyamagabo *commune*, Gikongoro

Gashoba Hill, Ruhashya *commune*, Butare
Rugongwe Trading centre, Ruhashya *commune* Butare
Cyanika parish, Karama *commune*, Gikongoro
Kibeho parish, Mubuga *commune*, Gikongoro

Massacre at Kaduha Parish :

27. Starting from 8 April 1994, as a result of the campaign of buming and looting Tutsi homes, thousands of Tutsi civilians fled from neighbouring *communes* to Kaduha parish, in Karambo *commune*, Gikongoro *prefecture*.

28. On or about the 19 and 20 April Aloys Simba ordered the displaced children, women and men, at Kaduha parish and health center to dig their own graves.

29. On or about 19 April 1994, Aloys Simba and Joachim Hategekimana, addressed Hutus gathered at Kaduha trading centre. Aloys Simba announced that he would go to Gikongoro to collect guns and ammunition and would distribute them on his return.

30. On or about the 20 April 1994, Aloys Simba returned to Kaduha with a lorry carrying soldiers, guns, and ammunition to launch the first major firearm attack on Kaduha parish. These weapons were stored in the office of the *Sous-prefecture*.

31. On or about 20 April 1994, Aloys Simba announced to the gathering at the Kaduha trading centre that there was now no other way but for the Hutus to kill all

attaques. Une fois sur place, Aloys Simba a annulé ces directives et a pris la tête de la campagne génocide dans cette commune et dans la région.

c) En juin 1994, Aloys Simba incitait les Hutus à «travailler» et distribuait de l'argent aux jeunes hommes en paiement des voies de fait qu'ils commettaient sur les Tutsis. Les administrateurs ne devaient pas s'entendre ordonner de tuer les Tutsis» pour comprendre que c'était là la politique approuvée.

25. Le matin du 7 avril 1994 ou vers ce moment, Juvénal Ndabarinze est arrivé à Gasarenda-centre, dans la commune de Mudasomwa, pour se réunir avec d'autres organisateurs des massacres, dont Aloys Simba, Denis Kamodoka et Damien Biniga. La déclaration faite par Kamodoka en vue d'inciter au massacre de la population tutsie éclaire sur l'objet de cette réunion. L'après-midi du même jour, des armes traditionnelles apportées par le colonel Rwamanya ont été distribuées aux miliciens en présence de Juvénal Ndabarinze.

26. Entre le 7 avril et le 30 mai 1994, des milliers de civils tutsis et de civils hutus modérés ont été attaqués chez eux par des miliciens. En conséquence, ils ont été rassemblés par les autorités locales en des lieux ou ils estimaient pouvoir être en sécurité ou se sont eux-mêmes réfugiés en de tels lieux. Parmi les lieux retenus à cet effet dans les préfectures de Gikongoro et de Butare figurent notamment :

– la paroisse et le centre de santé de Kaduha dans la commune de Karambu (Gikongoro),

– le collège technique de Murambi dans la commune de Nyamagabo (Gikongoro),

– la colline de Gashoba dans la commune de Ruhashya (Butare),

– le centre commercial de Rugogwe dans la commune de Ruhashya (Butare),

– la paroisse de Cyanika dans la commune de Karama (Gikongoro),

– la paroisse de Kibeho dans la commune de Mubuga (Gikongoro).

Massacre de la paroisse de Kaduha

27. A partir du 8 avril 1994, à cause de la campagne de mise à feu et de pillage des maisons de Tutsis, des milliers de civils tutsis des communes environnantes se sont réfugiés à la paroisse de Kaduha, dans la commune de Karambo (préfecture de Gikongoro).

28. Les 19 et 20 avril 1994 ou vers ces dates, Aloys Simba a ordonné aux enfants, aux femmes et aux hommes réfugiés à la paroisse et au centre de santé de Kaduha de creuser leurs propres tombes.

29. Le 19 avril 1994 ou vers cette date, Aloys Simba et Joachim Hategekimana ont pris la parole devant les Hutus rassemblés au centre commercial de Kaduha. Aloys Simba a annoncé qu'il se rendrait à Gikongoro pour prendre des armes à feu et des munitions et qu'il distribuerait celles-ci a son retour.

30. Le 20 avril 1994 ou vers cette date, Aloys Simba est revenu à Kaduha avec un camion chargé de militaires, d'armes à feu et de munitions en vue de lancer la première grande attaque à l'arme à feu contre la paroisse de Kaduha. Les armes ont été entreposées dans les locaux de la sous-préfecture.

31. Le 20 avril 1994 ou vers cette date, Aloys Simba a annoncé aux personnes assemblées au centre commercial de Kaduha que les Hutus n'avaient plus d'autre

the Tutsis. He instructed soldiers to begin shooting Tutsi refugees at 03.00 hours and ordered civilian attackers to follow and kill any surviving Tutsi. He also instructed soldiers to shoot those displaying cowardice during the attack. Aloys Simba deployed soldiers around Kaduha parish.

32. As a result of the above incitement by Aloys Simba, at about 05.00 hours, a large group of attackers comprised of soldiers, *gendarmes*, *Interahamwe*, reservists or former soldiers, rnilitiamen and Hutu civilians attacked Kaduha parish using guns, grenades, machetes, clubs and other traditional weapons. Several soldiers and National Police were camouflaged in civilian clothing while carrying guns. The attack continued until about 17.00 hours. During the attack, which lasted the whole day, Aloys Simba replenished the ammunition of the attackers on several occasions.

33. During the attack on Kaduha parish, Bucyibaruta, transported a group of gendarmes to the massacre site to reinforce the attackers' efforts. The gendarmes group joined the attackers and participated in the killings.

34. As a result of the attack, thousands of men, women and children were massacred at Kaduha parish, Gikongoro prefecture on or around 21 April 1994. A majority of the victims were Tutsi. Many of the dead were buried between 23 April and 26 April 1994 in and around Kaduha.

Massacre at Murambi Technical School :

35. On or about 10 April 1994, Bucyibaruta held a meeting in the Nyamagabe *Commune* Office attended by Colonel Aloys Simba, Captain Faustin Sebuhura, *Sous-préfet* Biniga, *Bourgmestre* of Nyamagabe *Commune* Semakwaw, the representative of the MRND political party, *Conseillers* of Sectors and other officiais as well as ordinary members of the population.

36. During the meeting, Bucyibaruta said that he did not "want to hear any talk about a single Tutsi who did not go to Murambi. Even those who have taken refuge in the churches must go to Murambi". He explained that "the Tutsis have hatched a plot to kill the Hutus, therefore, the Hutus must start the killing first".

37. At the same meeting Aloys Simba asked Sebuhura to identify the number of Tutsi gendarmes in his force and Semakwavu to identify all young men who were suitable for military training.

38. On or about 11 April 1994, thousands of Tutsi civilians fled their homes and gathered in Gikongoro Diocese. Following the orders of Bucyibaruta, accompanied by Sebuhura and the then Bourgmestre of Nyamagabe *Commune*, Semakwavu, *gendarmes* escorted the refugees to Murambi technical school.

39. By 20 April 1994, around 40,000 mostly Tutsi civilians had taken refuge in Murambi technical school. They were surrounded by roadblocks to prevent their escape and were kept under conditions calculated to bring about their destruction.

choix que de tuer tous les Tutsis. Il a donné aux militaires l'ordre de commencer à abattre les réfugiés tutsis à 3 heures et a enjoint aux assaillants civils de suivre les militaires pour tuer tout Tutsi qui survivrait. Il a également ordonné aux militaires d'abattre tous ceux qui feraient preuve de lâcheté pendant l'attaque. Aloys Simba a déployé les militaires autour de la paroisse de Kaduha.

32. En conséquence de ces actes d'incitation d'Aloys Simba, un grand groupe d'assaillants comprenant des militaires, des gendarmes, des *Interahamwe*, des réservistes ou d'anciens militaires, des miliciens et des civils hutus ont attaqué la paroisse de Kaduha vers 5 heures. Ces assaillants se sont servis de fusils, de grenades, de machettes, de gourdins et d'autres armes traditionnelles. Plusieurs militaires et agents de la police nationale s'étaient déguisés en civils, mais portaient des armes à feu. L'attaque s'est poursuivie jusqu'aux alentours de 17 heures. Au cours de cette attaque qui a ainsi duré toute la journée, Aloys Simba a, à maintes reprises, réapprovisionné les assaillants en munitions.

33. Lors de l'attaque lancée contre la paroisse de Kaduha, Bucyibaruta a transporté un groupe de gendarmes sur les lieux du massacre pour prêter main forte aux assaillants. Ces gendarmes se sont joints aux assaillants et ont pris part au massacre.

34. Cette attaque s'est soldée par le massacre de milliers d'hommes, de femmes et d'enfants à la paroisse de Kaduha, dans la préfecture de Gikongoro, le 21 avril 1994 ou vers cette date. La plupart des victimes étaient des Tutsis. Bon nombre des personnes décédées ont été enterrées entre le 23 et le 26 avril 1994 à Kaduha et dans ses environs.

Massacre du collège technique de Murambi

35. Le 10 avril 1994 ou vers cette date, Bucyibaruta s'est réuni au bureau communal de Nyamagabe avec le colonel Aloys Simba, le capitaine Faustin Sebuhura, le sous-préfet Bibiga, le bourgmestre local Semakwaku, le représentant du MRND, les conseillers de secteur, d'autres responsables et des membres ordinaires de la population.

36. Lors de cette réunion, Bucyibaruta a dit qu'il ne voulait pas «entendre parler du moindre Tutsi qui ne soit pas allé à Murambi» et que même ceux qui [s'étaient] réfugiés dans les églises [devaient] se rendre à Murambi». Il a expliqué que «les Tutsis [avaient] tramé un complot visant a tuer les Hutus et que les Hutus devaient donc se mettre à tuer les premiers».

37. Lors de la même réunion, Aloys Simba a demandé à Sebuhura de recenser ceux de ses gendarmes qui étaient Tutsis et à Semakwavu de recenser tous les jeunes hommes aptes à recevoir un entraînement militaire.

38. Le 11 avril 1994 ou vers cette date, des milliers de civils tutsis ont fui leurs maisons et se sont rassemblés au diocèse de Gikongoro. Sur les ordres de Bucyibaruta, accompagné de Sebuhura et de Semakwavu, alors bourgmestre de la commune de Nyamagabe, des gendarmes ont escorté les réfugiés jusqu'au collège technique de Murambi.

39. Au 20 avril 1994, environ 40 000 civils, pour la plupart tutsis, s'étaient réfugiés au collège technique de Murambi. Entourées de barrages routiers mis en place pour les empêcher de fuir, ils étaient soumis à des conditions devant entraîner leur des-

They were denied access to food and water. As a result, some died due to hunger and disease.

40. On or around 19 and 20 April 1 994, Aloys Simba, together with *Gendarmerie* Captain Sebuhura, *Prefet* Bucyibaruta, *Sous-prefet* Biniga and *Bourgmestre* Munyaneza amongst others, organised and ordered government armed forces, militiamen and Hutu civilians to surround and attack the displaced persons who had taken refuge at Murambi technical school. At a meeting, at the *gendarmerie* barracks, immediately prior to the attack Aloys Simba urged Captain Sebuhura, *prefet* Bucyibaruta and *Sous-prefet* Biniga to attack the displaced Tutsi at Murambi technical school.

41. On or about the afternoon of 20 April 1994, Bucyibaruta met with Captain Sebuhura in the gendarmes' Brigade. He informed Sebuhura about the plan to attack Murambi in the early hours of 21 April 1994. Furthemore, he ordered him to release his gendarmes, at about 01.00 hours on 21 April 1994, to join the *Interahamwe* in the attack on Murambi and make sure that no Tutsi escaped the massacre.

42. Aloys Simba came to Murambi dressed in military uniform. He arrived in a truck loaded with machetes which he subsequently distributed to the *Interahamwe*.

43. At about 03.00 hours, on 21 April 1994, following the orders of Bucyibaruta, a large group of attackers comprised of soldiers, *gendarmes*, *Interahamwe* and armed civilians encircled and attacked Murambi using heavy guns, arms, grenades, machetes, clubs and other traditional weapons. Both Laurent Bucyibaruta and Faustin Sebuhura fired at the refugees.

44. The attack on Murambi continued until about 07.00 hours. Thousands of Tutsi civilians were massacred as a result of this attack and their properties were looted. During the attack, Aloys Simba delivered and supplied machetes to the attackers and rewarded them after the attack.

45. At about 07.00 hours on 21 April 1994, Laurent Bucyibaruta, Aloys Simba and Faustin Sebuhura examined the massacre site. While Aloys Simba expressed his satisfaction at the results of the killing campaign, Laurent Bucyibaruta rewarded those who were active in the killing by giving them cows belonging to the victims.

46. As a result of this attack, thousands of men, women and children were massacred at Murambi technical school on or about 21 April 1994. The majority of the victims were Tutsi. The victims were buried in mass graves dug by prisoners from Gikongoro prison shortly after the attack. The mass burial took approximately one week.

Massacre in Ruhashya Commune *:*

47. Sometime in April 1994, after the death of the President, Aloys Simba organised and ordered two major attacks by government armed forces, militiamen and Hutu civilians on displaced Tutsi civilians in Ruhashya *commune*, Butare *prefecture*. The first attack was against the displaced people at Rugogwe trading centre and the second attack was against displaced people at Gashoba Hill.

truction. Ils étaient privés de nourriture et d'eau. En conséquence, certains sont morts de faim et de maladie.

40. Le 19 et le 20 avril 1994 ou vers ces dates, Aloys Simba, le capitaine de gendarmerie Sebuhura, le préfet Bucyibaruta, le sous-préfet Biniga et le bourgmestre Munyaneza, entre autres personnes, ont pris les dispositions nécessaires et ordonné aux forces armées gouvernementales, aux miliciens et aux civils hutus d'encercler et d'attaquer les personnes déplacées qui avaient trouvé refuge au collège technique de Murambi. Au cours d'une réunion tenue à la caserne de la gendarmerie juste avant l'attaque, Aloys Simba a exhorté le capitaine Sebuhura, le préfet Bucyibaruta et le sous-préfet Biniga à attaquer les déplacés tutsis qui s'étaient réfugiés au collège technique de Murambi.

41. L'après-midi du 20 avril 1994 ou vers ce moment, Bucyibaruta s'est entretenu avec le capitaine Sebuhura dans les locaux de la brigade de gendarmerie. Il a informé Sebuhura du plan prévu pour attaquer Murambi aux premières heures du 21 avril 1994. Il lui a en outre ordonné de libérer ses gendarmes, vers 1 heure le 21 avril 1994, afin qu'ils se joignent aux *Interahamwe* pour lancer l'attaque contre Murambi et veiller à ce qu'aucun Tutsi n'échappe au massacre.

42. Aloys Simba s'est rendu à Murambi en uniforme militaire. Il est arrivé à bord d'un camion chargé de machettes. Il a ensuite distribué celles-ci aux *Interahamwe*.

43. Vers 3 heures le 21 avril 1994, sur les ordres de Bucyibaruta, un important groupe d'assaillants comprenant des militaires, des gendarmes, des *Interahamwe* et des civils armés ont encerclé et attaqué Murambi. Ces assaillants se sont servis d'armes à feu lourdes, d'armes légères, de grenades, de machettes, de gourdins et d'autres armes traditionnelles. Laurent Bucyibaruta et Faustin Sebuhura ont tous deux tiré sur les réfugiés.

44. L'attaque lancée contre Murambi s'est poursuivie jusqu'à 7 heures environ. Des milliers de civils tutsis ont été massacrés à cette occasion et leurs biens ont été pillés. Pendant l'attaque, Aloys Simba a ravitaillé les assaillants en machettes. Après l'attaque, il les a récompensés.

45. Vers 7 heures le 21 avril 1994, Laurent Bucyibaruta, Aloys Simba et Faustin Sebuhura ont examiné les lieux du massacre. Aloys Simba s'est déclaré satisfait des résultats de la campagne meurtrière, tandis que Laurent Bucyibaruta a récompensé ceux qui y avaient participé activement en leur donnant des vaches appartenant aux victimes.

46. L'attaque s'est soldée par le massacre de milliers d'hommes, de femmes et d'enfants au collège technique de Murambi le 21 avril 1994 ou vers cette date. La plupart des victimes étaient des Tutsis. Les victimes ont été enterrées dans des charniers creusés par des détenus de la prison de Gikongoro peu après l'attaque. Cet enterrement collectif a pris environ une semaine.

Massacre de la commune de Ruhashya

47. Au mois d'avril 1994 à une date inconnue après le décès du Président, Aloys SIMBA a organisé et ordonné deux grandes attaques perpétrées par les forces armées gouvernementales, des miliciens et des civils hutus contre des civils tutsis déplacés dans la commune de Ruhashya (préfecture de Butare). La première visait les personnes déplacées qui s'étaient réfugiées au centre commercial de Rugogwe et la seconde celles qui s'étaient regroupées sur la colline de Gashoba.

48. Aloys Simba armed and transported attackers for the purpose of the attacks. He transported *Interahamwe* to Muhange Bridge, on the border between Kinyamakara (Gikongoro *prefecture*) and Ruhashya (Butare *prefecture*). From here the *Interahamwe* pursued and killed fleeing displaced people in the *communes* of Ruhashaya, Rusatira and Nyabisindu, Butare *prefecture*.

49. Aloys Simba, together with his escort, participated in these killings by shooting the Tutsi refugees who tried to flee from the *Interahamwe*. In these attacks, many Tutsi men, women and children were killed. During the killings, Aloys Simba gave instructions and encouragements to the other killers.

50. Prior to the attack on Rugongwe Trading Centre, towards the end of March 1994, Aloys Simba brought weapons, including long and short guns, to Kinyamakara *communal* offices, where they were stored. He distributed weapons to the attackers and gave clear instructions on the methods and manner of the attack.

51. Aloys Simba, armed and dressed in military uniform, led more than a thousand men during the attacks in Ruhashya *commune*. Some armed local civilians were transported in vehicles belonging to the *Bourgmestre*, others in a military pickup provided by Aloys Simba. Aloys Simba was present at all times, supervising and giving the orders to attack.

52. As a result of the attacks hundreds of men women and children were massacred at Rugongwe and Gashoba in Ruhashya commune. Most of the victims were Tutsi.

Massacre at Cyanika Parish :

53. Aloys Simba organised and ordered government armed forces, militiamen and Hutu civilians to attack Cyanika parish on or about 21 April 1994. This attack occurred immediately after the attack on Murambi technical school. As a result of this attack, hundreds of displaced men, women and children were massacred at Cyanika parish. Most of the victims were Tutsi.

54. Aloys Simba supervised and coordinated the massacre of Tutsis in Cyanika and ordered the *Interahamwe* to cut off all escape routes of any one who tried to escape.

Massacre at Kibeho Parish :

55. Aloys Simba and/or persons trained, armed and instructed by him participated in one or more of a series of massacres during April and May 1994 at Kibeho parish, college, primary school and hospital. This included an attack by Government armed forces, militiamen and Hutu civilians on thousands of displaced people at the parish.

56. On or about 9 April 1994, Aloys Simba told the *Interahamwe* in Gasarenda centre to go to Kibeho and help their colleagues there to kill Tutsis.

48. Aloys Simba a armé et transporté des assaillants en vue de ces attaques. Il a transporté des *Interahamwe* au pont de Muhange situé sur la ligne de démarcation qui sépare Kinyarnakara (préfecture de Gikongoro) de Ruhashya (préfecture de Butare). De là, ceux-ci ont pourchassé et tué des personnes déplacées en fuite dans les communes de Ruhashya, de Rusatira et de Nyabisindu (préfecture de Butare).

49. Aloys Simba et son escorte ont participé à ces massacres en abattant les réfugiés tutsis qui tentaient d'échapper aux *Interahamwe*. Un grand nombre d'hommes, de femmes et d'enfants d'origine tutsie ont trouvé la mort dans ces attaques. Pendant les massacres, Aloys Simba donnait des instructions et adressait des encouragements aux autres tueurs.

50. Avant l'attaque perpétrée au centre commercial de Rugogwe, Aloys Simba a apporté des armes – notamment des armes à feu longues et courtes – au bureau communal de Kinyamakara vers la fin du mois de mars 1994 et les y a entreposées. Il a distribué ces armes aux assaillants et leur a donné des instructions claires sur les modalités d'exécution de l'attaque.

51. Aloys Simba, armé et en uniforme militaire, a mené plus d'un millier d'hommes lors des attaques lancées dans la commune de Ruhashya. Certains civils armés de la localité ont été transportés dans des véhicules appartenant au bourgmestre et d'autres dans un pick-up militaire fourni par Aloys Simba. Celui-ci était constamment présent, supervisant les opérations et donnant l'ordre d'attaquer.

52. Les attaques perpétrées à Rugogwe et à Gashoba, dans la commune de Ruhashya, se sont soldées par le massacre de centaines d'hommes, de femmes et d'enfants. La plupart des victimes étaient des Tutsis.

Massacre de la paroisse de Cyanika

53. Aloys Simba a organisé l'attaque perpétrée à la paroisse de Cyanika le 21 avril 1994 ou vers cette date et a ordonné aux forces armées gouvernementales, à des miliciens et à des civils hutus de l'exécuter. Cette attaque a eu lieu immédiatement après celle lancée contre le collège technique de Murambi et s'est soldée par le massacre de centaines d'hommes, de femmes et d'enfants déplacés qui s'étaient réfugiés à la paroisse de Cyanika. La plupart des victimes étaient des Tutsis.

54. Aloys Simba a supervisé et coordonné le massacre des Tutsis à Cyanika et a ordonné aux *Interahamwe* de barrer toutes les voies à quiconque tenterait de s'échapper.

Massacre de la paroisse de Kibeho

55. Aloys Simba et/ou des personnes agissant sur ses instructions qu'il avait entraînées et armées ont participé à au moins un des massacres perpétrés en série dans le courant des mois d'avril et de mai 1994 à la paroisse, au collège, à l'école primaire et à l'hôpital de Kibeho. Parmi ces massacres figure celui perpétré lors d'une attaque lancée par les forces armées gouvernementales, des miliciens et des civils hutus contre des milliers de personnes déplacées qui s'étaient réfugiées à la paroisse.

56. Le 9 avril 1994 ou vers cette date, à Gasarenda-centre, Aloys Simba a demandé aux *Interahamwe* de se rendre à Kibeho pour aider leurs collègues à tuer les Tutsis.

57. Aloys Simba distributed weapons to the *Interahamwe*, notably Ngoga, Gakuru, Nkusi, Bakundukize Innocent, who participated in the attack on the Kibeho parish.

58. Aloys Simba intended to commit the acts above, this intent being shared by all other individuals involved in the crimes perpetrated.

Count 3 : Extermination as a crime against humanity :

The Prosecutor of the International Criminal Tribunal for Rwanda charges Aloys Simba with Extermination as a CRIME AGAINST HUMANITY, as stipulated in Article 3 (b) of the Statute in that on or between the dates of 6 April 1994 and 30 May 1994 in Gikongoro and Butare prefectures, Rwanda. Aloys Simba was responsible for killing persons, or causing persons to be killed, during mass killing events as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds.

Pursuant to Article 6 (1) of the Statute : by virtue of his acts in planning, instigating, ordering, committing, or otherwise aiding and abetting the planning, preparation or execution of the crime charged, in concert with others as part of a joint criminal enterprise.

And/or,

Pursuant to Article 6 (3) of the Statute : by virtue of his actual or constructive knowledge of the acts or omissions of his subordinates, including soldiers, gendarmes, communal Police, *Interahamwe*, civilian militia or civilians acting under his authority and his failure to take necessary and reasonable measures to stop or prevent them, or to discipline and punish them, for their acts in the planning, preparation or execution of the crime charged.

Concise Statements of Fact for Count 3 :

59. Paragraphs 1 through 58 above are incorporated by reference herein.

60. Between 6 April 1994 and 17 July 1994, there were throughout Rwanda widespread or systematic attacks directed against a civilian population on political, ethnic or racial grounds. *Interahamwe* militias engaged in a campaign of violence against Rwanda's civilian Tutsi population and against Hutu civilians perceived to be politically opposed to the MRND political party. Hundreds of thousands of civilian Tutsi men, women and children and "moderate" Hutus were killed.

61. Between 7 April 1994 and 30 May 1994, Aloys Simba planned and participated in massacres that occurred in Gikongoro and Butare *prefectures*, including at Kaduha parish and health centre, Murambi technical school, Ruhashya *commune*, Cyanika parish and Kibeho parish. These massacres were part of a widespread and systematic attack both within the two prefectures and within Rwanda.

62. Aloys Simba provided training and weapons to *Interahamwe*, militiamen and others who participated in the attacks. He facilitated the transportation of soldiers,

57. Aloys Simba a distribué des armes aux *Interahamwe* – en particulier à Ngoga, Gakuru, Nkusi et Bakundukize Innocent – qui ont participé à l'attaque lancée contre la paroisse de Kibeho.

58. Aloys Simba a eu l'intention de commettre les actes ci-dessus, cette intention ayant été partagée par tous les autres individus impliqués dans les crimes perpétrés.

Chef 3 : Extermination constitutive de crime contre l'humanité

Le Procureur du Tribunal pénal international pour le Rwanda accuse Aloys Simba d'extermination constitutive de CRIME CONTRE L'HUMANITÉ, infraction prévue à l'alinéa b de l'article 3 du Statut, en ce que le 6 avril et le 30 mai 1994 ou entre ces deux dates, dans les préfectures de Gikongoro et Butare au Rwanda, Aloys Simba a commis ou fait commettre des homicides à l'occasion de massacres perpétrés dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale.

En application du paragraphe 1 de l'article 6 du Statut, à raison des actes de l'accusé, en ce sens qu'il a planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime qui lui est reproché, de concert avec d'autres personnes dans le cadre d'une entreprise criminelle commune, et/ou

En application du paragraphe 3 de l'article 6 du Statut, en ce que l'accusé connaissait effectivement ou était censé connaître les actes ou les omissions de ses subordonnés, notamment des militaires, des gendarmes, de la police communale, des *Interahamwe*, de la milice civile ou des civils agissant sous son autorité, mais n'a pas pris les mesures nécessaires et raisonnables soit pour y mettre fin ou les prévenir, soit pour en discipliner les auteurs et les punir de leur participation à la planification, à la préparation ou à l'exécution du crime qui lui est reproché.

Exposé succinct des faits relatifs au chef 3

59. Les paragraphes 1 à 58 ci-dessus sont repris ici par référence.

60. Entre le 6 avril et le 17 juillet 1994, des attaques généralisées ou systématiques dirigées contre une population civile en raison de son appartenance politique, ethnique ou raciale ont été perpétrées partout au Rwanda. Les *Interahamwe* se sont engagés dans une campagne de violence visant la population civile tutsie du Rwanda et les civils hutus considérés comme des opposants au parti politique MRND. Des centaines de milliers de civils tutsis – hommes, femmes et enfants – et de civils hutus modérés» ont été tués.

61. Entre le 7 avril et le 30 mai 1994, Aloys Simba a planifié des massacres commis dans les préfectures de Gikongoro et de Butare, notamment à la paroisse et au centre de santé de Kaduha, au collège technique de Murambi, dans la commune de Ruhashya, à la paroisse de Cyanika et à celle de Kibeho, et a participé à ces massacres qui s'inscrivaient dans le cadre d'attaques généralisées et systématiques lancées tant dans ces deux préfectures que dans le reste du Rwanda.

62. Aloys Simba a entraîné et armé les *Interahamwe*, les miliciens et les autres personnes qui ont participé à ces attaques. Il a contribué au transport de militaires,

Interahamwe, militiamen and others to the above named sites for the purpose of carrying out the attacks.

63. The victirns of the massacres were civilians and Aloys Simba was aware that the victims of the massacres were civilians. He planned and executed the massacres, on the basis of the ethnicity of the victims, namely that they were Tutsi or the political persuasion of the victims, namely that they were in opposition to the MRND party.

64. Aloys Simba and/or his subordinates participated directly in the killing of civilians at the massacre sites and elsewhere in Gikongoro and Butare *prefectures*.

65. These acts were unlawful and intentional.

Count 4 : Murder as a Crime Against Humanity

The Prosecutor of the International Criminal Tribunal for Rwanda charges Aloys SIMBA with Murder as a Crime Against Humanity, as stipulated in Article 3 (a) of the Statute in that Aloys SIMBA was responsible for murder, as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds.

Pursuant to Article 6 (1) of the Statute : by virtue of his affirmative acts in planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of the crime charged, in concert with others as part joint criminal enterprise.

Concise Statements of Fact For Count 4 :

66. Paragraphs 1 through 65 above are incorporated by reference herein.

67. On or about 20 April 1994, at the barracks of the *Gendarmerie* in Gikongoro Town, Aloys SIMBA ordered and supervised the killing of a Tutsi *gendarme*, Ndagijimana.

68. The Killing of the Tutsi gendarme was part of the campaign against Tutsi civilians.

69. On or about 21 April 1994, at approximately mid-day, in the vicinity of Kaduha Trading Centre, Karambo *Commune*, Gikongoro *prefecture* Aloys Simba shot and killed Gasana, *Substitut du procureur* of Gikongoro *prefecture*.

70. At the same time and place Aloys Simba shot and killed Monique Munyana, a primary school teacher of Gikongoro prefecture and Mimyana's child. The acts and omissions of Aloys Simba detailed herein are punishable in reference to articles 22 and 23 of the Statute of the Tribunal.

Dated this 10th day of May 2004

[Signed] : Hassan Bubacar Jallow

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d'*Interahamwe*, de miliciens et d'autres personnes sur les lieux susmentionnés en vue de la perpétration des attaques.

63. Les victimes des massacres étaient des civils et Aloys Simba savait qu'elles étaient des civils. Aloys Simba a planifié et perpétré ces massacres en raison soit de l'appartenance ethnique des victimes, c'est-à-dire parce que c'étaient des Tutsis, soit de leurs convictions politiques, c'est-à-dire parce qu'elles s'opposaient au MRND.

64. Aloys Simba et/ou ses subordonnés ont participé directement au meurtre de civils sur les lieux de massacre susvisés et dans d'autres endroits des préfectures de Gikongoro et de Butare.

65. Ces actes étaient contraires au droit et intentionnels.

Chef 4 : Assassinat constitutif de crime contre l'humanité

Le Procureur du Tribunal pénal international pour le Rwanda accuse Aloys Simba d'assassinat constitutif de CRIME CONTRE L'HUMANITÉ, infraction prévue à l'alinéa a de l'article 3 du Statut, en ce qu'Aloys Simba a été responsable de meurtres commis dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale.

En application du paragraphe I de l'article 6 du Statut, à raison des actes positifs de l'accusé, en ce sens qu'il a planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le crime qui lui est reproché, de concert avec d'autres personnes dans le cadre d'une entreprise criminelle commune.

Exposé succinct des faits relatifs au chef 4

66. Les paragraphes 1 à 65 ci-dessus sont repris ici par référence.

67. Le 20 avril 1994 ou vers cette date, à la caserne de la gendarmerie de la ville de Gikongoro, Aloys Simba a ordonné et supervisé le meurtre d'un gendarme tutsi nommé Ndagijimana.

68. Le meurtre du gendarme Tutsi faisait partie de la campagne contre les civils Tutsi.

69. Le 21 avril 1994 ou vers cette date, aux alentours de midi et à proximité du centre commercial de Kaduha, dans la commune de Karambo (préfecture de Gikongoro), Aloys Simba a abattu le nommé Gasana, substitut du procureur de la préfecture de Gikongoro.

70. Au même moment et au même endroit, Aloys Simba a abattu Monique Munyana, institutrice de la préfecture de Gikongoro, et l'enfant de celle-ci. Les actes et omissions d'Aloys Simba exposés en détail dans le présent acte d'accusation sont punissables conformément aux dispositions des articles 22 et 23 du Statut.

Fait le 10 Mai 2004

[Signé] Hassan Bubacar Jallow

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Ordonnance pour la comparution des parties à une conférence préalable au procès 12 mai 2004 (ICTR-2001-76-I)

(Original : Français)

Chambre de première instance I

Juge : Sergei Alekseevich Egorov

Aloys Simba – conférence préalable au procès

Instruments internationaux cités : Règlement de procédure et de preuve, art. 54 et 73 bis *(A)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»);

SIÉGEANT en la personne du Juge Sergei Alekseevich Egorov, conformément à l'article 54 du Règlement de procédure et de preuve (le «Règlement»);

PRENANT NOTE de la lettre de la défense adressée à la Chambre de première instance I, en date du 11 mai 2004;

RAPPELANT la circulaire du Président du Tribunal datée du 5 mars 2004, prévoyant le commencement du procès pour le 10 mai 2004;

RAPPELANT la Décision du 28 avril 2004 rendue à la suite d'une requête de la défense et dans laquelle la Chambre reportait au 13 mai 2004, le commencement du procès;

RAPPELANT qu'en vertu de l'article 73 *bis* (A) du Règlement, «[l]a Chambre de première instance tient une conférence préalable au procès avant l'ouverture des débats»;

Moi, Juge Sergei Alekseevich Egorov,

ORDONNE aux parties de comparaître le 13 mai 2004, à 8h45 à une conférence préalable au procès, sans préjudice ni des droits de l'accusé ni des ordonnances relatives à la programmation du procès.

Arusha, 12 mai 2004

[Signé] : Sergei Alekseevich Egorov

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Order of the Presiding Judge Assigning a Bench of Three Judges Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence 19 May 2004 (ICTR-01-76-AR72.2)

(Original : English)

Appeals Chamber

Judge : Theodor Meron

Aloys Simba – Appeals Chamber – judges – composition

International Instruments Cited : Document IT/222 of the International Criminal Tribunal for the former Yugoslavia – Rules of Procedure and Evidence, Rules 72 (B) (i), 72 (B) (ii), 72 (D), 72 (E) and 108 – Statute, Art. 13 (4)

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Notice of Appeal of 'Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment' Issued in English by Trial Chamber I, 6 May 2004, Pursuant to Article 108 (RPE)," filed by counsel for Aloys Simba on 14 May 2004;

CONSIDERING that the Appeal does not rely on certification by the Trial Chamber under Rule 72 (B) (ii) of the Rules of Procedure and Evidence of the International Tribunal ("Rules") and therefore appears to proceed as of right as an appeal challenging jurisdiction under Rule 72 (B) (i) of the Rules;

CONSIDERING that Rule 72 (E) of the Rules provides that an appeal brought under Rule 72 (B) (i) may not be proceeded with if a bench of three judges of the Appeals Chamber decides that the appeal is not capable of satisfying the requirements of Rule 72 (D), in which case the appeal shall be dismissed;

CONSIDERING the composition of the Appeals Chamber of the International Tribunal set out in Document IT/222 of the International Criminal Tribunal for the former Yugoslavia, dated 17 November 2003;

NOTING Article 13 (4) of the Statute of the International Tribunal;

FOR THE FOREGOING REASONS,

ORDER that, in the case of *Simba v. Prosecutor,* Case N°. ICTR-01-76-AR72.2, the determination provided for in Rule 72 (E) be made by the following bench :

Judge Theodor Meron
Judge Florence Mumba
Judge Mehmet Güney.

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

Done this 9th day of February 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron, Presiding Judge of the Appeals Chamber

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Decision on Defence motion for Translation of Prosecutor's Motion 3 June 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judge : Sergei Alekseevich Egorov

Aloys Simba – translation of the Prosecutor's motion – motion granted

International Instrument Cited : Rules of Procedure and Evidence, Rules 73 and 92 bis

The International Criminal Tribunal for Rwanda ("the Tribunal");

Sitting as Trial Chamber I, composed of Judge Sergei Alekseevich Egorov, designated by the Trial Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

Being seized of the "Requête en extrême urgence de la défense en vue d'obtenir la traduction en français du document intitulé 'The Prosecutor's Motion for Admission of Testimony of an Expert Witness'", filed on 21 May 2004, wherein the Defence seeks a suspension of the time limit for responding to the Prosecutor's motion, until a French translation of the motion is served to the Defence;

Considering the "*Corrigendum* à la requête en extrême urgence de la défense en vue d'obtenir la suspension du délai prévu à l'article 92 *bis* pour faire ses observations sur la requête du procureur", filed on 24 May 2004;

Noting that the Translation Section has indicated that the translation of the document will be ready on or about Monday 7 June 2004,

Grants the motion and allows the Defence five days, from service of the French translation, to respond to the Prosecutor's Motion.

Arusha, 3 June 2004

[Signed] : Sergei Alekseevich Egorov

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Décision relative à la requête de la défense en vue d'obtenir la traduction de la requête du Procureur 3 juin 2004 (ICTR 601-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juge : Sergei Alekseevich Egorov

Aloys Simba – traduction de la requête du Procureur – requête acceptée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 73 et 92 bis

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (LE «TRIBUNAL»),

SIÉGEANT en la personne du juge Sergei Alekseevich Egorov, désigné par la Chambre de première instance en vertu de l'article 73 du Règlement de procédure et de preuve (le «Règlement»),

SAISI de la Requête en extrême urgence de la défense en vue d'obtenir la traduction en français du document intitulé "The Prosecutor's Motion for Admission of Testimony of an Expert Witness", déposée le 21 mai 2004, tendant à voir suspendre le délai à elle fixé pour produire sa réponse à la requête du Procureur en attendant que la version française de ladite requête lui soit communiquée,

CONSIDÉRANT le *Corrigendum* à la requête en extrême urgence de la défense en vue d'obtenir la suspension du délai prévu à l'article 92 *bis* pour faire ses observations sur la requête du Procureur, déposé le 24 mai 2004,

ATTENDU que la Section des services linguistiques a indiqué que la traduction du document sera disponible le 7 juin 2004 ou vers cette date,

FAIT DROIT à la requête et ACCORDE à la défense un délai de cinq jours, à compter de la date à laquelle la traduction lui aura été communiquée, pour produire sa réponse à la requête du Procureur.

Fait à Arusha, le 3 juin 2004

[Signé] : Sergei Alekseevich Egorov

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Order of the Presiding Judge to Assign Judges 4 June 2004 (ICTR-2001-76-AR72.2)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge

Aloys Simba – Appeals Chamber – judges - composition

International Instruments Cited : Document IT/222 of the International Criminal Tribunal for the former Yugoslavia – Rules of Procedure and Evidence, Rules 72 (E) and 108 – Statute, Art. 11 (3) and 13 (4)

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Notice of Appeal of 'Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment' Issued in English by Trial Chamber I, 6 May 2004, Pursuant to Article 108 (RPE)," filed by counsel for Aloys Simba on 14 May 2004 ("Appeal");

NOTING the "Decision on Validity of Appeal Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence" rendered by a Bench of three Judges of the Appeals Chamber on 4 June 2004, which determined that the Appeal was validly filed as to one ground;

CONSIDERING the composition of the Appeals Chamber of the International Tribunal set out in Document IT/222 of the International Criminal Tribunal for the former Yugoslavia, dated 17 November 2003;

NOTING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal;

FOR THE FOREGOING REASONS,

ORDER that, in the case of *Aloys Simba v. Prosecutor*, Case N° ICTR-01-76-AR72.2, the Appeals Chamber be composed as follows :

Judge Theodor Meron

Judge Florence Mumba

Judge Mehmet Güney

Judge Wolfgang Schomburg

Judge Inès Monica Weinberg de Roca.

Ordonnance portant désignation de Juges 4 juin 2004 (ICTR-01-76-AR72.2)

(Original : Anglais)

Chambre d'appel

Juges : Theodor Meron, Président de Chambre

Aloys Simba – Chambre d'appel – juges – composition

Instruments internationaux cités : Document IT/222 du Tribunal pénal international pour l'ex-Yougoslavie – Règlement de procédure et de preuve, art. 72 (E) et 108 – Statut, art. 11 (3) et 13 (4)

Nous, Theodor Meron, Président de la Chambre d'appel du Tribunal pénal international chargé de poursuivre les personnes présumées responsables d'actes de génocide et d'autres violations graves du droit international humanitaire commises sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994 («le Tribunal international»),

VU la demande d'autorisation d'interjeter appel contre la décision du 6 mai 2004 rendue par la Chambre de première instance I du Tribunal en réponse à la requête de la défense en exceptions préjudicielles pour vices de forme de l'acte d'accusation, déposée le 14 mai 2004 par le conseil d'Aloys Simba sur le fondement de l'article 108 du Règlement de procédure et de preuve (l'«Appel»),

VU la Décision sur la recevabilité de l'appel au regard de l'article 72 (E) du Règlement de procédure et de preuve, rendue le 4 juin 2004 par un collège de trois juges de la Chambre d'appel, décision qui a conclu à ce que l'appel était fondé s'agissant d'un grief,

VU le document IT/222 du Tribunal pénal international pour l'ex-Yougoslavie en date du 17 novembre 2003, arrêtant la composition de la Chambre d'appel du TPIY,

VU les articles 11 (3) et 13 (4) du Statut du Tribunal international,

PAR CES MOTIFS,

DESIGNONS la formation composée des juges

Theodor Meron
Florence Mumba
Mehmet Güney
Wolfgang Schomburg
Inés Monica Weinberg de Roca,

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

Done this 4th day of June 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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Decision on Validity of Appeal Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence 4 June 2004 (ICTR-O1-76-AR72.2)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Florence Mumba; Mehmet Güney

Aloys Simba – interlocutory appeal – appeal restricted to the ratione temporis *jurisdiction of the Tribunal*

International Instruments Cited : Rules of Procedure and Evidence, Rules 72 (B), 72 (B) (i), 72 (B) (ii), 72 (D), 72 (D) (iii), 72 (D) (iv), 72 (E) and 108 – Statute, Art. 2, 3, 4, 6, 20 (4) (a) and 20 (4) (d)

International Case Cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Aloys Simba, *Decision on Aloys Simba's Interlocutory Appeal Regarding Defects in the Form of the Indictment, 24 March 2004 (ICTR-2001-76-AR72,* Reports 2004, *p. XXX)*

THIS BENCH of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the territory of Rwanda and Rwandan citizens responsible for Genocide and other Such Violations Committed in territory of Neighbouring States between 1 January and 31 December 1994 ("International Tribunal"),

BEING SEISED OF the "Notice of Appeal of 'Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment' Issued in English by Trial Chamber I, 6 May 2004, Pursuant to Article 108 (RPE)", filed on 14 May 2004 by counsel for Aloys Simba ("Appeal" and "Appellant" respectively);

Pour connaître du recours de l'appelant Aloys Simba en la cause *Aloys Simba c. Le Procureur,* affaire n° ICTR-01-76-AR72.2.

Fait en français et en anglais, le texte anglais faisant foi.

Fait le 4 juin 2004 à La Haye (Pays-Bas)

[Signé] : Theodor Meron

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Décision rendue sur la question de la régularité d'un appel conformément à l'article 72 (E) du Règlement de Procédure et de preuve 4 juin 2004 (ICTR-01-76-AR72.2)

(Original : Anglais)

Chambre d'appel

Juges : Theodor Meron, Président; Florence Mumba; Mehmet Güney

Aloys Simba – appel en cours de procès – appel limité à la compétence ratione temporis *du Tribunal*

Instruments internationaux cités : Règlement de procédure et de preuve, art. 72 (B), 72 (B) (i), 72 (B) (ii), 72 (D), 72 (D) (iii), 72 (D) (iv), 72 (E) et 108 – Statut, art. 2, 3, 4, 6, 20 (4) (a) et 20 (4) (d)

Jurisprudence internationale citée :

T.P.I.R. : Chambre d'appel, Le Procureur c. Aloys Simba, *Decision on Aloys Simba's Interlocutory Appeal Regarding Defects in the Form of the Indictment, 24 mars 2004 (ICTR-2001-76-AR72,* Recueil 2004, *p. XXX)*

LA PRESENTE FORMATION de la Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre le 1er janvier et le 31 décembre 1994 (le «Tribunal international»),

SAISIE d'un acte d'appel intitulé *Notice of Appeal of "Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment" Issued in English by Trial Chamber I, 6 May 2004, Pursuant to Article 108 (RPE)*, déposé le 14 mai 2004 par les conseils d'Aloys Simba (respectivement l'«appel») et l'«appellant»),

NOTING Trial Chamber I's "Decision on Preliminary Defence Motion Regarding Defects in the form of the Indictment" dated 6 May 2004 («Impugned Decision") which dismissed in. part the Appellant's "Requête de la défense en exceptions préjudicielles et en incompétence pour vices de forme substantiels contre l'acte d'accusation modifié en date du 28 novembre 2003", filed on 16 April 2004 and the Corrigendum thereto filed on 20 April 2004;

CONSIDERING that the Prosecution has not filed a response to the Appeal or moved for an extension of time in which to file one;

CONSIDERING that the Appellant submits the following grounds of appeal :

1) The issuance of the Impugned Decision only in English violates the rights of the accused under Articles 20 (4) (a) and (d) of the Statute of the International Tribunal ("Statute") insofar accused and his Lead Counsel cannot understand English ("First Ground");

2) The Trial Chamber, by failing to mandate the Prosecutor to correct the defects of vagueness and imprecision of the amended indictment, violated the right of the accused to be informed of the nature and cause of the charges against him pursuant to Article 20 (4) (a) of the Statute ("Second Ground");

3) The Trial Chamber violated the right of the accused to be charged only for conduct within the International Tribunal's temporal jurisdiction by permitting the use of events outside its temporal jurisdiction to prove criminal allegations within its temporal jurisdiction ("Third Ground");

4) (i) The Prosecutor failed to comply with the Impugned Decision in relation to the pleading of the *mens rea* element of joint criminal enterprise ("First Sub-Ground of the Fourth Ground");

(ii) The Trial Chamber erred in rejecting the Appellant's arguments that the theory of joint criminal enterprise violated his right to due process and a fair trial by potentially holding him responsible for the acts of others; that the theory of joint criminal enterprise was factually unsupported; and that the theory of joint criminal enterprise charged him with criminal responsibility for acts "for which he is given no notice" and which are not pleaded in the Indictment ("Second Sub-Ground of the Fourth Ground");

5) The Prosecutor failed to comply with the Impugned Decision in relation to the charge of murder as a crime against humanity ("Fifth Ground");

CONSIDERING that the Appeal purports to proceed under Rule 108 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), which applies only to appeals from final judgement or sentence and, therefore, that Rule 108 of the Rules cannot provide a basis for appeal of the Impugned Decision;

CONSIDERING that the Appeal challenges a decision on a preliminary motion and that, pursuant to Rule 72 (B) of the Rules, decisions on preliminary motions are without interlocutory appeal save in the case of motions challenging jurisdiction and, in other cases, where certification has been granted by the Trial Chamber;

VU la Décision relative à la requête en exceptions préjudicielles pour vices de forme de l'acte d'accusation, rendue le 6 mai 2004 (la «décision attaquée») par laquelle la Chambre de première instance I a rejeté en partie la Requête de la défense en exceptions préjudicielles et en incompétence pour vices de forme substantiels contre l'acte d'accusation modifié en date du 28 novembre 2003, déposée le 16 avril 2004, et son rectificatif déposé le 20 avril 2004,

ATTENDU que le Procureur n'a ni répondu à l'acte d'appel de la défense ni sollicité une prorogation du délai imparti pour déposer sa réponse,

ATTENDU que l'appelant invoque au soutien de son recours les moyens suivants :

1. Le fait que la décision attaquée n'ait été rendue qu'en anglais constitue une violation des droits de l'accusé prévus par les alinéas a et d du paragraphe 4 de l'article 20 du Statut du Tribunal international (le «Statut»), l'accusé et son conseil principal ne pouvant comprendre l'anglais («premier moyen»),

2. En n'obligeant pas le Procureur à remédier au vague et à l'imprécision dont est entaché l'acte d'accusation modifié, la Chambre de première instance a violé le droit de l'accusé d'être informé de la nature et des moyens des accusations portées contre lui que prévoit l'alinéa a du paragraphe 4 de l'article 20 du Statut («deuxième moyen»),

3. La Chambre de première instance a violé le droit de l'accusé d'être inculpé uniquement de comportement relevant de la compétence temporelle du Tribunal international en autorisant l'usage de faits commis en dehors de la période sur laquelle porte le pouvoir juridictionnel du Tribunal pour établir des allégations de crimes relevant de sa compétence temporelle («troisième moyen»),

4. i) Le Procureur ne s'est pas conformé à. la décision attaquée en ce qui concerne l'indication de l'élément moral de l'infraction d'entreprise criminelle commune («première branche du quatrième moyen»),

ii) La Chambre de première instance a versé dans l'erreur en rejetant les thèses suivantes avancées par l'appelant : la théorie de l'entreprise criminelle commune viole son droit à une procédure régulière et à un procès équitable en le présumant responsable des actes d'autrui; elle n'est étayée en l'espèce par aucun fait; dans le cadre de cette théorie, le Procureur retient sa responsabilité pénale à raison d'actes «dont il n'est pas informé» et qui n'ont pas été évoqués dans l'acte d'accusation («seconde branche du quatrième moyen»),

5. Le Procureur ne s'est pas conformé à la décision attaquée en ce qui concerne le chef d'assassinat constitutif de crime contre l'humanité («cinqui6me moyen»),

ATTENDU que l'appelant déclare fonder son recours sur l'article 108 du Règlement de procédure et de preuve du Tribunal international (le «Règlement») qui ne s'applique qu'aux appels interjetés de jugements définitifs ou de peines définitives et ne saurait dès lors être invoqué pour faire appel de la décision attaquée,

ATTENDU que l'appel est interjeté contre une décision relative à une exception préjudicielle et que, aux termes de l'article 72 (B) du Règlement, les décisions de cette nature ne sont pas susceptibles d'appel en cours de procès, à l'exclusion de celles ayant trait à des exceptions d'incompétence et des cas où la Chambre de première instance a certifié l'appel,

CONSIDERING that the Appellant and his counsel were reminded of the requirements of Rule 72 (B) of the Rules in an earlier decision in this case[1];

CONSIDERING that the Appellant has not shown that he has obtained certification to appeal the Impugned Decision under Rule 72 (B) (ii) of the Rules;

CONSIDERING that Rule 72 (D) of the Rules provides that a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to the personal, territorial or temporal jurisdiction of the International Tribunal, or to any of the violations enumerated in Articles 2, 3, 4 and 6 of the Statute;

CONSIDERING that Rule 72 (E) of the Rules provides that an appeal brought under Rule 72 (B) (i) may not be proceeded with if a bench of three judges of the Appeals Chamber decides that the appeal is not capable of satisfying the requirements of Rule 72 (D), in which case the appeal shall be dismissed;

CONSIDERING that the First and Second Grounds of appeal do not challenge the jurisdiction of the International Tribunal within the meaning of Rule 72 (D) of the Rules and, consequently, are not subject to interlocutory appeal under Rule 72 (B) (i) of the Rules;

CONSIDERING that the First Sub-Ground of the Fourth Ground and the Fifth Ground do not purport to challenge the Impugned Decision, but rather the Amended Indictment dated 10 May 2004 filed in response to the impugned Decision, and that these objections should be first addressed to the Trial chamber;

CONSIDERING that the Second Sub-Ground of the Fourth Ground contends that the Theory of joint criminal enterprise, as pleaded in the indictment, violates the Appellant's right to due process and a fair trial, and also that the indictment is unsupported by factual allegations and does not provide adequate notice of the acts of others for which he is allegedly responsible;

CONSIDERING that these arguments do not challenge the indictment on the ground that it does not relate to either the violations over which the Tribunal had jurisdiction, as required by Rule 72 (D) (iv) of the Rules, or the personal, territorial or temporal jurisdiction of the Tribunal, as required by Rule 72 (D) (i) through (iii) of the Rules;

CONSIDERING, however, that the Third Ground asserts that the amended indictment charges conduct outside the temporal jurisdiction of the International Tribunal and is therefore subject to interlocutory appeals as of right under Rule 72 (B) (i) and (D) (iii) of the Rules;

FOR THE FOREGOING REASONS,

1. HEREBY DISMISSES the Appeal insofar as it concerns the First, Second, Fourth and Fifth Grounds;

2. DECLARES that the Appeal is validly filed and may proceed with regard to the Third Ground;

[1] *Simba v. Prosecutor*, n° ICTR-07-76-AR72, Decision on Aloys Simba's interlocutory Appeal Regarding Defects in the Form of the Indictment, 24 March 2004, p. 2.

ATTENDU que la Chambre a rappelé à l'appelant et à ses conseils les dispositions de l'article 72 (B) du Règlement dans une décision antérieure en l'espèce[1],

ATTENDU que l'appelant n'a pas établi qu'il avait obtenu l'autorisation d'interjeter appel de la décision attaquée comme le prescrit l'article 72 (B) (ii) du Règlement,

ATTENDU que l'article 72 (D) du Règlement dispose que l'exception d'incompétence s'entend exclusivement d'une objection selon laquelle l'acte d'accusation ne cadre pas avec la compétence personnelle, territoriale ou temporelle du Tribunal international, ou ne se rapporte pas à l'une des violations définies aux articles 2, 3, 4 et 6 du Statut,

ATTENDU que l'article 72 du Règlement dispose en son paragraphe E que l'appel interjeté en application du paragraphe (B) (i) est rejeté si une formation de trois juges de la Chambre d'appel décide que le recours n'est pas susceptible de remplir l'une des conditions mentionnées au paragraphe (D) du même article,

ATTENDU que le premier et le deuxième moyens ne tendent pas à contester la compétence du Tribunal international au sens de l'article 72 (D) du Règlement et qu'ils ne peuvent donc pas être invoqués au soutien d'un appel en cours de procès, en application de l'article 72 (B) (i) du Règlement,

ATTENDU que la première branche du quatrième moyen et le cinquième moyen ne visent pas à remettre en question la décision attaquée, mais plutôt l'acte d'accusation modifié du 10 mai 2004 déposé à la suite de ladite décision, et que ces exceptions devraient d'abord être adressées à la Chambre de première instance,

ATTENDU que l'appelant déclare dans la seconde branche du quatrième moyen que la théorie de l'entreprise criminelle commune, telle qu'elle est invoquée dans l'acte d'accusation, viole son droit à une procédure régulière et à un procès équitable, que l'acte d'accusation ne comporte à cet égard aucune allégation factuelle et qu'il ne renseigne pas suffisamment sur les actes d'autrui dont l'appelant serait responsable,

ATTENDU que ces arguments ne reprochent à l'acte d'accusation ni de ne pas se rapporter aux violations dont le Tribunal peut connaître, comme l'exige l'alinéa (iv) du paragraphe (D) de l'article 72 du Règlement, ni de ne pas cadrer avec la compétence personnelle, territoriale ou temporelle du Tribunal, comme l'exigent les alinéas (i) à (iii) du même paragraphe,

ATTENDU toutefois que le troisième moyen fait grief à l'acte d'accusation modifié de reprocher à l'appelant un comportement qui ne relève pas de la compétence temporelle du Tribunal et que ce moyen peut par conséquent être invoqué de plein droit au soutien d'un appel en cours de procès en vertu de l'alinéa (i) du paragraphe B et de l'alinéa (iii) du paragraphe D de l'article 72 du Règlement,

PAR CES MOTIFS,

1. REJETTE l'appel en ses premier, deuxième, quatrième et cinquième moyens;

2. DECLARE que l'appel est valablement formé et peut être examiné au fond en ce qui concerne le troisième moyen;

[1] *Simba c Le Procureur*, affaire n° ICTR-01-76-AR72, *Decision on Aloys Simba's Interlocutory Appeal Regarding Defects in the Form of the Indictment*, 24 mars 2004, p. 2.

3. INFORMS the parties that they may file written briefs as follows :

i) The Appellant may file a supplementary brief within 10 days of this decision;

ii) The Prosecution may file a response within seven days of the filing of the supplementary brief or, if no such brief is filed, may file a brief addressing the merits of the Third Ground within 14 days of this decision;

iii) The Appellant may reply to any response or brief filed by the Prosecution within four days of the filing of such response or brief.

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

Done this 4th day of June 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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3. INFORME les parties qu'elles peuvent déposer des conclusions écrites à cet égard suivant les modalités énoncées ci-après :

i) L'appelant peut déposer des conclusions ampliatives dans un délai de 10 jours à compter de la date de la présente décision ;

ii) Le Procureur peut déposer sa réponse dans un délai de sept jours à compter du dépôt des conclusions ampliatives ou, si celles-ci n'existent pas, déposer un mémoire traitant du bien-fondé du troisième moyen dans un délai de 14 jours à compter de la date de la présente décision ;

iii) L'appelant peut répliquer à la réponse ou au mémoire du Procureur dans un délai de quatre jours à compter du dépôt de ladite réponse ou dudit mémoire.

Fait en français et en anglais, la version anglaise faisant foi.

La Haye (Pays-Bas), le 4 juin 2004

[Signé] : Theodor Meron

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Decision on Extremely Urgent Defence Motion for the Deposition of Alibi Witnesses 14 June 2004 (ICTR-01-76-I)

(Oiginal : English)

Trial Chamber I

Judge : Sergei Alekseevich Egorov

Aloys Simba – deposition of alibi witnesses – exceptional circumstance, health of one of the witnesses, statement of matters for examination – consent, testimony – security concerns – motion granted in part

International Instruments Cited : Rules of Procedure and Evidence, Rules 71, 71 (A), 71 (B), 73 and 90 (A) – Statute, Art 28

International Case Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Aloys Simba, *Decision on the Defence's Extremely Urgent Motion for a Deposition, 11 March 2004 (ICTR-2001-76-AR72,* Reports 2004, *p. XXX)*

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

SITTING as Trial Chamber I, composed of Judge Sergei Alekseevich Egorov, designated by the Trial Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

BEING SEIZED OF the "Requête en extrême urgence de la défense aux fins de recueillir les dépositions des témoins institutionnels de l'alibi", filed on 17 May 2004;

CONSIDERING the Prosecution's Response, filed on 21 May 2004;

FURTHER CONSIDERING the "Réplique de la défense", filed on 26 May 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Indictment against the Accused was confirmed on 8 January 2002. The amended Indictment was filed on 27 January 2004. During the Pre-Trial Conference on 13 May 2004, the Defence requested that the Prosecution interview the Accused, on the issue of alibi, as part of its investigations. The Chamber, in an oral decision delivered the same day, denied the request as it was not for the Chamber to decide how the Prosecution should conduct its investigations, nor is such an interview a requirement with respect to alibi.

SUBMISSIONS

2. The Defence requests that the Chamber order a deposition of five Defence alibi witnesses, some of whom may not wish to speak to Counsel for the Defence, and request that their statements during the deposition be treated confidentially. In support of its motion, the Defence cites Article 28 and Rules 71 and 73.

3. The Prosecution objects to the motion and submits that the motion is similar to the previous request made by the Defence, which was rejected, for the Prosecution to interview the Accused, as the Prosecution would then be compelled to question alibi witnesses. The Prosecution notes that a previous deposition motion filed by the Defence was rejected due to a lack of information as to the exceptional circumstances justifying a deposition. Moreover, Article 28 is inapplicable as the Defence has not exhausted all avenues of investigation, and authorization from the Rwandan Government is not necessary. The Prosecution also notes that the alibi witnesses may come to Arusha to testify to alibi during the Defence case.

4. In its reply, the Defence submits that it could not contact the witnesses directly because of the witnesses' present positions as officials or as detainees, or because the Defence did not want to appear to have influenced their testimonies. For this reason, the Defence makes an application under Article 28 for the cooperation of the Rwandan Government. The Defence contends that there is an interest in hearing these witnesses, and that there are difficulties in obtaining their testimonies. The Reply contains the information that the Defence seeks to obtain from the witnesses via a deposition hearing. The Defence also seeks to substitute Tharcisse Muvunyi with another as an alibi witness.

DELIBERATIONS

5. The Defence has made two applications within one motion, one for depositions (Rule 71) and another for cooperation from States (Article 28). With respect to the Article 28 aspect of the motion, the Chamber notes that the Defence has not shown that previous efforts to obtain the assistance were unsuccessful, for example, that it has written unsuccessfully to the Rwandan Government to seek audiences with the witnesses who require such authorization from the Rwandan Government.

6. Pursuant to Rule 71 (A), the Chamber has the discretion to grant the taking of depositions where exceptional circumstances exist and where it would be in the interests of justice. Rule 71 (B) stipulates certain information that the request must provide : the name and whereabouts of the witness, the date and place of deposition, a statement of matters for examination and of the exceptional circumstances justifying the deposition. The Chamber notes that the list of witnesses is not annexed to the motion, as indicated in the motion. The Chamber also notes that the Defence did not elaborate upon the exceptional circumstances, nor on the matters for examination, in its motion, but rather in its Reply.

7. With respect to one of the witnesses, the Chamber previously issued a decision on 11 March 2004 denying a similar request for deposition[1]. The Chamber held that

[1] *Prosecutor v. Aloys Simba*, Decision on the Defence's Extremely Urgent Motion for a Deposition (TC), 11 March 2004.

although it accepted that the ill-health of the witness was an exceptional circumstance, it would have been preferable to have more precise information regarding the witness's health. The Chamber further held that the statement of matters for examination was vague, and the matter could be reconsidered upon provision of this information. At that time, the information regarding the witness's health was derived from a medical certificate dated 7 January 2004 from Dr. Philippe Bertaud. The Chamber notes that in support of its present second motion with respect to this potential witness, the Defence again supplies the Chamber with the same medical certificate that was deemed insufficient in the previous decision. In its present Reply however, the Defence provides the statement of matters for examination that was lacking before, and the Chamber will consequently grant the deposition with respect to this witness.

8. In respect of the two military and government officials, it is not clear if they have consented to being witnesses for the Defence, as the Defence has not approached the two witnesses. A deposition is an alternative method, from live in-court testimony, of hearing a party's witness, and is not a means by which to compel witnesses who do not wish to testify. The Defence alludes to immunity privileges of the witnesses, which may prevent them from testifying at all, whether by live testimony or by deposition. The Chamber is of the view that the Defence should have clarified the situation regarding the two officials, perhaps with the Rwandan Government, before applying to the Chamber.

9. Annexed to the motion are two unsigned statements from the two religious witnesses, attesting to their knowledge of the Accused and the events at the time. One witness has raised security concerns if s/he testifies before the Tribunal, as the proceedings are not closed, and his/her name will be revealed. However, these concerns would be addressed if protective measures were granted. The other witness has stated simply that she cannot come to Arusha to testify, without specifying the reasons. The Defence submits that the witnesses have security concerns and require authorization from their superiors. A deposition cannot be used to circumvent the necessary authorization witnesses may require from their superiors to testify. The security concerns raised do not explain why the witnesses could not come to Arusha as protected witnesses, whose identities would not be revealed to the public. Furthermore, when the witness is to testify, if the Chamber deems appropriate at that time, the witness could testify in closed session, where proceedings are not open to the public. A deposition is a special measure to be granted only in exceptional circumstances where it would serve the interests of justice. Rule 90 (A) provides that in principle, witnesses shall be heard directly by the Chamber.

10. The Chamber is of the view that the Defence has misunderstood the use of depositions under Rule 71. The Chamber strongly urges the Defence to ensure that all necessary steps to be taken, as mandated by the Statute or the Rules, or by the jurisprudence of this Tribunal, have been taken, and that all legal requirements to be fulfilled have been fulfilled, before applying to the Chamber. The applications relating to Article 28 and the deposition of the two officials and two religious witnesses were misconceived.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion with respect to one witness for health reasons and DENIES the motion in all other respects.

Arusha, 14 June 2004

[Signed] : Sergei Alekseevich Egorov

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Decision on Aloys Simba's Extremely Urgent Motion for an Extension of Time 14 June 2004 (ICTR-OI-76-AR72.2)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Florence Ndepele Mwachande Mumba; Mehmet Güney; Wolfgang Schomburg; Inès Monica Weinberg de Roca

Aloys Simba – Appeals Chamber – extension of time – working language of Defence Counsels, translation – good cause – motion granted in part

International Instrument Cited : Rules of Procedure and Evidence, Rules 72 (E), 116 (A) and 116 (B)

International Case Cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Aloys Simba, *Decision on Validity of Appeal Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence, 4 June 2004 (ICTR-2001-76-AR72.2,* Reports 2004, *p. XXX)*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between I January 1994 and 31 December 1994 ("Appeals Chamber" and "International Tribunal", respectively),

BEING SEISED OF the «Requête en extrême urgence de la défense en vue d'obtenir une prorogation des délais pour le dépôt de son mémoire complémentaire éventuel suite a la décision en date du 4juin 2004», filed by counsel for Aloys Simba on 10 June 2004 ("Motion");

RECALLING the "Decision on Validity of Appeal Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence," rendered on 4 June 2004 by a Bench of three Judges of the Appeals Chamber ("Validity Decision");

CONSIDERING that the Validity Decision permitted Appellant Aloys Simba ("Appellant") to file a supplementary brief within ten days of the Validity Decision, such that the brief is due on 14 June 2004;

CONSIDERING that the Validity Decision declared that the Appellant could proceed with his third ground of appeal, which asserts that the Trial Chamber violated his right to be charged only for conduct within the International Tribunal's temporal jurisdiction by permitting the use of events outside its temporal jurisdiction to prove criminal allegations within its temporal jurisdiction, and dismissed the remaining grounds of appeal[1];

CONSIDERING that the Motion seeks an extension of time within which to file an appeal following receipt of the French translation of the Validity Decision, on the basis that the accused and his counsel are proficient in French;

CONSIDERING, however, that at least one member of the Appellant's defence team is proficient in English, as is shown by the fact that the underlying appeal document in this matter was filed in English[2];

CONSIDERING, furthermore, that the Validity Decision does not contain any substantive discussion of the merits of the Appellant's grounds of appeal, but rather merely permits the Appellant to proceed with one of his grounds of appeal;

CONSIDERING that, to the extent that the Appellant or any members of his defence team are not proficient in English, the essential elements of the Validity Decision may be effectively conveyed to them without waiting for an official translation;

CONSIDERING that it does not appear that an official translation is necessary to the preparation of the Appellant's supplementary document or to "the ability of the accused to make full answer and defence" under Rule 116 (B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules");

CONSIDERING, however, that the Appellant's English-speaking counsel should be afforded a brief extension of time to consult with French-speaking counsel or the Appellant with regard to the contents of the Validity Decision;

CONSIDERING that Rule 116 (A) of the Rules permits the Appeals Chamber to grant a motion to extend a time limit "upon a showing of good cause";

CONSIDERING that good cause has been shown for granting a brief extension of time pursuant to Rule 116 (A) of the Rules;

FOR THE FOREGOING REASONS,

HEREBY GRANTS the Motion in part;

ORDERS that Defendant Aloys Simba's supplementary brief, pursuant to the Validity Decision, may be filed within five days of the filing of this decision;

ORDERS that the Prosecution may file a response within seven days of the filing of the supplementary brief or, if no such brief is filed, may file a brief addressing the merits of the Third Ground within 12 days of this decision;

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[1] *Simba v. Prosecutor*, n° ICTR-01-76-AR72.2, Decision on Validity of Appeal Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence, 4 June 2004, pp. 2, 4.

[2] Notice of Appeal of "Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment" Issued in English by Trial Chamber I, 6 May 2004, Pursuant to Article 108 (RPE), dated 14 May 2004.

ORDERS that the Appellant may reply to any response or brief filed by the Prosecution within four days of the filing of such response or brief.

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

Done this 14th day of June 2004, at The Hague, The Netherlands.

[Signed] : Judge Florence Ndepele Mwachande Mumba[3]

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[3] Judge Florence Ndepelo Mwachande Mumba signs this decision with the authorization of Presiding Judge Theodor Meron, who is absent from The Hague on official business. All five members of the Bench of the Appeals Chamber have reviewed and agree with this decision.

Decision on Defence Motion for Order in Reference to Rule 73 bis *14 June 2004 (ICTR-01-76-I)*

(Original : English)

Trial Chamber I

Judges : Sergei Alekseevich Egorov

Aloys Simba – translation – list of witnesses – summary of witness testimony – frivolous motion – fees and costs – motion denied

International Instrument Cited : Rules of Procedure and Evidence, Rules 73, 73 (F) and 73 bis

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

SITTING as Trial Chamber I, composed of Judge Sergei Alekseevich Egorov, designated by the Trial Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

BEING SEIZED OF the "Motion for Order in Reference to Rule 73 *bis* (RPE), pursuant to Article 73 (RPE)", filed on 27 May 2004;

CONSIDERING the Prosecution's Response, filed on 1 June 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Indictment against the Accused was confirmed on 8 January 2002. The amended Indictment was filed on 27 January 2004, and the trial is scheduled to commence on 16 August 2004. During the Pre-Trial Conference on 13 May 2004, Counsel for the Prosecution and Defence were directed by the Chamber to meet to resolve disclosure issues.

SUBMISSIONS

2. The Defence requests that the Chamber order the Prosecution to translate certain of its exhibits; provide the Defence with a precise list of Prosecution witnesses and the order in which they will appear; indicate in the "Summary of Witness Testimony" which evidence relates to which paragraphs of the Indictment and the elements of the offences charged; and include in the same Summary the estimated length of time for each witness's testimony.

Décision relative à la requête de la défense aux fins d'ordonnance sur le fondement de l'article 73 bis *du Règlement 14 juin 2004 (ICTR-01-76-I)*

(Original : Non spécifié)

Chambre de première instance I

Juge : Sergei Alekseevich Egorov

Aloys Simba – traduction des documents – liste de témoins – résumé des déclarations de témoins – requête fantaisiste – frais et honoraires – requête rejetée

Instrument international cité : Règlement de procédure et de preuve, art. 73, 73 (F) et 73 bis

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la personne du juge Sergei Alekseevich Egorov, désigné par la Chambre de première instance en vertu de l'article 73 du *Règlement de procédure et de preuve* du Tribunal (le «Règlement»),

SAISI de la «requête aux fins d'ordonnance sur le fondement de l'article 73*bis* du *Règlement de procédure et de preuve*, formée en vertu de l'article 73 du Règlement» introduite le 27 mai 2004,

VU la réponse du Procureur déposée le 1er juin 2004,

STATUE sur la requête.

INTRODUCTION

1. L'acte d'accusation établi contre l'accusé a été confirmé le 8 janvier 2002. L'acte d'accusation modifié a été déposé le 27 janvier 2004, le procès devant en principe s'ouvrir le 16 août 2004. Lors de la conférence préalable au procès tenue le 13 mai 2004, la Chambre a invité le Procureur et la Défense à se rencontrer pour régler les questions de communication d'éléments de preuve.

ARGUMENTS

2. La défense demande à la Chambre d'ordonner au Procureur de traduire certaines de ses pièces à conviction, de fournir à la défense la liste exacte des témoins à charge en précisant l'ordre de leur comparution, d'indiquer dans le «Résumé des déclarations de témoins» que tel élément de preuve a trait à tel paragraphe de l'acte d'accusation, les éléments constitutifs des infractions retenues et d'y préciser la durée probable de chaque déposition.

3. The Prosecution seeks a dismissal of the motion. As to the first request, the Prosecution submits that the exhibits have been provided to the Translation Section for translation, and it is not the Prosecution's duty to translate documents. With regard to the list of witnesses, the Prosecution responds that such a list was provided on 6 April 2004, and it is not obliged to state the order in which the witnesses will appear. In relation to the third request, the Prosecution argues that it has complied with the Rules, which do not state that it has to specify which witness will testify to which paragraph of the indictment. With regard to the last request, the Prosecution contends that it provided the estimated lengths of the witnesses' testimonies during the Status Conference on 15 January 2004.

DELIBERATIONS

4. With respect to the first request for translations, the Chamber reminds the Defence that it is the Translation Section of the Tribunal that is responsible for the translation of documents; therefore, there is no duty on the Prosecution to translate all its documents. Documents received by the Registry are routinely sent to the Translation Section for translation, unless there are contrary instructions from the Chamber.

5. As to the list of witnesses, the Chamber notes that a list has been provided. The Rules do not compel the Prosecution to state the order of the witnesses to be called, and the Chamber notes that the practice is for the order of the witnesses to be called in a particular week to be notified as soon as possible before that week. This arrangement is due to the fact that there may be difficulties transferring witnesses to Arusha to testify.

6. Turning to the Summary, the Chamber considers that the Summary need not cite the paragraphs of the Indictment, nor the elements of the offence, that each witness will testify to, as Rule 73 *bis* merely refers to the "points" of the Indictment. The Chamber recalls that the Prosecution did provide estimated lengths of time of each witness's testimony during the Status Conference, and that therefore the information has been disclosed to the Defence.

7. The Chamber considers that this motion was unnecessary and a waste of judicial time and resources, especially after the Chamber directed parties to sort out these matters between themselves. A careful reading of the Rules would have counselled the Defence against making such a motion. The Chamber is compelled to warn the Defence that should it make further motions that may be regarded as frivolous, the Chamber may order the non-payment of fees and/or costs, as provided under Rule 73 (F).

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 14 June 2004

[Signed] : Sergei Alekseevich Egorov

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3. Le Procureur demande le rejet de la requête. Pour ce qui est de la première demande, le Procureur fait valoir que les pièces à conviction ont été remises pour traduction à la Section des services linguistiques et qu'il n'incombe pas au Procureur de traduire les documents. S'agissant de la liste de témoins, le Procureur répond qu'elle a été fournie le 6 avril 2004 et qu'il n'est pas tenu d'indiquer l'ordre de comparution des témoins. Concernant la troisième demande, le Procureur prétend qu'il s'est conformé au *Règlement de procédure et de preuve* qui ne lui fait pas obligation de préciser quel témoin évoquera tel ou tel paragraphe de l'acte d'accusation. En ce qui concerne la dernière demande, le Procureur affirme avoir indiqué la durée probable des dépositions des témoins lors de la conférence de mise en état du 15 janvier 2004.

DISCUSSION

4. En ce qui concerne la première demande relative à la traduction des documents, la Chambre rappelle à la défense que c'est la Section des services linguistiques du Tribunal qui est responsable de la traduction des documents, si bien que cette responsabilité n'incombe pas au Procureur. Les documents reçus par le Greffe sont systématiquement soumis pour traduction à la Section des services linguistiques, sauf instructions contraires de la Chambre.

5. Pour ce qui est de la liste de témoins, la Chambre relève qu'elle a déjà été fournie. Le Règlement ne fait pas obligation au Procureur d'indiquer l'ordre dans lequel les témoins seront appelés à la barre et la Chambre constate que la pratique est de notifier dès que possible avant la semaine, l'ordre dans lequel des témoins seront appelés pendant la semaine considérée. Cette mesure est dictée par les difficultés qu'il pourrait y avoir à acheminer les témoins à Arusha.

6. En ce qui concerne le résumé, la Chambre considère qu'il n'est pas besoin d'y indiquer les paragraphes de l'acte d'accusation ni les éléments constitutifs de l'infraction au sujet de laquelle tel ou tel témoin déposera, l'article 73 *bis* du Règlement se bornant à parler de «points» de l'acte d'accusation. La Chambre rappelle que le Procureur a indiqué la durée probable de la déposition de chaque témoin lors de la conférence de mise en état et que, par conséquent, les informations utiles ont été communiquées à la défense.

7. La Chambre estime que la présente requête était sans intérêt et un gaspillage du temps et des ressources de la justice, surtout que la Chambre a ordonné aux parties de régler ces problèmes entre elles. À lire attentivement le Règlement, la Défense aurait fait l'économie d'une telle requête. La Chambre se voit dans l'obligation d'avertir la Défense que toute autre requête jugée fantaisiste pourrait l'amener à demander qu'il soit sursis au paiement des honoraires et/ou des frais y relatifs comme l'y autorise l'article 73 (F) du Règlement.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête.

Arusha, le 14 juin 2004

[Signé] Sergei Alekseevich Egorov

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Decision on Defence Request for Leave to Appeal "Decision on Defence Motion for Extension of Time" and Oral Decision 24 June 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Jai Ram Reddy; Sergei Alekseevich Egorov; Emile Short

Aloys Simba – leave to appeal – translation – threshold requirements for certification not fulfilled - motion denied

International Instrument Cited : Rules of Procedure and Evidence, Rules 72 (A), 72 (B) (ii), 72 (G), 73, 73 (B) and 73 (C)

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

SITTING as Trial Chamber I, composed of Judge Jai Ram Reddy, presiding, Judge Sergei Alekseevich Egorov, and Judge Emile Short;

BEING SEIZED OF the "Defence Request, pursuant to Rule 72 (B) (ii) (RPE), for Leave to Appeal the Trial Chamber's Written Decision, 'Decision on Defence Motion for Extension of Time,' 4 May 2004 and Oral Decision, Rendered 13 May 2004", filed on 17 May 2004;

CONSIDERING the Prosecution's Response, filed on 24 May 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Indictment against the Accused was confirmed on 8 January 2002. The amended Indictment was filed on 27 January 2004, the second amended Indictment was filed on 10 May 2004, and the trial is scheduled to commence on 16 August 2004. On 28 April 2004, the Defence filed a motion seeking a suspension of the time limit for filing its reply to the Prosecution's response to the Defence's motion regarding defects in the form of the Indictment, until the French translation was served on the Defence. The motion was denied on 4 May 2004; Lead and Co-Counsel, one English-speaking, the other French-speaking, were urged to cooperate on language issues. In the Pre-Trial Conference on 13 May 2004, the same issue relating to language was raised by the Defence and rejected by the Chamber on the same day in an oral decision.

SUBMISSIONS

2. The Defence seeks leave to appeal the Decision filed on 4 May 2004, and the oral decision of 13 May 2004 under Rule 72 (B) (ii). On the issue of language raised in both decisions, the Defence cites communication difficulties between Counsel in Africa and North America, and submits that even without such logistical problems, Counsel are not able to comprehend legal issues not in their first language, and are therefore unable to cooperate in the manner the Chamber has decided. The Defence argues that it would be a violation of the Accused's rights if he were not provided with English and French copies of all pleadings. Additionally, the Defence seeks a waiver of the time limit for appeal of the 4 May Decision, as it was received by Co-Counsel on the day she was leaving Arusha and she was unable to consult with Lead Counsel until 10 May 2004. The Defence contends that the trial should not commence until the appeals have been decided.

3. The Prosecution objects to the motion and submits that the Defence has not shown how overturning the 4 May Decision would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor how an immediate resolution by the Appeals Chamber may materially advance the proceedings. Moreover, certification would be granted only in exceptional circumstances, and that the Defence has not demonstrated such circumstances. The Prosecution contends that arguing the merits of the appeal, as the Defence has done, is inappropriate and only arguments relating to the criteria for certification should be addressed. Turning to the translation issue, the Prosecution argues that the Rules do not impose an absolute duty to translate all documents into the Accused's language, and that translation should be done on a case-by-case basis where the relevance of the document has been determined. With respect to the 13 May Oral Decision, the Prosecution also argues that the requirements for certification have not been met and adopts its oral arguments made on 13 May 2004.

DELIBERATIONS

4. The decisions sought to be appealed are not decisions on preliminary motions according to Rule 72 (A). Appeals from decisions on other motions are provided for by Rule 73 (B) and (C), which state as follows :

> (B) Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
>
> (C) Requests for certification shall be filed within seven days of the filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless
>
> (i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

If certification is given, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify.

4 May Decision

5. The motion for certification of appeal of the 4 May Decision is out of time as it was filed more than seven days from the filing of the impugned decision. Under Rule 73, there is no provision for a waiver upon a showing of good cause, as under Rule 72 (G) which the Defence erroneously cites. Therefore, the certification motion with respect to the 4 May Decision is time-barred.

13 May Oral Decision

6. The portion of the impugned Decision relating to translation states as follows :

> The Defence seeks to have a postponement of trial until all documents in English have been translated into French, as that is the language of the Lead Counsel and the Accused. The Chamber notes that the practice in the Tribunal is that Lead and Co-Counsel, who between them have a command of both official languages of the Tribunal, co-operate with one another to have documents translated themselves. In addition, the Chamber notes that the unredacted witness statements have been disclosed in both French and English. To require translation of all motions, responses, correspondence, and other documents, would place an impossible burden on the Translation section of the Tribunal. The Chamber will consider ordering or facilitating the translation of specific documents on a case-by-case basis in the interests of justice. In any event, in the absence of a specific showing of how the Defence will be prejudiced if a particular document is not translated, the Chamber does not find this to be an adequate ground for postponing trial.

7. The Defence, in its motion, has not applied itself to the threshold requirements for certification, that is, that the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and an immediate resolution of which by the Appeals Chamber may materially advance the proceedings. The motion states : "[a]n appellate decision on these issues would 'significantly affect the fair and expeditious conduct of the proceedings' and the 'outcome of the trial'. Indeed, an immediate resolution of the issues would not only 'materially advance the proceedings,' but possibly avoid future delays since the issues raised are material to the entire trial." This is merely a restatement of the Rule which does not address the substantive tests to be met for certification. The Defence has not shown how the translation issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that an immediate resolution of which by the Appeals Chamber may materially advance the proceedings.

8. Finally, the Defence requests that trial proceedings commence only after the interlocutory appeals have been decided. With respect to the appeals sought in this motion, the request is moot as certification has been denied. With respect to the appeals pending before the Appeals Chamber, the Chamber considers that there is no legal basis for postponing the trial pending an interlocutory appeal. In any event, the request is likely to be moot given that the trial will commence on 16 August 2004, by which time the appeals would have been decided.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 25 June 2004

[Signed] : Jai Ram Reddy, Presiding Judge; Sergei Alekseevich Egorov; Emile Short

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Décision relative à la requête en vue d'ordonner des autorités rwandaises la communication au Procureur des dossiers de poursuite des témoins prisonniers 14 juillet 2004 (ICTR-2001-76-I)

(Original : Anglais)

Chambre de première instance I

Juges : Jai Ram Reddy, Président de Chambre; Sergei Alekseevich Egorov; Emile Francis Short

Aloys Simba – communication des dossiers de poursuite des témoins prisonniers – Rwanda – requête prématurée – requête rejetée

Instrument international cité : Règlement de procédure et de preuve, art. 66 (A) (ii) et 66 (B)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Jai Ram Reddy, Président de Chambre, Alekseevich Egorov et Emile Short, (la «Chambre»),

SAISI de la Requête en vue d'ordonner des autorités rwandaises la communication au Procureur des dossiers de poursuite des témoins prisonniers, déposée le 17 mai 2004, (la «requête»),

VU la Réponse du Procureur à la requête de la défense en vue d'ordonner des autorités rwandaises la communication au Procureur des dossiers de poursuite des témoins prisonniers, déposée le 17 mai 2004 (la «Réponse»),

ARGUMENTS DES PARTIES

Arguments de la défense

1. La défense prie la Chambre d'ordonner aux autorités rwandaises de communiquer au Procureur les dossiers de poursuite des témoins prisonniers qu'il entend appeler. La défense prétend n'avoir pas reçu à ce jour de réponse des autorités rwandaises au sujet des pièces en question.

2. Pour la défense, il incombe au Procureur, aux termes de l'article 66 (A) (ii) et (B), d'obtenir des autorités rwandaises et de communiquer par la suite à la défense tous les dossiers relatifs aux poursuites exercées contre les témoins prisonniers devant les juridictions rwandaises.

3. La défense fait aussi valoir que la non communication des dossiers de poursuite doit conduire à exclure les témoins en cause ou, à tout le moins, à surseoir à les entendre en attendant que la question soit tranchée.

Arguments du Procureur

4. Sans soulever d'objection à la requête de la défense tendant à obtenir les dossiers de poursuite des témoins à charge en détention, le Procureur soutient que le défaut par lui de fournir tes dossiers en question ne doit ni faire obstacle à la comparution des témoins intéressés ni entraîner leur exclusion.

5. Le Procureur précise cependant qu'il a déjà saisi les autorités judiciaires rwandaises qui «ont promis d'aider même si à ce jour il n'a pas reçu lesdits dossiers».

DÉLIBÉRATION

6. La Chambre relève que le Procureur s'est engagé à redoubler d'effort et à multiplier ses démarches pour obtenir des autorités judiciaires communication des dossiers de poursuite des témoins détenus qu'il entend appeler. De plus, la Chambre retient que, selon le Procureur, «rien dans [ses] démarches auprès desdites autorités ne l'autorise à penser que celles-ci se refuseraient à fournir les informations demandées». La Chambre conclut dès lors que vu les circonstances de la cause, la requête de la défense tendant à obtenir des autorités rwandaises communication des dossiers est sans fondement.

7. Par conséquent, la Chambre juge que la requête est prématurée à ce stade et doit être rejetée. Toutefois, le procès devant en principe s'ouvrir le 16 août 2004, la Chambre, tenant compte des préoccupations de la défense, charge le Procureur de faire tout ce qui est nécessaire pour obtenir les dossiers de poursuite des témoins à charge détenus et les communiquer à la défense dès leur réception et d'informer la Chambre de toute difficulté ou de tout retard qu'il rencontrerait dans sa quête pour les obtenir auprès des autorités rwandaises.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête;

CHARGE le Procureur de faire tout son possible pour obtenir les dossiers de poursuite des témoins à charge détenus;

CHARGE EN OUTRE le Procureur de déposer auprès du Greffe, le 2 août 2004 au plus tard, un document indiquant à l'intention de la Chambre les dossiers de poursuite qu'il aura obtenus et communiqués à la défense, ceux qu'il serait sur le point de recevoir et ceux qu'il n'aura pu obtenir;

DEMEURE saisie de la question.

Fait à Arusha, le 14 juillet 2004

[Signé] : Jai Ram Reddy; Sergei Alekseevich Egorov; Emile Francis Short

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Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment 14 July 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Jai Ram Reddy; Sergei Alekseevich Egorov; Emile Short

Aloys Simba – defects in the form of the second amended indictment – diligence of the Defence Counsel – joint criminal enterprise, mens rea *– murder as a crime against humanity, qualification of the civilian population, discriminatory grounds – motion denied*

International Instruments Cited : Rules of Procedure and Evidence, Rules 72 and 73 – Statute, Art 6 (1)

International Cases Cited :

I.C.T.R. : Trial Chamber III, The Prosecutor v. Laurent Semanza, *Judgement, 15 May 2003, (ICTR-97-20-T,* Reports 2003*, p. 3622) – Appeals Chamber,* The Prosecutor v. Georges Rutaganda, *Judgement, 26 May 2003 (ICTR-96-3-A,* Reports 2003*, p. 3180) –Trial Chamber III,* The Prosecutor v. André Ntagerura et al., *Judgement, 25 February 2004 (ICTR-99-46-T,* Reports 2004, *p. XXX)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Milorad Krnojelac*, Judgement, 17 September 2003 (IT-97-25-A) – Trial Chamber,* The Prosecutor v. Zeljko Mejakic et al.*, Decision on Zeljko Mejakic Preliminary Motion on the Form of the Indictment, 14 November 2003 (IT-02-65-PT) – Appeals Chamber,* The Prosecutor v. Mitar Vasiljevic*, Judgement, 25 February 2004 (IT-98-32-A)*

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

SITTING as Trial Chamber I, composed of Judge Jai Ram Reddy, presiding, Sergei Alekseevich Egorov, and Judge Emile Short;

BEING SEIZED OF the "Requête de la défense en exception préjudicielles et en incompétence pour vices de forme substantiels contre l'acte d'accusation modifié en date du 10 Mai 2004 (articles 72 et 73 du RPP)", filed on 9 June 2004, the annex thereto filed on 15 June 2004, and the corrigendum to the motion, filed on 16 June 2004;

CONSIDERING the Prosecution's response filed on 16 June 2004;

HEREBY DECIDES the motion.

Décision relative à l'exception préjudicielle tirée par la défense de vices de forme du deuxième acte d'accusation modifié 14 juillet 2004 (ICTR-01-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juges : Jai Ram Reddy ; Sergei Alekseevich Egorov ; Emile Short

Aloys Simba – vices de forme du deuxième acte d'accusation modifié – diligence du conseil de l'accusé – entreprise criminelle commune, mens rea *– assassinat constitutif de crime contre l'humanité, qualification de la population civile, motif de discrimination – requête rejetée*

Instruments internationaux cités : Règlement de procédure et de preuve, art. 72 et 73 – Statut, art. 6 (1)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance III, Le Procureur c. Laurent Semanza, *jugement, 15 mai 2003 'ICTR-97-20-T,* Recueil 2003*, p. 3623) – Chambre d'appel,* Le Procureur c. Georges Rutaganda, *arrêt, 26 mai 2003 (ICTR-96-3-A,* Recueil 2003*, p. 3181) – Chambre de première instance III,* Le Procureur c. André Ntagerura et consorts*, jugement, 25 février 2004 (ICTR-99-46-T,* Recueil 2004, *p. XXX)*

T.P.I.Y. : Chambre d'appel, Le Procureur c. Milorad Krnojelac, *arrêt, 17 septembre 2003 (IT-97-25-A) – Chambre de première instance,* Le Procureur c. Zeljko Mejakic et consorts, *Décision relative à l'exception préjudicielle déposée par Zeljko Mejakic pour vice de forme de l'acte d'accusation, 14 novembre 2003 (IT-02-65-PT) – Chambre d'appel,* Le Procureur c. Mitar Vasiljevic*, arrêt, 25 février 2004 (IT-98-32-A)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Jai Ram Reddy, Président de Chambre, Sergei Alekseevich Egorov et Emile Short,

SAISI de la «Requête de la défense en exception préjudicielle et en incompétence pour vices de forme substantiels contre l'acte d'accusation modifié en date du 10 mai 2004 (articles 72 et 73 du RPP)», déposée le 9 juin 2004, de l'annexe à ladite requête, déposée le 15 juin 2004 et du rectificatif déposé le 16 juin 2004,

VU la réponse du Procureur déposée le 16 juin 2004,

DÉCIDE CE QUI SUIT :

INTRODUCTION

1. The Indictment against Aloys Simba was confirmed on 8 January 2002. A first amended Indictment was filed on 27 January 2004, adding an allegation that the Accused participated in a joint criminal enterprise. The Defence filed a preliminary motion challenging defects in the first amended Indictment on 16 April 2004. In its decision filed on 6 May 2004, the Chamber ordered the Prosecutor to plead the *mens rea* of the Accused or his alleged partners in the joint criminal enterprise. The Chamber also ordered the Prosecutor to plead that the alleged murders in Count 4 were part of the widespread and systematic attack and that the gendarme was part of the civilian population. The Prosecution filed a second amended Indictment on 10 May 2004, which forms the basis of the present challenge. The trial is scheduled to begin on 16 August 2004.

SUBMISSIONS

2. In its motion filed on 9 June 2004, the Defence argues that, notwithstanding the Prosecutor's amendments, the second amended Indictment still fails to adequately plead the *mens rea* element for joint criminal enterprise and also fails to adequately link the murders alleged in Count 4 (Murder as a Crime Against Humanity) to the widespread and systematic attack. On 15 June 2004, the Defence submitted the annex mentioned in its motion. This annex contained a copy of earlier pleadings submitted by the Defence on the issue, most of it irrelevant to the two narrow issues framed in the Defence's motion. On 16 June 2004, the Defence submitted a corrigendum to its motion, largely rectifying grammatical errors in the original motion.

3. In its response, the Prosecutor asserts that the amendments made to the indictment filed on 10 May 2004 fully comply with the Chamber's decision of 6 May 2004.

DELIBERATIONS

4. At the outset, the Chamber emphasizes its profound dissatisfaction with the Defence's practice of submitting its motions in a piecemeal fashion, particularly where its supplementary pleadings primarily contain irrelevant material or corrections of an editorial nature, as in the present motion. This practice wastes scarce judicial time and resources by placing an unnecessary burden on the Chamber to review these multiple submissions and on the Registry which is tasked with filing, copying, circulating, and translating these largely superfluous documents. It further reflects a lack of diligence on the part of Lead Counsel in preparing his initial submissions. The Lead Counsel for the Defence must exercise greater care in preparing his initial pleadings. Should this practice continue, the Chamber will consider imposing an appropriate sanction, particularly if the Defence is billing these unnecessary submissions.

INTRODUCTION

1. L'acte d'accusation dressé contre Aloys Simba a été confirmé le 8 janvier 2002. Un premier acte d'accusation modifié, comportant une nouvelle allégation reprochant à l'accusé d'avoir été partie à une entreprise criminelle commune, a été déposé le 27 janvier 2004. Le 16 avril 2004, la défense a déposé une requête en exception préjudicielle tirée de vices de forme du premier acte d'accusation modifié. Dans la décision qu'elle a rendue le 6 mai 2004, la Chambre a ordonné au Procureur d'articuler la *mens rea* de l'accusé ou des autres parties présumées à l'entreprise criminelle commune et de préciser que les crimes allégués au chef 4 de l'acte d'accusation ont été commis dans le cadre d'une attaque généralisée et systématique et que le gendarme tué était membre de la population civile. Le 10 mai 2004, le Procureur a déposé un deuxième acte d'accusation modifié, objet de la présente exception. Le procès doit en principe s'ouvrir le 16 août 2004.

ARGUMENTS

2. Dans la requête qu'elle a déposée le 9 juin 2004, la défense fait valoir qu'en dépit des modifications apportées par le Procureur, le deuxième acte d'accusation modifié n'articule pas convenablement la *mens rea* de l'entreprise criminelle commune et n'établit pas clairement le lien de causalité entre les meurtres allégués au chef 4 (assassinat constitutif de crime contre l'humanité) et l'attaque généralisée et systématique. Le 15 juin 2004, la défense a déposé l'annexe qu'elle avait mentionnée dans sa requête. Cette annexe contenait le texte des conclusions déposées précédemment par la défense sur la question et qui, pour l'essentiel, sont sans rapport avec les deux questions étroitement circonscrites dans la requête de la défense. Le 16 juin 2004, la défense a déposé un rectificatif corrigeant largement les erreurs grammaticales contenues dans la requête initiale.

3. Dans sa réponse, le Procureur fait valoir que les modifications apportées à l'acte d'accusation déposé le 10 mai 2004 satisfont pleinement à la décision de la Chambre du 6 mai 2004.

DÉLIBÉRATIONS

4. Tout d'abord, la Chambre voit d'un très mauvais œil que la défense dépose des requêtes par bribes, surtout quand on sait que ses écritures supplémentaires constituent pour l'essentiel des éléments sans pertinence ou des corrections d'ordre rédactionnel, comme à l'occasion de la requête dont il s'agit. La défense gaspille ainsi le temps et les ressources judiciaires limitées dont dispose le Tribunal en imposant un fardeau inutile à la Chambre qui se trouve contrainte d'examiner ces nombreuses écritures, et au Greffe qui est chargé de recevoir ces documents largement sans intérêt, d'en établir des copies, de les distribuer et de les faire traduire. Il apparaît en outre que le conseil principal n'apporte pas la diligence voulue à la rédaction de ses écritures initiales. Il doit apporter plus de soin à cette mission. Faute pour le conseil de cesser d'agir de la sorte, la Chambre envisagera de prendre toute sanction qui s'imposerait, notamment si la défense facture ces écritures inutiles.

Joint Criminal Enterprise

5. The Appeals Chamber has explained that joint criminal enterprise is a form of "commission" within the meaning of Article 6 (1) of the Statute[1]. The mode and extent of an accused's participation in an alleged crime are always material facts that must be clearly set forth in the indictment[2]. If the Prosecutor intends to rely on the theory of joint criminal enterprise, the indictment should plead this in an unambiguous manner and specify upon which of the three recognized forms of joint criminal enterprise the Prosecutor will rely : basic, systematic, or extended[3].

6. The Chamber notes that the indictment only refers to joint criminal enterprise without specifying the particular form. In the Chamber's view, the indictment's failure to point to a particular form of joint criminal enterprise reflects the Prosecution's intention to rely on all three forms[4]. Consequently, the indictment must plead the distinct *mens rea* for each form of joint criminal enterprise. In assessing an indictment, the Chamber is mindful that each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment[5].

7. In response to the Chamber's decision of 6 May 2004, the Prosecutor amended the indictment to include the following allegation at paragraph 58 : "Aloys Simba intended to commit the acts above, this intent being shared by all other individuals involved in the crimes perpetrated."

8. The requisite intent for the basic form of joint criminal enterprise is the intent to perpetrate a certain crime[6]. Paragraph 58 asserts that the Accused intended to commit the acts enumerated in the indictment[7]. Though this is somewhat conclusory, it suffices in the context of the indictment as a whole given that an intention to participate in a crime can be reflected by an individual's words and actions or inferred from surrounding circumstances. Therefore, notice of the Accused's as well as the other participants' intention to commit the crime's enumerated in the indictment, which form the purpose of the joint criminal enterprise, is reflected not only by paragraph 58, but also by the allegations of his repeated actions in furtherance of com-

[1] *Vasilejevic*, Judgement (AC), para. 95 (referring to Article 7 (1) of the ICTY Statute which is identical to Article 6 (1) of the ICTR Statute).

[2] *Ntagerura et al*, Judgement (TC), para. 31. See also *Krnojelac*, Judgement (AC), para. 138.

[3] *Ntagerura et al*, Judgement (TC), para. 34. See also *Krnojelac*, Judgement (AC), para. 138; *Prosecutor v, Mejakic*, Case N° IT-02-65-PT, Decision on Zeljko Mejakic Preliminary Motion on the Form of the Indictment, 14 November 2003, p. 3. For a description of each form of joint criminal enterprise, see generally *Vasilejevic*, Judgement (AC), paras. 97-99.

[4] This is also confirmed by the Pre-Trial Brief. See Pre-Trial Brief, para. 127. The Chamber notes that the pre-trial brief may be used as a source of information to provide additional information concerning the Prosecutor's theory of its case. See *Ntagerura et al*, Judgement (TC), para. 66; *Krnojelac*, Judgement (AC), para. 138.

[5] *Rutaganda*, Judgement (AC), para. 304; *Ntagerura et al*, Judgement (TC), para. 30.

[6] *Vasilejevic*, Judgement (AC), para. 101.

[7] Paragraph 65 of the Indictment also mentions that the acts in the indictment were done intentionally.

Entreprise criminelle commune

5. La Chambre d'appel a précisé que l'entreprise criminelle commune était une forme de «commission» d'un crime au sens de l'article 6 (1) du Statut[1]. La forme et la portée de la participation de l'accusé à un crime allégué constituent toujours des faits essentiels qui doivent être clairement exposés dans l'acte d'accusation[2]. Si le Procureur entend invoquer la théorie de l'entreprise criminelle commune, il doit le dire clairement dans l'acte d'accusation et y préciser laquelle des trois formes reconnues d'entreprise criminelle commune (élémentaire, systématique ou élargie) il entend retenir[3].

6. La Chambre relève que l'acte d'accusation se borne à parler de l'entreprise criminelle commune sans en préciser la forme visée. De l'avis de la Chambre, si le Procureur n'a pas retenu telle ou telle forme d'entreprise criminelle c'est qu'il entend en invoquer les trois formes reconnues[4]. Par conséquent, l'acte d'accusation doit préciser la *mens rea* de chacune des formes d'entreprise criminelle commune. En examinant l'acte d'accusation, la Chambre sait que, loin d'envisager chaque paragraphe isolément, elle doit le rapprocher des autres paragraphes[5].

7. Comme suite à la décision de la Chambre du 6 mai 2004, le Procureur a modifié l'acte d'accusation pour y insérer l'allégation suivante au paragraphe 58 : «Aloys Simba a eu l'intention de commettre les actes ci-dessus, cette intention ayant été partagée par tous les autres individus impliqués dans les crimes perpétrés».

8. Pour ce qui est de la forme élémentaire de l'entreprise criminelle commune, l'élément moral requis tient dans l'intention de perpétrer tel crime[6] bien déterminé. Selon le paragraphe 58 de l'acte d'accusation, l'accusé était animé de l'intention de commettre les actes visés dans l'acte d'accusation[7]. Pour être quelque peu abstraite, cette affirmation est néanmoins suffisante, replacée dans le contexte de l'acte d'accusation, l'intention de participer à un crime pouvant se déduire des propos et actions de l'agent, ou des circonstances entourant la commission du crime. Par conséquent, l'intention dont étaient animés l'accusé et les autres parties à l'entreprise de commettre les crimes énumérés dans l'acte d'accusation et qui étaient l'objet de l'entreprise criminelle commune, ressort non seulement du paragraphe 58, mais aussi des

[1] Arrêt *Vasilejevic*, para. 95 (parlant de l'article 7 (1) du Statut du TPIY qui est identique à l'article 6 (1) du Statut du TPIR).

[2] *Ntagerura et consorts*, jugement, para. 31. Voir aussi *Krnojelac*, arrêt, para. 138.

[3] *Ntagerura et consorts*, jugement, para. 34. Voir aussi *Krnojelac*, arrêt, para. 138; *Le Procureur c. Mejakic*, affaire n° IT-02-65-PT, Décision relative à l'exception préjudicielle déposée par Zeljko Mejakic pour vice de forme de l'acte d'accusation, 14 novembre 2003, p. 3. Pour une description de chaque forme de l'entreprise criminelle commune, voir généralement l'arrêt *Vasilejevic*, paras. 97 à 99.

[4] Cela est également confirmé par le mémoire préalable au procès. Voir ce mémoire, para. 127. La Chambre fait observer que le mémoire préalable au procès se veut une source d'informations permettant d'éclairer davantage la thèse du Procureur. Voir *Ntagerura et consorts*, jugement, para. 66; *Krnojelac*, arrêt, para. 138.

[5] *Rutaganda*, arrêt, para. 304, *Ntagerura et consorts*, jugement, para. 30.

[6] Arrêt *Vasilejevic*, para. 101.

[7] Le paragraphe 65 de l'acte d'accusation précise également que les actes énumérés ont été commis intentionnellement.

mitting the enumerated crimes and allegations detailing the circumstances in which they were committed[8].

9. The requisite intent for the systemic form of joint criminal enterprise is personal knowledge of the system of ill-treatment, as well as the intent to further this system of ill-treatment[9]. The Appeals Chamber has noted that personal knowledge of the system of ill-treatment can be proven by express testimony or a matter of reasonable inference from the accused's position of authority[10]. The indictment does not contain a specific conclusory allegation asserting personal knowledge and the intent to further a system of ill-treatment. Nonetheless, the Chamber is satisfied that the requisite intent is adequately pleaded in the indictment's numerous allegations that the accused was in a position of authority and planned, participated in, or was present during the alleged crimes, which if proven would reflect knowledge of ill-treatment and an intent to further it.

10. The requisite intent for the extended form of joint criminal enterprise is the intent to participate in the common criminal purpose and awareness that the commission of such a crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise[11]. In the Chamber's view, given that *mens rea* can be proven by an individual's words and actions or inferred from surrounding circumstances, the indictment adequately pleads the accused's intent to participate in the extended form of joint criminal enterprise from the numerous allegations of his authority, his statements to assailants, acts of planning, participation in, and presence during numerous attacks.

11. Consequently, the Chamber does not find merit in the Defence's challenge to the indictment's pleading of *mens rea* for joint criminal enterprise.

Murder as a Crime Against Humanity

12. A crime against humanity must have been committed as part of a widespread or systematic attack against any civilian population on discriminatory grounds[12]. Although the act need not be committed at the same time and place as the attack or

[8] In addition, Paragraphs 23 and 24 of the Indictment plead material facts relevant to the specific intent of genocide and instigation, which are also relevant to establishing the general intent to commit the underlying crimes.

[9] *Vasilejevic*, Judgement (AC), para. 101.

[10] *Vasilejevic*, Judgement (AC), para. 101.

[11] *Vasilejevic*, Judgement (AC), para. 101.

[12] *Semanza*, Judgement (TC), para. 326.

actes répétés qu'il aurait posés en exécution desdits crimes et des allégations exposant les circonstances ayant entouré leur commission[8].

9. L'intention requise pour ce qui est de la forme systématique de l'entreprise criminelle commune, tient, quant à elle, en ce que l'accusé a eu personnellement connaissance de mauvais traitements systématiques et qu'il était animé de l'intention d'y concourir[9]. La Chambre d'appel a considéré que cette connaissance personnelle de mauvais traitements systématiques pouvait être prouvée par un témoignage précis, ou raisonnablement déduite de la position d'autorité de l'accusé[10]. L'acte d'accusation ne contient pas d'allégation précise reprochant à l'accusé à titre préliminaire d'avoir eu personnellement connaissance de mauvais traitements systématiques et d'avoir eu l'intention d'y concourir. Néanmoins, la Chambre considère que l'intention requise est convenablement articulée dans les nombreux passages de l'acte d'accusation où le Procureur fait valoir que l'accusé occupait une position d'autorité et a planifié les crimes allégués, en a été témoin ou y a participé. Si elles étaient prouvées, ces allégations rendraient compte de mauvais traitements systématiques et de l'intention d'y concourir.

10. Le dol spécial de la forme élargie de l'entreprise criminelle commune tient en ceci que l'accusé a eu l'intention de participer à un dessein criminel commun, qu'il a eu conscience que la commission de tel crime était une conséquence éventuelle de l'exécution de cette entreprise et qu'il a décidé d'y participer tout en en étant conscient[11]. De l'avis de la Chambre, comme la *mens rea* peut être prouvée par les propos et les actions de l'agent, ou se déduire des circonstances, l'acte d'accusation caractérise l'intention de l'accusé de participer à la forme élargie d'entreprise criminelle commune, dans la mesure où il comporte de nombreuses allégations tirées de sa position d'autorité, des propos qu'il a tenus aux assaillants, de la planification de nombreuses attaques auxquelles il a participé ou dont il a été témoin.

11. Dès lors, la Chambre juge mal fondé le grief tiré de l'articulation de la *mens rea* d'entreprise criminelle commune dans l'acte d'accusation.

Assassinat constitutif de crime contre l'humanité

12. Le crime contre l'humanité doit avoir été commis dans le cadre d'une attaque généralisée et systématique dirigée contre une population civile pour un motif discriminatoire[12]. Quoiqu'il ne soit pas nécessaire que l'acte ait été commis au même lieu et au même moment que l'attaque ou qu'il comporte toutes les caractéristiques de l'attaque, il doit cependant, de par ses caractéristiques, ses objectifs, sa nature ou ses

[8] Par ailleurs, les paragraphes 23 et 25 de l'acte d'accusation mentionnent les faits substantiels qui sont pertinents au regard de l'intention spécifique de commettre le génocide ou d'inciter à la perpétration de crimes, et qui permettent également d'établir le dol général des crimes sous-jacents.

[9] *Vasilejevic*, arrêt, para. 101.

[10] *Vasilejevic*, arrêt, para. 101.

[11] *Vasilejevic*, arrêt, para. 101.

[12] *Semanza*, jugement, para. 326.

share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence, objectively form part of the discriminatory attack[13].

13. Responding to the Chamber's decision concerning Count 4 (Murder as a crime Against Humanity), the Prosecutor amended the indictment to add an allegation at paragraph 66 incorporating the previous 65 paragraphs of the indictment into the charge of murder. This incorporated into the murder count the general allegations of widespread or systematic attacks directed against a civilian population and the specific allegations of particular massacres and preparatory acts contained in paragraphs 1 through 65 of the Indictment.

14. In the Chamber's view, having read each paragraph in the context of the other paragraphs in the indictment, the allegations contained Count 4, charging murder, are adequately connected to the widespread and systematic attack.

15. Paragraphs 67 and 68 of the second amended indictment refer to the killing of a Tutsi gendarme at the barracks of the Gendarmerie in Gikongoro Town. Mindful that the murder as a crime against humanity must be committed against the civilian population, the Chamber ordered the Prosecutor to plead that the gendarme was part of a civilian population. In response to the Chamber's order, the Prosecution added the following paragraph : "The Killing (*sic*) of the Tutsi gendarme was part of the campaign against Tutsi civilians." In the Chamber's view, this is a conclusory allegation that does not plead the material facts indicating how the murder of the gendarme formed part of the civilian population. Nonetheless, the Chamber notes that other paragraphs in the indictment concerning the massacres forming the widespread and systematic attack refer to the Accused's orders to identify the number of Tutsis in the gendarmerie (paragraph 37) as well as instructions to soldiers to shoot attackers who displayed cowardice during attacks (paragraph 31). As such, the Chamber will reserve its finding on whether to disregard or dismiss the allegation due to vagueness or lack of jurisdiction after hearing the evidence adduced at trial and further legal arguments of the parties.

16. Paragraphs 69 and 70 of the second amended indictment refer to the alleged murder by the Accused of Gasana, a deputy prosecutor, as well as Monique Munyana, a primary school teacher, and her child on or about 21 April 1994 near Kaduha Trading Centre. Paragraphs 27 through 34 of the second amended Indictment, which are incorporated in the Count 4, refer to multiple attacks against Tutsi civilians culminating in the massacre of thousands of civilians at Kaduha parish on or around 21 April 1994. Given the temporal and geographic proximity of the three murders to the broader attack at Kaduha parish, the alleged participation of the Accused in both events, the allegation that thousands of mostly Tutsi civilians were killed in the area, the apparent civilian status of the three murder victims, the Chamber is satisfied that the

[13] *Semanza*, Judgement (TC), para. 326.

effets, s'inscrire objectivement dans le cadre d'une attaque fondée sur un motif de discrimination[13].

13. Comme suite à la décision de la Chambre touchant le chef 4, (assassinat constitutif de crime contre l'humanité), le Procureur a modifié l'acte d'accusation, y ajoutant une allégation au paragraphe 66, rangeant les 65 anciens paragraphes sous le chef d'accusation d'assassinat. Ainsi, les allégations générales d'attaques généralisées ou systématiques dirigées contre une population civile et les allégations spécifiques de massacres particuliers et d'actes préparatoires visés aux paragraphes 1 à 65 de l'acte d'accusation ont été rattachées au chef d'assassinat.

14. Ayant rapproché chaque paragraphe des autres paragraphes de l'acte d'accusation, la Chambre est d'avis que les allégations d'assassinat portées au chef 4 sont convenablement liées à l'attaque généralisée et systématique.

15. Les paragraphes 67 et 68 du deuxième acte d'accusation modifié évoquent l'assassinat d'un gendarme tutsi à la caserne de la gendarmerie de Gikongoro. Sachant que l'assassinat constitutif de crime contre l'humanité est un acte dirigé contre une population civile, la Chambre a ordonné au Procureur de faire valoir que le gendarme assassiné appartenait à la population civile. En exécution de l'ordonnance de la Chambre, le Procureur a ajouté le paragraphe suivant : «Le meurtre du gendarme Tutsi faisait partie de la campagne contre les civils Tutsis». De l'avis de la Chambre, il s'agit là d'une allégation abstraite qui n'articule pas les faits substantiels indiquant en quoi le meurtre du gendarme s'inscrit dans le cadre d'une attaque dirigée contre la population civile. Néanmoins, la Chambre relève que d'autres paragraphes de l'acte d'accusation consacrés aux massacres s'inscrivant dans l'attaque généralisée et systématique évoquent l'ordre donné par l'accusé de recenser les Tutsis de la gendarmerie (paragraphe 37) et les instructions données aux soldats de tirer sur les assaillants qui faisaient preuve de lâcheté pendant les attaques (paragraphe 31). Á ce propos, la Chambre surseoira à se prononcer quant à savoir s'il y a lieu de méconnaître les allégations du Procureur ou de les rejeter motif pris de défaut de précision ou de compétence, en attendant d'être saisie par des parties d'éléments de preuve et de tous autres arguments de droit pendant le procès.

16. Les paragraphes 69 et 70 du deuxième acte d'accusation modifié évoquent le meurtre que l'accusé aurait commis sur la personne de Gasana, substitut du Procureur, de Monique Munyana, institutrice, et de l'enfant de cette dernière. Tous auraient été tués le 21 avril 1994 ou vers cette date, à proximité du centre commercial de Kaduha. Les paragraphes 27 à 34 du second acte d'accusation modifié, qui sont rattachés au chef 4, évoquent les multiples attaques lancées contre des civils Tutsis et qui ont débouché sur le massacre de milliers de civils à la paroisse de Kaduha le 21 avril 1994 ou vers cette date. Étant donné la proximité temporelle et géographique entre les trois meurtres susmentionnés et l'attaque d'envergure lancée contre la paroisse de Kaduha, la participation alléguée de l'accusé aux deux faits, l'allégation selon laquelle des milliers de personnes, essentiellement des civils tutsis, ont été tuées dans cette localité, l'apparente qualité de civils des trois victimes des meurtres susmentionnés, la Chambre considère que l'acte d'accusation spécifie convenablement que ces trois

[13] *Ibid.*

Indictment adequately pleads that these three individual murders objectively form part of the discriminatory attack.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion.

Arusha, 14 July 2004

[Signed] : Jai Ram Reddy; Sergei Alekseevich Egorov; Emile Short

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Decision on Defence Motion to disqualify Expert Witness, Alison Des Forges, and to Exclude her Report 14 July 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Jai Ram Reddy, Presiding; Sergei Alekseevich Egorov; Emile Short

Aloys Simba – exclusion of the expert report – disqualification of the expert witness – motion denied

International Instruments Cited : Rules of Procedure and Evidence, Rule 95 – Universal Declaration of Human Rights, Art. 12

International Case Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Nahimana Akayesu, *Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998 (ICTR-96-4-T*, Reports 1998*, p. 32)*

National Case Cited :

Supreme Court of Canada, Mugesera v. Canada (Minister of Citizenship and Immigration)*, 28 June 2005, [2005] 2 S.C.R. 91, 2005 SCC 39*

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

SITTING as Trial Chamber I, composed of Judge Jai Ram Reddy, presiding, Judge Sergei Alekseevich Egorov, and Judge Emile Short;

meurtres ont été objectivement commis dans le cadre de l'attaque inspirée par un motif de discrimination.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la défense

[Signé] : Jai Ram Reddy; Sergei Alekseevich Egorov; Emile Short

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Décision relative à la requête de la défense en irrecevabilité du rapport d'expertise et en disqualification du témoin expert Alison Des Forges 14 juillet 2004 (ICTR-01-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juges : Jai Ram Reddy, Président de Chambre; Sergei Alekseevich Egorov; Emile Short

Aloys Simba – irrecevabilité du rapport d'expertise – disqualification du témoin expert – requête rejetée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 95 – Déclaration universelle des droits de l'homme, art 12

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Nahimana Akayesu, *Décision faisant suite à une requête de la défense aux fins de comparution d'un accusé en tant que témoin expert, 9 mars 1998 (ICTR-96-4-T*, Recueil 1998*, p. 33)*

Jurisprudence nationale citée :

Cour Suprême du Canada, Mugesera c. Canada (Ministre de la Citoyenneté et de l'Immigration), *28 juin 2005, [2005] 2 R.C.S. 100, 2005 CSC 40*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Jai Ram Reddy, Président de Chambre, Alekseevich Egorov et Emile Short,

BEING SEIZED OF the "Requête en irrecevabilité du rapport d'expertise et en disqualification de l'expert, Alison Des Forges", filed on 26 May 2004;

CONSIDERING the Prosecutor's Response, filed on 31 May 2004; the Defence Reply, filed on 7 June 2004, and the Corrigendum thereto, filed on 9 June 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Indictment against the Accused was confirmed on 8 January 2002. The amended Indictment was filed on 27 January 2004, the second amended Indictment was filed on 10 May 2004, and the trial is scheduled to commence on 16 August 2004. On 5 April 2004, the Prosecution filed a motion for the admission of the transcripts and exhibits of Alison Des Forges's testimony in *Prosecutor v. Akayesu*.

SUBMISSIONS

2. Regarding exclusion of the expert report, the Defence submits that it should be excluded under Rule 95 because the report contains information from protected Prosecution witnesses and confidential correspondence written by the Accused. The use of the information from protected witnesses prejudices the presumption of innocence of the accused and the use of correspondence violates Article 12 of the Universal Declaration of Human Rights ("UDHR"). Finally, the Defence contends that the information in the report is unreliable due to the lack of corroboration or adversarial debate, and proposes that the information in the report was furnished by political enemies of the Accused. Regarding the disqualification of Dr. Des Forges, the Defence submits that Dr. Des Forges does not fulfil the definition of an expert witness from the *Akayesu* case because she is not impartial and her testimony is not technical in nature. The Defence underscores that her impartiality has already been challenged in *Mugesera v. Canada*.

3. The Prosecution submits that the Defence motion is premature because the information has not actually been offered into evidence, nor has its relevance been challenged. The Prosecution argues that the Defence is precluded from arguing that the evidence is inadmissible on the grounds that it was "obtained by methods which cast substantial doubt on its reliability" because the Defence has not raised these objections. Therefore, the Defence may only argue that the evidence's "admission is antithetical to, and would seriously damage, the integrity of the proceedings" and has not met its burden in doing so. In addition, the Prosecution submits that excluding the evidence without hearing Dr. Des Forges would be a "serious breach of justice". The argument that the report contains information supplied by political enemies of the accused is merely speculative. The Prosecution contends that the *Mugesera* case cannot be a basis to discredit the report because Dr. Des Forges has not yet testified, and that the report contains helpful, technical information. The Prosecution further submits that it has not disclosed information relating to protected witnesses. The Defence responds to this statement by saying that if the Prosecution did not give

ÉTANT SAISI de la Requête en irrecevabilité du rapport d'expertise et en disqualification de l'expert Alison Des Forges, déposée le 26 mai 2004,

VU la réponse produite par le Procureur le 31 mai 2004, la réplique, déposée par la défense le 7 juin 2004, et le rectificatif y relatif, déposé le 9 juin 2004,

STATUANT SUR LA REQUÊTE

INTRODUCTION

1. L'acte d'accusation dressé contre l'accusé a été confirmé le 8 janvier 2002. L'acte d'accusation modifié a été déposé le 27 janvier 2004, le deuxième acte d'accusation modifié l'a été le 10 mai 2004, le procès devant s'ouvrir le 16 août 2004. Le 5 avril 2004, le Procureur a introduit une requête aux fins d'admission des procès-verbaux et pièces à conviction relatifs à la déposition d'Alison Des Forges dans l'affaire *le Procureur c. Akayesu.*

ARGUMENTS

2. S'agissant du rapport d'expert, la défense fait valoir qu'il doit être déclaré irrecevable en vertu de l'article 95 du Règlement de procédure et de preuve parce qu'il contient des informations émanant de témoins à charge protégés et la correspondance confidentielle de l'accusé. L'utilisation d'informations obtenues de témoins protégés porte atteinte au droit de l'accusé à la présomption d'innocence et l'exploitation de sa correspondance viole l'article 12 de la Déclaration universelle des droits de l'homme. Enfin, la défense soutient que la teneur du rapport n'est pas fiable faute de corroboration et contradiction et que les informations figurant dans le rapport ont été fournies par des ennemis politiques de l'accusé. Pour ce qui est de la disqualification de l'expert Alison Des Forges, la défense fait valoir que celle-ci ne satisfait pas la qualité de témoin expert définie dans l'affaire *Akayesu* car elle n'est pas impartiale, et sa déposition ne revêt pas un caractère technique. La défense souligne que son impartialité a déjà été contestée dans l'affaire *Mugesera c. le Canada*.

3. Le Procureur trouve prématurée la requête de la défense parce qu'en fait, les informations en cause n'ont pas encore été produites en preuve et leur pertinence n'a pas été contestée. Il fait valoir que celle-ci ne peut pas invoquer l'irrecevabilité de l'élément de preuve «au motif que les procédés par lesquels il a été obtenu entament fortement sa fiabilité», faute d'avoir soulevé d'objections en ce sens. Dès lors, la défense n'est recevable qu'à prétendre que l'admission de cet élément de preuve «irait à l'encontre de l'intégrité de la procédure et lui porterait gravement atteinte», ce dont elle n'a pas rapporté la preuve. Par ailleurs, selon le Procureur, exclure cet élément de preuve sans avoir au préalable entendu l'expert Des Forges, constituerait une «grave atteinte à la justice». L'argument tiré de ce que le rapport contient des informations fournies par des ennemis politiques de l'accusé n'est que pure spéculation. Pour le Procureur, l'affaire *Mugesera* n'autorise pas à écarter le rapport en question car le témoin Des Forges n'a pas encore déposé et le rapport comporte d'utiles informations d'ordre technique. Au surplus, ledit rapport ne divulgue pas d'informations intéressant des témoins protégés, à quoi la défense réplique que si le Procureur n'a

information about protected witnesses to Dr. Des Forges, then she acquired that information through fraud or theft.

DELIBERATIONS

4. Rule 95 provides as follows :

> No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

5. In respect of the report, the expert witness's methodology in compiling the report is not known at present. These are arguments that may be made when the Prosecution seeks to enter the report into evidence, and the Defence can test the reliability of the report during cross-examination. As for the UDHR, it protects against "arbitrary" interferences with a person's correspondence, and does not apply in this case. In addition, the Defence's arguments alluding to the Accused's political enemies and fraud are highly speculative.

6. With respect to the disqualification of the witness, the Chamber recalls that an expert witness is one "whose testimony is intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field."[1] The witness is being called for her expertise as an historian. The Tribunal is not bound by the findings of the Canadian Court in *Mugesera v Canada*, just as it is not bound by previous Trial Chambers in this Tribunal who have found the witness to be an expert witness. The motion is premature and largely speculative in nature. The Defence has not shown how Rule 95 disallows the admission of the report or the witness.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 14 July 2004

[Signed] : Jai Ram Reddy, Presiding Judge; Sergei Alekseevich Egorov; Emile Short

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[1] *Akayesu*, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness (TC), 9 March 1998.

pas fourni les informations en cause au témoin Des Forges, celle-ci les a acquises par vol ou moyens frauduleux.

DÉLIBÉRATION

4. Aux termes de l'article 95 :

> N'est recevable aucun moyen de preuve obtenu par des procédés qui entament fortement sa fiabilité ou dont l'admission irait à l'encontre de l'intégrité de la procédure et lui porterait gravement atteinte.

5. Pour ce qui est du rapport, la méthodologie utilisée par le témoin expert pour l'établir reste à être déterminée. Les arguments avancés plus haut pourraient l'être lorsque le Procureur cherchera à verser ledit rapport au dossier, la défense pouvant éprouver la fiabilité du rapport lors du contre-interrogatoire. Quant à la Déclaration universelle des droits de l'homme, elle protège contre les immixtions «arbitraires» dans la correspondance d'un individu et ne trouve pas application en l'espèce. En outre, les arguments tirés des ennemis politiques de l'accusé et de la fraude relèvent de la spéculation.

6. S'agissant de la disqualification du témoin, la Chambre rappelle qu'un témoin expert est un témoin «dont le témoignage a pour but d'éclairer les juges sur des problèmes spécifiques d'ordre technique, requérant des connaissances particulières dans un domaine déterminé»[1]. Le témoin est cité en sa qualité d'historienne. Le Tribunal n'est pas lié par les conclusions de la juridiction canadienne en l'affaire *Mugesera c. le Canada* ni par la constatation des autres Chambres de première instance du Tribunal de céans que Des Forges a la qualité de témoin expert. La requête est prématurée et relève essentiellement de la spéculation. La Défense n'a pas prouvé en quoi l'article 95 du Règlement interdit d'admettre le rapport en cause ou d'entendre le témoin.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête.

Arusha, le 14 juillet 2004

[Signé] : Jai Ram Reddy; Sergei Alekseevich Egorov; Emile Short

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[1] Affaire *Akayesu*, Décision faisant suite à une requête de la défense aux fins de comparution d'un accusé en tant que témoin expert (Chambre de première instance), 9 mars 1998.

Decision on Prosecutor's Motion for Admission of Testimony of an Expert Witness 14 July 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Jai Ram Reddy, presiding; Sergei Alekseevich Egorov; Emile Short

Aloys Simba – admission of the testimony of an expert witness – test of relevance and probative value not satisfied – motion denied

International Instrument Cited : Rules of Procedure and Evidence, Rules 54, 73, 73 (A), 73 (E), 89 (C), 92 bis, *92* bis *(D) and 92* bis *(E)*

International Case Cited :

I.C.T.R. : Trial Chamber XXX, The Prosecutor v. Théoneste Bagosora, *Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 bis, 9 March 2004 (ICTR-96-7-XXX,* Reports 2004*, p. XXX)*

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

SITTING as Trial Chamber I, composed of Judge Jai Ram Reddy, presiding, Judge Sergei Alekseevich Egorov, and Judge Emile Short;

BEING SEIZED OF the "Prosecutor's Motion for Admission of Testimony of an Expert Witness", filed on 5 April 2004;

NOTING that to date the Defence has not responded to the motion and the five-day deadline for responses, pursuant to Rule 73 (E), has passed;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Indictment against the Accused was confirmed on 8 January 2002. The amended Indictment was filed on 27 January 2004, the second amended Indictment was filed on 10 May 2004, and the trial is scheduled to commence on 16 August 2004. On 26 May 2004, the Defence filed a motion for the disqualification of expert witness Alison Des Forges and the exclusion of her report.

Décision relative à la requête du Procureur tendant à voir déclarer recevable la déposition d'un témoin expert 14 juillet 2004 (ICTR-01-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juges : Jai Ram Reddy, Président de Chambre; Sergei Alekseevich Egorov; Emile Short

Aloys Simba – recevabilité de la déposition d'un témoin expert – critère de pertinence et de valeur probante non satisfait – requête rejetée

Instrument international cité : Règlement de procédure et de preuve, art. 54, 73, 73 (A), 73 (E), 89 (C), 92 bis, *92* bis *(D) et 92* bis *(E)*

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance XXX, Le Procureur c. Théoneste Bagosora, *Décision relative à la requête du Procureur en versement au dossier de déclarations de témoins par application de l'article 92* bis *du Règlement, 9 mars 2004, (ICTR-96-7-XXX,* Recueil 2004*, p. XXX)*

LE TRIBUNAL PÉNAL INTERNATONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Jai Ram Reddy, Président de Chambre, Sergei Alekseevich Egorov et Emile Short,

SAISI de la Requête du Procureur tendant à voir déclarer recevable la déposition d'un témoin expert, déposée le 5 avril 2004,

CONSIDÉRANT qu'à ce jour, la défense n'a pas répondu à la requête et que le délai de cinq jours fixé par l'article 73 (E) pour répondre a expiré,

STATUANT SUR LA REQUÊTE

INTRODUCTION

1. L'acte d'accusation dressé contre l'accusé a été confirmé le 8 janvier 2002. L'acte d'accusation modifié a été déposé le 27 janvier 2004, le second acte d'accusation modifié le 10 mai 2004, le procès devant en principe s'ouvrir le 16 août 2004. Le 26 mai 2004, la défense a introduit une requête en disqualification du témoin expert Alison Des Forges et en exclusion de son rapport.

SUBMISSIONS

2. The Prosecution seeks to admit into evidence the exhibits and transcript of the testimony of Alison des Forges in *Prosecutor v. Akayesu*, pursuant to Rules 54, 73 and 92 *bis* (D) and (E), which qualify as proof of a matter other than the acts and conduct of the Accused. This would save judicial time and is in the interests of justice, and the Prosecution undertakes to make the witness available for cross-examination.

DELIBERATIONS

3. Rules 54 and 73 (A) allow the Chamber to issue orders when appropriate. Rule 92 *bis* provides for the admission of written statements or transcripts in lieu of oral testimony where the evidence goes to proof of a matter other than the acts and conduct of the Accused as charged. Rule 92 *bis* (D) and (E) provide as follows :

> (D) A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.
>
> (E) Subject to any order of the Trial Chamber to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.

4. Rule 92 *bis* does not expressly exclude the possibility of its applicability to expert, as well as factual, witnesses; reference is made merely to "a witness". Although the qualification of a witness as an expert is usually preceded by a voir dire, the Chamber notes that Rule 92 *bis* was used in *Prosecutor v. Gacumbitsi* to admit the transcripts of the testimony of Alison Des Forges in *Akayesu*. However, both Akayesu and Gacumbitsi were *bourgmestres* and a substantial part of the witness's testimony in *Akayesu* dealt with the powers and role of a *bourgmestre*, which would not be relevant in this case.

5. Motions under Rule 92bis must also satisfy the test of relevance and probative value set out in Rule 89 (C)[1]. The Accused, Simba, is mentioned in the transcripts in one passing reference, merely as an example of the collaboration between the military, civilian and political spheres :

> In fact, it's remarkable the extent to which the civilian administration continues to function, in the areas that I have examined, in any case. But, for example, I have been told that in the prefecture of Gikongoro, that when the prefect called

[1] Bagosora, Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 *bis* (TC), 9 March 2004, para. 12.

ARGUMENTS

2. Le Procureur souhaite verser en preuve les pièces à conviction et le compte rendu de la déposition d'Alison Des Forges en l'affaire *Le Procureur c. Akayesu,* en vertu des articles 54, 73, et 92 *bis* (D) et (E) du Règlement qui tendent à prouver un point autre que les actes et le comportement de l'accusé. Cette approche permettra d'économiser le temps judiciaire et est de l'intérêt de la justice. Le Procureur promet que le témoin comparaîtra pour être soumis à un contre-interrogatoire.

DÉLIBÉRATION

3. Les articles 54 et 73 (A) du Règlement autorisent la Chambre à rendre des ordonnances, le cas échéant. L'article 92 *bis* prévoit l'admission de déclarations écrites, en lieu et place d'un témoignage oral, dès lors que celles-ci permettent de démontrer un point autre que les actes et le comportement de l'accusé tels qu'allégués. L'article 92 *bis* (D) et (E) porte ce qui suit :

> D) La Chambre peut verser au dossier le compte rendu d'un témoignage entendu dans le cadre de procédures menées devant le Tribunal et qui tend à prouver un point autre que les actes et le comportement de l'accusé.
>
> E) Sous réserve de toute ordonnance contraire, une partie qui entend soumettre une déclaration écrite ou le compte rendu d'un témoignage le notifie quatorze jours à l'avance à la partie adverse, qui peut s'y opposer dans un délai de sept jours. La Chambre de première instance décide, après audition des parties, s'il convient de verser la déclaration ou le compte rendu au dossier, en tout ou partie, et s'il convient d'ordonner que le témoin comparaisse pour être soumis à un contre-interrogatoire.

4. L'article 92 *bis* n'exclut pas expressément que ses dispositions puissent s'appliquer à la déposition d'un expert tout autant qu'à celle d'un témoin de faits même s'il ne parle que d'«un témoin». Même si la qualité d'expert s'apprécie d'ordinaire à la faveur de l'institution dite de *voir dire*, la Chambre relève que l'article 92 *bis* a été invoqué dans l'espèce *Le Procureur c. Gacumbitsi* pour déclarer recevable le compte rendu de la déposition d'Alison Des Forges en l'affaire *Akayesu.* Cependant, Akayesu et Gacumbitsi étaient tous deux bourgmestres et une partie non négligeable de la déposition du témoin dans l'affaire *Akayesu* avait trait aux pouvoirs et au rôle du *bourgmestre,* lesquels sont sans intérêt en l'espèce.

5. Les requêtes tirant fondement de l'article 92 *bis* doivent également satisfaire au critère de la pertinence et de la valeur probante énoncé à l'article 89 (C)[1]. Les procès-verbaux mentionnaient incidemment le nom de l'accusé Simba rien que pour illustrer la collaboration entre les sphères militaire, civile et politique :

> En fait, cette administration a continué à fonctionner de manière admirable, en particulier dans les zones que j'ai eu à parcourir. Mais, par exemple, l'on m'a

[1] Affaire *Bagosora*, Décision relative à la requête du Procureur en versement au dossier de déclarations de témoins par application de l'article 92 *bis* du Règlement (Chambre de première instance), 9 mars 2004, para. 12.

> a meeting of the – the prefectural security council, that he shared precedence over the session with Colonel Asimba (phonetic spelling), a military figure, retired military, but still in?? a very important military leader. And I think that that's not an inaccurate symbol for the kind of collaboration that I would see here. In fact, the remarkable?? one of the remarkable characteristics is the extent of collaboration between military, civilian and political. And it is this very collaboration which allows the reaching out to encompass such a significant part of the population[2].

6. It is difficult to see how the testimony would be relevant in this case, and the Prosecution has not explained why it wishes to adduce this evidence, which was given seven years ago. The Chamber is not convinced that, in a case of this nature involving a single Accused, the broad historical evidence offered by Alison des Forges has any value in the proving of the charges against the Accused. Therefore, the evidence does not satisfy the criteria of Rule 89 (C) for admission.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 14 July 2004

[Signed] : Jai Ram Reddy; Sergei Alekseevich Egorov; Emile Short

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[2] Akayesu, Transcript of 18 February 1997, p. 142.

> laissé entendre que dans la Préfecture de Gikongoro, lorsque le Préfet a convoqué une réunion du conseil de sécurité préfectoral, il assurait la présidence avec le colonel Simba (phonétique) qui était un officier à la retraite, mais il n'en était pas moins un militaire. Et je crois que ce n'était… c'était un symbole tout à fait parlant qui illustre bien le type de collaboration entre l'administration civile et l'administration militaire dont j'ai parlée tout à l'heure. En fait, un des éléments caractéristiques de ce phénomène est que c'est cette collaboration qui a permis de toucher, d'accéder à toute la population de ce pays à ce moment-là[2].

6. On voit mal en quoi cette disposition serait pertinente en l'espèce et le Procureur n'a pas davantage expliqué pourquoi il voudrait verser au dossier cette disposition faite il y a sept années. La Chambre n'est pas convaincue que dans une cause comme la présente qui n'intéresse qu'un seul accusé, les faits historiques d'ordre général évoqués par Alison Des Forges soient de nature à permettre de rapporter la preuve des charges retenues contre l'accusé. Dès lors, l'élément de preuve ne satisfait pas des critères de recevabilité énoncés à l'article 89 (C).

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête.

Fait à Arusha, le 14 juillet 2004

[Signé] : Jai Ram Reddy; Sergei Alekseevich Egorov; Emile Short

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[2] Affaire *Akayesu*, procès-verbal du 18 février 1997, p. 142.

Order of the Presiding Judge to Assign Judges 23 July 2004 (ICTR-01-76-AR72.3)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge

Aloys Simba – Appeals Chamber – judges – composition

International Instruments Cited : Document IT/222 of the International Criminal Tribunal for the former Yugoslavia – Statute, Art. 11 (3) and 13 (4)

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Requête en extrême urgence de la défense en vue d'obtenir une prorogation des délais pour le dépôt de son recours en appel contre la décision en date du 14 juillet 2004 rendue par la première chambre du TPIR intitulée 'Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment,'" filed by counsel for Aloys Simba on 21 July 2004;

CONSIDERING the composition of the Appeals Chamber of the International Tribunal set out in Document IT/222 of the International Criminal Tribunal for the former Yugoslavia, dated 17 November 2003;

NOTING Articles 11 (3) and 13 (4) of the Statute of the International Tribunal;

FOR THE FOREGOING REASONS**,**

ORDER that, in the case of *Aloys Simba v. Prosecutor,* Case N° ICTR-01-76-AR72.3, the Appeals Chamber be composed as follows :

Judge Theodor Meron
Judge Florence Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca.

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

Done this 23rd day of July 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron, Presiding Judge of the Appeals Chamber

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Decision on Aloys Simba's Motion For an Extension of Time 27 July 2004 (ICTR-01-76-AR72.3)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Florence Ndepele Mwachande Mumba; Mehmet Güney; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Aloys Simba – extension of time – working language of Defence Counsels, translation – good cause – motion granted in part

International Instrument Cited : Rules of Procedure and Evidence, Rules 116 (A) and 116 (B)

International Case Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Aloys Simba, *Decision on Aloys Simba's Extremely Urgent Motion for an Extension of Time, 14 June 2004, (ICTR-01-76-AR72.2,* Reports 2004*, p. XXX)*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "International Tribunal", respectively),

BEING SEISED OF the "Requête en extrême urgence de la défense en vue d'obtenir une prorogation des délais pour le dépôt de son recours en appel contre la décision en date du 14 juillet 2004 rendue par la première chambre du TPIR intitulée 'Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment,' " filed by counsel for Aloys Simba on 21 July 2004 ("Motion");

NOTING Trial Chamber I's "Decision on Defence's Preliminary Motion Challenging the Second Amended Indictment" dated 14 July 2004 ("Impugned Decision");

CONSIDERING that the Motion seeks an extension of time within which to file an appeal following receipt of the French translation of the Impugned Decision, on the basis that the accused and his counsel are proficient in French;

CONSIDERING, however, that at least one member of the Appellant's defence team is proficient in English[1];

[1] See *Simba v. Prosecutor*, N° ICTR-01-76-AR72.2, Decision on Aloys Simba's Extremely Urgent Motion for an Extension of Time, 11 June 2004, p. 2.

Décision relative à la requête d'Aloys Simba en prorogation des délais 27 juillet 2004 (ICTR-01-76-AR72.3)

(Original : Anglais)

Chambre d'appel

Juges : Theodor Meron, Président de Chambre; Florence Ndepele Mwachande Mumba; Mehmet Güney; Wolgang Schomburg; Inès Monica Weinberg de Roca

Aloys Simba – prorogation des délais – langue de travail des conseils de l'accusé, traduction – motif valable – requête acceptée en partie

Instrument international cité : Règlement de procédure et de preuve, art. 116 (A) et 116 (B)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Aloys Simba, *Décision relative à la requête en extrême urgence aux fins d'obtenir une prorogation de délais, 14 juin 2004 (ICTR-2001-76-AR72.2,* Recueil 2004*, p. XXX)*

LA CHAMBRE D'APPEL du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins, entre le 1er janvier et le 31 décembre 1994 («Chambre d'appel» et le «Tribunal international», respectivement),

SAISIE de la Requête en extrême urgence de la défense en vue d'obtenir une prorogation de délais pour le dépôt de son recours en appel contre la décision en date du 14 juillet 2004, rendue par la première Chambre du TPIR, intitulée «Décision relative à l'exception préjudicielle de la défense contestant le deuxième acte d'accusation modifié», déposée par le conseil d'Aloys Simba le 21 juillet 2004, «la Requête»,

VU la Décision de la Chambre de première instance I relative à l'exception préjudicielle soulevée par la défense contestant le deuxième acte d'accusation modifié, en date du 14 juillet 2004. (la «Décision contestée»),

ATTENDU que la requête tend à voir proroger le délai de recours de sorte qu'il coure à compter de la réception du texte français de la décision contestée, au motif que l'accusé et son conseil s'expriment en français,

ATTENDU, cependant, qu'au moins un membre de l'équipe de la défense de l'appelant comprend l'anglais[1],

[1] Voir *Le Procureur c. Aloys Simba*, affaire n° ICTR-01-76-AR72.2, Décision relative à la requête en extrême urgence aux fins d'obtenir une prorogation de délais, 11 juin 2004, p. 2.

CONSIDERING that, to the extent that the Appellant or any members of his defence team are not proficient in English, the essential elements of the Impugned Decision may be effectively conveyed to them without waiting for an official translation;

CONSIDERING that it does not appear that an official translation is necessary to "the ability of the accused to make full answer and defence" under Rule 116 (B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules");

CONSIDERING, however, that the Appellant's English-speaking counsel should be afforded a brief extension of time to consult with French-speaking counsel or the Appellant with regard to the contents of the Impugned Decision;

CONSIDERING that Rule 116 (A) of the Rules permits the Appeals Chamber to grant a motion to extend a time limit "upon a showing of good cause";

CONSIDERING that, in light of Rule 116 (B) of the Rules, good cause has been shown for granting an extension of time pursuant to Rule 116 (A) of the Rules;

FOR THE FOREGOING REASONS,

HEREBY GRANTS the Motion in part;

ORDERS that Aloys Simba's appeal may be filed within ten days of receipt the French translation of the Impugned Decision; and

DIRECTS the Registrar to ensure that the French translation of the Impugned Decision is forwarded without delay to the accused, if he has not already done so.

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

Done this 27th day of July 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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ATTENDU que, à supposer que l'appelant ou tel ou tel membre de son équipe ne comprennent pas l'anglais, l'essence de la décision contestée peut lui être utilement expliquée sans qu'il faille en attendre le texte officiellement traduit,

ATTENDU qu'il n'apparaît pas que l'accusé doive disposer d'une version officiellement traduite pour «pouvoir répondre et se défendre correctement» au sens de l'article 116 (B) du Règlement de procédure et de preuve du Tribunal international (le «Règlement»),

ATTENDU toutefois qu'il y a lieu de ménager au conseil anglophone de l'accusé un court délai supplémentaire de sorte qu'il puisse s'entretenir avec son co-conseil francophone ou l'appelant de la teneur de la décision contestée,

ATTENDU que l'article 116 (A) du Règlement autorise la Chambre d'appel à faire droit à une demande de report de délais «si elle considère que des motifs valables le justifient»,

ATTENDU qu'au regard de l'article 116 (B), des motifs valables justifient la prorogation des délais en vertu de l'article 116 (A) du Règlement,

PAR CES MOTIFS,

FAIT DROIT à la requête en partie,

DÉCIDE qu'Aloys Simba pourra faire recours dans les dix jours de la réception de la version française de la décision contestée; et

CHARGE le Greffier, s'il ne l'a pas encore fait, de veiller à faire tenir sans retard à l'accusé la version française de la décision contestée.

Rendue en anglais et en français, le texte anglais faisant foi.

Rendue le 27 juillet 2004, à La Haye (Pays-Bas)

[Signé] : Theodor Meron

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Decision on interlocutory appeal regarding temporal jurisdiction 29 July 2004 (ICTR-01-76-AR72.2)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Florence Ndepele Mwachande Mumba; Mehmet Güney; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Aloys Simba – interlocutory appeal – ratione temporis *jurisdiction of the Tribunal – indictment – proof of elements of the crimes by inference from acts falling outside the temporal scope of the Tribunal's jurisdiction – power of the Trail Chamber to evaluate evidence – appeal denied*

International Instruments Cited : Rules of Procedure and Evidence, Rules 72 (E), 89 (C) and 108 – Statute, Art. 7

International Case Cited :

I.C.T.R. : Appeals Chamber, The Prosecutor v. Hassan Ngeze and Ferdinand Nahimana, *Decision on the Interlocutory Appeals, 5 September 2000 (ICTR-96-11-AR72,* Reports 2000*, p. 1957)*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively);

BEING SEIZED OF the "Notice of Appeal of Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment Issued in English by Trial Chamber I, 6 May 2004, pursuant to Article 108 (RPE)", filed by Aloys Simba ("Appellant") on 14 May 2004 ("Appeal");

NOTING the "Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment", rendered by Trial Chamber I of the Tribunal on 6 May 2004 ("Impugned Decision");

NOTING the "Decision on Validity of Appeal Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence", issued by a Bench of the Appeals Chamber on 4 June 2004, allowing the Appeal to proceed as to the issue of temporal jurisdiction of the Tribunal;

NOTING the "Supplemental Defence Brief in Support of Appellant's Third Ground (Tribunal's Lack of Temporal Jurisdiction) in Notice of Appeal, Filed 14 May 2004", filed on 17 June 2004;

NOTING the "Prosecutor's Response to the Defence Brief in Support of Appellant's Third Ground (Tribunal's Lack of Temporal Jurisdiction) in Notice of Appeal

Filed on 14 May 2004", filed on 18 June 2004 ("Prosecutor's Response"), in which the Prosecutor requests the dismissal of the Appeal;

NOTING that the Appellant did not reply to the Prosecutor's Response;

NOTING the Appellant's submission that in the Impugned Decision the Trial Chamber indicated that the Prosecution may use allegations outside the temporal jurisdiction of the Tribunal "to draw inferences as to intent or other elements of the crimes alleged to have been committed within the temporal jurisdiction" and that this, in the Appellant's view, violates his right to be charged only for conduct within the Tribunal's temporal jurisdiction;[1]

NOTING the Appellant's request for an order to exclude from the indictment against him allegations based on events outside the temporal jurisdiction of the Tribunal;

CONSIDERING that Article 7 of the Statute of the Tribunal delimits the scope of the temporal jurisdiction of the Tribunal as the period between 1 January and 31 December 1994;

CONSIDERING, therefore, that no one may be indicted for a crime that was committed outside the prescribed jurisdictional scope[2];

CONSIDERING, however, that Article 7 of the Statute of the Tribunal does not preclude inclusion in an indictment of information or allegations relating to events falling outside the temporal jurisdiction of the Tribunal, provided that all of the crimes charged against the accused in the indictment are alleged to have been committed within the temporal jurisdiction period[3];

NOTING that in the present case, the indictment charges the Appellant with crimes alleged to have been committed within the temporal scope of the Tribunal's jurisdiction, while also mentioning events in which the Appellant allegedly took part which predate the temporal jurisdiction of the Tribunal[4];

CONSIDERING that the Prosecution may seek to prove elements of the charged crimes by inference from acts falling outside the temporal scope of the Tribunal's jurisdiction;[5]

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[1] Appeal, para. 13.

[2] *Ngeze and Nahimana v. Prosecutor*, Case N° ICTR-96-11-AR72, Decision on the Interlocutory Appeals, 5 September 2000, p. 6 ("Ngeze and Nahimana").

[3] See Decision on the Interlocutory Appeals, p. 6.

[4] See Amended Indictment Pursuant to 6 May 2004 Decision.

[5] Judge Shahabuddeen explained this point in his Separate Opinion in *Ngeze and Nahimana*, pp. 4-5 (internal citation omitted) :

The prosecution has to prove that all the legal elements of a crime were present at the time of commission of the crime, that is to say, at the time within the mandate year when the crime is alleged to have been committed. However, there is no reason why the evidence of their existence at that point of time cannot (in some cases, at any rate) include evidence deriving from a time prior to the commission of the crimes charged and, in particular, prior to the commencement of the mandate year. Prior matters can ground a finding of the present existence of a fact, in the sense that from one fact a reasonable inference may sometimes be made that another fact also existed.

…

FINDING that the Trial Chamber's impugned statement that the references in the indictment to events which allegedly took place prior to 1994 "provide a context or background and may be a basis on which to draw inferences as to intent or other elements of the crimes alleged to have been committed within the temporal jurisdiction" correctly reflects the law of the Tribunal;

NOTING that it will be for the Trial Chamber during the trial to decide whether to admit evidence relating to events falling outside the temporal jurisdiction of the Tribunal in accordance with Rule 89 (C) of the Rules of Procedure and Evidence of the Tribunal;

FOR THE FOREGOING REASONS,

HEREBY DISMISSES the Appeal in its entirety.

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

Dated this 29th day of July 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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If, for example, a man was charged with a crime committed on a certain date, it would be necessary … for the prosecution to prove, as an element of the crime, that on that date he had the intent to commit the crime. But the evidence that on that date he had that intent could well derive from an earlier time. It may be that on a previous occasion he did acts or used words showing that he entertained feelings of enmity for the victim or that he even intended to commit the particular crime. A reasonable inference could, in some cases, be drawn that the intent so shown was present at the time of commission of the crime. In the result, the prosecution could prove that, at the actual time of the crime, the accused had the necessary intent, though the proof derived from an earlier time.

…

This reasoning has to be applied to the temporal framework of the Statute : the evidence of a required element could come from a time anterior to the mandate year, but what that evidence would prove was that, at the point of time within the mandate year when the crime was allegedly committed, the required element was present.

Order for Transfer of Witnesses (Pursuant to Rule 90 bis *of the Rules of Procedure and Evidence) 4 August 2004 (ICTR-2001-76-I)*

(Original : english)

Trial chamber I

Judge : Dennis C. M. Byron

Aloys Simba – transfer of detained witnesses – Rwanda

International Instrument Cited : Rules of Procedure and Evidence, Rules 28, 90 bis, *90* bis *(A), 90* bis *(B), 90* bis *(B) (i) and 90* bis *(ii)*

International Case Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Emmanuel Ndindabahizi, *Order for Transfer of Witness CGC (Rule 90bis), 15 September 2003 (ICTR-01-71)*

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

SITTING as Trial Chamber I, composed of Judge Dennis C. M. Byron, designated in accordance with Rule 28 of the Rules of Procedure and Evidence (the "Rules");

BEING SEIZED of the "Prosecutor's Request for the Transfer of Detained Witnesses Pursuant to Rule 90 *bis* of the Rules of Procedure and Evidence", filed on 2 August 2004;

HEREBY DECIDES the motion.

1. Pursuant to Rule 90 *bis* (A) of the Rules "[a]ny detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Unit of the Tribunal, conditional on his return within the period decided by the Tribunal". Rule 90 *bis* (B) requires prior verification of two conditions for such an order :

> (i) The presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;
>
> (ii) The transfer of the witness does not extend the period of his detention as foreseen by the requested State.

2. The Prosecution moves the Trial Chamber for an order authorizing the transfer of fourteen of its witnesses known by the pseudonyms KDD, KEC, KSD, XXG, XXI, YA, KSQ, KEC, YH, KEI, YC, YG, ANX and YI, currently detained in Rwanda. In relation to the requirements of Rule 90 *bis* (B) (i), the Prosecutor indicates that he has taken necessary steps to ensure that the presence of these witnesses is not required for any criminal proceedings in Rwanda during the period the witnesses are required to be present at the

Ordre de transfèrement de témoins (Par application de l'article 90 bis *du Règlement de procédure et de preuve) 4 août 2004 (ICTR-2001-76-I)*

(Original : Anglais)

Chambre de première instance I

Juge : Dennis C. M. Byron

Aloys Simba – transfèrement de témoins détenus – Rwanda

Instrument international cité : Règlement de procédure et de preuve, art. 28, 90 bis, *90* bis *(A), 90* bis *(B), 90* bis *(B) (i) et 90* bis *(ii)*

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Emmanuel Ndindabahizi*, ordonnance de transfert du témoin CGC (art. 90* bis*), 15 septembre 2003 (ICTR-01-71)*

Le Tribunal pénal international pour le Rwanda (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, en la personne du juge Dennis C. M. Byron, désigné conformément à l'article 28 du Règlement de procédure et de preuve (le «Règlement»),

SAISI de la requête du Procureur tendant à voir délivrer un ordre de transfèrement de témoins détenus par application de l'article 90 *bis* du Règlement de procédure et de preuve, déposée le 2 août 2004,

STATUANT SUR LA REQUÊTE.

1. Aux termes de l'article 90 *bis* (A) du Règlement, «toute personne détenue dont la comparution personnelle en qualité de témoin est ordonnée par le Tribunal sera transférée temporairement au quartier pénitentiaire relevant du Tribunal, sous condition de son retour au terme du délai fixé par le Tribunal». Aux termes de l'article 90 *bis* (B), l'ordre de transfert ne peut être délivré qu'après vérification préalable de la réunion des conditions suivantes :

> i) La présence du témoin détenu n'est pas nécessaire dans une procédure pénale en cours sur le territoire de l'État requis pour la période durant laquelle elle est sollicitée par le Tribunal;
>
> ii) Son transfert n'est pas susceptible de prolonger la durée de sa détention telle que prévue par l'État requis.

2. Le Procureur demande à la Chambre d'ordonner le transfèrement de 14 témoins à charge désignés par les pseudonymes KDD, KEC, KSD, XXG, XXI, YA, KSQ, KEC, YH, KEI, YC, YG, ANX et YI, détenus au Rwanda. Ainsi que l'exige l'article 90 *bis* (B) (i) et (ii), le Procureur fait valoir que toutes les dispositions ont été prises pour s'assurer que la présence des témoins ne serait pas nécessaire dans une procédure pénale pendant la période au cours de laquelle leur présence est sollicitée par

Tribunal as prosecution witnesses[1]. Furthermore, relating to the requirement of Rule 90 *bis* (B) (ii), the Prosecutor notes that "it is averred that the transfer of the witnesses will not extend the period of his detention, foreseen by the Republic of Rwanda"[2].

3. The Chamber recalls that the Prosecution has the burden of providing specific information that the conditions in Rule 90 *bis* (B) are fulfilled[3]. On the other hand, the Chamber notes that, on 22 January 2004, the Prosecutor filed a previous request for the transfer from Rwanda of the eight detained witnesses known by the pseudonyms KDD, KEC, KSD, XXG, YA, YC, YG. In his motion, the Prosecutor stated, among others, that he "had received informal assurances that these witnesses would not be needed for any judicial proceedings in Rwanda between April and the end of June 2004, and that the transfer of the witnesses would not extend their detention". The Chamber accepted that as sufficient evidence to support the required verification. Accordingly, the Chamber was satisfied that the conditions for an order under Rule 90 *bis* (B) were met in relation to these witnesses[4].

4. In the light of those elements communicated by the Prosecutor in his previous motion as well as given the reiterated assurances of the Prosecution, the Chamber is satisfied, that the conditions for an order under Rule 90 *bis* (B) are met in relation to these witnesses.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS, pursuant to Rule 90 *bis* of the Rules, that the individuals designated under the pseudonyms KDD, KEC, KSD, XXG, XXI, YA, KSQ, KEC, YH, KEI, YC, YG, ANX and YI be transferred no earlier than 9 August 2004 to the Detention Unit in Arusha, and returned to Rwanda no later than the end of September 2004;

REQUESTS the Government of Rwanda to comply with this order and to arrange for the transfer in cooperation with the Registrar and the Tanzanian Government;

INSTRUCTS the Registrar to :

(a) Transmit this decision to the Governments of Rwanda and Tanzania;

(b) Ensure the proper conduct of the transfer, including the supervision of the witnesses in the Tribunal's detention facilities;

(c) Remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the temporary detention, and as soon as possible, inform the Trial Chamber of any such change.

Arusha, 4 August 2004

[Signed] : Dennis C. Byron

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[1] The Prosecutor's Request for the Transfer of Detained Witnesses Pursuant to Rule 90 *bis*, at par. 14

[2] The Prosecutor's Request for the Transfer of Detained Witnesses Pursuant to Rule 90 *bis*, at par. 15.

[3] *Ndindabahizi*, Order for Transfer of Witness CGC (Rule 90bis) (TC), 15 September 2003, para. 2.

[4] Order For Transfer of Witnesses (Rule 90 *bis*) (TC), 24 February 2004.

le Tribunal, comme témoins à charge[1] et que le transfert desdits témoins n'est pas susceptible de prolonger la durée de leur détention telle que prévue par la République rwandaise[2].

3. La Chambre rappelle qu'il incombe au Procureur de fournir des informations précises établissant qu'il a été satisfait aux conditions prévues à l'article 90 *bis* (B)[3]. Elle relève que le Procureur l'avait déjà saisie, le 22 janvier 2004, d'une requête tendant au transfert de huit témoins détenus connus sous les pseudonymes de KDD, KEC, KSD, XXG, YA, YC et YG, requête dans laquelle il affirmait notamment «tenir de sources non officielles des assurances selon lesquelles la présence des témoins concernés ne serait nécessaire dans aucune procédure pénale au Rwanda entre avril et fin juin 2004 et leur transfert n'était pas susceptible de prolonger la durée de leur détention». Jugeant ces assurances suffisantes aux fins de la vérification requise, la Chambre a considéré que les conditions préalables à la délivrance d'un ordre de transfèrement par application de l'article 90 *bis* (B) étaient réunies concernant les témoins concernés[4].

4. Au vu des éléments d'informations dont le Procureur l'avait saisie à l'occasion de sa requête antérieure et des assurances renouvelées que celui-ci lui a données, la Chambre estime que les conditions préalables à la délivrance d'un ordre de transfèrement par application de l'article 90 *bis* (B) sont satisfaites en l'espèce.

PAR CES MOTIFS,

ORDONNE par application de l'article 90 *bis* du Règlement de procédure et de preuve, que les personnes désignées par les pseudonymes KDD, KEC, KSD, XXG, XXI, YA, KSQ, KEC, YH, KEI, YC, YG, ANX et YI soient transférées au quartier pénitentiaire d'Arusha le 9 août 2004 au plus tôt et remises aux autorités du Rwanda fin septembre 2004 au plus tard;

DEMANDE au gouvernement rwandais de donner suite à la présente ordonnance et d'assurer le transfert desdits témoins en liaison avec le gouvernement tanzanien et le Greffier;

CHARGE le Greffier de :

A) transmettre la présente ordonnance aux Gouvernements rwandais et tanzanien;

B) s'assurer du bon déroulement dudit transfert, y compris le suivi de la détention des témoins au quartier pénitentiaire relevant du Tribunal;

C) S'informer de toutes modifications pouvant intervenir dans les modalités de la détention telles que prévues par l'État requis et pouvant affecter la durée de détention temporaire et d'en faire part, dans les plus brefs délais, à la Chambre.

Arusha, le 4 août 2004

[Signé] : Dennis C. Byron

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[1] *The Prosecutor's Request for the Transfer of Detained Witnesses Pursuant to Rule 90* bis, para. 14.
[2] *The Prosecutor's Request for the Transfer of Detained Witnesses Pursuant to Rule 90* bis, para. 15.
[3] Affaire *Ndindabahizi*, ordonnance de transfert du témoin CGC (art. 90 *bis*) (Chambre de première instance), 15 septembre 2003, para. 2.
[4] Ordonnance de transfert de témoins détenus (article 90 *bis*) (Chambre de première instance), 24 février 2004.

Decision on Prosecutor's Request for Certification to Appeal Decision Dated 14 July 2004 Denying the Admission of Testimony of an Expert Witness 16 August 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – certification to appeal – appeal from interlocutory decisions – absence of issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial – motion denied

International Instrument Cited : Rules of Procedure and Evidence, Rules 73 (B) and 92 bis

International Cases Cited :

I.C.T.R. : Trial Chamber XXX, The Prosecutor v. Arsène Shalom Ntahobali et al., *Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004 (ICTR-97-21-XXX,* Reports 2004*, p. XXX)* – *Trial Chamber XXX,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Prosecutor's Request for Certification Under Rule 73 With Regard to Trial Chamber's "Decision on Prosecutor's Request for a Suspension of the Time-Limit", 14 July 2004 (ICTR-96-7- XXX,* Reports 2004*, p. XXX)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the "Prosecutor's Request for Certification to Appeal the Trial Chamber I Decision Dated 14 July 2004 Denying the Admission of Testimony of an Expert Witness", filed on 21 July 2004;

NOTING that the Defence has not responded and the deadline for responses has passed;

HEREBY DECIDES the motion.

Décision relative à la requête de l'accusé en certification d'appel contre la «Decision on Defence Motion to Disqualify expert Witness, Alison Des Forges, and to Exclude her Report» du 14 juillet 2004 16 août 2004 (ICTR-2001-76-I)

(Original : Français)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – certification d'appel – traduction, suspension du délai – absence de question susceptible de compromettre sensiblement l'équité et la rapidité du procès ou de son issue – requête rejetée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 72 (B) (ii), 72 (C), 73 (A), 73 (B), 73 (C), 92 bis, 95 *– Statut; art. 20*

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance XXX, Le Procureur c. Arsène Ntahobali et Pauline Nyiramasuhuko*, Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of Evidence of Witnesses RV and QBZ inadmissible', 18 mars 2004 (ICTR-97-21-T,* Recueil 2004*, p. XXX) – Chambre, de première instance XXX,* Le Procureur c. Edouard Karemera et al.*, Decision on Defence Request for Certification to Appeal the Decision on Accused Nzirorera's Motion for Inspection of Materials, 26 février 2004 (ICTR-98-42,* Recueil 2004*, p. XXX)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des Juges Erik Møse, Président, Sergei A. Egorov et Dennis C. M. Byron, conformément à l'article 73 (A) du Règlement de procédure et de preuve (le «Règlement»);

SAISIE d'une requête de la défense intitulée «Defence Motion to Request Certification to Appeal Trial Chamber's Decision on Defence Motion to Disqualify Expert Witness, Alison Des Forges, and to Exclude Her Report», déposée le 28 juillet 2004; et d'une requête en extrême urgence de la défense en vue d'obtenir une prorogation de délai pour introduire une requête en certification d'appel contre la décision du 14 juillet 2004, déposée le 20 juillet 2004;

CONSIDÉRANT la réponse du Procureur, déposée le 2 août 2004;

STATUE comme suit.

INTRODUCTION

1. The Indictment against the Accused was confirmed on 8 January 2002. The amended Indictment was filed on 27 January 2004, and the second amended Indictment was filed on 10 May 2004. The trial is scheduled to commence on 16 August 2004. On 5 April 2004, the Prosecution filed a motion for the admission under Rule 92 *bis* of the transcripts and exhibits of Alison Des Forges's testimony in *Prosecutor v. Akayesu*. On 26 May 2004, the Defence filed a motion for the disqualification of expert witness Alison Des Forges and the exclusion of her report. Both motions were denied on 14 July 2004. The Chamber was then composed of Judges Jai Ram Reddy, Sergei Alekseevich Egorov and Emile Short. Both parties have filed motions for certification to appeal the decisions.

SUBMISSIONS

2. The Prosecution seeks leave to appeal the decision filed on 14 July 2004 on the admission of transcripts and exhibits under Rule 92 *bis*, pursuant to Rule 73 (B) of the Rules of Procedure and Evidence ("the Rules"). The evidence of the witness, Alison Des Forges, would go towards proving the objective elements of the crimes charged against the Accused, that is, the "widespread" and "systematic" nature of the attacks against the Tutsi. An annex of the relevant paragraphs from the witness's testimony in *Akayesu* has been provided.

3. The Prosecution submits that the Chamber failed to evaluate the relevance of the evidence. As the trial is about to commence, the Prosecution contends that an immediate resolution of the issue would expedite the proceedings. Arguing that the decision denies the Prosecution the opportunity to rely on the evidence to show the nature of the Accused's conduct as an international crime at that time in Gikongoro, the Prosecution asserts that this would significantly affect its case, the expeditious conduct of the trial and the outcome of the trial.

INTRODUCTION

1. L'acte d'accusation dressé contre l'accusé a été confirmé le 8 janvier 2002. Deux versions de l'acte d'accusation ont été successivement déposées les 27 janvier 2004 et 10 mai 2004. Le procès doit s'ouvrir le 16 août 2004. Le 5 avril 2004, le Procureur a déposé une requête visant à admettre au dossier, sur la base de l'article 92 *bis* du Règlement, les déclarations et les éléments de preuves contenus dans le témoignage d'Alison Des Forges recueilli dans l'affaire *Le Procureur c. Akayesu*. Le 26 mai 2004, la défense a déposé une requête en disqualification du témoin expert Alison Des Forges et en irrecevabilité de son rapport. Ces deux requêtes ont été rejetées le 14 juillet 2004 par la Chambre qui était alors composée des Juges Jai Ram Reddy, Sergei Alekseevich Egorov et Emile Short. Tant le Procureur que la défense ont introduit une demande en certification d'appel à l'encontre de ces décisions.

ARGUMENTS DES PARTIES

2. La défense demande, sur la base de l'article 72 (B) (ii), l'autorisation d'interjeter appel contre la «Decision on Defence Motion to Disqualify Expert Witness, Alison Des Forges, and to Exclude Her Report» rendue le 14 juillet 2004. La défense soutient que l'article 95 du Règlement pourrait fonder le rejet d'un élément de preuve au stade de la mise en état. Elle ajoute que le refus d'admettre le rapport du témoin expert Alison Des Forges au titre de preuve à charge, dès la mise en état, affecterait sensiblement la suite du procès dans la mesure où, sans ce rapport, la thèse du Procureur serait fortement affaiblie. La défense soutient en outre que, dans la décision du 14 juillet 2004, la Chambre de première instance n'a pas répondu à son argument selon lequel le rapport du témoin expert porterait atteinte au droit de l'accusé au respect de sa correspondance. Enfin, la défense estime que le respect des droits de l'accusé consacrés par l'article 20 du Statut justifie la certification d'appel.

3. Le Procureur s'oppose à la certification d'appel. La défense n'apporterait pas la preuve que les conditions prévues à l'article 73 (B) du Règlement sont bien remplies en l'espèce. Le Procureur estime également que l'interprétation faite par la défense de l'article 95 du Règlement est erronée. En outre, un tel argument, qui n'a jamais été soulevé devant la Chambre de première instance dont la décision est attaquée, ne pourrait être invoqué à l'appui de la demande de certification d'appel. Le Procureur rappelle enfin que les appels interlocutoires fondés sur l'article 73 (B) du Règlement doivent rester exceptionnels, comme l'a précédemment jugé le Tribunal[1].

[1] Le Procureur cite à l'appui de sa requête les décisions rendues dans les affaires *Le Procureur c. Arsène Ntahobali et Pauline Nyiramasuhuko* («Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the 'Decision on Defence Urgent Motion to Declare Parts of Evidence of Witnesses RV and QBZ inadmissible'», ICTR-97-21-T, 18 mars 2004) et *Le Procureur c. Edouard Karemera et al.* («Decision on Defence Request for Certification to Appeal the Decision on Accused Nzirorera's Motion for Inspection of Materials, ICTR-98-42, 26 février 2004).

DELIBERATIONS

4. Appeals from interlocutory decisions on motions other than preliminary motions are provided for by Rule 73 (B), which states as follows :

> (B) Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

5. Interlocutory appeals are not generally available, and the Chamber's discretion to grant the same may be exercised only when the conditions under Rule 73 (B) are met[1]. To qualify for certification, the decision must involve an issue : a) that would significantly affect the fair and expeditious conduct of the proceedings *or* the outcome of the trial ; *and* b) for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. In its request for certification, the Prosecution has asserted that it wishes to call Alison Des Forges with respect to the "widespread" and "systematic" nature of the attacks and in relation to the events in Gikongoro at the time. The motion decided by the Chamber on 14 July 2004 did not specify which parts of the testimony were being sought to prove which elements of the crimes charged against the Accused. Annex A of the previous motion contained all the exhibits and all the transcripts of Des Forges's testimony. The annex to the present request makes more specific references to the parts of the testimony which the Prosecution considers relevant.

7. The Chamber observes that the written expert report of 17 May 2004 contains information relating to the widespread and systematic character of attacks. Furthermore, several Prosecution witnesses will, according to the disclosed information, testify directly to events in Gikongoro and to widespread and systematic attacks. As similar evidence is available through other witnesses, the appeal does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

[1] *Ntahobali et al*., Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible" (TC), 18 March 2004, paras. 14-15 ; *Bagosora et al*., Decision on the Prosecutor's Request for Certification Under Rule 73 With Regard to Trial Chamber's "Decision on Prosecutor's Request for a Suspension of the Time-Limit" (TC), 14 July 2004, para. 7.

4. La Chambre note que la requête de la défense se réfère à l'article 72 (B) (ii) du Règlement, alors que la décision contre laquelle la défense demande une certification d'appel ne porte sur aucune exception préjudicielle. La Chambre est d'avis qu'il convient d'examiner la demande en certification d'appel sur la base de l'article 73 (B) du Règlement dont les termes sont identiques à ceux de l'article 72 (B) (ii) précité.

5. Comme l'article 72 (C) relatif aux appels interjetés sur la base de l'article 72 (B) (ii), l'article 73 (C) prévoit également un délai de sept jours à compter du dépôt de la décision contestée pour introduire une requête en certification d'appel sur la base de l'article 73 (B). En l'espèce, la requête de la défense, déposée le 28 juillet 2004, a été introduite plus de sept jours suivant le 14 juillet 2004, date du dépôt de la décision contestée.

6. La Chambre note cependant que, le 20 juillet 2004, préalablement à l'introduction de la présente requête, la défense avait sollicité une suspension du délai pour introduire une demande en certification d'appel à l'encontre de la décision du 14 juillet 2004[2]. La défense souhaitait voir courir ce délai à compter de la traduction en français de la décision contestée, au motif que le français était la seule langue maîtrisée par l'accusé et son conseil. La Chambre note que, bien que tardive, la présente requête, déposée le 28 juillet 2004, établit que la défense est, à présent, tout à fait capable de répondre aux questions soulevées par la décision du 14 juillet 2004. La Chambre estime que la présente requête a été introduite dans les délais.

7. L'article 73 (B) du Règlement dispose que les décisions relatives à des requêtes présentées après la comparution initiale de l'accusé ne peuvent, en principe, pas faire l'objet d'appels interlocutoires. La Chambre ne peut faire droit à une demande en certification d'appel uniquement si deux conditions sont cumulativement rencontrées : d'une part, la décision contestée porte sur une question susceptible de compromettre sensiblement l'équité et la rapidité du procès, ou son issue, et, d'autre part, son règlement immédiat par la Chambre d'appel pourrait concrètement faire progresser la procédure.

8. En l'espèce et comme l'a précédemment jugé la Chambre dans sa décision du 14 juillet en se référant à l'article 95 du Règlement, la requête de la Défense visant à écarter le rapport du témoin expert est prématurée au stade actuel de la procédure[3]. La question de la force probante de ce rapport sera discutée ultérieurement lors de l'examen des preuves retenues contre l'accusé. Ce dernier aura ainsi l'occasion de contre-interroger le témoin expert et de mettre en doute la fiabilité de son témoignage.

[2] Requête en extrême urgence de la défense en vue d'obtenir une prorogation de délai pour introduire une requête en certification d'appel contre la décision du 14 juillet 2004 par la première Chambre du Tribunal (Article 72 (C). du RPP) intitulée «Decision on Defence Motion to Disqualify Expert Witness, Alison Des Forges, and to Exclude Her Report», 20 juillet 2004.

[3] Decision on Defence Motion to Disqualify Expert Witness, Alison Des Forges, and to Exclude Her Report (TC), paras. 5 et 6.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 16 August 2004

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Dennis C. M. Byron

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Decision on Postponement of Trial 18 August 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – postponement of trial – rights of the Accused - right to defend himself through legal assistance, right to communicate with Counsel, of his own choosing, right to have a legal assistance assigned to him – health of the Defence Lead Counsel – postponement of the commencement of the trial – Lead Counsel replaced by the Co-Counsel if absent – working language of Defence Counsels – motion granted

International Instruments Cited : Directive on Assignment of Defence Counsel, art. 15 (A), 15 (C), 15 (E), 19, 19 (A), 20 (A), 20 (E) and 20 (E) (i) – Rules of Procedure and Evidence, Rules 44, 45, 45 ter, *45* quarter, *45 (I), 46 and 73* bis *(B) – Statute, Art. 20 (4) (b) and 20 (4) (d)*

International Case Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Aloys Simba, *Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment, 14 July 2004 (ICTR-01-76-I,* Reports 2004*, p. XXX)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

Dans ces conditions, la décision contestée ne porte pas sur une question susceptible de compromettre sensiblement l'équité et la rapidité du procès ou de son issue.

9. La Chambre estime, en conséquence, que les exigences posées à l'article 73 (B) du Règlement ne sont pas rencontrées en l'espèce.

PAR CES MOTIFS,

LE TRIBUNAL

REJETTE la requête.

Arusha, le 16 août 2004.

[Signé] : Erik Møse; Sergei A. Egorov; Dennis C. M. Byron

***

Décision portant report de la date d'ouverture du procès 18 août 2004 (ICTR-01-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – report de la date d'ouverture du procès – droits de l'accusé – droit de bénéficier de l'assistance d'un défenseur, droit de communiquer avec le conseil de son choix, droit de se voir attribuer d'office un défenseur – état de santé du conseil principal de l'accusé – ajournement de l'ouverture du procès – conseil principal remplacé par le co-conseil si absent – langue de travail de la défense – requête acceptée

Instruments internationaux cités : Directive relative à la commission d'office de conseils de la défense, art. 15 (A), 15 (C), 15 (E), 19, 19 (A), 20 (A), 20 (E) et 20 (E) (i) – Règlement de procédure et de preuve, art. 44, 45, 45 ter*, 45* quater*, 45 (I), 46 et 73* bis *(B) – Statut, art. 20 (4) (b) et 20 (4) (d)*

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Aloys Simba, *Décision relative à l'exception préjudicielle tirée par la défense de vices de forme du deuxième acte d'accusation modifié, 14 juillet 2004 (ICTR-01-76-I,* Recueil 2004*, p. XXX)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I composée des juges Erik Møse, Président de Chambre, Sergei Alekseevich Egorov et Dennis C. M. Byron,

HEREBY DECIDES as follows.

INTRODUCTION

1. The Accused was arrested on 27 November 2001 in Senegal. The Indictment against the Accused was confirmed on 8 January 2002. He was subsequently transferred to the Tribunal's Detention Facility on 11 March 2002, and made his initial appearance on 18 March 2002.

2. During a Status Conference held on 15 January 2004, Prosecution and Defence Counsel were informed that the trial would commence sometime between 15 May and the end of July 2004. Following the Chamber's decision on a defence motion alleging defects in the form of the Indictment, the amended Indictment was filed on 27 January 2004. The Accused made a further appearance, as requested by the Defence, on 17 March 2004.

3. Pursuant to a memorandum of 5 March 2004 from the President of the Tribunal, the trial was scheduled to commence on 10 May 2004. On 19 April 2004, the Defence moved for a postponement of the commencement of the trial due to untimely service of disclosure documents to the Defence. By a decision of 28 April 2004, the Chamber granted the motion and deferred commencement to 13 May 2004. On 16 April 2004, the Defence filed another motion alleging defects in the form of the Indictment, which was granted in part on 6 May 2004. The second amended Indictment was subsequently filed on 10 May 2004 in English and French.

4. On 11 May 2004, the Defence sent an urgent letter to the Chamber seeking a further postponement of the trial, on the basis that the Defence wished to appeal the decision of 6 May 2004. By memorandum of 11 May 2004, the President informed the parties that the issues raised by the Defence did not change the scheduling of the trial which would commence on 13 May 2004 as previously notified. It would be for the Chamber, as composed at trial, to decide on the issues raised in the letter.

5. A Pre-trial Conference was held on 13 May 2004. The Chamber was then composed of Judges Jai Ram Reddy, Sergei Alekseevich Egorov and Emile Short. During the Conference, the Defence again sought a postponement of the trial, on the following grounds : (i) the trial had to be stayed since the Defence intended to appeal two decisions rendered by the Chamber, and interlocutory appeals had the effect of staying trial proceedings; (ii) all documents in English had to be translated into French, the language of Lead Counsel, before the trial could commence; (iii) the Prosecution had not disclosed the criminal records of its witnesses and their cooperation agreements with Rwanda; (iv) the Prosecution had not fulfilled its disclosure obligations; and (v) the Prosecution should interview the Accused.

6. In an oral decision rendered the same day, the request for postponement was denied for the following respective reasons : (i) the Defence had not actually filed any appeals as yet and interlocutory appeals did not necessitate a stay of proceedings; (ii) Co-Counsel speaks English, documents such as witness statements had been disclosed in both languages, and translations could be ordered on a case-by-case basis; (iii) the

REND LA DÉCISION DONT LA TENEUR SUIT.

INTRODUCTION

1. L'accusé a été arrêté le 27 novembre 2001 au Sénégal. L'acte d'accusation porté contre lui ayant été confirmé le 8 janvier 2002, il a été transféré au centre de détention du Tribunal le 11 mars 2002 et sa comparution initiale s'est faite le 18 mars 2002.

2. Au cours d'une conférence de mise en état tenue le 15 janvier 2004, la Chambre a informé le Procureur et la défense que le procès s'ouvrirait entre le 15 mai et la fin du mois de juillet 2004. À la suite d'une décision de la Chambre relative à une exception de la défense tirée des vices de forme de l'acte d'accusation, un acte d'accusation modifié a été déposé le 27 janvier 2004. À la requête de la défense, l'accusé a comparu de nouveau le 17 mars 2004.

3. Un mémorandum du Président du Tribunal en date du 5 mars 2004 a fixé la date d'ouverture du procès au 10 mai 2004. Le 19 avril 2004, la défense a sollicité l'ajournement de l'ouverture du procès au motif que des pièces ne lui avaient pas été communiquées en temps utile. Par décision rendue le 28 avril 2004, la Chambre a accueilli la requête de la défense et renvoyé l'ouverture du procès au 13 mai 2004. Le 16 avril 2004, la défense a soulevé une nouvelle exception fondée sur les vices de forme de l'acte d'accusation. La Chambre y ayant fait droit en partie le 6 mai 2004, le second acte d'accusation modifié a été déposé le 10 mai 2004 en français et en anglais.

4. Le 11 mai 2004, la défense a envoyé à la Chambre une lettre urgente pour solliciter un nouveau report de la date d'ouverture du procès, motif pris de ce qu'elle entendait relever appel de la décision du 6 mai 2004. Par mémorandum daté du 11 mai 2004, le Président a informé les parties au procès que les questions soulevées par la défense n'avaient pas d'incidence sur l'ouverture du procès qui aurait lieu le 13 mai 2004 comme initialement annoncé et qu'il revenait à la Chambre, telle que composée au moment des débats, de trancher lesdites questions.

5. Une conférence préalable au procès s'est tenue le 13 mai 2004 devant la Chambre composée à l'époque des juges Jai Ram Reddy, Sergei Alekseevich Egorov et Emile Short. Au cours de la conférence, la défense a sollicité une fois de plus le report de l'ouverture du procès pour les raisons suivantes : (i) la défense entendait faire appel de deux décisions rendues par la Chambre, et les appels interlocutoires suspendent la procédure en première instance ; (ii) tous les documents en anglais devaient être traduits en français, langue de travail du conseil principal, avant l'ouverture du procès ; (iii) le Procureur n'avait pas encore communiqué les casiers judiciaires des témoins à charge et les accords de coopération conclus entre ceux-ci et le gouvernement rwandais ; (iv) le Procureur ne s'était pas acquitté des obligations de communication mises à sa charge ; (v) le Procureur devrait s'entretenir avec l'accusé.

6. Dans une décision orale rendue le même jour, la Chambre a rejeté la demande de report pour les motifs suivants : (i) la défense n'avait encore concrètement formé aucun recours et les appels interlocutoires ne nécessitent pas une suspension de l'instance ; (ii) le co-conseil parle anglais, certaines pièces telles que les déclarations de témoin avaient été communiquées en français et en anglais, et la traduction des

Prosecution maintained that it did not have criminal records of its witnesses or any cooperation agreements with Rwanda; (iv) the Defence had not previously raised problems with disclosure, and could not point to any document that was missing, but the parties were ordered to resolve this issue before the trial; and (v) the request that the Prosecution should interview the Accused was wholly without merit. The Defence's grounds for postponement were therefore rejected. However, due to unforeseen circumstances relating to the unavailability of one of the judges, the trial had to be postponed to a date to be fixed[1].

7. At the Pre-trial Conference, the Chamber also held that the preconditions for commencing a trial, set out in Rule 73 *bis* (B), have been met, and the trial was ready to commence[2]. Citing the Accused's wishes not to be represented, Lead Counsel for the Defence observed that the Defence could not say that it would be present when the trial commenced[3]. In light of Defence's statement, and pursuant to Rule 45 *quarter*, the Chamber ordered Counsel to be present when the trial commenced, in order to represent the Accused's interests, failing which sanctions would be imposed[4].

8. During oral contact around 14 May 2004, the Defence accepted the Chamber's proposal to start the trial on 16 August 2004. On 21 May 2004, the President notified the parties that the trial would commence on that date.

9. On 6 July 2004, Co-Counsel for the Defence informed the Registry that due to medical reasons, Lead Counsel was not certain of his ability to appear for trial on 16 August 2004. The following day, the Registry conveyed to both Defence Counsel the President's regrets that Lead Counsel was ill. However, the trial would commence as scheduled on 16 August 2004. If, for medical reasons, Lead Counsel was not available, Co-Counsel should be prepared to replace him.

10. In a decision of 14 July 2004, the Chamber denied a Defence motion alleging defects in the form of the Indictment. In paragraph 4 of its decision, the Chamber criticized the Defence's practice of submitting its motions in a piecemeal fashion and warned him that it would consider an appropriate sanction[5].

11. On 20 July 2004, Lead Counsel requested to withdraw from the case. He stated that his current state of health did not put him in an ideal position to manage insults, although he would continue to extend his cordial co-operation to his replacement and facilitate and expedite the taking over of the case. In its fax of 22 July 2004, the Registry's Defence Counsel Management Section (DCMS) responded by reminding Lead Counsel that under Rule 19 (A) of the Directive on Assignment of Defence Counsel ("the Directive"), Counsel could withdraw only in exceptional circumstances. Further, pursuant to Rule 20 (A), Counsel has to remain on the case until he is

[1] T. 13 May 2004 (Open Session) pp. 1-2.
[2] *Ibid.* p. 3.
[3] *Ibid.* p. 5.
[4] *Ibid.*
[5] *Prosecutor v. Simba*, Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment (TC), 14 July 2004, para. 4.

autres pourrait être ordonnée au cas par cas; (iii) le Procureur avait soutenu qu'il n'était en possession ni des casiers judiciaires des témoins à charge ni d'accords de coopération conclus avec le Rwanda; (iv) la défense n'avait auparavant évoqué aucun problème de communication de pièces, et n'avait indiqué le moindre document faisant défaut; la Chambre a cependant ordonné aux parties de régler cette question avant le début du procès; (v) il n'y avait aucune raison de demander au Procureur de s'entretenir avec l'accusé. Ayant ainsi écarté les moyens invoqués par la défense au soutien de sa demande de report, la Chambre a néanmoins dû ajourner *sine die* l'ouverture du procès en raison d'un cas de force majeure tenant à l'indisponibilité de l'un des juges[1].

7. Lors de la conférence préalable au procès, la Chambre a également jugé que les conditions d'ouverture des débats fixées par l'article 73 *bis* (B) du Règlement étaient réunies et que l'affaire était en état[2]. S'autorisant de ce que l'accusé ne souhaitait pas être représenté, le conseil principal a souligné que la défense ne pouvait pas garantir sa présence à l'ouverture du procès[3]. Cela dit, la Chambre a enjoint au conseil, en vertu de l'article 45 *quarter* du Règlement et sous peine de sanctions, d'être présent à l'ouverture du procès pour défendre les intérêts de l'accusé[4].

8. Au cours d'une conversation vers le 14 mai 2004, la défense a accepté, sur proposition de la Chambre, que le procès s'ouvre le 16 août 2004. Le 21 mai 2004, le Président a informé les parties que le procès s'ouvrirait à cette date.

9. Le 6 juillet 2004, le co-conseil de la défense a informé le Greffe que pour raison de santé, le conseil principal n'était pas certain de pouvoir être présent au procès le 16 août 2004. Le lendemain, le Greffe a fait savoir aux deux conseils de la défense que le Président déplorait la maladie du conseil principal, que le procès s'ouvrirait néanmoins le 16 août comme initialement prévu et que le co-conseil devait se préparer à remplacer le conseil principal au cas où celui-ci serait indisponible pour raison de santé.

10. Dans une décision rendue le 14 juillet 2004, la Chambre a rejeté une exception de la défense tirée des vices de forme de l'acte d'accusation. Au paragraphe 4 de cette décision, la Chambre s'est élevée contre la pratique de la fragmentation des requêtes adoptée par la Défense et a prévenu celle-ci qu'elle encourait une sanction appropriée[5].

11. Le 20 juillet 2004, le conseil principal a sollicité l'autorisation de se dessaisir du dossier, arguant que son état de santé ne lui permettait pas de supporter des injures, même s'il restait disposé à coopérer de tout cœur avec son remplaçant pour faciliter et accélérer la prise en main du dossier par celui-ci. Dans une réponse datée du 22 juillet 2004, envoyée par télécopie, la Section de l'administration des questions relatives aux conseils de la défense, organe du Greffe, a rappelé au conseil principal qu'aux termes de l'article 19 (A) de la Directive relative à la commission d'office

[1] Compte rendu de l'audience du 13 mai 2004 (audience publique), pp. 26 et 27.
[2] *Ibid*., p. 27.
[3] *Ibid*., p. 29.
[4] *Ibid*.
[5] *Le Procureur c. Simba*, Décision relative à l'exception préjudicielle tirée par la défense de vices de forme du deuxième acte d'accusation modifié, (Chambre de première instance), 14 juillet 2004, para. 4.

replaced. In a letter of 22 July 2004 to his Lead Counsel, the Accused stated that he had not been notified by his Lead Counsel of the content of his email of 20 July 2004. Even if he expressed confidence in his Counsel and supported his protest against the language used by the Chamber, the Accused did not find the formulation so serious that it necessitated the abandoning of the conduct of his case less than one month before commencement of the trial. He was particularly frustrated that Lead Counsel had taken a decision with such grave consequences without first consulting him, and strongly urged Counsel to reconsider[6].

12. Following Lead Counsel's request of 27 July 2004 for approval of his work programme to come to Arusha from 6 to 12 August 2004 to consult with his client, DCMS informed him that he would have to stay on to 16 August 2004 for the commencement of the trial. The work programme was approved on 30 July 2004, with respect to his travel and that of two Defence assistants. On 2 August 2004, Lead Counsel wrote to DCMS stating that as the work programme had been approved too late, the travel agency had cancelled their travel reservations, and that therefore he could not come to Arusha as planned. DCMS replied the same day, indicating that the approval was granted three days after the request, even though the usual practice is for such requests to be submitted 20 working days before the date of travel. In addition, as the trial was to commence on 16 August, he would have sufficient time to arrange for tickets, with the assurance that he would be reimbursed.

13. By email sent on 3 August 2004, Lead Counsel submitted a medical certificate of 3 August, which prohibited airplane travel for ten days due to illness. The character of the illness was not specified. DCMS responded the same day, in an email copied to Co-Counsel, that according to Rule 15 (E) and 20 (E) (i) of the Directive, Co-Counsel had to assume the responsibility for the case in the event of illness of Lead Counsel. In a further response on 5 August 2004, DCMS noted that the certificate was brief and lacked details, but that in any event, the certificate prohibited airplane travel up to 13 August 2004, and Counsel should therefore still attend trial on 16 August. If he is unable, Co-Counsel should, in his place, attend the Status Conference on 12 August 2004 and the trial, pursuant to Rule 15 (E) of the Directive. On 6 August 2004, Lead Counsel gave Co-counsel authorization to

[6] French version : "Ceci étant dit, je ne trouve pas cet incident si grave au point de vous pousser à m'abandonner à moins d'un mois du commencement de mon procès. Je suis particulièrement frustré par le fait que vous avez pris une décision si grave de conséquences sur l'issue de mon procès sans m'en avoir préalablement informé. Sans avoir recueilli mon avis sur cette décision, mes intérêts n'ont pas été pris en considération. En conséquence de ce qui précède, je vous demande fermement de reconsidérer votre décision qui compromet sérieusement ma stratégie de défense et risqué de retarder considérablement mon procès et ma libération vu que je suis innocent."

de conseils de la défense (la «Directive»), un conseil ne peut se dessaisir d'un dossier que dans des circonstances exceptionnelles. En outre, l'article 20 (A) fait obligation au conseil de continuer à représenter son client jusqu'à la désignation de son remplaçant. Dans une lettre adressée à son conseil principal le 22 juillet 2004, l'accusé a déclaré n'avoir pas été informé par le conseil de la teneur de son message électronique du 20 juillet 2004. Tout en maintenant sa confiance en son conseil et en se joignant à lui pour dénoncer les termes utilisés par la Chambre, l'accusé n'a pas jugé ceux-ci assez graves pour que le conseil soit obligé de se déporter moins d'un mois avant l'ouverture du procès. Particulièrement déçu par le fait que son conseil principal eut pris une décision aussi lourde de conséquences sans l'avoir consulté, l'accusé a vivement exhorté le conseil à revenir sur sa décision[6].

12. Répondant au conseil principal qui avait sollicité le 27 juillet 2004 l'approbation de son programme de travail pour lui permettre de venir s'entretenir avec son client à Arusha du 6 au 12 août 2004, la Section de l'administration des questions relatives aux conseils de la défense l'a informé qu'il devrait prolonger son séjour jusqu'au 16 août 2004, en vue de l'ouverture du procès. Le programme de travail a été approuvé le 30 juillet 2004. Le conseil était autorisé à se déplacer avec deux assistants. Dans une lettre adressée à la Section le 2 août 2004, le conseil principal a déclaré que le programme de travail ayant été approuvé trop tard, l'agence de voyages avait annulé leurs réservations et qu'il ne pouvait donc pas se rendre à Arusha comme prévu. La Section lui a répondu le même jour que le programme avait été approuvé trois jours après la demande, même s'il est de règle que de telles demandes soient présentées 20 jours ouvrables avant la date du voyage. En outre, le procès s'ouvrant le 16 août, il aurait suffisamment de temps pour obtenir des titres de transport, avec l'assurance que les frais y afférents lui seraient remboursés.

13. Par courrier électronique envoyé le 3 août 2004, le conseil principal a présenté un certificat médical daté du même jour lui interdisant, pour cause de maladie, de se déplacer en avion pendant dix jours. La nature de la maladie n'a cependant pas été précisée. Dans un message électronique dont copie a été envoyée au co-conseil, la Section a répondu le même jour que, selon les articles 15 (E) et 20 (E) (i) de la Directive, le co-conseil devait se charger du dossier en cas d'indisponibilité du conseil principal pour cause de maladie. Dans un complément de réponse daté du 5 août 2004, la Section a relevé non seulement que le certificat médical était bref et imprécis, mais encore que celui-ci n'ayant en tous cas interdit les déplacements en avion que jusqu'au 13 août 2004, le conseil principal devait toujours participer à l'ouverture du procès le 16 août. En cas d'indisponibilité, le co-conseil se devait de participer en ses lieu et place à la conférence de mise en état le 12 août 2004 et par la suite aux débats, conformément à l'article 15 (E) de la Directive. Le 6 août 2004, le conseil

[6] La lettre est ainsi libellée : «Ceci étant dit, je ne trouve pas cet incident si grave au point de vous pousser à m'abandonner à moins d'un mois du commencement de mon procès. Je suis particulièrement frustré par le fait que vous avez pris une décision si grave de conséquences sur l'issue de mon procès sans m'en avoir préalablement informé. Sans avoir recueilli mon avis sur cette décision, mes intérêts n'ont pas été pris en considération. En conséquence de ce qui précède, je vous demande fermement de reconsidérer votre décision qui compromet sérieusement ma stratégie de défense et risqué de retarder considérablement mon procès et ma libération vu que je suis innocent».

replace him during hearings and take all measures required during his period of unavailability[7].

14. On 11 August 2004, the Registrar denied Counsel's request for withdrawal. Considering the Chamber's decision of 14 July 2004, Counsel's complaint against the statements therein, and the Accused's expressed wish that Lead Counsel should reconsider his position, there were no exceptional circumstances within the meaning of Article 19 of the Directive[8].

15. During the Status Conference on 12 August 2004, Co-Counsel represented the Accused. She stated that the trial could not start in the absence of Lead Counsel and reserved Lead Counsel's right to re-open any issue. The Chamber noted her position and proceeded to clarify trial-related issues.

16. In a telephone conversation between a DCMS representative and Lead Counsel on 10 August 2004, Lead Counsel indicated that he would meet his doctor on 13 August 2004. If the doctor agreed, he might be able to travel to Arusha if injections could be administered to him every six hours for his backache, and if the former Chamber retracted paragraph 4 of its decision. It was conveyed to Lead Counsel by email on 12 August 2004 that the Tribunal's medical personnel was willing to administer the injections prescribed and provided by his doctor. On 13 August 2004, Lead Counsel expressed his disagreement with the Registrar's 11 August 2004 decision denying his request for withdrawal from the case, maintaining that paragraph 4 of the Chamber's decision affected the defence of the Accused. He also stated that he would meet with the Accused to convince him of the basis of his position.

17. On 16 August 2004, the Registry received an email from Lead Counsel with a new medical certificate attached. The certificate was dated 13 August 2004 and certified Lead Counsel for a rest and exemption from physical activities for eight days, and an arrangement in the exercise of his functions and travels during one month[9]. During the court session on 16 August 2004, Co-Counsel requested that the trial be postponed for one month. However, later that day, she informed the Chamber that Lead Counsel was not prevented from travelling, and that he would be able to come to Arusha next week.

[7] The authorization ("Procuration") of 6 August 2004 reads as follows : "Je soussigneé Me Ayo Alao, conseil Principal de l'accusé Aloys Simba, donne par la présente, procuration à Madame Beth Lyons, co-conseil dans la même affaire, aux fins de prendre toutes les dispositions d'usage pour me substituer lors des audiences du Tribunal et faire toutes les diligences que requiert ledit dossier pendant toute la période de mon indisponibilité. "

[8] Decision Denying the Request for Withdrawal of Assignment of Mr. Sadikou Alao as Lead Counsel for Mr. Aloys Simba, 11 August 2004.

[9] French version : "Un aménagement dans l'exercice de ses fonctions et dans les voyages pendant 1 mois."

principal a autorisé le co-conseil à le remplacer au prétoire et à prendre toutes les mesures requises pendant la durée de son indisponibilité[7].

14. Le 11 août 2004, le Greffier a rejeté la demande de retrait de sa commission d'office présentée par le conseil principal, estimant qu'à la lumière de la décision rendue par la Chambre le 14 juillet 2004, des griefs formulés par le conseil principal contre les propos qui y avaient été tenus, et du souhait manifeste de l'accusé de voir le conseil principal revenir sur sa position, il n'y avait pas de circonstances exceptionnelles au sens de l'article 19 de la Directive[8].

15. Le co-conseil a représenté l'accusé lors de la conférence de mise en état du 12 août 2004. Soulignant que le procès ne pouvait s'ouvrir en l'absence du conseil principal, elle a réservé à celui-ci le droit de revenir sur toute question qui aura été débattue en son absence. La Chambre a pris acte de cette position et s'est ensuite attachée à préciser certains points touchant au déroulement du procès.

16. Au cours d'un entretien téléphonique avec un représentant de la Section de l'administration des questions relatives aux conseils de la défense le 10 août 2004, le conseil principal a fait savoir qu'il rencontrerait son médecin le 13 août 2004, et qu'au cas où celui-ci donnerait son consentement, il pourrait se rendre à Arusha s'il lui était possible de recevoir ses injections toutes les six heures pour son mal de dos et si l'ancienne formation de la Chambre supprimait le paragraphe 4 de sa décision. Le 12 août 2004, il a été informé par courrier électronique que le personnel médical du Tribunal était disposé à lui administrer les injections prescrites et fournies par son médecin. Le 13 août 2004, le conseil principal s'est élevé contre la décision du 11 août 2004 par laquelle le Greffier avait rejeté la demande de retrait de sa commission d'office, soutenant que le paragraphe 4 de la décision de la Chambre entravait la défense de l'accusé. Il a également déclaré qu'il s'entretiendrait avec son client pour le convaincre du bien-fondé de sa décision.

17. Le 16 août 2004, le Greffe a reçu du conseil principal un message électronique accompagné d'un nouveau certificat médical daté du 13 août 2004 qui lui prescrivait de se reposer et de s'abstenir de toute activité physique pendant huit jours, ainsi que de procéder à un aménagement dans l'exercice de ses fonctions et dans les voyages pendant un mois[9]. Au cours de l'audience du 16 août 2004, le co-conseil a demandé à la Chambre d'ajourner les débats pour une durée d'un mois, mais elle informera la Chambre le même jour que le médecin n'avait pas interdit au conseil principal de voyager, et que celui-ci pourrait venir à Arusha la semaine prochaine.

[7] La procuration du 6 août 2004 est ainsi libellée : «Je soussigné Me Ayo Alao, conseil principal de l'accusé Aloys Simba, donne par la présente, procuration à Madame Beth Lyons, Co-conseil dans la même affaire, aux fins de prendre toutes les dispositions d'usage pour me substituer lors des audiences du Tribunal et faire toutes les diligences que requiert ledit dossier pendant toute la période de mon indisponibilité».

[8] Décision rejetant la demande de retrait de la commission d'office de Me Sadikou Alao, conseil principal d'Aloys Simba, 11 août 2004.

[9] Le certificat médical prescrit : «Un aménagement dans l'exercice de ses fonctions et dans les voyages pendant 1 mois».

18. In an email of 17 August 2004, Lead Counsel states, *inter alia*, that he remains committed to the defence of the Accused, and that he is willing, as soon as his health allows it next week, to come to Arusha and discuss with the Accused[10].

SUBMISSIONS

19. On 16 August 2004, Co-Counsel referred to Article 20 (4) (b) and (d) of the Statute and submitted that the Accused was entitled to a defence conducted by Lead and Co-Counsel. She was assigned as Co-Counsel in January 2004 and was allotted only 250 hours to work on the case. The conditions under Rule 15 (E) of the Directive on the replacement of Lead Counsel by Co-Counsel were not met in this case. Her language was English, and her conversational French did not permit her to discuss the Accused's case with him. Since Lead Counsel would be able to travel to Arusha after a month, a postponement of a month would be appropriate, especially at a stage as important as that of the commencement of the trial. In response to the bench, she stated that one of the Defence assistants was bilingual and the other French-speaking.

20. The Prosecution submitted that it was ready to start the trial, and that Co-Counsel should assume responsibility for the case in Lead Counsel's absence. If a postponement was ordered, it should not exceed a week.

21. Later on that day, Co-Counsel informed the Chamber that Lead Counsel had notified her that he would be able to arrive in Arusha next week (see above), instead of one month, and that the Chamber should expect an email from him to that effect.

DELIBERATIONS

22. According to Article 20 (4) (b) and (d) of the Statute, the Accused has the right to defend himself through legal assistance, and to communicate with Counsel, of his own choosing. He is also entitled to have legal assistance assigned to him where required by the interests of justice, without payment if he has insufficient means. Rules 44 to 46 and the Directive supplement the rights guaranteed by the Statute.

23. Rule 45 (I) states that it is understood that Counsel shall represent the Accused and conduct the case to finality. Pursuant to Rule 45 *ter* of the Rules, Counsel must provide a written undertaking to the Registrar of the Tribunal that he will appear before the Tribunal within a reasonable time as specified by the Registrar. Both Lead

[10] French version : «Je reste attaché à 1a défence de l'accusé Simba Aloys»; «… je suis donc disposé, dès que mon état de santé le permettra la semaine prochaine, à venir à Arusha pour m'entretenir avec l'accusé …». The mail also refers to paragraph 4 of the 14 July 2004 decision and the need to discuss it with the President, who had previously accepted to meet with Lead Counsel.

18. Dans un message électronique daté du 17 août 2004, le conseil principal a déclaré, entre autres choses, qu'il restait attaché à la défense de l'accusé et qu'il était disposé, dès que son état de santé le lui permettrait, à venir à Arusha la semaine prochaine pour s'entretenir avec l'accusé[10].

ARGUMENTS DES PARTIES

19. Le 16 août 2004, le co-conseil a invoqué les alinéas (b) et (d) du paragraphe 4 de l'article 20 du Statut pour faire valoir que l'accusé avait droit à l'assistance du conseil principal et d'un co-conseil. Rappelant qu'elle avait été désignée co-conseil en janvier 2004 pour assurer uniquement 250 heures de prestations dans le cadre de l'instance, elle a estimé que les conditions prévues par l'article 15 (E) de la directive qui régit le remplacement du conseil principal par le co-conseil n'étaient pas réunies en l'espèce. Qui plus est, sa langue de travail était l'anglais et sa connaissance du français parlé n'était pas suffisante pour discuter de la cause avec l'accusé. Au demeurant, comme le conseil principal serait en mesure de venir à Arusha dans un mois, il conviendrait de suspendre l'instance pour une durée d'un mois, surtout à un stade aussi important que celui de l'ouverture du procès. En réponse à une question de la Chambre, elle a déclaré que l'un de leurs assistants était bilingue et l'autre francophone.

20. Faisant valoir qu'il était prêt pour l'ouverture du procès et que le co-conseil devait prendre en main le dossier en l'absence du conseil principal, le Procureur a demandé que la suspension de l'instance ne dure pas plus d'une semaine si elle est ordonnée.

21. Par la suite, le co-conseil a dit à la Chambre, dans le courant de la journée, avoir été informée par le conseil principal qu'il pourrait venir à Arusha la semaine prochaine (voir plus haut), et non plus dans un mois, et qu'il enverrait un message électronique à la Chambre à cet effet.

DÉLIBÉRATIONS

22. Aux termes des alinéas (b) et (d) du paragraphe 4 de l'article 20 du Statut, l'accusé a le droit de bénéficier de l'assistance d'un défenseur et de communiquer avec le conseil de son choix. Il a également le droit, chaque fois que l'intérêt de la justice l'exige, de se voir attribuer d'office un défenseur, sans frais, s'il n'a pas les moyens de le rémunérer. Les articles 44 à 46 du Règlement de procédure et de preuve et la Directive viennent compléter les droits garantis par le Statut.

23. Selon l'article 45 (I) du Règlement, il est admis que le conseil commis représentera l'accusé, et ce, jusqu'à la fin de l'affaire. Aux termes de l'article 45 *ter*, le conseil et le co-conseil doivent fournir au Greffier «un engagement écrit selon lequel ils apparaîtront devant le Tribunal dans un délai raisonnable spécifié par le Greffier».

[10] Ce message est ainsi libellé : «Je reste attaché à la défense de l'accusé Simba Aloys […] je suis donc disposé, dès que mon état de santé le permettra la semaine prochaine, à venir à Arusha pour m'entretenir avec l'accusé …». Il évoque également le paragraphe 4 de la décision du 14 juillet 2004 et la nécessité d'en discuter avec le Président qui avait déjà accepté de s'entretenir avec le conseil principal.

Counsel and Co-Counsel in the present case have signed such declarations. Article 6 of the Code of Professional Conduct for Defence Counsel states that unless representation is terminated, Counsel "must carry through to conclusion all matters undertaken for a client within the scope of his legal representation".

24. Article 15 (A) of the Directive provides for the Accused to have one Counsel assigned to him. Under Article 15 (C), the Registrar *may* appoint a Co-Counsel to assist assigned Counsel. The Accused therefore has a right to one Counsel, although the Registrar has the discretion to appoint a Co-Counsel to assist. Lead Counsel has primary responsibility for the Defence, pursuant to Article 15 (E), which also provides that Co-Counsel, under the authority of Lead Counsel, "may deal with all stages of the procedure and all matters arising out of the representation of the accused or of the conduct of his Defence".

25. The Chamber observes that the Accused wishes to be represented by Lead Counsel, who has stated that he remains committed to the defence of the Accused. Lead Counsel has also informed the Chamber of his intention to travel to Arusha next week. The Chamber notes that his email of 17 August 2004 leaves certain matters unclarified. His travel depends on his health; it is uncertain on which day he will arrive; and it is not explicitly stated that he will participate in the trial. However, the Chamber grants the request for postponement of the commencement of trial until no later than Monday 30 August 2004.

26. If Lead Counsel is not in Arusha on the stipulated date, ready for trial, Co-Counsel must be prepared to commence trial. Under Article 20 (E) of the Directive, Co-Counsel shall assume responsibility of carrying on the proceedings if Lead Counsel is not available. The Chamber considers that the term "the proceedings" covers the entire proceedings against the Accused, not only the trial. Therefore, the Chamber may order Co-Counsel to assume Lead Counsel's responsibilities also at the start of the trial.

27. Co-Counsel has submitted that she has French language problems, which make it difficult to function as Lead Counsel for the Accused, and that she has only been allotted 250 hours to work on the case. With respect to the language issue, it is now clear that there is a Defence Assistant on the Defence team who is bilingual, has legal training, and is therefore able to assist with communication within the Defence team. As for her time to prepare at the pre-trial stage, the Chamber observes that the postponement of trial will give her additional time. Moreover, the Chamber will consider requests for reasonable adjournments during trial.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the request for postponement of trial until no later than Monday 30 August 2004 08.45.

Arusha, 18 August 2004

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Dennis C. M. Byron

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En l'espèce, le conseil principal et le co-conseil ont signé cet engagement. En outre, l'article 6 du Code de déontologie à l'intention des conseils de la défense dispose que le conseil «conduit à leur terme toutes les démarches entreprises pour son client dans le cadre de son mandat», à moins qu'il ne soit mis fin à sa mission de représentation.

24. Selon l'article 15 (A) de la Directive, un seul conseil est commis d'office à la défense de l'accusé. Aux termes de l'article 15 (C), le Greffier *peut* nommer un co-conseil pour assister le conseil commis. L'accusé a donc droit à un seul conseil, même si le Greffier a la faculté de nommer un co-conseil pour assister le conseil commis. Le conseil principal est le premier responsable de la défense d'après l'article 15 (E) qui dispose également que sous l'autorité du conseil principal, le co-conseil «est chargé d'accomplir à tous stades de la procédure tous actes ou vacations nécessaires à l'accomplissement de sa mission de représentation et de défense du suspect ou de l'accusé».

25. La Chambre fait remarquer que l'accusé souhaite être représenté par le conseil principal qui a lui-même déclaré qu'il restait attaché à la défense de l'accusé. Le conseil principal a également informé la Chambre de son intention de venir à Arusha la semaine prochaine. La Chambre relève que son message électronique du 17 août 2004 n'a pas fait la lumière sur certaines questions. Son voyage dépend de son état de santé, la date de son arrivée n'est pas déterminée et il n'est pas clairement dit qu'il participera au procès. Toutefois, la Chambre fait droit à la demande d'ajournement de l'ouverture du procès jusqu'au au lundi 30 août 2004 au plus tard.

26. Si le conseil principal n'est pas présent à Arusha à la date indiquée et prêt pour le procès, le co-conseil devra s'attendre à le remplacer à l'ouverture des débats. D'après l'article 20 (E) de la Directive, la responsabilité de la continuation de la procédure échet au co-conseil en cas d'indisponibilité du conseil principal. La Chambre estime que le terme «procédure» désigne toute l'instance et non le seul procès. Elle peut dès lors ordonner au co-conseil d'assumer également les responsabilités du conseil principal à l'ouverture du procès.

27. Le co-conseil a invoqué sa méconnaissance de la langue française, ce qui l'empêche de jouer le rôle de conseil principal de l'accusé et a fait valoir qu'il ne lui avait été attribué que 250 heures de prestations dans le cadre de la cause. S'agissant des difficultés linguistiques, il est désormais clair que l'équipe de la défense comprend un assistant bilingue et de formation juridique qui peut par conséquent assurer l'intercommunication au sein de l'équipe. En ce qui concerne le temps de préparation alloué au co-conseil pendant la phase de la mise en accusation, la Chambre fait remarquer que le report de l'ouverture du procès prolongera ce temps. Au demeurant, la Chambre examinera au cours du procès toute demande de suspension des débats pour une durée raisonnable dont elle sera saisie.

PAR CES MOTIFS, LA CHAMBRE

FAIT DROIT à la demande de report de la date d'ouverture du procès jusqu'au lundi 30 août 2004 à 8 h 45 au plus tard.

Arusha, le 18 août 2004

[Signé] : Erik Mose; Sergei Alekseevich Egorov; Dennis C. M. Byron

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Decision on Defence Motion for Extension of Time 24 August 2004 (ICTR-01-76-I)

(Original : Not specified)

Trial Chamber I

Judges : Erik Møse, presiding; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – extension of time – translation, working language of Defence Counsels – motion granted

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the "Requête en extrême urgence de la défense en vue d'obtenir une autorisation à répondre à date fixe ou une prorogation des délais pour le depôt de sa réponse à la requête du procureur en date du 16 août 2004", filed on 18 August 2004, wherein the Defence requests a time frame of five days from receipt of a French translation of the Prosecutor's motion within which to respond to the motion;

CONSIDERING that an unofficial translation of the motion was made available to the Defence on Friday 20 August 2004;

FURTHER CONSIDERING that Co-Counsel who is presently in Arusha speaks English;

HEREBY DECIDES that the Defence shall have until Thursday 26 August 2004 to respond to the motion.

Arusha, 24 August 2004

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Dennis C. M. Byron

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Decision on Defence Request for Protection of Witnesses 25 August 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – extension of time, working language of Defence Counsels – measures of protection of witnesses, real and objective fears – motion partly granted

International Instruments Cited : Rules of Procedure and Evidence, Rules 3, 69 and 75 – Statute, Art. 20, 20 (4) (a) and 21

International Cases Cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Juvénal Kajelijeli, *Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses, 3 April 2001 (ICTR-98-44A-T,* Reports 2001, *p. 1628) – Trial Chamber,* The Prosecutor v. Emmanuel Ndindabahizi, *Order for Non-Disclosure, 3 October 2001 (ICTR-2001-71-I,* Reports 2001, *p. 2812) – Trial Chamber I,* The Prosecutor v. Mika Muhimana, *Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, 6 November 2001 (ICTR-95-1-B-I,* Reports 2001, *p. 2412) – Trial Chamber I,* The Prosecutor v. Théoneste Bagasora et al., *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003 (ITCR-98-41-T) – Trial Chamber,* The Prosecutor v. Athanase Seromba, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 30 June 2003 (ICTR-2001-66) – Trial Chamber III,* The Prosecutor v. Sylvestre Gacumbitsi, *Decision on Defence Motion for Protection of Witnesses (TC), 25 August 2003 (ICTR-2001-64-T,* Reports 2003, *p. 1582) – Trial Chamber I,* The Prosecutor v. Théoneste Bagasora et al., *Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003 (ICTR-98-41-T,* Reports 2003, *p. 108) – Trial Chamber XXX,* The Prosecutor v. Jean-Baptiste Gatete, *Decision on Prosecution Request for Protection of Witnesses, 11 February 2004 (ICTR-2000-61-XXX,* Reports 2004, *p. XXX) – Trial Chamber I,* The Prosecutor v. Aloys Simba, *Decision on Prosecution Request for Protection of Witnesses, 4 March 2004 (ICTR-2001-76-I,* Reports 2004, *p. XXX) – Appeals Chamber,* The Prosecutor v. Aloys Simba, *Decision on Aloys Simba's Motion for An Extension of Time, 27 July 2004 (ICTR-2001-76-AR72.3,* Reports 2004, *p. XXX)*

Décision relative à la requête de la défense en prescription de mesures de protection de témoins 25 août 2004 (ICTR-01-76-I)

(Original : Anglais)

Chambre de première instance I

Juges : Erik Mose, Président de Chambre; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – prorogation du délai, langue de travail de la défense – mesures de protection de témoins, craintes réelles et objectives – requête partiellement acceptée

Instruments internationaux cités : Règlement de procédure et de preuve, art. 3, 69 et 75 – Statut, art. 20, 20 (4) (a) et 21

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Juvénal Kajelijeli, *Décision relative à la requête de Kajelijeli aux fins de protection de témoins à décharge, 3 avril 2001 (ICTR-98-44A-T,* Recueil 2001, *p. 1629) – Chambre de première instance,* Le Procureur c. Emmanuel Ndindabahizi, *Ordonnance aux fins de non divulgation, 3 octobre 2001 (ICTR-2001-71-I,* Recueil 2001, *p. 2813) – Chambre de première instance I,* Le Procureur c. Mika Muhimana, *Décision relative à la requête de la défense aux fins de traduction des documents de l'accusation et des actes de procédure en kinyarwanda, langue de l'accusé, et en français, langue de son conseil, 6 novembre 2001 (ICTR-95-1-B-I,* Recueil 2001, *p. 2413) – Chambre de première instance I,* Le Procureur c. Théoneste Bagasora et consorts, *Decision on Defence Motion for Reconsideration ofthe Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 juillet 2003 (ITCR-98-41-T) – Chambre de première instance,* Le Procureur c. Athanase Seromba, *Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins, 30 juin 2003 (ICTR-2001-66) – Chambre de première instance III,* Le Procureur c. Sylvestre Gacumbitsi, *Décision relative à la requête de la défense aux fins de mesures de protection de témoins, 25 août 2003 (ICTR-2001-64-T,* Recueil 2003, *p. 1583) – Chambre de première instance I,* Le Procureur c. Théoneste Bagasora et consorts, *Décision sur la requête de Bagosora en prescription de mesures de protection de témoins, 1er septembre 2003 (ICTR-98-41-T,* Recueil 2003, *p. 109) – Chambre de première instance XXX,* Le Procureur c. Jean-Baptiste Gatete, Decision on Prosecution Request for Protection of Witnesses*, 11 février 2004 (ICTR-2000-61-XXX,* Recueil 2004*, p. XXX) – Chambre de première instance I,* Le Procureur c. Aloys Simba, *Décision relative à la requête du Procureur en prescription de mesures de protection de témoins, 4 mars 2004 (ICTR-2001-76-I,* Recueil 2004*, p. XXX) – Chambre d'appel,* Le Procureur c. Aloys Simba, *Décision relative à la requête d'Aloys Simba en prorogation de délai, 27 juillet 2004 (ICTR-2001-76-AR72.3,* Recueil 2004*, p. XXX)*

I.C.T.Y. : Trial Chamber, The Prosecutor v. Zejnil Delalic et al. *Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996 (IT-96-21)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the Defence Motion for Protection of Defence Witnesses, filed on 12 August 2004, as well as a motion for an extension of time to file a reply, filed on 19 August 2004;

CONSIDERING the Prosecution's response to the motion, filed on 17 August 2004, and the corrigendum thereto filed on 18 August 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Indictment against the Accused was confirmed on 8 January 2002. The amended Indictment was filed on 27 January 2004, and the second amended Indictment was filed on 10 May 2004. The trial is scheduled to commence on 30 August 2004. On 4 March 2004, the Chamber, at the request of the Prosecution, ordered protective measures for Prosecution witnesses[1]. The Defence filed the present motion for protection of its witnesses on 12 August 2004. On 17 August 2004, the Prosecution filed a response. A copy was made available to the Defence and the Accused during the Status Conference on 18 August 2004. At the same time, the Prosecution read, at the request of the bench, the text of its response, which was simultaneously interpreted into French. On 19 August 2004, the Defence filed a motion requesting a time frame of five days from receipt of a French translation of the Prosecution's motion within which to respond to the motion. On the same day, the Defence sent a written response to the Prosecution in English. A copy was addressed to the Chamber.

SUBMISSIONS

2. The Defence claims that its witnesses have expressed real fears for their safety and for the safety of their families within Rwanda and in neighbouring countries as well as outside Africa. In support of its request, the Defence relies upon the general security situation, an article from the *Hirondelle* News Agency, the Prosecution's motion filed on 16 February 2004 and its supporting material, and the decision of the Chamber of 4 March 2004 granting protective measures to Prosecution witnesses. The Defence requests thirteen protective measures, primarily non-disclosure to the public and the Prosecution of the names and the identifying information of all potential Defence witnesses, including seventeen potential alibi witnesses. According to the Defence, the identifying data shall be disclosed to the Prosecutor on the basis of a

[1] *Simba*, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004.

T.P.I.Y. : Chambre de première instance, Le Procureur c. Zejnil Delalic et consorts*, Décision relative à la requête de la défense aux fins de transmission des documents dans la langue de l'accusé, 25 septembre 1996 (IT-96-21)*

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Mose, Président de Chambre, Sergei Alekseevich Egorov et Dennis C. M. Byron,

SAISI de la requête de la défense en prescription de mesures de protection de témoins, déposée le 12 août 2004, ainsi que d'une requête en prorogation de délai, déposée le 19 août 2004,

VU la réponse du Procureur à la première requête, déposée le 17 août 2004, et le rectificatif, déposé le 18 août 2004,

STATUE À PRÉSENT sur la requête

INTRODUCTION

1. L'acte d'accusation établi contre l'accusé a été confirmé le 8 janvier 2002. L'acte d'accusation modifié a été déposé le 27 janvier 2004 et un second acte d'accusation modifié a été déposé le 10 mai 2004. L'ouverture du procès a été fixée au 30 août 2004. Le 4 mars 2004, à la demande du Procureur, la Chambre a ordonné des mesures de protection en faveur des témoins à charge[1]. Le 12 août 2004, la défense a déposé la présente requête en prescription de mesures de protection des témoins à décharge. Le 17 août 2004, le Procureur a déposé une réponse dont la défense et l'accusé ont reçu copie à la conférence de mise en Etat du 18 août 2004. À cette occasion et à la demande des juges, le Procureur a lu le texte de sa réponse, avec interprétation simultanée en français. Le 19 août 2004, la défense a déposé une requête tendant à obtenir pour sa réplique un délai de cinq jours à compter de la date de réception de la traduction en français de la réponse du Procureur. Le même jour, la défense a envoyé au Procureur une réplique écrite, en anglais, avec copie à la Chambre.

ARGUMENTS DES PARTIES

2. La défense prétend que ses témoins ont exprimé des craintes réelles pour leur sécurité et celle de leurs familles résidant au Rwanda, dans les pays voisins et hors du continent africain. À l'appui de sa demande, la défense invoque la situation d'insécurité en général et un article de l'agence de presse Hirondelle. Elle fait état également de la requête du Procureur, déposée le 16 février 2004 avec ses pièces justificatives, ainsi que de la décision rendue par la Chambre le 4 mars 2004, qui prescrit des mesures de protection en faveur de témoins à charge. La défense sollicite 13 mesures de protection des témoins à décharge, qui consistent essentiellement en la non-divulgation au public et au Procureur du nom et des renseignements permettant

[1] *Simba*, Décision relative à la requête du Procureur en prescription de mesures de protection de témoins, 4 mars 2004.

"rolling disclosure" no sooner than 21 days before the testimony of each witness. The Defence alleges that the granting of those measures is consistent with the Accused's rights and the interests of a fair trial.

3. The Prosecution asserts that the Defence's motion fails to establish the existence of "exceptional circumstance" showing the existence of a danger or risk for the Defence witnesses. Nevertheless, if the Chamber determines that protective measures are appropriate, the Prosecution agrees that measures 12 (a), (b), (c), (d), (e) and (h) should be granted. The Prosecution objects to measures (f), (g), (i), (j), (k) and (l), submitting that these measures exceed what the Rules of Procedure and Evidence ("the Rules") allow and will impede the Prosecution's power to adequately investigate or interview witnesses.

DELIBERATIONS

Extension of Time for Reply

1. The present Defence motion requests a time frame of five days from receipt of a French translation of the Prosecution's response to the Defence motion. The Chamber reiterates that according to Article 20 of the Statute, Rule 3 of the Rules, and established jurisprudence, the Accused is entitled to be provided with the Indictment, the supporting material and all evidentiary material which will be used in the adjudicative process in a language he understands. There is no entitlement to have translated all documents in the case[2]. The practice of the Tribunal is that Lead and Co-Counsel, who between them have command of both official languages of the Tribunal, co-operate with one another[3]. The Chamber has previously stated that it will consider ordering or facilitating the translation of specific documents on a case-by-case basis[4].

2. In the present case, the composition of the Defence team is bilingual : Lead Counsel is French speaking but conversant in English, whereas Co-Counsel is an English speaker but conversant in French. One of the legal assistants is a bilingual qualified attorney. During the status conference of 18 August 2004, the written submissions of the Prosecution were read out and interpreted into French, the language of

[2] See in particular, *Delalic et al*., Decision on Defence Application for Forwarding the Documents in the Language of the Accused (TC), 25 September 1996; *Muhimana*, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel (TC), 6 November 2001.

[3] *Simba*, Oral Decision, T. 13 May 2004 p. 1; Decision on Aloys Simba's Motion for An Extension of Time (AC), 27 July 2004 ("Considering that, to the extent that the Appellant or any members of his defence team are not proficient in English, the essential elements of the Impugned Decision may be effectively conveyed to them without waiting for an official translation").

[4] Oral Decision, T. 13 May 2004, p. 1.

d'identifier tous les témoins à décharge potentiels, dont 17 susceptibles d'établir l'alibi de l'accusé. Selon la défense, les données permettant d'identifier les témoins seront communiquées au Procureur «par étapes», au plus tôt 21 jours avant la déposition de chaque témoin. Toujours selon la défense, ces mesures doivent préserver les droits de l'accusé et contribuer à garantir un procès équitable.

3. Le Procureur fait valoir que la requête de la défense n'établit pas l'existence de «circonstances exceptionnelles» d'où résulterait un danger ou un risque pour les témoins à décharge. Toutefois, au cas où la Chambre estimerait que des mesures de protection sont indiquées, le Procureur accepte que les mesures 12 (a), (b), (c), (d), (e) et (h) prescrites. En revanche, il s'oppose aux mesures (f), (g), (i), (j), et (l), au motif qu'elles vont au-delà de ce que prévoit le Règlement de procédure et de preuve (le «Règlement») et qu'elles risquent d'empêcher le Procureur de mener ses enquêtes et d'interroger les témoins comme il convient.

DÉLIBÉRATIONS

Prorogation du délai pour le dépôt d'une réplique

1. Par la présente requête, la défense sollicite un délai de cinq jours pour déposer une réplique à la réponse du Procureur à une requête qu'elle a formée, et ce, à compter de la date de réception de la traduction en français de ladite réponse. La Chambre rappelle qu'en vertu de l'article 20 du Statut, de l'article 3 du Règlement et de la jurisprudence établie, l'accusé a le droit d'être informé, dans une langue qu'il comprend, de l'acte d'accusation, des pièces à l'appui et de tous les moyens de preuve qui seront utilisés au procès. Cela ne lui donne cependant pas le droit d'exiger la traduction de tous les documents relatifs à l'affaire[2]. La pratique du Tribunal veut que le conseil et le co-conseil coopèrent, étant donné qu'ils maîtrisent chacun une des deux langues de travail du Tribunal[3]. La Chambre a déjà indiqué par le passé qu'elle pourrait ordonner ou faciliter la traduction de documents bien précis, au cas par cas[4].

2. En l'espèce, l'équipe de la défense est bilingue. Le conseil principal est francophone mais connaît l'anglais, tandis que le co-conseil est anglophone mais connaît le français. L'un des assistants juridiques est juriste confirmé, bilingue. A la conférence de mise en état, le 18 août 2004, les conclusions écrites du Procureur ont été lues à haute voix, et elles ont été interprétées en français, langue de l'accusé, qui était pré-

[2] Voir, en particulier, *Delalic et consorts*, Décision relative à la requête de la défense aux fins de transmission des documents dans la langue de l'accusé, 25 septembre 1996, et *Muhimana*, Décision relative à la requête de la défense aux fins de traduction des documents de l'accusation et des actes de procédure en kinyarwanda, langue de l'accusé, et en français, langue de son conseil, 6 novembre 2001.

[3] *Simba*, Décision orale, compte rendu de l'audience du 13 mai 2004, p. 1; Chambre d'appel, Décision relative à la requête d'Aloys Simba en prorogation de délai, 27 juillet 2004 («... à supposer que l'appelant, ou tel ou tel membre de son équipe, ne comprend pas l'anglais, l'essence de la décision contestée peut lui être utilement expliquée sans qu'il faille en attendre le texte officiellement traduit»).

[4] Décision orale, compte rendu de l'audience du 13 mai 2004, p. 1.

the Accused, who was present. A copy of the Prosecution's response was also made available to the Accused and the Defence. The unofficial French transcripts of the proceedings have been made available. Furthermore, Co-Counsel sent a written reply to the Prosecution's response.

3. In the particular circumstances, the Chamber is satisfied that Lead Counsel and Co-Counsel have been duly able to address the questions raised by the Prosecution's response. The information to which the motion is directed does not fall within that covered by Article 20 (4) (a) of the Statute, and translation is therefore not guaranteed by its provisions. The Rules do not provide for a right of reply to a party's response, and a further pleading on this matter would not materially assist the Chamber. The request for extension of time is therefore denied.

Measures of Protection

4. Pursuant to Article 21 of the Statute, the Tribunal provides in its Rules for protection of victims and witnesses. Under Rules 69 and 75 of the Rules, such protective measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of victim's identity. Rule 75 of the Rules elaborates several specific witness protection measures that may be ordered, including sealing or expunging names and other identifying information that may otherwise appear in the Tribunal's public records, assignment of a pseudonym to a witness, and permitting witness testimony in closed session. Pursuant to Rule 69 of the Rules :

> (A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.
>
> …
>
> (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the prosecution and the defence.

5. Established jurisprudence requires that the witnesses for whom protective measures are sought must have a real fear for the safety of the witness or her or his family, and there must be an objective justification for this fear. Measures for protection of witnesses are granted on a case-by-case basis. In granting protective measures, the Chamber must also take into consideration the fairness of the trial and the equality of the parties[5].

6. The Chamber considers that the Defence has not provided independent justifying elements that clearly demonstrate that the fears of its potential witnesses are well founded. The main documents relied on by the Defence pertain to the specific situation of the Prosecution witnesses. Nevertheless, the Chamber is mindful of its pre-

[5] *Gacumbitsi*, Decision on Defence Motion for Protection of Witnesses (TC), 25 August 2003, para. 8; *Bagosora et al*., Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, paras. 2, 4.

sent. Une copie de la réponse du Procureur a été communiquée à l'accusé et à la défense. Les comptes rendus d'audience non officiels en français ont été également mis à leur disposition. Par ailleurs, le co-conseil a déposé une réplique écrite à la réponse du Procureur.

3. En l'espèce, la Chambre estime que le conseil et le co-conseil ont été tout à fait en mesure de répliquer aux questions soulevées dans la réponse du Procureur. Les éléments d'information qui font l'objet de la requête ne font pas partie de ceux visés à l'article 20 (4) (a) du Statut et ledit article ne garantit pas la traduction de ces éléments. Le Règlement ne prescrit pas le droit de réplique à la réponse d'une partie, et des débats supplémentaires ne seraient pas utiles à la Chambre. La demande de prorogation des délais est donc rejetée.

Mesures de protection

4. En application de l'article 21 du Statut, le Règlement prescrit la protection des victimes et des témoins. Conformément aux articles 69 et 75 du Règlement, de telles mesures comprennent, sans y être limitées, la tenue d'audiences à huis clos et la non-divulgation de l'identité de la victime. L'article 75 du Règlement indique en détail plusieurs mesures particulières de protection des témoins qui pourraient être prescrites, notamment la suppression, dans les dossiers du Tribunal, du nom de l'intéressé et des indications permettant de l'identifier, l'emploi d'un pseudonyme et la tenue d'audiences à huis clos pour entendre la déposition d'un témoin. L'article 69 du Règlement est libellé comme suit :

> A) Dans des cas exceptionnels, chacune des deux parties peut demander à la Chambre de première instance d'ordonner la non-divulgation de l'identité d'une victime ou d'un témoin pour empêcher qu'ils ne courent un danger ou des risques, et ce, jusqu'au moment où la Chambre en décidera autrement.
>
> C) Sous réserve de l'article 75, l'identité des victimes ou des témoins doit être divulguée dans les délais prescrits par la Chambre de première instance, pour accorder au Procureur et à la défense le temps nécessaire à leur préparation.

5. Selon la jurisprudence établie, les témoins pour lesquels des mesures de protection sont demandées doivent éprouver une crainte réelle pour leur sécurité ou celle de leur famille, et cette crainte doit reposer sur des raisons objectives. Les mesures de protection des témoins sont accordées au cas par cas. La Chambre doit aussi prendre en considération l'équité du procès et l'égalité entre les parties[5].

6. La Chambre estime que la défense n'a pas présenté d'éléments justificatifs de source indépendante établissant nettement que les craintes de ses témoins éventuels sont fondées. Le principal document invoqué concerne la situation particulière des témoins à charge. Toutefois, la Chambre garde à l'esprit ses décisions antérieures rela-

[5] *Gacumbitsi*, Décision relative à la requête de la défense aux fins de mesures de protection de témoins, 25 août 2003, para. 8; *Bagosora et consorts*, Décision sur la requête de Bagosora en prescription de mesures de protection de témoins, 1er septembre 2003, paras. 2 et 4.

vious decisions regarding protection for Defence witnesses and considers that the evidence of the volatile security situation in Rwanda, and of potential threats against Rwandans living in other countries, indicates that witnesses could justifiably fear that disclosure of their participation in the proceedings of this Tribunal would threaten their safety and security[6]. The Chamber notes also that, in its motion filed on 16 February 2004, the Prosecution recognized that Defence witnesses also faced risks[7]. Accordingly, exceptional circumstances have been established.

7. The Chamber notes that the Prosecution objects only to some of the requested measures. Regarding the "rolling disclosure" (paragraph i), namely the disclosure of the identifying information to the Prosecution not sooner than 21 days before the testimony of each witness, the Chamber relies upon its deliberation in its Decision of 4 March 2004 granting protective measures to Prosecution witnesses[8]. The present case is to be short in comparison with some of the longer trials before the Tribunal in which rolling disclosure has been ordered[9]. As a practical matter, rolling disclosure would not, under these circumstances, significantly enhance the protection afforded to witnesses. Based on a concrete evaluation of the present case, the Chamber shall order complete disclosure of the witness statements to the Prosecution, without redactions to protect the identity of the witness, thirty days prior to the commencement of the Defence case.

8. The Chamber considers that the Defence request for the closed session testimony for each of its protected witnesses (paragraph l) is not necessary at the present stage and goes beyond those in effect for Prosecution witnesses. It is recalled that protective measures may be amended, at any time and when necessary. The measures requested by the Defence at paragraphs (i) and (l) of its motion are therefore denied. The Defence's request that the Prosecution shall make a written request prior to contacting any relative of a potential Defence witness (paragraph j) also exceeds what is normally granted as protective measures in similar cases and should be granted only as regards the potential Defence witnesses.

[6] *Bagosora*, Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 3.

[7] The Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment (Pursuant to Article 21 of the Statute, Rules 54, 69, 73 and 75), 16 February 2004, para. 29.

[8] *Simba*, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004, paras. 6 and 7; *Bagosora et al*., Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 10.

[9] *Bagosora et al*., Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC), 18 July 2003, para. 2; *Seromba*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses (TC), 30 June 2003, para. 7.

tives à la protection des témoins à décharge et considère que les éléments établissant l'existence d'une situation instable en matière de sécurité au Rwanda et de menaces potentielles contre les Rwandais résidant dans d'autres pays indiquent que les témoins pourraient craindre à juste titre que leur participation aux procès devant le Tribunal, si elle était connue, compromette leur sécurité[6]. Elle relève également que le Procureur a admis, dans la requête qu'il a déposée le 16 février 2004, que les témoins à décharge couraient aussi des risques[7].

7. La Chambre constate que le Procureur s'oppose uniquement à certaines des mesures demandées. En ce qui concerne la communication «par étapes» (para. (i)), consiste à ne communiquer les informations permettant d'identifier un témoin que 21 jours avant sa déposition, la Chambre se fonde sur les considérations ayant motivé sa décision du 4 mars 2004 prescrivant des mesures de protection en faveur des témoins à charge[8]. En l'espèce, les débats seront d'une durée relativement courte, par comparaison à d'autres procès plus longs où le Tribunal a ordonné la communication des pièces par étapes[9]. En tant que mesure pratique, la communication des pièces par étapes ne renforcerait pas de façon significative la protection accordée aux témoins en l'espèce. Après avoir examiné de façon approfondie les faits de la cause, la Chambre ordonne la communication intégrale au Procureur des déclarations de témoins, sans les caviarder pour protéger l'identité des témoins, 30 jours avant le début des plaidoiries de la défense.

8. La Chambre estime que la demande de la défense, qui voudrait faire entendre à huis clos chacun de ses témoins protégés (para. (1)) ne se justifie pas au présent stade procès et va au-delà des mesures accordées aux témoins à charge. Il est rappelé que les mesures de protection de témoins peuvent être modifiées à n'importe quel moment et chaque fois que cela est nécessaire. Les mesures que sollicite la défense aux paragraphes (i) et (l) de sa requête sont donc rejetées. De même, la mesure sollicitée par la défense, à savoir l'obligation faite au Procureur de présenter une demande d'autorisation par écrit avant d'entrer en contact avec un parent d'un témoin à décharge potentiel (par. (j)), va au-delà de ce qui est habituellement accordé dans le cadre des mesures de protection de témoins dans des affaires similaires et ne doit être accordée que dans le cas des seuls témoins à décharge potentiels.

[6] Décision sur la requête de Bagosora en prescription de mesures de protection de témoins, 1er septembre 2003, para. 3.

[7] Requête du Procureur en prescription de mesures de protection des victimes et des témoins des crimes allégués dans l'acte d'accusation (en vertu de l'article 21 du Statut et des articles 54, 69, 73 et 75 du Règlement de procédure et de preuve), 16 février 2004, para. 29.

[8] *Simba*, Décision relative à la requête du Procureur en prescription de mesures de protection de témoins, 4 mars 2004, para. 6 et 7; *Bagosora et consorts*, Décision sur la requête de Bagosora en prescription de mesures de protection de témoins, 1er septembre 2003, par. 10.

[9] *Bagosora et consorts*, *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC)*, 18 juillet 2003, para. 2; *Seromba*, Décision relative à la requête du Procureur en prescription de mesures de protection des victimes et des témoins, 30 juin 2003, para. 7.

9. As regards the other protective measures requested by the Defence and to which the Prosecution objects (paragraphs (f), (g) and (k)), the Chamber notes that those measures have normally been granted in previous cases[10]. They do not conflict with the Prosecution's mandate nor impede the Prosecution's power to investigate adequately possible witnesses. Most of the measures sought by the Defence are substantially identical to those previously ordered in respect of the Prosecution witnesses in the present case. The interests of trial fairness strongly favour the adoption of identical measures, which are enumerated below in language customarily adopted in such orders[11].

10. Finally, in the view of the Chamber, the Defence's request that confidential information only be transmitted by the Registry to officials of the Witness and Victims Support Section (paragraph (c)) is unworkable and unnecessary and consequently denied[12]. Members of the Registry who are not part of the Witness and Victims Support Section may well be called upon to provide assistance for these witnesses in respect of their appearance and protection. Confidential information is handled by the Registry in a manner that restricts its dissemination to those who require such access for the proper exercise of their duties.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion for an extension of time to file a reply; and

HEREBY ORDERS that :

1. The names, addresses, whereabouts, and other identifying information ("identifying information") of any witness for whom the Defence claims the application of this order ("protected witness") shall be kept confidential by the Registry and not included in any non-confidential Tribunal records, or otherwise disclosed to the public. If any such information does appear in the Tribunal's non-confidential records, it shall be expunged.

2. The Defence shall assign a pseudonym to each protected witnesses for whom it claims the application of this order. The identifying information of each protected witness, with a corresponding pseudonym, shall be forwarded by the Defence to the Registry in confidence, and shall not be disclosed by the Registry to the Prosecution unless otherwise ordered. Where necessary to ensure non-disclosure of identifying information, the pseudonym shall be used in trial proceedings, discussions between

[10] *Kajelijeli*, Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses (TC), 3 April 2001; Gacumbitsi, Decision on Defence Motion for Protection of Witnesses (TC), 25 August 2003; *Bagosora et al*., Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003.

[11] *Kajelijeli*, Decision on Juvénal Kajelijeli's Motion for Protective Measures for Defense Witnesses (TC), 3 April 2001; *Ndindabahizi*, Order for Non-Disclosure (TC), 3 October 2001; *Bagosora et al*., Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003; Gatete, Decision on Prosecution Request for Protection of Witnesses (TC), 11 February 2004.

[12] *Bagosora et. al*., Decision on Bagosora Motion for Protection of Witnesses (TC), 1 September 2003, para. 5.

9. En ce qui concerne les autres mesures de protection demandées par la défense et auxquelles le Procureur s'oppose (paras. (f), (g) et (k)), la Chambre relève que, dans d'autres affaires, ces mesures ont été généralement accordées[10]. En effet, elles n'empêchent pas le Procureur d'exécuter son mandat ni d'exercer son pouvoir de mener les enquêtes nécessaires du côté de témoins éventuels. La plupart des mesures demandées par la défense sont pratiquement les mêmes que celles prescrites pour les témoins à charge dans la présente affaire. L'équité du procès commande fortement que des mesures identiques soient accordées, telles qu'elles sont énumérées plus loin, dans le langage habituellement utilisé pour ce genre de prescription[11].

10. Enfin, la Chambre est d'avis que la demande de la défense tendant à ce que les informations confidentielles ne soient transmises par le Greffe qu'aux seuls responsables de la Section d'assistance aux témoins et aux victimes est impraticable et inutile. Elle est donc rejetée[12]. Des fonctionnaires du Greffe étrangers à ladite Section pourraient parfaitement être amenés à fournir une assistance en organisant la comparution et la protection de ces témoins. Les informations confidentielles sont traitées par le Greffe de manière à en limiter l'accès uniquement à ceux qui doivent les utiliser dans le cadre de leurs obligations professionnelles.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la défense en prorogation de délai pour le dépôt de sa réplique, et

PRESCRIT LES MESURES SUIVANTES

1. Le nom de tout témoin auquel la défense demande d'appliquer la présente mesure (ci-après dénommé «témoin protégé»), son adresse, le lieu où il se trouve et toutes autres informations permettant de l'identifier (ci-après dénommés «éléments d'identification») seront gardés secrets par le Greffe; ils ne seront inscrits dans aucun dossier non confidentiel du Tribunal ou d'aucune autre manière divulgués au public, et tout renseignement de cette nature qui figurerait dans les dossiers non confidentiels du Tribunal en sera supprimé;

2. La défense attribuera un pseudonyme à chaque témoin protégé auquel elle demande d'appliquer la présente mesure et communiquera au Greffe, sous le sceau du secret, les éléments d'identification de l'intéressé, ainsi que le pseudonyme correspondant; le Greffe ne communiquera pas ces éléments au Procureur, sauf instructions contraires. Le pseudonyme du témoin sera utilisé au procès, dans les dis-

[10] *Kajelijeli*, Décision relative à la requête de Kajelijeli aux fins de protection de témoins à décharge, 3 avril 2001; *Gacumbitsi*, Décision relative à la requête de la défense aux fins de mesures de protection en faveur des témoins à décharge, 25 août 2003; *Bagosora et consorts*, Décision sur la requête de Bagosora en prescription de mesures de protection de témoins, 1er septembre 2003.

[11] *Kajelijeli*, Décision relative à la requête de Kajelijeli aux fins de protection de témoins à décharge, 3 avril 2001; *Ndindabahizi*, Order for Non-Disclosure, 3 octobre 2001; *Bagosora et consorts*, Décision sur la requête de Bagosora en prescription de mesures de protection de témoins, 1er septembre 2003; *Gatete*, *Decision on Prosecution Request for Protection of Witnesses*, 11 février 2004.

[12] *Bagosora et consorts*, Décision sur la requête de Bagosora en prescription de mesures de protection de témoins, 1er septembre 2003, para. 5.

the Parties in proceedings, and in statements disclosed in redacted form to the Prosecution.

3. Making or publicizing photographs, sketches, or audio or video recordings of protected witnesses without leave of the Chamber or the protected witness, is prohibited.

4. The Prosecution shall not contact, or attempt to contact or influence, whether directly or indirectly, any protected witness in any manner, or encourage any person to do so, without first notifying the Defence which shall, if appropriate, make arrangements for such contacts.

5. The Prosecution shall provide the Registry with a designation of all persons working on the Prosecution team who will have access to any identifying information concerning any protected witness, and shall notify the Registry in writing of any persons leaving the Prosecution team and to confirm in writing that such person has remitted all material containing identifying information.

6. The Prosecution shall not attempt to make an independent determination of the identity of any protected witness, nor encourage or otherwise aid any person in so doing.

7. The Prosecution shall keep confidential to itself all identifying information of any protected witness, and shall not distribute or disseminate to any person not designated as part of the Prosecution team in accordance with paragraph 5 above, or make public, identifying information in any form.

8. The Defence is authorised to withhold disclosure of identifying information to the Prosecution, and to temporarily redact their names, addresses, locations and other identifying information as may appear in witness statements or other material disclosed to the Prosecution.

9. The identifying information withheld by the Defence in accordance with this order shall be disclosed by the Defence to the Prosecutor no later than thirty days before the commencement of the Defence case.

Arusha, 25 August 2004

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Dennis C. M. Byron

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cussions entre les parties à l'instance et dans les déclarations caviardées communiquées au Procureur, lorsque la non-divulgation des éléments d'identification s'impose;

3. Il est interdit de photographier un témoin protégé, de le dessiner, d'enregistrer ses propos sur un support audio ou de le filmer ou de publier les photos, dessins et enregistrements audio ou vidéo ainsi réalisés, sans l'autorisation de la Chambre ou du témoin protégé;

4. Il est interdit au Procureur d'employer un moyen quelconque pour se mettre en rapport avec un témoin protégé, tenter de se mettre en rapport avec lui ou l'influencer, directement ou indirectement, ou d'encourager quiconque à agir de la sorte, sans en avoir avisé au préalable la défense qui prend en ce cas les dispositions nécessaires pour assurer ces contacts s'il y a lieu;

5. Le Procureur indiquera au Greffe tous les membres de son bureau qui auront accès à tout élément d'identification d'un témoin protégé, l'informera par écrit lorsqu'une personne est appelée à quitter son équipe et confirmera également par écrit que cette personne a restitué toutes les pièces contenant des éléments d'identification;

6. Il est interdit au Procureur de tenter de découvrir par ses propres moyens l'identité d'un témoin protégé ou d'encourager ou aider de toute autre manière une personne à le faire;

7. Le Procureur gardera par devers lui tous les éléments d'identification des témoins protégés et s'abstiendra d'employer un moyen quelconque pour communiquer ou faire connaître des éléments d'identification à toute personne qui n'a pas été déclarée membre du Bureau du Procureur conformément aux dispositions du paragraphe 5 ci-dessus, ou pour publier lesdits éléments;

8. La défense est autorisée à différer la communication au Procureur des éléments d'identification des témoins protégés et à caviarder pour un temps leur nom, leur adresse, le lieu où ils se trouvent et toute autre information permettant de les identifier qui figurerait dans leurs déclarations ou autres pièces qu'elle doit communiquer au Procureur;

9. La défense communiquera au Procureur les éléments d'identification qu'elle s'est abstenue de révéler en application de la présente mesure, et ce, au plus tard 30 jours avant l'ouverture du procès.

Arusha, le 25 août 2004

[Signé] : Erik Mose; Sergei Alekseevich Egorov; Dennis C.M. Byron

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Decision on the Prosecution's Motion to Vary the Witness List 27 August 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – variation of the list of witnesses – criteria to be taken into account by the Tribunal – motion granted

International Instrument Cited : Rules of Procedure and Evidence, Rules 54, 66, 66 (A) (ii), 67 (A) (i), 73, and 73 bis *E*

International Cases Cited :

I.C.T.R. : Trial chamber I, The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean Bosco Barayagwiza, *Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001 (ICTR-99-52-T,* Reports 2001, *p. 1172) – Trial Chamber I,* The Prosecutor v. Théoneste Bagasora et al., *Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73* bis *(E), 26 June 2003 (ICTR-98-41-T,* Reports 2003, *p. 84) – Chamber XXX,* The Prosecutor v. Aloys Simba, *Decision on Prosecution Request for Protection of Witnesses, 4 March 2004 – Trial Chamber XXX,* The Prosecutor v. Théoneste Bagasora et al., *Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73* bis *(E), 21 May 2004 (ICTR-96-7-XXX,* Reports 2004, *p. XXX)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the "Prosecutor's Extremely Urgent Motion for Leave to Vary the List of Prosecution Witnesses Pursuant to Rules 54, 73, and 73 *bis* E of the Rules of Procedure and Evidence", filed on 16 August 2004;

CONSIDERING the Defence's Response, filed on 24 August 2004, and the Defence's Addendum, filed on 26 August 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Indictment against Aloys Simba was confirmed on 8 January 2002. The first amended Indictment was filed on 27 January 2004, and the second amended Indictment was filed on 10 May 2004. The trial was scheduled to commence on 16 August 2004. On 18 August 2004, the Chamber postponed the commencement of trial to 30 August 2004.

2. On 26 August 2004, the Prosecution filed a rejoinder to the Defence submissions. The Chamber did not consider this pleading.

SUBMISSIONS

3. The Prosecution seeks leave to remove twelve witnesses from its witness list : YA, KSD, DDG, ANQ, KCJ, XXG, XXI, KSH, YI, ALT, AMP, and KSB. In their place, the following witnesses are to be added : YD, KTB, KSK, and KSM. It is asserted that this proposed variation will promote judicial economy by producing the best evidence in the fewest number of witnesses. It is also noted that Witnesses YA and KSD have expressed reluctance to testify. According to the Prosecution, the Defence will not be prejudiced by the addition of four new witnesses given that their redacted statements were disclosed on 10 May 2002 as part of the supporting materials to the Indictment. The request to remove the twelve witnesses is strictly conditioned on the Chamber's agreement to add the four proposed witnesses.

4. The Defence argues that the Prosecution's motion is premature because, according to Rule 73 *bis* (E), a motion to vary the witness list may be brought only after commencement of trial, which is not scheduled to begin until 30 August 2004. The Defence also notes that if any of the four new proposed witnesses are Rwandan prisoners, then obtaining their judicial records would delay the proceedings and consequently prejudice the Accused. Furthermore, it is argued that the manner in which the Prosecution gave notice of these additional witnesses and disclosed their unredacted statements does not conform with Rules 66 and 67 (A) (i) and the Chamber's decision on protection measures for prosecution witnesses. The Defence also asserts that it is prejudiced because in its trial preparation it has relied on the Prosecution's "Summary of Witness Testimony", dated 10 May 2004.

DELIBERATIONS

5. Rule 73 *bis* (E) provides that :

> After commencement of Trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.

6. Though the trial has not yet commenced, the Chamber finds it appropriate in the present circumstances to consider the Prosecution's motion. The Prosecution filed its motion on 16 August 2004, the date when the trial was originally scheduled to commence, and the Chamber envisions no relevant intervening circumstances before trial commences on 30 August 2004 that warrant postponing the consideration of the Prosecution's motion. The interests of justice favour a prompt disposition of the motion so that the Chamber and all parties will have additional time to prepare and make arrangements for trial. In the Chamber's view, the time constraints placed on the Prosecution by Rule 73 *bis* (E), do not narrow the Chamber's authority, both inherent and pursuant to Rule 54, to issue all relevant orders ensuring the proper conduct of the trial proceedings.

7. In previous case law, considerations of the interests of justice and the existence of good cause guided the Chamber in determining whether or not to grant leave to vary the witness list in the context of an ongoing trial[1]. Those principles are equally applicable in this context as well. Relevant considerations include the materiality of the testimony, the complexity of the case, and prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence[2]. The Chamber should also consider factors such as the justification for adding witnesses, date on which the Prosecution declared its intention to call the proposed witnesses, the stage of the trial proceedings, whether the late discovery of the witnesses arose from fresh investigations, and whether the Defence will have adequate time to make an effective cross-examination[3]. The Chamber may grant a postponement of the testimony of new witnesses in order to allow the Defence sufficient time to prepare its cross-examination[4].

8. After making a close analysis of the written statements of the proposed witnesses, the Chamber finds that these criteria have been met. The four proposed witnesses will, according to their statements, provide in many respects first hand material evidence in support of the Indictment, and not new allegations. Witness YD to some extent replaces the testimonies of Witnesses YA and KSD, who have expressed reluctance to testify. In addition, Witness KSM replaces the testimony of Witnesses DDG, ANQ, ALT, and YI. The statements of Witnesses KTD and KSK, as well as the others, indicate that they will corroborate other prosecution witnesses.

9. The fact that the request was made at the outset of trial favours allowing the variation, particularly given that the witnesses will not testify on new allegations outside the scope of the Indictment. The proposed variation will promote judicial economy by substantially reducing the number of witnesses scheduled for trial. Moreover, it does not impact the witnesses that the Prosecution has proposed to call at the outset of trial.

10. There is minimal prejudice to the Defence given that the redacted witness statements of the four proposed witnesses were disclosed to the Defence on 10 May 2002 as part of the supporting material to the Indictment. This disclosure was well before the deadline envisioned in Rule 66 (A) (ii). In addition, the Chamber has compared the redacted statements with the unredacted statements and notes that very little relevant information, if any, was removed apart from identifying information. Moreover, the Chamber does not find that the Prosecution's notice to the Defence of its intent

[1] *Bagosora et al*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E), 21 May 2004, paras. 8-10; *Bagosora et al*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, paras. 14-22; *Nahimana et al*, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001, paras. 19-20.

[2] *Bagosora et al*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E), 21 May 2004, para. 8; *Nahimana et al*, Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses (TC), 26 June 2001, paras. 19-20.

[3] *Bagosora et al*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E), 21 May 2004, paras. 9-10; *Bagosora et al*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E) (TC), 26 June 2003, paras. 14-22.

[4] *Bagosora et al*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E), 21 May 2004, para. 10.

to call additional witnesses violates Rule 67 (A) (i) as it was done prior to the commencement of the trial.

11. In its witness protection decision, the Chamber ordered the Prosecution to disclose all identifying information of its witness to the Defence no later than 30 days before the commencement of trial[5]. The Prosecution disclosed the unredacted statement of Witness KSK on 30 July 2004, which meets this deadline. However, it did not disclose the unredacted statements of YD, KTB, and YSM until 16 August 2004. In order to remedy this late disclosure and any possible prejudice flowing from it or this variation of witnesses, the Chamber will consider reasonable requests for the postponement of the testimony of these witnesses to provide additional time for the Defence to prepare for cross-examination.

12. The Chamber is also aware that one of the proposed witnesses appears to be currently detained in Rwanda. If the Prosecution is in possession of this witness's judicial records, then they should be immediately disclosed.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution leave to vary its witness list removing YA, KSD, DDG, ANQ, KCJ, XXG, XXI, KSH, YI, ALT, AMP, and KSB and adding YD, KTB, KSK, and KSM.

Arusha, 27 August 2004

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Dennis C.M. Byron

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[5] *Simba*, Decision on Prosecution Request for Protection of Witnesses (TC), 4 March 2004, para. 10.

Decision on the Defence Motion to Preclude Prosecution Evidence 31 August 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – preclusion of prosecution evidence – decision of the Tribunal during the trial – motion denied

International Instrument Cited : Rules of Procedure and Evidence, Rule 89 (C)

International Cases Cited :

I.C.T.R. : Trial Chamber, The Prosecutor v. Ferdinand Nahimana, *Decision on the Defence Preliminary Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence, 12 July 2000 (ICTR-96-11) – Appeals Chamber,* The Prosecutor v. Hassan Ngeze et Ferdinand Nahimana, *Décision sur les appels interlocutoires, Separate Opinion of Judge Shahabuddeen, 5 September 2000 (ICTR-97-19) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Admissibility of Proposed Witness DBY, 18 September 2003 (ICTR-98-41-T,* Reports 2003, *p. 148) – Trial Chamber I,* The Prosecutor v. Ferdinand Nahimana et al., *Judgment, 3 December 2003 (ICTR-99-52-T,* Reports 2003*, p. 376) – Appeals Chamber,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 décembre 2003 (ICTR-98-41-AR93 et ICTR-98-41-AR93.2,* Recueil 2003*, p. 257) – Trial Chamber I,* The Prosecutor v. Aloys Simba, *Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment, 6 May 2004 (ICTR-01-76-I*, Reports 2004*, p. XXX) – Appeals Chamber,* The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhoko, *Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 2 July 2004 (ICTR-98-42-XXX,* Reports 2004, *p. XXX) – Appeals Chamber,* The Prosecutor v. Aloys Simba*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004 (ICTR-01-76-AR72.2,* Reports 2004, *p. XXX)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

Décision relative à la requête de la défense visant à interdire au Procureur de présenter certains éléments de preuve 31 août 2004 (ICTR-01-76-I)

(Original : Non spécifié)

Chambre de première instance I

Juges : Erik Møse, Président de Chambre; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – interdiction de présenter certains éléments de preuve – décision du Tribunal lors du procès – requête rejetée

Instrument international cité : Règlement de procédure et de preuve, art. 89 (C)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance, Le Procureur c. Ferdinand Nahimana, *Décision sur la requête en exceptions préjudicielles soulevées par la défense conformément à l'article 72 du Règlement de procédure et de preuve, 12 juillet 2000 (ICTR-96-11) – Chambre d'appel,* Le Procureur c. Hassan Ngeze et Ferdinand Nahimana, *Décision sur les appels interlocutoires, Separate Opinion of Judge Shahabuddeen, 5 septembre 2000 (ICTR-97-19) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts, *Décision relative à l'admissibilité de la déposition envisagée du témoin DBY, 18 septembre 2003 (ICTR-98-41-T,* Recueil 2003, *p. 149) – Chambre de première instance I,* Le Procureur c. Ferdinand Nahimana et consorts, *jugement, 3 décembre 2003 (ICTR-99-52-T,* Recueil 2003*, p. 377) – Chambre d'appel,* Le Procureur c. Théoneste Bagosora et consorts, *Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 décembre 2003 (ICTR-98-41-AR93 et ICTR-98-41-AR93.2,* Recueil 2003*, p. 257) – Chambre de première instance I,* Le Procureur c. Aloys Simba, *Décision relative à la requête de la défense en exceptions préjudicielles pour vices de forme de l'acte d'accusation, 6 mai 2004 (ICTR-01-76-I*, Recueil 2004*, p. XXX) – Chambre d'appel,* Le Procureur c. Arsène Shalom Ntahobali et Pauline Nyiramasuhoko, *Decision on the Appeals by Pauline Nyiramasuhoko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to declare parts of the Evidence of Witnesses RY and QBZ Inadmissible", 2 juillet 2004 (ICTR-98-42-XXX,* Recueil 2004, *p. XXX) –Chambre d'appel,* Le Procureur c. Aloys Simba, *Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 juillet 2004 (ICTR-01-76-AR72.2,* Recueil 2004, *p. XXX)*

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I composée des juges Erik Møse, Président de Chambre, Sergei Alekseevich Egorov et Dennis C. M. Byron,

BEING SEIZED OF the "Defence Motion *In Limine* to Preclude Prosecution Evidence for Allegations which Are Outside the Temporal Jurisdiction of the Tribunal", filed on 27 August 2004;

CONSIDERING the Prosecution's response, filed on 27 August 2004;

HEREBY DECIDES the motion.

1. The Defence motion requests the Trial Chamber to preclude the Prosecution from introducing testimonial and documentary evidence concerning allegations in the Indictment which are outside the temporal jurisdiction of the Tribunal. The Defence asserts that the Prosecution's anticipated pre-1994 evidence are allegations of crimes outside the Tribunal's temporal jurisdiction, and not simply historical background or context. It also argues that the vagueness and imprecision of the pre-1994 allegations further prejudice the Accused.

2. In its response, the Prosecution argues that the motion is pre-mature as no evidence has yet been led. It further notes the Tribunal's practice of admitting pre-1994 evidence in order to provide context to the alleged crimes.

3. Previous cases confirm that there are three bases of relevance for pre-1994 evidence, which are exceptions to the general inadmissibility of pre-1994 evidence : (i) evidence relevant to an offence continuing into 1994; (ii) evidence providing a context or background; and (iii) similar fact evidence[1]. The Chamber held recently in this case that the paragraphs in the Indictment alleging events occurring prior to 1994 provide a context or background and may be a basis on which to draw inferences as to intent or other elements of the crimes alleged to have been committed within the Tribunal's temporal jurisdiction[2]. This decision was affirmed by the Appeals Cham-

[1] *Simba*, Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment (TC), 6 May 2004, para. 7. See also *Simba*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction (AC), 29 July 2004; *Ntahobali and Nyiramasuhuko*, Decision On The Appeals By Pauline Nyiramasuhuko And Arsène Shalom Ntahobali On The "Decision On Defence Urgent Motion To Declare Parts Of The Evidence Of Witnesses RY And QBZ Inadmissible" (AC), 2 July 2004, paras. 15-16; *Bagosora et al*, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence (AC), 19 December 2003; *Ngeze and Nahimana*, Décision sur les appels interlocutoires (AC), Separate Opinion of Judge Shahabuddeen, 5 September 2000; *Bagosora et al*, Decision on the Admissibility of Proposed Witness DBY (TC), 18 September 2003, paras. 9-14; *Nahimana et al*, Judgement (TC), 3 December 2003, para. 101; *Nahimana*, Decision on the Defence Preliminary Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence (TC), 12 July 2000, p. 4.

[2] *Simba*, Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment (TC), 6 May 2004, para. 8.

SAISI de la requête intitulée «Defence Motion *in Limine* to Preclude Prosecution Evidence for Allegations which are outside the Temporal Jurisdiction of the Tribunal», (Requête *in limine* de la défense visant à interdire au Procureur de présenter des éléments de preuve relativement à des allégations ne relevant pas de la compétence temporelle du Tribunal) déposée le 27 août 2004,

VU la réponse du Procureur déposée le 27 août 2004,

STATUE À PRÉSENT SUR LA REQUÊTE.

1. Dans sa requête, la défense prie la Chambre d'interdire au Procureur de présenter des éléments de preuve testimoniaux et documentaires portant sur des allégations de l'acte d'accusation qui ne relèvent pas de la compétence temporelle du Tribunal. Elle affirme que les éléments de preuve antérieurs à 1994 que le Procureur envisage de présenter ne sont pas de simples rappels historiques ou contextuels, mais des allégations de crimes qui sortent de la compétence temporelle du Tribunal. Elle fait en outre valoir que le caractère vague et imprécis de ces allégations cause un préjudice à l'accusé.

2. Dans sa réponse, le Procureur soutient que la requête est prématurée dès lors qu'aucun élément de preuve n'a encore été présenté. Il relève également que le Tribunal a pour pratique d'admettre des éléments de preuve antérieurs à 1994 pour situer les crimes reprochés dans leur contexte.

3. La jurisprudence du Tribunal confirme qu'il existe trois catégories de preuve permettant de statuer sur la pertinence des éléments de preuve antérieurs à 1994 comme exceptions à la règle générale d'inadmissibilité de moyens de preuve antérieurs à cette date, il s'agit : (i) d'éléments de preuve pertinents pour des infractions dont la commission s'est poursuivie en 1994; (ii) d'éléments de preuve contextuels ou historiques; et (iii) d'éléments de preuve tirés de faits similaires[1]. Dans une décision récente, la Chambre a conclu que les paragraphes de l'acte d'accusation qui exposent des faits survenus avant 1994 situent le contexte historique et peuvent servir à opérer des déductions quant à l'intention ou à d'autres éléments constitutifs des crimes allégués relevant de la compétence temporelle du Tribunal[2]. Cette décision a été confir-

[1] *Le Procureur c. Simba*, Chambre de première instance, Décision relative à la requête de la défense en exceptions préjudicielles pour vices de forme de l'acte d'accusation, 6 mai 2004, para. 7, voir également *Le Procureur c. Simba*, Chambre d'appel, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 juillet 2004; *Le Procureur c. Ntahobali et Nyiramasuhoko*, Chambre d'appel, Decision on the Appeals by Pauline Nyiramasuhoko and Arsène Shalom Ntahobali on the " Decision on Defence Urgent Motion to declare parts of the Evidence of Witnesses RY and QBZ Inadmissible", 2 juillet 2004, paras. 15 et 16; *Le Procureur c. Bagosora et consorts*, Chambre d'appel, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 décembre 2003; *Le Procureur c. Hassan Ngeze et Ferdinand Nahimana*, Chambre d'appel, Décision sur les appels interlocutoires, Separate Opinion of Judge Shahabuddeen, 5 septembre 2000; *Le Procureur c. Bagosora et consorts*, Chambre de première instance, Décision relative à l'admissibilité de la déposition envisagée du témoin DBY, 18 septembre 2003, paras. 9 à 14; *Le Procureur c. Nahimana et consorts*, Chambre de première instance, jugement du 3 décembre 2003, par. 101; *Le Procureur c. Nahimana*, Chambre de première instance, Décision sur la requête en exceptions préjudicielles soulevées par la défense conformément à l'article 72 du Règlement de procédure et de preuve, 12 juillet 2004, p. 4.

[2] *Le Procureur c. Simba*, Chambre de première instance, Décision relative à la requête de la défense en exceptions préjudicielles pour vices de forme de l'acte d'accusation, 6 mai 2004, para. 8.

ber[3]. Therefore, the Chamber does not consider allegations of pre-1994 events, or evidence to be lead in support of these allegations, to be separate crimes for which the accused could be potentially held criminally liable, as argued by the Defence. Consistent with the approach adopted by both the Appeals Chamber and this Trial Chamber, it will be for the Trial Chamber during the trial to decide whether to admit evidence relating to events falling outside the temporal jurisdiction of the Tribunal in accordance with Rule 89(C)[4].

4. The Chamber has already ruled on issues of vagueness and imprecision in the Indictment and will not consider it again here[5].

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion in all respects.

Arusha, 31 August 2004

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Dennis C.M. Byron

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[3] *Simba*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction (AC), 29 July 2004.

[4] *Simba*, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction (AC), 29 July 2004. See also *Bagosora et al*, Decision on the Admissibility of Proposed Witness DBY (TC), 18 September 2003, paras. 6, 7; *Ntahobali and Nyiramasuhuko*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible" (AC), 2 July 2004, para. 15; *Bagosora et al*, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence (AC), 19 December 2003; *Ngeze and Nahimana*, Décision sur les appels interlocutoires (AC), Separate Opinion of Judge Shahabuddeen, 5 September 2000, para. 40. See also *Nahimana*, Decision on the Defence Preliminary Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence (TC), 12 July 2000, p. 4.

[5] *Simba*, Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment (TC), 6 May 2004, paras. 4-5.

mée par la Chambre d'appel[3]. Ainsi, contrairement à ce que soutient la défense, la Chambre n'estime pas que les allégations relatives à des faits antérieurs à 1994 et les éléments de preuve qui seront produits à l'appui de celles-ci reprochent à l'accusé des crimes distincts dont celui-ci pourrait être reconnu pénalement responsable. Conformément aux décisions de la Chambre d'appel et de la présente Chambre, il appartiendra à la Chambre de première instance de se prononcer lors du procès en application du paragraphe (C) de l'article 89 sur l'admissibilité des éléments de preuve relatifs aux faits qui ne relèvent pas de la compétence temporelle du Tribunal[4].

4. S'étant déjà prononcée sur la question du caractère vague et imprécis de l'acte d'accusation, la Chambre ne la réexaminera pas dans le cadre de la présente décision[5].

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête.

Arusha, le 31 août 2004

[Signé] : Erik Møse; Sergei Aleekseevich Egorov; Dennis C.M. Byron

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[3] *Le Procureur c. Simba*, Chambre d'appel, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 juillet 2004.

[4] *Le Procureur c. Simba*, Decision on interlocutory Appeal regarding Temporal Jurisdiction, 29 juillet 2004; voir aussi *Le Procureur c. Bagosora et consorts*, Chambre de première instance, Décision relative à l'admissibilité de la déposition envisagée du témoin DBY, 18 septembre 2003, paras. 6 et 7; *Le Procureur c. Ntahobali et Nyiramasuhoko*, Chambre d'appel, Decision on the Appeals by Pauline Nyiramasuhoko and Arsène Shalom Ntahobali on the «Decision on Defence Urgent Motion to Decalare Parts of the Evidence of Witnesses RY and QBZ Inadmissible», 2 juillet 2004, para. 15; *Le Procureur c. Bagosora et consorts*, Chambre d'appel, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 décembre 2003; *Le Procureur c. Hassan Ngeze et Ferdinand Nahimana*, Chambre d'appel, Décision sur les appels interlocutoires, Separate Opinion of Judge Shahabuddeen, 5 septembre 2000 para. 40; *Le Procureur c. Nahimana*, Chambre de première instance, Décision sur la requête en exceptions préjudicielles soulevées par la défense conformément à l'article 72 du Règlement de procédure et de preuve, 12 juillet 2000, p. 4.

[5] *Le Procureur c. Simba*, Chambre de première instance, Décision relative à la requête de la défense en exceptions préjudicielles pour vices de forme de l'acte d'accusation, 6 mai 2004, paras. 4 à 5.

Decision on Aloys Simba's Extremly Urgent Motion for an Extension of Time for the Filing of a Reply Brief 31 August 2004 (ICTR-01-76-AR72.3)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding Judge; Florence Ndepele Mwachande Mumba; Mehmet Güney; Wolfgang Schomburg; Inés Mónica Weinberg de Roca

Aloys Simba – extension of time – working language of Defence Counsels, translation – good cause – motion partly granted

International Instruments Cited : Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal – Rules of Procedure and Evidence, Rule 116 (A)

International Case Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Aloys Simba*, Decision on Aloys Simba's Extremely Urgent Motion for an Extension of Time, 14 June 2004 (ICTR-01-76-AR72.2,* Reports 2004, *p. XXX)*

THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "International Tribunal", respectively),

BEING SEISED OF the "Requête en extrême urgence de la défense en vue d'obtenir une autorisation à répliquer à date fixe ou une prorogation des délais pour le dépôt de sa réplique à la réponse du Procureur à son acte d'appel contre la décision de rejet de la Première Chambre en date du 4 juillet 2004," filed by counsel for Aloys Simba on 18 August 2004 ("Motion");

RECALLING the "Decision on Aloys Simba's Motion for an Extension of Time," rendered by the Appeals Chamber on 27 July 2004, which granted Appellant Aloys Simba ("Appellant") an extension of time in which to file his appeal in this matter pending receipt of the French translation of the decision of the Trial Chamber appealed from;

CONSIDERING that the Appellant filed his appeal on 9 August 2004 ("Appeal");

CONSIDERING that the Prosecution filed its response to the Appeal on 16 August 2004 ("Response");

CONSIDERING that, pursuant to the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal, dated 16 Septem-

ber 2002, the Appellant was permitted to file a reply within four days of the filing of the Response, thus on or before 20 August 2004;

CONSIDERING that the Motion timely sought an extension of time within which to file a reply to the Response on the ground that the Response was filed in English whereas the Appellant and his counsel are proficient in French;

CONSIDERING that at least one member of the Appellant's defence team is proficient in English[1];

CONSIDERING that, to the extent that the Appellant or any members of his defence team are not proficient in English, the essential elements of the Response may be effectively conveyed to them without waiting for an official translation;

CONSIDERING, however, that the Response asserts arguments, notably regarding whether the appeal is properly filed, to which the Appellant should be permitted to reply in full and that the Appellant's English-speaking counsel should be afforded a brief extension of time to consult with French-speaking counsel or the Appellant with regard to the contents of the Response;

CONSIDERING that Rule 116 (A) of the Rules permits the Appeals Chamber to grant a motion to extend a time limit "upon a showing of good cause";

CONSIDERING that good cause has been shown for granting a brief extension of time pursuant to Rule 116 (A) of the Rules;

FOR THE FOREGOING REASONS,

HEREBY GRANTS the Motion in part;

ORDERS that the Appellant may file a reply brief within four days of receipt of the French translation of the Response; and

DIRECTS the Registrar to ensure that the French translation of the Response is forwarded without delay to the Appellant, if he has not already done so.

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

Done this 31st day of August 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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[1] See *Simba v. Prosecutor*, No. ICTR-01-76-AR72.2, Decision on Aloys Simba's Extremely Urgent Motion for an Extension of Time, 14 June 2004, p. 2.

Ordonnance portant calendrier
Article 54 du Règlement de procédure et de preuve
2 septembre 2004 (TPIR-2001-73-R54)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente ; Flavia Lattanzi ; Florence Rita Arrey

Aloys Simba – calendrier

Instrument international cité : Règlement de procédure et de preuve, art. 54 et 73 (E)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance III (la «Chambre»), composée des Juges Andrésia Vaz, Présidente, Flavia Lattanzi et Florence Rita Arrey ;

CONSIDÉRANT la requête du Procureur intitulée «Prosecutor's Conditional Motion for Leave to Amend Indictment», déposée le 31 août 2004 ;

CONSIDÉRANT le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve du Tribunal (le «Règlement») et particulièrement les Articles 54 et 73 (E) du Règlement qui disposent respectivement :

> Article 54
>
> A la demande d'une des parties ou de sa propre initiative, un juge ou une Chambre de première instance peut délivrer les ordonnances, citations à comparaître, assignations, injonctions, mandats et ordres de transfert nécessaires aux fins de l'enquête, de la préparation ou de la conduite du procès.
>
> Article 73 (E)
>
> La partie défenderesse dépose sa réponse au plus tard cinq jours après la date à laquelle elle a reçu la requête.

LA CHAMBRE,

ORDONNE à la défense, au cas où elle souhaiterait répondre à la requête du Procureur, de le faire dans les cinq jours à compter de la réception de la version française de ladite requête.

Arusha, 2 septembre 2004

[Signé] : Andrésia Vaz ; Flavia Lattanzi ; Florence Rita Arrey

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Order of the Presiding Judge Assigning a Bench of Three Judges Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence 23 September 2004 (ICTR-01-76-AR72.3)

(Original : English)

Appeals Chamber

Judge : Theodor Meron, Presiding Judge

Aloys Simba – Appeals Chamber – judges – composition

International Instruments Cited : Document IT/222 of the International Criminal Tribunal for the former Yugoslavia – Rules of Procedure and Evidence, Rules 72 (B) (i), 72 (B) (ii), 72 (D) and 72 (E)

I, THEODOR MERON, Presiding Judge of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("International Tribunal"),

NOTING the "Acte d'appel contre la décision de la première chambre en date du 14 juillet 2004, rejetant la requête de la défense en exceptions préjudicielles pour incompétence et pour vice de forme substantiels contre l'acte d'accusation modifié en date du 10 mai 2004," ("Appeal") filed by counsel for Aloys Simba on 9 August 2004;

CONSIDERING that the Appeal does not rely on certification by the Trial Chamber under Rule 72 (B) (ii) of the Rules of Procedure and Evidence of the International Tribunal ("Rules") and therefore appears to proceed as of right as an appeal challenging jurisdiction under Rule 72 (B) (i) of the Rules;

CONSIDERING that Rule 72 (E) of the Rules provides that an appeal brought under Rule 72 (B) (i) may not be proceeded with if a bench of three judges of the Appeals Chamber decides that the appeal is not capable of satisfying the requirements of Rule 72 (D);

CONSIDERING the composition of the Appeals Chamber of the International Tribunal set out in Document IT/222 of the International Criminal Tribunal for the former Yugoslavia, dated 17 November 2003;

NOTING Article 13 (4) of the Statute of the International Tribunal;

FOR THE FOREGOING REASONS,

ORDER that, in the case of *Aloys Simba v. Prosecutor,* Case N° ICTR-01-76-AR72.3, the determination provided for in Rule 72 (E) be made by the following bench :

Judge Theodor Meron
Judge Mehmet Güney.
Judge Wolfgang Schomburg

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

Done this 23rd day of September 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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Decision on the Prosecution's Extremely Urgent Request for an Extension of the Trial Chamber's Order for Transfer of Witnesses Pursuant to Rule 90 **bis** *(F) 29 September 2004 (ICTR-01-76-T)*

(Original : English)

Trial Chamber I

Judge : Erik Møse

Aloys Simba – extension of the Order for the transfer of detained witnesses – motion granted

International Instrument Cited : Rules of Procedure and Evidence, Rules 73 (A), 90 bis *(B) and 90* bis *(F)*

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

SITTING as Judge Erik Møse designated by the Trial Chamber pursuant to Rule 73 (A) of the Rules of Procedure and Evidence ("the Rules");

BEING SEIZED OF the "Prosecutor's Extremely Urgent Request for an Extension of the Trial Chamber's Order for Transfer of Witnesses Pursuant to Rule 90 *bis* (F)", filed on 28 September 2004;

HEREBY DECIDES the motion.

1. The Prosecution seeks to extend until 15 November 2004 the Order for the Transfer of Detained Witnesses, dated 4 August 2004, with respect to Witnesses KDD, YG, YC, ANX, AMH, and KEI. This order is set to expire on 30 September 2004.

2. Rule 90 *bis* (F) provides that "[i]f by the end of the period decided by the Tribunal the presence of the detained witnesses continues to be necessary, a Judge or a Chamber may extend the period, on the same conditions stated in Sub-Rule (B)".

3. The Chamber finds that the requirements of Rule 90 *bis* (F) have been satisfied with respect to the six above-named witnesses. Due to the postponement of the commencement of trial, these witnesses could not be heard during the recent trial segment and are scheduled to testify during the upcoming trial session from 25 October until 12 November 2004. In addition, the Prosecution has confirmed, as required by Rule 90 *bis* (B), that the proposed extension would not extend the period of detention of these detainees in Rwanda nor would their presence be required for criminal proceedings during the period requested.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution's motion;

ORDERS the extension of the authorised period transfer for Witnesses KDD, YG, YC, ANX, AMH, and KEI until 15 November 2004.

Arusha, 29 September 2004

[Signed] : Erik Møse

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Decision on Validity of Appeal Pursuant to Rule 72 (E) of the Rules of Procedure and Evidence 30 September 2004 (ICTR-01-76-AR72.3)

(Original : English)

Appeals Chamber

Judges : Theodor Meron, Presiding; Mehmet Güney; Wolfgang Schomburg

Aloys Simba – validity of appeal – appeal dismissed

International Instrument Cited : Rules of Procedure and Evidence, Rules 72 (B) (i), 72 (D) and 72 (E)

International Case Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Aloys Simba*, Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment, 14 July 2004 (ICTR-01-76-I,* Reports 2004*, p. XXX)*

1. This Bench of three Judges of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Commit-

ted in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "International Tribunal", respectively) is seized of the "*Acte d'appel contre la décision de la première chambre en date du 14 juillet 2004 rejetant la requête de la défense en exceptions préjudicielles pour incompétence et pour vice de forme substantiels contre l'Acte d'accusation modifié en date du 10 mai 2004*" filed by Aloys Simba on 9 August 2004 ("Appeal" and "Appellant" respectively). In this appeal, the Appellant takes issue with Trial Chamber I's Decision of 14 July 2004 ("Impugned Decision")[1], in which the Trial Chamber found that (1) the second amended Indictment adequately pleads the *mens rea* for joint criminal enterprise; and (2) the allegations contained in Count 4 (Murder as a Crime Against Humanity) of the Indictment are adequately connected to the widespread and systematic attack.

2. The Appeal, as corrected in the Reply filed by the Appellant on 7 September 2004[2], purports to proceed as of right under Rule 72 (B) (i) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), which provides that preliminary motions are without interlocutory appeal, except "in the case of motions challenging jurisdiction, where an appeal by either party lies as of right." The Appellant alleges that : 1) the Trial Chamber erred in concluding that the second amended Indictment adequately pled the *mens rea* for joint criminal enterprise; and (2) the Trial Chamber erred in considering that the allegations contained in Count 4 (Murder as a Crime Against Humanity) were adequately connected to the widespread and systematic attack. In his Response, the Prosecutor submits *inter alia* that the Appeal is inadmissible, since neither ground of appeal qualifies as a jurisdictional challenge within the definition of Rule 72 (D)[3].

3. The Appellant submits in his Reply that his Appeal has to be understood as challenging the Trial Chamber's jurisdiction in relation to the counts contained in the second amended Indictment. The Appellant argues that the Appeal is an appeal against jurisdiction as a result of the formulation of the counts, and as the notion of the joint criminal enterprise is outside the parameters of Articles 2 and 3 of the Statute of the Tribunal. He adds that the Appeal seeks a finding that the Trial Chamber lacked jurisdiction to deal with murders as crimes against humanity, so long as the Prosecution had failed to establish coherently the link between the alleged murders and the widespread and systematic attacks which occurred in the country.

[1] Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment, 14 July 2004.

[2] *Réplique de la défense à la réponse du Procureur en date du 16 août 2004 à l'acte d'appel du 4 août 2004 intitulé : "Acte d'appel contre la décision de la première chambre en date du 14 juillet 2004, rejetant la requête de la défense en exceptions préjudicielles pour incompétence et pour vice de forme substantiels contre l'acte d'accusation modifié en date du 10 mai 2004 – art.72 (B) (i) (Corrigendum) et 108 du RPP*", filed on 7 September 2004 ("Reply").

[3] The Prosecutor's Response to the Defence Appeal Against the Trial Chamber Decision of 14 July 2004 Denying the Defence Motion Challenging Defects in the Form of Indictment, 16 August 2004 ("Response").

VALIDITY OF APPEAL UNDER RULE 72(D)

4. Pursuant to Rule 72 (E), this Bench must determine whether the Appeal is "capable of satisfying the requirements of paragraph (D)." If the Appeal fails to satisfy the requirements of Rule 72 (D) of the Rules, it must be dismissed[4].

5. Neither of the Appellant's grounds of appeal constitutes a jurisdictional challenge pursuant to Rule 72 (D). Although in his Reply, the Appellant has attempted to reformulate his arguments in jurisdictional terms, the Appeals Chamber considers that the substance of the Appeal remains nonetheless concerned with alleged defects in the form of the indictment. The Appellant's propositions that "the notion of joint criminal enterprise … is outside the parameters of art. 2 and 3 of the Statute,"[5] and that "the reference to joint criminal enterprise … relies on no legal basis"[6], without more, do not suffice to transform the Appeal into a jurisdictional challenge as defined by Rule 72 (D).

DISPOSITION

6. For the foregoing reasons, the Appeal is dismissed.

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

Done this 30th day of September 2004, at The Hague, The Netherlands.

[Signed] : Theodor Meron

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[4] Rule 72 (D) provides : "For purposes of paragraphs (A) (i) and (B) (i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to : (i) any of the persons indicated in Articles 1, 5, 6 and 8 of the Statute; (ii) the territories indicated in Articles 1, 7 and 8 of the Statute; (iii) the period indicated in Articles 1, 7, and 8 of the Statute; or (iv) any of the violations indicated in Articles 2, 3, 4 and 6 of the Statute."

[5] Reply, p. 3.

[6] Reply, p. 5.

Decision on the Defence Motion to Exclude the Testimony of Witness KSM 4 October 2004 (ICTR-01-76-I)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – exclusion of the testimony of a witness – premature submissions – motion denied

International Cases Cited :

I.C.T.R. : Appeals chamber, The Prosecutor v. Arsène Shalom Ntahobali et Pauline Nyiramasuhuko*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible", 2 July 2004 (ICTR-97-21-XXX,* Reports 2004*, p. XXX) – Appeals Chamber,* The Prosecutor v. Eliezer Niyitegeka*, Judgement, 9 July 2004 (ICTR-96-14-A, Reports 2004, p. XXX)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the "Defence Motion to Exclude the Testimony of Witness KSM", filed on 20 September 2004;

CONSIDERING the Prosecution's response, filed on 24 September 2004, and the Defence's reply, filed on 29 September 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Defence motion requests the Chamber to exclude the testimony of Prosecution Witness KSM. The witness testified on 14 and 15 September 2004 about events allegedly involving Simba in Kinyamakara and Ruhashya communes.

SUBMISSIONS

2. The Defence's principal ground for excluding Witness KSM's evidence is that it does not relate to the Indictment. The Defence notes that the witness's testimony principally concerned Simba's alleged participation in a massacre in Kinyamakara commune and general killings in Ruhashya commune. The Indictment, however, refers

to the distribution of weapons in Kinyamakara commune, not killings, and to two specific massacre sites in Ruhashya commune, which were not mentioned by the witness. The Defence claims that it lacked notice of these new allegations and would be prejudiced by their admission into evidence. The Defence also asserts that Witness KSM's testimony should be excluded because the Prosecution failed to previously identify the points in the Indictment to which she would testify. Furthermore, in the Defence's view, the witness appeared visibly upset and traumatized, which calls into question her capacity to testify, including the validity of her oath and the reliability of her recollections.

3. The Prosecution argues that the Defence has waived its rights to challenge KSM's evidence on grounds of lack of notice because it failed to contemporaneously object during her testimony. According to the Prosecution, this failure, the Defence's subsequent cross-examination, and the prior disclosure of the witness's statement reflect that the Defence was not surprised or prejudiced by her testimony. The Prosecution concedes that the evidence pertaining to the massacres in Kinyamakara commune were not pleaded in the Indictment and thus cannot be a basis of conviction. Nonetheless, it submits that Witness KSM's evidence is within the scope of the Indictment and should not be excluded. According to the Prosecution, Witness KSM's testimony refutes Simba's alibi and goes to proving Simba's *mens rea* during the Ruhashya massacres as well as to establishing the general requirements of a widespread and systematic attack. In addition, the Prosecutor asserts that its summary of Witness KSM's evidence in its motion seeking to leave to vary the witness list adequately specified the points to which the witness was going to testify. The Prosecution also argues that the Defence's challenge to the validity of the witness's capacity to testify are not supported by the evidence.

DELIBERATIONS

4. The Defence first raised the challenges contained in the present motion orally at the close of Witness KSM's evidence[1]. At that time, the Chamber noted the objections for the record and indicated that these issues should be addressed at the closing brief stage[2]. This preserved the Defence's objections for further consideration[3].

5. At this stage of the case, the Chamber is not in a position to fully appreciate the evidentiary value of all aspects of Witness KSM's testimony. While lack of notice may preclude conviction on an unpleaded allegation, the Appeals Chamber has confirmed that the evidence may nonetheless be admitted to the extent that it may be relevant to the proof of any allegation pleaded in the Indictment[4]. The Prosecution

[1] T. 15 September 2004, p. 43.

[2] T. 15 September 2004, p. 44. This is particularly true for the Defence's arguments concerning the impact of trauma on the reliability of the witness's testimony, which goes to weight, not admissibility.

[3] *Niyitegeka*, Judgement (AC), paras. 199-200.

[4] *Ntahobali and Nyiramasuhuko*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, paras. 14 and 15.

has indicated that Witness KSM's testimony will corroborate other witnesses in connection with the massacres in Ruhashya commune, which are pleaded in the Indictment[5]. Moreover, in Chamber's view, neither party has sufficiently addressed in detail the potential problems with each allegation made by the witness or their specific relevance to other aspects of the Indictment or as background for the case.

6. Thus, the Chamber finds these submissions to be pre-mature and maintains its position that the parties address these issues in their closing briefs.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion.

Arusha, 4 October 2004

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Dennis C. M. Byron

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Decision on defence Motion to Obtain Judicial Records Pursuant to Rule 68 4 October 2004 (ICTR-01-76-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – communication of judicial records of witnesses – efforts of good faith by the Defence – motion denied

International Instruments Cited : Rules of Procedure and Evidence, Rules 68 and 98 – Statute, Art. 28

International Cases Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Ignace Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA, 8 June 2000 (ITCR-95-1A-T,* Reports 2000, *p. 166) – Trial Chamber III,* The Prosecutor v. Joseph Nzirorera et al.*, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003 (ICTR-98-44-I,* Reports 2003, *p. 1382) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al, *Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003 (ICTR-98-41-T,* Reports 2003, *p. 252) –*

5 T. 15 September, p. 37.

Trial Chamber XXX, The Prosecutor v. Théoneste Bagosora et al.*, Decision on Motion for Disclosure under Rule 68, 1 March 2004 (ITCR-96-7-XXX,* Reports 2004*, p. XXX) – Trial Chamber XXX,* The Prosecutor v. Théoneste Bagosora et al.*, Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute, 10 March 2004 (ITCR-96-7-XXX,* Reports 2004*, p. XXX) – Trial Chamber XXX,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana, 25 May 2004 (ITCR-96-7-XXX,* Reports 2004*, p. XXX) – Trial Chamber XXX,* The Prosecutor v. Théoneste Bagosora et al.*, Request to the Government of Rwanda for Cooperation and Assistance, 31 August 2004 (ITCR-96-7-XXX,* Reports 2004*, p. XXX)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the "Defence Motion to Obtain All the Prior Statements and/or Judicial Records which Witnesses KSS and KEH Gave to Authorities in Rwanda", filed on 24 September 2004, and the oral request for the disclosure of the judicial records of Emmanuel Rekeraho, made on 18 August 2004;

CONSIDERING the Prosecution's response, filed on 24 September 2004, and the Defence's reply, filed on 29 September 2004;

HEREBY DECIDES the motion and oral request.

INTRODUCTION

1. The Defence written motion raises the issue of the scope of the Prosecution's disclosure obligations pursuant to Rule 68 with respect to Rwandan judicial documents pertaining to Witnesses KEH and KSS.

2. Witness KEH testified before the Chamber on 31 August and 1 September 2004. During his testimony, he indicated that he had testified in judicial proceedings in Gikongoro, but added that these proceedings did not in anyway involve Aloys Simba or the events at the Murambi Technical school[1]. Rather, the proceedings involved local people who had torched houses and killed livestock in his sector[2]. The Defence made an oral request for the Prosecution to obtain any judicial documents pertaining to Witness KEH during the status conference on 1 September 2004.

3. Witness KSS testified before the Chamber on 14 September 2004. During his testimony, Witness KSS indicated that he had given statements about events to the police and Public Prosecutor in Rwanda other than those he discussed in his testimony[3].

4. On 13 and 14 July 2004, the Prosecution disclosed to the Defence the French and English versions of the Rekeraho judgement as a prospective exhibit. On

[1] T. 1 September 2004, pp. 33-34.
[2] T. 1 September 2004, p. 34.
[3] T. 14 September 2004, pp. 53-57.

18 August 2004, the Defence made an oral request pursuant to Rule 68 for the disclosure of the judicial dossier of Rekeraho. The Prosecution stated that it was under no obligation to produce the file because the dossier was not in its possession and it did not intend to call Rekeraho as a witness[4]. The Prosecution has previously noted that the document would be introduced at trial by its investigator[5]. In addition, the Prosecution has stated that it formed part of the materials that Alison Des Forges consulted in order to form her expert opinion[6].

SUBMISSIONS

5. The Defence motion requests the Chamber to instruct the Prosecution, pursuant to Rule 68, to obtain Rwandan judicial documents related to proceedings involving Witnesses KEH and KSS. The Defence argues that the Prosecution has an obligation pursuant to Rule 68 to provide it with witnesses' prior statements concerning the same events about which they testify.

6. The Prosecution argues that it has no obligation under Rule 68 to provide the Defence with copies of Rwandan judicial documents pertaining to Witnesses KEH and KSS. In support of this position, it points to the Defence's concession that the requested documents are not in the possession of the Prosecution, but rather the Rwandan authorities. The Prosecution also asserts that the Defence has not demonstrated that the requested material is exculpatory or even potentially exculpatory, noting that the witnesses in cross-examination stated that the domestic proceedings in which they were involved were not related to the Accused. Moreover, the Prosecution highlights the Defence's failure to demonstrate that it has diligently searched and failed to obtain the requested material before filing its motion.

DELIBERATIONS

7. The Chamber is seized with a written motion to order the Prosecution to obtain the judicial records pertaining to Witnesses KEH and KSS. Moreover, the Defence has orally requested the Chamber to order the Prosecution to obtain the judicial dossier of Rekeraho. As this request raises similar issues as the motion, the Chamber considers it expedient to address also oral request in the present decision.

8. The Prosecution's obligation pursuant to Rule 68 is to disclose exculpatory evidence or evidence which may affect the credibility of Prosecution evidence, where such evidence is in its possession[7]. It is not disputed that the requested documents

[4] T. 18 August 2004, p. 25; T. 2 September 2004, pp. 1-2.

[5] T. 12 August 2004, p. 16; T. 18 August 2004, p. 25.

[6] T. 2 September, pp. 1-2.

[7] *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, paras. 5-6. See also *Bagosora et al*., Decision on Motion for Disclosure under Rule 68 (TC), 1 March 2004, para. 5; *Bagosora et al*., Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 7; *Nzirorera et al*., Decision on the Defence Motion for Disclosure of Exculpatory Evidence (TC), 7 October 2003, para. 11.

are not within the Prosecution's possession. Thus, the motion must be dismissed. The Prosecution's disclosure obligations under the Statute and the Rules do not extend to pursuing every possible avenue of investigation into a witness's credibility on behalf of the Defence[8].

9. That being said, this Chamber has in the past ordered, pursuant to Rule 98, the Prosecution to use its good offices to request the Rwandan judicial records of detained witnesses[9]. The Chamber has previously recognized that these documents are important for the preparation of the Defence given their relevance to credibility[10]. However, Witnesses KEH and KSS are neither detained nor alleged accomplices. The Chamber is reluctant to issue a similar order in this case where, from the testimony of these witnesses, the materials requested by the Defence do not appear to directly relate to the credibility of any allegations against the Accused.

10. In addition, at this stage it is not entirely clear whether or for what purposes the Rekeraho judgement will be used at trial. Without a greater showing as to the relevance of this document and the need for challenging its credibility, the Chamber declines to order the Prosecution to request his judicial records, particularly where he will not be appearing as a witness[11].

11. As is the general practice in the Tribunal, the Defence must first make its own independent efforts to secure evidence it wishes to use at trial other than exculpatory material in the possession of the Prosecution[12]. Once the Defence demonstrates its

[8] *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, para. 6 ("The disclosure obligation under Rule 68 relates to "the existence of evidence known" to the Prosecutor. A literal interpretation might suggest that mere knowledge of exculpatory evidence in the hands of a third party would suffice to engage the responsibility of the Prosecutor under that provision. However, to adopt such a meaning, would, in the extreme, allow for countless motions to be filed with the sole intention of engaging the Prosecutor into investigations and disclosure of issues which the moving party considered were 'known' to the Prosecutor. This would not be in conformity with Article 15 of the Statute. Under that provision, the Prosecutor is responsible for investigations. She shall act independently and not receive instructions from any source.")

[9] See, e.g., *Bagosora et al*., Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 7; *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, paras. 10-11.

[10] See, e.g., *Bagosora et al*., Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 7; *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, paras. 10-11.

[11] At present, the Defence has submitted only : "With regard to the Rekeraho judicial file, the Prosecutor has just submitted before this Court that he's not obliged to produce the judicial file as part of the judgement which he disclosed to us because he does not intend to call that witness, but that witness might be called by an expert witness. Now, I think in the interests of this case, the Defence reiterates that we do need that file, and we'd like the Court to take due note of our position in this regard." T. 2 September 2004, p. 4.

[12] *Bagosora et al*., Request to the Government of Rwanda for Cooperation and Assistance (TC), 31 August 2004, para. 3; *Bagosora et al*., Decision on the Defence for Bagosora's Request to Obtain the Cooperation of the Republic of Ghana (TC), 25 May 2004, para. 6; *Bagosora et al*., Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 10 March 2004, para. 4.

inability to obtain relevant material despite its good faith efforts, it may then seize the Chamber and request appropriate judicial assistance pursuant to Article 28 of the Statute. Absent such a showing, the Defence motion is premature.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion and oral request.

Arusha, 4 October 2004

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Dennis C. M. Byron

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Decision on the defence Request to Preclude the Testimony of Prosecution Witness KDD Under Oath 28 October 2004 (ICTR-01-76-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – preclusion of the testimony of a witness – national rules of evidence – motion denied

International Instrument Cited : Rules of Procedure and Evidence, Rule 89 (A)

International Cases Cited :

I.C.T.R. : Trial Chamber XXX, The Prosecutor v. Théoneste Bagosora et al., *Decision on the Defence Motion to Preclude Portions of the Anticipated Testimony of Prosecution Witness DCH, for the Postponement of Witness DCH's Testimony, and for the Appointment of Defence Counsel for DCH, 29 March 2004 (ITCR-96-7-XXX,* Reports 2004*, p. XXX) – Trial Chamber XXX,* The Prosecutor v. Sylvestre Gacumbitsi*, Judgement, 17 June 2004 (ITCR-2001-64-XXX,* Reports 2004*, p. XXX)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the "Requête Urgente de la Défense en Vue de Déclarer Irrecevable le Témoignage sous Serment de Témoin KDD et sur la Valeur Probante de son Témoignage ", filed on 25 October 2004;

HAVING HEARD the parties on 27 October 2004;

HEREBY DECIDES the motion.

1. The Defence seeks to preclude the taking of the anticipated testimony of Prosecution Witness KDD under oath. At any rate, the witness's testimony should only be considered for informative purposes, and not accorded any probative value. The witness has been condemned to death, thus depriving him under Rwandan law of his civil rights including his ability to testify to an accused's acts. According to the Defence, under Rwandan law, the witness's testimony could only be given without an oath and considered as simple information.

2. The Prosecution prays that the Defence motion be dismissed in its entirety.

3. The Chamber recalls that according to Rule 89 (A) the Tribunal is not bound by national rules of evidence. The witness's legal status in Rwanda in no way impacts his capacity to testify or the manner in which he would give evidence before this Tribunal[1]. The Chamber is also unwilling to pre-judge the credibility and reliability of a witness's anticipated testimony[2].

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence's motion.

Arusha, 28 October 2004

[Judges] : Erik Møse; Sergei Alekseevich Egorov; Dennis C.M. Byron

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Decision on the Defence Request for the Cooperation of Rwandan Government Pursuant to Article 28 28 October 2004 (ICTR-01-76-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – cooperation, Rwanda – absence of adequate efforts by the Defence to obtain the requested documents, premature request – adjournment of the testimony – premature motion regarding to the inconsistencies of the testimony – motion denied

International Instrument Cited : Rules of Procedure and Evidence, Rule 28

[1] *Gacumbitsi*, Judgement (TC), 17 June 2004, para. 87.

[2] *Bagosora et al*., Decision on the Defence Motion to Preclude Portions of the Anticipated Testimony of Prosecution Witness DCH, for the Postponement of Witness DCH's Testimony, and for the Appointment of Defence Counsel for DCH (TC), 29 March 2004, para. 9.

International Cases Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Ignace Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA, 8 June 2000 (ITCR-95-1A-T,* Reports 2000, *p. 166) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al, *Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003 (ICTR-98-41-T,* Reports 2003, *p. 252) – Trial Chamber I,* The Prosecutor v. Aloys Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant To Rule 68, 4 October 2004 (ICTR-01-76-T,* Reports 2004*, p. XXX) – Trial Chamber XXX,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 17 December 2004 (ITCR-96-7-XXX,* Reports 2004*, p. XXX)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the "Requête Urgente de la Défense en Vue d'Ordonner à l'Etat Rwandais Communication de l'Entier Dossier Judiciaire du Témoin KDD", filed on 27 October 2004;

HAVING HEARD the parties on 27 October 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Defence seeks the entire judicial dossier of Prosecution Witness KDD. According to the parties, the witness is a detained witness who has been condemned to death in Rwanda. The Chamber has previously ordered the Prosecution to request the judicial records of its detained witnesses from the Rwandan authorities. The Prosecution disclosed the records it obtained to the Defence on 3 August and 1 September 2004. Two of these documents related to Witness KDD have been translated from Kinyarwanda into French and provided to the Defence, including a Pro Justitia statement dated 17 August 2001 and the record of the witness's guilty plea dated 26 January 2001.

SUBMISSIONS

2. The Defence argues that it does not have any documentation relating to Witness KDD's death sentence, which prevents the full appreciation of the witnesses testimony. The Defence indicated without further detail that it explained its various efforts to obtain these documents during the status conference of 13 May 2004. The Defence indicated that the witnesses testimony should be postponed until these records are obtained.

3. The Prosecution states that it has complied the Chamber's order to request judicial records of its witnesses from the Rwandan authorities and that all the judicial records it received from them were disclosed to the Defence. The Defence has not adequately demonstrated that it has made its own good faith efforts to obtain the documents prior to making its request.

DELIBERATIONS

4. The Chamber has previously recognized that Rwandan judicial records are important for the preparations of the Defence given their relevance to credibility[1]. The Chamber recently stated in this case :

> As is the general practice in the Tribunal, the Defence must first make its own independent efforts to secure evidence it wishes to use at trial other than exculpatory material in the possession of the Prosecution. Once the Defence demonstrates its inability to obtain relevant material despite its good faith efforts, it may then seize the Chamber and request appropriate judicial assistance pursuant to Article 28 of the Statute[2].

5. The Chamber has reviewed the transcript from the 13 May 2003 status conference, which documents only the Defence's need for judicial documents, not their efforts to obtain them. Consequently, in the Chamber's view, the Defence has not adequately demonstrated the efforts that it has undertaken to obtain the requested documents. Absent such a showing, the Defence's request for cooperation is premature.

6. The request for the adjournment of the testimony of the witness until the Defence obtains the full judicial dossier is also denied. The Defence may draw the Chamber's attention to inconsistencies between the testimony of the witness before this Chamber and any declaration or record obtained subsequently[3]. If prejudice can be shown from its inability to put these inconsistencies to the witness, the Defence may submit a motion for his recall.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence's motion.

Arusha, 28 October 2004

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Dennis C.M. Byron

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1 See, e.g., *Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant To Rule 68 (TC), 4 October 2004, para. 8; *Bagosora et al*., Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 7; *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, paras. 10-11.

2 Simba, Decision on Defence Motion to Obtain Judicial Records Pursuant To Rule 68 (TC), 4 October 2004, para. 11 (internal citation omitted).

3 Bagosora et al., Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 17 December 2004, para. 8.

Decision on the Defence Motion to Recall Witness KEL for Further Cross-Examination 28 October 2004 (ICTR-01-76-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – recall of a witness for cross-examination – good cause – lack of information – motion denied

International Instrument Cited : Rules of Procedure and Evidence, Rules 73, 85, 90 (F) and 90 (G)

International Case Cited :

I.C.T.R. : Trial Chamber XXX, The Prosecutor v. Théoneste Bagosora et al., *Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004 (ITCR-96-7-XXX,* Reports 2004*, p. XXX)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the "Requête de la Défense pour Ordonner une Nouvelle Comparution du Témoin de l'Accusation KEL en Vue de son Contre Interrogatoire à Huis Clos Conformément aux Dispositions de l'Article 73 du RPP", filed on 7 October 2004;

CONSIDERING the Prosecution's Response, filed on 12 October 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. Witness KEL testified from 7 to 9 September 2004. At the beginning of the cross-examination, Lead Counsel for the Defence stated that his Co-Counsel would "start the cross"[1]. At the close of the first day of the witness's cross-examination, Co-Counsel indicated that her Lead Counsel had one area to cover[2]. The next day at the close of Co-Counsel's cross- examination, she indicated that the Lead Counsel had "a very few short points"[3]. Lead Counsel indicated that his questioning would last

[1] T. 8 September 2004, p. 2.
[2] *Ibid*., p. 50.
[3] T. 9 September 2004, p. 16.

only about 30 minutes. The Chamber noted that it was exceptional in the Chamber's practice to allow both Defence counsel to cross-examine a single witness but nonetheless allowed Lead Counsel to proceed, emphasizing that he had to "focus on the key issues" and "prioritise … very, very strictly"[4].

2. After a number of questions, the Defence indicated that it had one final question before moving into closed session. The Chamber indicated that the Defence should conclude its cross-examination and ask one final question. The Defence noted that it had not yet examined the witness in closed session, but added that "if the court decides otherwise we are going to abide by the Court's decision. There's no problem, Mr. President"[5]. The Chamber, noting that the Defence had already been given an extensive opportunity to cross-examine the witness, again asked the Defence to ask one final question. The Defence without further objection indicated that it had no further questions[6].

SUBMISSIONS

3. The Defence seeks to recall Witness KEL to cross-examine him in closed session. The motion argues that, despite Lead Counsel's insistence, the Chamber did not permit him to ask the questions reserved for closed session. The Defence asserts that the Chamber implicitly granted Lead Counsel the right to conclude the cross-examination when the Defence indicated at the outset that Co-Counsel would start the cross-examination. In the Defence's view, it was deprived of the right to cross-examine the witness under Rule 85. Failure to correct this error will compromise the rights of the Accused.

4. The Prosecution argues that the Defence had sufficient time to question Witness KEL and that it has not shown good cause to recall him.

DELIBERATIONS

5. In its recent decision in *Bagosora et al*., the Chamber set forth the standard for recalling a witness :

> A party seeking to recall a witness must demonstrate good cause, which previous jurisprudence has defined as a substantial reason amounting in law to a legal excuse for failing to perform a required act. In assessing good cause, the Chamber must carefully consider the purpose of the proposed testimony as well as the party's justification for not offering such evidence when the witness originally testified. The right to be tried with undue delay as well as concerns of judicial economy demand that recall should be granted only in the most compelling of circumstances where the evidence is of significant probative value and not of a cumulative nature. For example, the Chamber has intimated in this case that the recall of a witness might be appropriate where a party demonstrates prej-

[4] *Ibid*., pp. 16-17.
[5] *Ibid*., p. 24.
[6] *Ibid*., p. 26.

udice from an inability to put significant inconsistencies to a witness which arise from previously unavailable Rwandan judicial documents[7].

6. Pursuant to Rule 90 (F) and (G), the Chamber has the authority to limit the examination of a witness to ensure the efficiency of the proceedings. The Chamber properly exercised this authority after extensive cross-examination by two Defence Counsels.

7. Contrary to the Defence's suggestions, the fact that Lead Counsel indicated that Co-Counsel would "start the cross" does not mean that the Chamber implicitly authorized the Defence to conduct a second cross-examination. It was only at the end of Co-Counsel's lengthy cross-examination that the Chamber allowed Lead Counsel to ask additional questions. Allowing two counsels to cross-examine a single witness is not the usual practice and requires the express approval of the Chamber[8].

8. When granting Lead Counsel the right to ask additional question, the Chamber emphasised that the second examination must be short and focused. Therefore, it is clear from the record that from the outset the Defence was aware that any subsequent questioning was discretionary and limited. Lead Counsel requested about thirty minutes, and the Chamber even allowed him to proceed for nearly forty minutes. At no point prior to the end of Lead Counsel's questioning was the Chamber given notice of the need for a closed session. When the Chamber asked the Defence to ask its last question the Defence stated that there was no problem and concluded its cross-examination.

9. Neither during the testimony of Witness KEL nor in its present motion has the Defence given any precise information about the purpose of further cross-examination in closed session. The motion only contains a vague reference to questions related to locations and the witness's personality. Absent further information, the Chamber cannot determine whether its decision to end cross-examination actually prejudiced the Defence[9]. Consequently, the Defence has not shown that there is good cause to recall the witness.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion.

Arusha, 28 October 2004

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Dennis C.M. Byron

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[7] *Bagosora et al*., Decision on the Prosecution Motion to Recall Witness Nyanjwa, 29 September 2004, para. 6 (internal citations omitted).

[8] T. 9 September 2004, p. 16.

[9] See similarly *Bagosora et al*., Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, paras. 7-8.

Decision on Matters Related to Witness KDD's Judicial Dossier 1 November 2004 (ICTR-01-76-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – communication of documents related to a witness – reasonable efforts, unsuccessful – nature of the evidence sought with particularity and relevance of that evidence to the trial – good offices – additional efforts of the Prosecution – motion granted in part

International Instruments Cited : Rules of Procedure and Evidence, Rules 66, 68, 73 and 98 – Statute, Art. 28

International Cases Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Ignace Bagilishema, *Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA, 8 June 2000 (ICTR-95-1A-T,* Reports 2000*, p. 166) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al., *Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 December 2003 (ICTR-98-41-T,* Reports 2003, *p. 252) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Defence Motion to Obtain Cooperation from the Vatican Pursuant to Article 28, 13 May 2004 (ICTR-96-7-XXX,* Reports 2004*, p. XXX) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al., *Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, 23 June 2004 (ICTR-96-7-XXX,* Reports 2004*, p. XXX) – Trial Chamber I,* The Prosecutor v. Aloys Simba, *Decision on "Requête en vue d'ordonner des autorités rwandaises la communication au Procureur des dossier de poursuites des témoins Prisonniers", 14 July 2004 (ICTR-01-76-I,* Reports 2004*, p. XXX) – Trial Chamber I,* The Prosecutor v. Aloys Simba, *Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68, 4 October 2004 (ICTR-01-76-T,* Reports 2004*, p. XXX) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al., *Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute, 22 October 2004 (ICTR-96-7-XXX,* Reports 2004*, p. XXX) – Trial Chamber I,* The Prosecutor v. Aloys Simba, *Decision on the Defence Request for the Cooperation of Rwandan Government Pursuant to Article 28, 28 October 2004 (ICTR-01-76-T,* Reports 2004*, p. XXX)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Sefer Halilović, *Decision on Issuance of Subpoenas, 21 June 2004* (IT-2001-48)

Décision relative à des points se rapportant au dossier judiciaire du témoin KDD 1er novembre 2004 (ICTR-01-76-T)

(Original : Anglais)

Chambre de première instance I

Juges : Erik Mose, Président de Chambre ; Sergei Alekseevich Egorov ; Dennis C. M. Byron

Aloys Simba – communication de documents relatif à un témoin – efforts raisonnables, sans succès, nature des moyens de preuve sollicités et pertinence de ceux-ci par rapport au procès – bons offices – efforts supplémentaires du Procureur – requête acceptée en partie

Instruments internationaux cités : Règlement de procédure et de preuve, art. 66, 68, 73 et 98 – Statut, art. 28

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Ignace Bagilishema*, Décision sur la requête de la défense demandant à la Chambre d'ordonner au Procureur de communiquer les aveux de culpabilité des témoins Y, Z et AA, 8 juin 2000 (ICTR-95-1A-T,* Recueil 2000*, p. 167) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts, *Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses, 16 décembre 2003 (ICTR-98-41-T,* Recueil 2003, *p. 252) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts, *Decision on Defence Motion to Obtain Cooperation from the Vatican Pursuant to Article 28, 13 mai 2004 (ICTR-96-7-XXX,* Recueil 2004*, p. XXX) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts *Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana, 23 juin 2004*, *(ICTR-96-7-XXX,* Recueil 2004*, p. XXX) – Chambre de première instance I,* Le Procureur c. Aloys Simba, *Décision relative à la requête en vue d'ordonner des autorités rwandaises la communication au Procureur des dossiers de poursuites des témoins prisonniers, 14 juillet 2004 (ICTR-01-76-I,* Recueil 2004*, p. XXX) – Chambre de première instance I,* Le Procureur c. Aloys Simba, *Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68, 4 octobre 2004 (ICTR-01-76-T,* Recueil 2004*, p. XXX) – Chambre de première instance I,* Le Procureur c. Théoneste Bagosora et consorts, *Demande de coopération et d'assistance adressée à la République française en vertu de l'article 28 du Statut, 22 octobre 2004 (ICTR-96-7-XXX,* Recueil 2004*, p. XXX) – Chambre de première instance I,* Le Procureur c. Aloys Simba, *Decision on the Defence Request for the Cooperation of Rwandan Government Pursuant to Article 28, 28 octobre 2004 (ICTR-01-76-T,* Recueil 2004*, p. XXX)*

T.P.I.Y. : Chambre d'appel, Le Procureur c. Sefer Halilović, Décision relative à la délivrance d'injonctions, 21 juin 2004 (IT-2001-48)

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the Defence's oral motion for interpretation of the Trial Chamber's Decision on the Defence Request for the Cooperation of Rwandan Government Pursuant to Article 28, made on 28 October 2004;

HAVING HEARD the parties on 28 and 29 October 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 10 May 2004, the Defence filed a motion pursuant to Article 28 of the Statute and Rules 66 and 73 of the Rules of Procedure and Evidence ("the Rules"), requesting the Chamber to order the Rwandan authorities to provide the Prosecution with the judicial dossiers of seventeen anticipated detainee witnesses, including Witness KDD, for disclosure to the Defence. In its motion, the Defence noted that it had made previous requests to the Prosecution for these documents, but made no mention of its own efforts to obtain them. On 14 July 2004, the Chamber denied the Defence's request as premature and noted that the Prosecution had already indicated that it was in the process of trying to obtain the records for the Defence. The Chamber consequently instructed the Prosecution to make all efforts to obtain the criminal records of its detained witnesses by 2 August 2004[1].

2. The Prosecution disclosed a number of judicial documents in Kinyarwanda related to anticipated witnesses on 2 August 2004. On 1 September 2004, it made a second disclosure of judicial documents in Kinyarwanda, which contained a document from 1997 relating to Witness KDD. Two other judicial documents concerning Witness KDD had been previously disclosed in connection with his statement to investigator dated 30 November 2001, a *Pro Justitia* statement in Kinyarwanda, and a letter to the Gikongoro prison governor, in Kinyarwanda, French, and English. The two Kinyarwanda documents were sent for translation into French and disclosed to the parties on 22 October 2004.

3. On 27 October 2004, the Defence filed an urgent request under Article 28 to order the Rwandan authorities to communicate the entire judicial dossier of Witness KDD and to postpone his testimony until it was received. The Chamber denied the request on 28 October 2004 and stated :

> 5. The Chamber has reviewed the transcript from the 13 May 2003 status conference, which documents only the Defence's need for judicial documents, not their efforts to obtain them. Consequently, in the Chamber's view, the Defence has not adequately demonstrated the efforts that it has undertaken to obtain the

[1] *Simba*, Decision on "Requête en vue d'ordonner des autorités rwandaises la communication au Procureur des dossier de poursuites des témoins prisonniers" (TC), 14 July 2004, paras. 6-7.

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance I, composée des juges Erik Mose, président de Chambre, Sergei Alekseevich Egorov et Dennis C. M. Byron,

SAISI de la requête orale de la défense intitulée *Defence's oral motion for interpretation of the Trial Chamber's decision on the Defence request for the cooperation of Rwandan Government pursuant to Article 28*, présentée le 28 octobre 2004,

AYANT ENTENDU les parties les 28 et 29 octobre 2004,

STATUE à présent sur la requête.

INTRODUCTION

1. Le 10 mai 2004, la défense a déposé une requête en vertu de l'article 28 du Statut et des articles 66 et 73 du Règlement de procédure et de preuve (le «Règlement»). Elle priait la Chambre de demander aux autorités rwandaises de mettre à la disposition du Procureur les dossiers judiciaires de 17 témoins détenus qui doivent venir à la barre, dont celui du témoin KDD, pour qu'il les communique à la défense. Dans sa requête, la défense a indiqué qu'elle avait déjà demandé ces documents au Procureur, mais elle n'a dit mot de ses propres efforts pour les obtenir. Le 14 juillet 2004, la Chambre a rejeté la requête de la défense au motif qu'elle était prématurée. Elle a souligné que le Procureur avait déjà indiqué qu'il était en train d'essayer d'obtenir les dossiers pour la défense. C'est pourquoi la Chambre a invité le Procureur à faire tout ce qui était en son pouvoir pour obtenir le dossier judiciaire de ses témoins détenus d'ici au 2 août 2004[1].

2. Le 2 août 2004, le Procureur a communiqué un certain nombre de documents judiciaires en kinyarwanda en rapport avec les témoins attendus. Le 1er septembre 2004, il a fait une deuxième communication de documents judiciaires en kinyarwanda, dont un document de 1997 relatif au témoin KDD. Deux autres documents judiciaires concernant le témoin KDD avaient été communiqués en relation avec sa déclaration faite à un enquêteur le 30 novembre 2001, à savoir un *pro justitia* en kinyarwanda et une lettre adressée au gouverneur de la prison de Gikongoro en kinyarwanda, français et anglais. Les deux documents en kinyarwanda ont été envoyés pour traduction en français et communiqués aux parties le 22 octobre 2004.

3. Le 27 octobre 2004, la défense a déposé une requête urgente en vertu de l'article 28 du Statut pour prier la Chambre de demander aux autorités rwandaises de communiquer le dossier judiciaire complet du témoin KDD, et, faire reporter la déposition de celui-ci jusqu'à la réception dudit dossier. La Chambre a rejeté cette requête le 28 octobre 2004 dans les termes suivants :

> 5. La Chambre a examiné le compte rendu de la conférence de mise en état du 13 mai 2003 qui explique certes que la défense souhaite obtenir des documents judiciaires, mais ne dit mot des efforts qu'elle a déployés en ce sens. La

[1] *Simba*, Décision relative à la requête intitulée «Requête en vue d'ordonner des autorités rwandaises la communication au Procureur des dossiers de poursuites des témoins prisonniers» (Chambre de première instance), 14 juillet 2004, paras. 6 et 7.

requested documents. Absent such a showing, the Defence's request for cooperation is premature.

6. The request for the adjournment of the testimony of the witness until the Defence obtains the full judicial dossier is also denied. The Defence may draw the Chamber's attention to inconsistencies between the testimony of the witness before this Chamber and any declaration or record obtained subsequently. If prejudice can be shown from its inability to put these inconsistencies to the witness, the Defence may submit a motion for his recall[2].

4. At the end of Witness KDD's examination-in-chief on 28 October 2004, the Defence requested an interpretation of the Chamber's decision delivered earlier on that day.

SUBMISSIONS

5. The Defence explained that the Chamber's witness protection order precluded it from conducting the necessary investigations. It was also noted that the Chamber had previously ordered the Prosecution to obtain the documents and now was shifting the burden to the Defence. If the Prosecution was unable to obtain the documents, then as a corollary the Defence could not obtain them. According to the Defence, Rule 68 compels the Prosecution to provide all documents relating to the credibility of its witnesses. The Defence also drew the Chamber's attention to the fact that the only documents it received concerning KDD related to proceedings after his death sentence.

6. The Prosecution argued that the Chamber's decision was clear and that the Defence had not demonstrated due diligence as required by Article 28. It further noted that many Defence teams obtain judicial documents on their own.

DELIBERATIONS

7. In its decision of 14 July 2004, the Chamber stated :

6. The Trial Chamber notes that the Prosecutor has undertaken to redouble efforts and contacts with judicial authorities to obtain the criminal records of the detained witnesses he intends to call. Further the Trial Chamber takes into account the Prosecutor's assertion that "nothing in [his] contacts with the said authorities indicates to [him] a refusal to provide the information requested". The Trial Chamber thus considers that the Defence request to order the Rwandan Authorities to provide the documents would not be justified by the circumstances of this case.

[2] *Simba*, Decision on the Defence Request for the Cooperation of Rwandan Government Pursuant to Article (TC), 28 October 2004.

Chambre estime donc que la défense n'a pas vraiment établi qu'elle s'était employée à obtenir les documents sollicités. De ce fait, sa requête est prématurée.

6. La Chambre rejette également la demande d'ajournement de la déposition du témoin jusqu'à la réception du dossier judiciaire. La défense a la possibilité de rendre la Chambre attentive aux contradictions existant entre la déposition du témoin devant la présente Chambre et des déclarations ou dossiers qui pourraient être obtenus par la suite. Si la preuve de l'existence d'un préjudice découlant de l'impossibilité d'interroger le témoin sur ces contradictions est apportée, la défense peut soumettre une requête pour demander le rappel du témoin[2]. [Traduction].

4. À la fin de l'interrogatoire principal du témoin KDD le 28 octobre 2004, la défense a demandé une interprétation de la décision que la Chambre avait rendue plus tôt ce jour-là.

ARGUMENTS

5. La défense a expliqué que l'ordonnance prescrivant des mesures de protection des témoins l'empêchait de faire les enquêtes nécessaires. Elle a également fait valoir que la Chambre avait déjà ordonné au Procureur de s'employer à obtenir les documents et qu'à présent elle faisait porter le fardeau à la défense. Si le Procureur n'arrivait pas à obtenir les documents, il allait de soi que la défense n'aurait pas plus de succès. Selon la défense, l'article 68 du Règlement oblige le Procureur à fournir tous les documents relatifs à la crédibilité de ses témoins. La défense a également attiré l'attention de la Chambre sur le fait que les seuls documents qu'elle avait reçus à propos de KDD concernaient la procédure postérieure à la condamnation à mort de celui-ci.

6. Le Procureur a soutenu que la décision de la Chambre était claire et que la défense n'avait pas fait preuve de la diligence que requiert l'article 28 du Statut. Il a en outre fait observer que nombre d'équipes de la défense parvenaient à obtenir les documents judiciaires par leurs propres efforts.

APRÈS EN AVOIR DÉLIBÉRÉ

7. Dans sa décision du 14 juillet 2004, la Chambre a déclaré ceci :

6. La Chambre relève que le Procureur s'est engagé à redoubler d'efforts et à multiplier ses démarches pour obtenir des autorités judiciaires communication des dossiers de poursuite des témoins détenus qu'il entend appeler. De plus, la Chambre retient que, selon le Procureur, «rien dans [ses] démarches auprès desdites autorités ne l'autorise à penser que celles-ci se refuseraient à fournir les informations demandées». La Chambre conclut dès lors que, vu les circonstances de la cause, la requête de la défense tendant à obtenir des autorités rwandaises communication des dossiers est sans fondement.

[2] *Simba*, Decision on the Defence Request for the Cooperation of Rwandan Government Pursuant to Article 28 (Chambre de première instance), 28 octobre 2004.

7. Therefore, the Trial Chamber is of the view that the Motion is premature at this date and should be denied. However, considering that the trial is scheduled to start on 16 August 2004, the Trial Chamber acknowledges the Defence concerns and instructs the Prosecutor to make all necessary efforts to obtain the criminal records of the detained Prosecutor's witnesses and to disclose them to the Defence as soon as he receives them. Further, the Trial Chamber instructs the Prosecutor to inform the Trial Chamber of any difficulty or delay he may encounter in the request of such records with the Rwandan Authorities[3].

8. The Chamber's order of 14 July 2004 to the Prosecution was not based on Article 28 of the Statute. Although it was not expressly stated, the decision clearly relied on the Chamber's authority under Rule 98 of the Rules to order *proprio motu* a party to produce evidence. This provision may be relied on when a Chamber deems it appropriate to facilitate the production of judicial documents[4].

9. A clear distinction must be made between the Chamber's authority to order the production of evidence based on Article 28 and Rule 98, respectively. Article 28 embodies the Chamber's authority to compel cooperation based on a state's obligations under Chapter VII of the United Nations Charter[5]. This authority should not be invoked lightly[6]. As such, a party seeking an order pursuant to Article 28 must demonstrate that it has made reasonable attempts to achieve the object of its request and has been unsuccessful[7]. In addition, it must set forth the nature of the evidence sought with particularity and the relevance of that evidence to the trial[8].

[3] *Simba*, Decision on "Requête en vue d'ordonner des autorités rwandaises la communication au Procureur des dossier de poursuites des témoins Prisonniers" (TC), 14 July 2004, paras. 6-7.

[4] *Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68 (TC), 4 October 2004, para. 9; *Bagosora et al*., Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (TC), 16 December 2003, para. 7; *Bagilishema*, Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witness Y, Z, and AA (TC), 8 June 2000, paras. 10-11.

[5] *Bagosora et al*., Decision on Defence Motion to Obtain Cooperation from the Vatican Pursuant to Article 28 (TC), 13 May 2004, para. 3.

[6] *Halilovic*, Decision on Issuance of Subpoenas (AC), 21 June 2004, paras. 6, 10.

[7] *Bagosora et al*., Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 22 October 2004, para. 3; *Bagosora et al*., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, paras. 4.

[8] *Bagosora et al*., Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute (TC), 22 October 2004, para. 3; *Bagosora et al*., Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana (TC), 23 June 2004, paras. 4; *Halilovic*, Decision on Issuance of Subpoenas (AC), 21 June 2004, paras. 6-7.

7. Par conséquent, la Chambre juge que la requête est prématurée à ce stade et doit être rejetée. Toutefois, le procès devant en principe s'ouvrir le 16 août 2004, la Chambre, tenant compte des préoccupations de la défense, charge le Procureur de faire tout ce qui est nécessaire pour obtenir les dossiers de poursuite des témoins à charge détenus et les communiquer à la défense dès leur réception et d'informer la Chambre de toute difficulté ou de tout retard qu'il rencontrerait dans sa quête pour les obtenir auprès des autorités rwandaises[3].

8. L'ordonnance du 14 juillet 2004 prescrivant certaines mesures au Procureur n'était pas fondée sur l'article 28 du Statut, mais, même si cela n'a pas été dit explicitement, sur l'article 98 du Règlement, qui habilite la Chambre à ordonner à une partie, de sa propre initiative, de produire des moyens de preuve. Une Chambre peut invoquer cette disposition lorsqu'elle le juge approprié pour faciliter la production de documents judiciaires[4].

9. Le pouvoir qu'a la Chambre d'ordonner la production de moyens de preuve peut se fonder soit sur l'article 28 du Statut, soit sur l'article 98 du Règlement, et il s'agit là de deux situations bien distinctes. L'article 28 du Statut habilite la Chambre à exiger la coopération d'un État en se fondant sur les obligations que celui-ci assume en vertu du Chapitre VII de la Charte des Nations Unies[5]. Ce pouvoir de la Chambre ne saurait être invoqué à la légère[6]. À ce titre, une partie qui sollicite une ordonnance en vertu de l'article 28 du Statut doit établir qu'elle s'est employée raisonnablement à faire aboutir ses démarches, mais sans succès[7]. En outre, elle doit exposer avec précision la nature des moyens de preuve sollicités et la pertinence de ceux-ci par rapport au procès[8].

[3] *Simba*, Décision relative à la requête en vue d'ordonner aux autorités rwandaises de communiquer au Procureur les dossier de poursuites de témoins détenus (Chambre de première instance), 14 juillet 2004, paras. 6 et 7.

[4] *Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68 (Chambre de première instance), 4 octobre 2004, para. 9; *Le Procureur c. Bagosora et consorts*, Decision on the Request for Documents Arising from Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses (Chambre de première instance), 16 décembre 2003, para. 7 *Bagilishema*, Décision sur la requête de la défense demandant à la Chambre d'ordonner au Procureur de communiquer les aveux de culpabilité des témoins Y, Z et AA (Chambre de première instance), 8 juin 2000, paras. 10 et 11.

[5] *Le Procureur c. Bagosora et consorts*, Decision on Defence Motion to Obtain Cooperation from the Vatican Pursuant to Article 28 (Chambre de première instance), 13 mai 2004, para. 3.

[6] *Halilovic*, Décision relative à la délivrance d'injonctions (Chambre d'appel), 21 juin 2004, paras. 6 10.

[7] *Le Procureur c. Bagosora et consorts*, Demande de coopération et d'assistance adressée à la République française en vertu de l'article 28 du Statut (Chambre de première instance), 22 octobre 2004, para. 3; *Le Procureur c. Bagosora et consorts*, Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana (Chambre de première instance), 23 juin 2004, para. 4.

[8] *Le Procureur c. Bagosora et consorts*, Demande de coopération et d'assistance adressée à la République française en vertu de l'article 28 du Statut (Chambre de première instance), 22 octobre 2004, para 3; *Le Procureur c. Bagosora et consorts*, Décision relative à la requête tendant à obtenir la délivrance d'une injonction de comparaître au général de division Yaache et la coopération de la République du Ghana (Chambre de première instance), 23 juin 2004, para. 4; *Halilovic*, Décision relative à la délivrance d'injonctions (Chambre d'appel), 21 juin 2004, paras. 6 et 7.

10. To date, the Defence has not been able to satisfy the threshold requirement that it first must have made reasonable efforts. No documentation or precise submissions have been provided[9]. The Chamber's witness protection order does not impede the Defence's ability to request files from a domestic tribunal or prosecutor. Experience shows that Defence teams have been able to obtain Rwandan judicial documents. Furthermore, the Defence is not relieved of its obligation because the Prosecution has not yet been successful. In view of the threshold requirement under Article 28 the Chamber cannot, based on the information presently provided by the Defence, issue an order under that provision. This does not mean, as argued by the Defence, that the burden is shifted from the Prosecution to the Defence but is simply an application of principles developed in consistent case law.

11. The Trial Chambers have in the past ordered, pursuant to Rule 98, the Prosecution to use its good offices to request the Rwandan judicial records of detained witnesses. This is a different avenue of relief than Article 28 and does not necessarily require the same showing, given that the Chamber is issuing an order to a party and not a state. With respect to the judicial records of detained witnesses, Rule 98 may be invoked to expedite the proceedings given the importance of these records to the preparation of the parties and given the familiarity of the Prosecution with its witnesses. This explains why the Chamber made its order to the Prosecution on 14 July 2004 to obtain the judicial records of its witnesses even though the Defence had not yet made sufficient independent efforts.

12. The Defence is not correct when it asserts that the production of judicial documents falls within the Prosecution's obligation under Article 68. As this Chamber recently stated in the present case :

> The Prosecution's obligation pursuant to Rule 68 is to disclose exculpatory evidence or evidence which may affect the credibility of Prosecution evidence, where such evidence is in its possession. It is not disputed that the requested documents are not within the Prosecution's possession. Thus, the motion must be dismissed. The Prosecution's disclosure obligations under the Statute and the Rules do not extend to pursuing every possible avenue of investigations into a witness's credibility on behalf of the Defence[10].

13. Following these clarifications, the Chamber now turns to some additional observations. In its decision of 14 July 2004, the Chamber issued an additional instruction for the Prosecution to file a report with details as to which criminal records it had obtained, the criminal records it was about to obtain, and the ones it was unable to obtain. The Prosecution has not identified the full extent of its previous efforts. The

[9] The Defence's reference to problems in contacting people sentenced to death (T. 27 October 2004 pp. 73-74) is not a sufficient explanation under Article 28.

[10] *Simba*, Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68 (TC), 4 October 2004, para. 8 (internal citations omitted).

10. À ce jour, la défense n'est pas parvenue à remplir l'obligation de départ qu'elle avait de «s'être employée raisonnablement». Aucune documentation ou argumentation précise n'a été fournie[9]. L'ordonnance de la Chambre prescrivant des mesures de protection des témoins n'empêche pas la défense de demander des dossiers à un tribunal ou à un procureur d'une juridiction nationale. L'expérience montre que des équipes de la défense ont pu obtenir des documents judiciaires rwandais. De plus, la défense n'est pas libérée de son obligation parce que les démarches du Procureur n'ont pas encore abouti. Vu les conditions préalables prévues à l'article 28 du Statut, la Chambre ne peut pas, au regard des indications fournies actuellement par la défense, rendre une ordonnance en vertu de cette disposition. Ceci ne veut pas dire, que la charge passe du Procureur à la défense, comme celle-ci l'a soutenu; il s'agit simplement de l'application des principes d'une jurisprudence constante.

11. Les Chambres de première instance ont déjà invité le Procureur, en d'autres occasions, à faire usage de ses bons offices pour demander aux autorités rwandaises les dossiers judiciaires de témoins détenus. C'est une solution différente de celle de l'article 28 du Statut, et elle n'est pas nécessairement subordonnée aux mêmes obligations, étant donné que l'ordonnance de la Chambre s'adresse à une partie et non à un État. En ce qui concerne les dossiers judiciaires de témoins détenus, l'article 98 du Règlement peut être invoqué pour accélérer la procédure, vu l'importance que revêtent ces dossiers pour la préparation des parties et le fait que le Procureur connaît bien ses témoins. Ceci explique pourquoi, dans son ordonnance du 14 juillet 2004, la Chambre a invité le Procureur à s'employer à obtenir les dossiers judiciaires de ses témoins, indépendamment du fait que la défense n'avait pas encore déployé suffisamment d'efforts de son côté.

12. La défense fait erreur lorsqu'elle affirme que la production de documents judiciaires relève de l'obligation du Procureur en vertu de l'article 68 du Règlement. La présente Chambre a récemment précisé ceci en l'espèce :

> L'obligation faite au Procureur à l'article 68 du Règlement consiste à communiquer à la Défense les moyens de preuve à décharge ou qui pourraient porter atteinte à la crédibilité des moyens de preuve à charge, lorsque de tels moyens de preuve se trouvent en la possession du Procureur. La Défense ne conteste pas que les documents demandés ne se trouvent pas en la possession du Procureur. La requête doit donc être rejetée. Les obligations de communication faites au Procureur en vertu du Statut et du Règlement ne vont pas jusqu'à le contraindre à explorer toutes les voies possibles pour chercher à déterminer la crédibilité d'un témoin pour le compte de la défense[10]. [Traduction].

13. Ces clarifications faites, la Chambre souhaite formuler encore d'autres observations. Dans sa décision du 14 juillet 2004, la Chambre a demandé en outre au Procureur de lui présenter un rapport détaillé sur les casiers judiciaires qu'il avait pu obtenir, ceux qu'il était sur le point d'obtenir et ceux qu'il ne pouvait obtenir. Le Procureur n'a pas fourni les précisions permettant de prendre la pleine mesure des efforts

[9] L'allusion de la défense aux problèmes qu'elle a rencontrés en cherchant à entrer en contact avec des condamnés à mort (Compte rendu de l'audience du 27 octobre 2004 pp. 70 à 73) n'est pas une explication suffisante au regard de l'article 28 du Statut.

[10] *Simba*, *Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68* (Chambre de première instance), 4 octobre 2004, para. 8 (citations intérieures omises).

Defence and the Chamber received only the documents and some indication to which witness they referred.

14. Witness KDD testified after the Chamber's decision of 28 October 2004. During his testimony, the witness indicated that he was arrested in 1994, initially convicted in 1998, and subsequently lodged an appeal. He also testified that after his conviction he pleaded guilty to other crimes[11]. The only document from the time period of the arrest, initial plea and conviction and appeal is a letter from 1997. Hence, a review of the disclosure concerning Witness KDD and his in court testimony reveals that there may be additional documents.

15. The Chamber order of 14 July 2004 to the Prosecution related to a number of witnesses. It is possible that some documents concerning Witness KDD may not have been identified given the general nature of the initial request. Based on the witness's testimony, the Chamber now acts on its own motion and makes a specific order under Rule 98. The Prosecution is requested to make additional efforts to obtain the judicial dossier of Witness KDD relating to his 1998 conviction, the subsequent appeal, and any guilty pleas. The Prosecution should disclose any records it obtains to the Defence and the Chamber by Friday 5 November 2004. If the Prosecution is unable to obtain any additional records, the Chamber requests that it document all its efforts and indicate any reasons for its inability to obtain further documents.

16. The Chamber's present decision implies that the remaining examination of Witness KDD has to be postponed to a later date within the present trial segment. Meanwhile, the Chamber will hear the testimony of two Prosecution witnesses that are presently available and ready to testify in Arusha.

FOR THE ABOVE REASONS, THE CHAMBER

ORDERS the Prosecution to make additional efforts to obtain the judicial dossier of Witness KDD relating to his 1998 conviction, the subsequent appeal, and any guilty pleas, and to report on the results of its efforts by Friday 5 November 2004.

Arusha, 1 November 2004

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Dennis C.M. Byron

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[11] T. 28 October 1994, p. 49.

qu'il a déjà déployés. La défense et la Chambre n'ont reçu que les documents et certaines indications relatives aux témoins dont il était question.

14. Le témoin KDD a déposé après la décision de la Chambre du 28 octobre 2004. Lors de sa comparution, il a dit qu'il avait été arrêté en 1994, qu'il avait été condamné une première fois en 1998 et qu'il avait ensuite fait appel. Il a également dit qu'après sa condamnation, il avait plaidé coupable d'autres crimes qui lui étaient reprochés[11]. Le seul document remontant à l'époque de l'arrestation, de la défense initiale de l'accusé, de sa condamnation et de son appel est une lettre datant de 1997. Par conséquent, un examen des documents communiqués concernant le témoin KDD et de sa déposition révèle qu'il pourrait y avoir des documents supplémentaires.

15. L'ordonnance de la Chambre du 14 juillet 2004, adressée au Procureur, se rapportait à un certain nombre de témoins. Il est possible que certains documents concernant le témoin KDD aient pu ne pas être identifiés, étant donné le caractère général de la demande initiale. Vu la déposition du témoin, la Chambre, agissant de sa propre initiative, ordonne une mesure en vertu de l'article 98. Elle enjoint au Procureur de redoubler d'efforts en vue d'obtenir le dossier judiciaire du témoin KDD se rapportant à sa condamnation de 1998, à l'appel qui a suivi et à tout plaidoyer de culpabilité qu'il a pu faire. Le Procureur devra communiquer à la défense et à la Chambre tous les documents qu'il a obtenus d'ici au vendredi 5 novembre 2004. Si le Procureur ne parvient pas à obtenir de documents supplémentaires, la Chambre lui demande d'établir que ce n'est pas faute de s'y être employé, et d'expliquer pourquoi il n'a pas pu y parvenir.

16. La présente décision de la Chambre implique que la suite de l'interrogatoire du témoin KDD doit être reportée à une date ultérieure de la présente session du procès. Entretemps, la Chambre entendra la déposition de deux témoins à charge qui sont actuellement disponibles et prêts à comparaître à Arusha.

PAR CES MOTIFS, LA CHAMBRE

ENJOINT au Procureur de redoubler d'efforts en vue d'obtenir le dossier judiciaire du témoin KDD se rapportant à sa condamnation de 1998, à l'appel qui a suivi et à tout plaidoyer de culpabilité qu'il a pu faire et de présenter un rapport sur les résultats de ses efforts, d'ici au 5 novembre 2004.

Arusha, le 1er novembre 2004

[Signé] : Erik Mose; Sergei Alekseevich Egorov; Dennis C.M. Byron

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[11] Compte rendu de l'audience du 28 octobre 1994, pp. 48 à 50.

Decision on the Admissibility of Evidence of Witness KDD 1 November 2004 (ICTR-01-76-T)

(Original : English)

Trial Chamber I

Judges : Erik Møse, presiding; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – admissibility of evidence – will-say statement – Prosecution's duties – new information in will-say statements, fair notice, possible remedy –remedy for defective indictment and lack of notice to the Accused – discretion of the Tribunal to admit evidence – additional time, translation – motion denied

International Instrument Cited : Rules of Procedure and Evidence, Rules 47, 47 (C), 66, 67 (D) and 89 (C) – Statute, Art. 18 (4), 20, 21 (2), 21 (4) (a) and 21 (4) (b)

International Cases Cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Judgment, 21 February 2003 (ICTR-96-10-T and ICTR-96-17-T,* Reports 2003*, p. 2752) – Trial Chamber I,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Admissibility of Evidence of Witness DP, 18 November 2003 (ICTR-98-41-T,* Reports 2003*, p. 240) – Trial Chamber III,* The Prosecutor v. Laurent Semanza*, Judgment, 15 May 2003 (ICTR-97-20-T,* Reports 2003*, p. 3622) – Trial Chamber I,* The Prosecutor v. Eliezer Niyitegeka*, Judgment, 16 May 2003 (ICTR-96-14-T,* Reports 2003*, p. 2442) – Trial Chamber III,* The Prosecutor v. André Ntagerura et al.*, Judgment, 25 February 2004 (ICTR-99-46-T,* Reports 2004*, p. XXX) – Trial Chamber III,* The Prosecutor v. Sylvestre Gacumbitsi*, Judgement, 16 juin 2004 (ICTR-2001-64-T,* Reports 2004*, p. XXX) – Appeals Chamber,* The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhoko*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible", 2 July 2004 (ITCR-98-42-XXX,* Reports 2004*, p. XXX) – Appeals Chamber,* The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhoko*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 2 July 2004 (ICTR-98-42-XXX,* Reports 2004*, p. XXX) – Trial Chamber I,* The Prosecutor v. Aloys Simba*, Decision on the Defence Motion to Exclude the Testimony of Witness KSM, 4 October 2004 (ICTR-01-76-T,* Reports 2004*, p. XXX) – Trial Chamber I,* The Prosecutor v. Aloys Simba*, Decision on the Defence Request for the Cooperation of Rwandan Government pursuant to Article 28, 28 October 2004 (ICTR-01-76-T,* Reports 2004*, p. XXX) – Trial Chamber I,* The Prosecutor v. Aloys Simba*, Decision on Matters Related to Witness KDD's Judicial Dossier, 1 November 2004 (ICTR-01-76-T,* Reports 2004*, p. XXX) – Trial Chamber,* The Prosecutor v. Théoneste Bagosora et al.*, Decision on Admissibility of Witness DBQ, 18 November 2004 (ICTR-98-41-T,* Reports 2004*, p. XXX)*

I.C.T.Y. : Appeals Chamber, The Prosecutor v. Anto Furundžija*, Judgement, 21 July 2000, (IT-95-17/1-A) – Appeals Chamber,* The Prosecutor v. Zoran Kupreškić*, Judgement, 23 October 2001 (IT-95-16-A) – Appeals Chamber,* The Prosecutor v. Milorad Krnojelac*, Judgement, 17 September 2003 (IT-97-25-A)*

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the Defence's oral motion of 28 October 2004 to preclude the testimony of Witness KDD based on his will-say statement;

HAVING HEARD the parties on 28 and 29 October 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. During the proceedings on 28 October 2004, the Defence raised a general challenge to the Prosecution's use of a will-say statement in connection with the evidence of Witness KDD as well as several specific objections to his testimony based on that statement.

2. Witness KDD was interviewed by ICTR investigators on 30 November 2001 and 18 November 2003. The Prosecution disclosed the statements in redacted form on 10 May 2002. Unredacted statements were disclosed on 6 April 2004[1]. On 29 August 2004, the Prosecution filed a will-say statement in English in connection with the anticipated testimonies of Witnesses KDD and KSU. During the status conference on 2 September 2004, Defence objected that the will-say statements had not been provided in French[2]. The Prosecution provided the Defence with an unofficial French translation of both will-say statements on 2 September 2004. It has later been discovered that the Prosecution failed to translate the last point in Witness KDD's will-say statement.

3. On 7 September 2004, the Defence made an oral application to have the will-say statements of KSU and KDD withdrawn in their entirety[3]. The Chamber noted that the Defence's concerns would be dealt with at an opportune moment. On 8 Sep-

[1] In addition to these statements, the Prosecution disclosed at least three Rwandan judicial documents related to the witness to the Defence, including a letter from the witness to the director of the Gikongoro prison, a *Pro Jusititia* statement, and the witness's plea, all dated in 2001. The witness's plea also had an attached letter dated in 1997 to the Gikongoro prison director. The Defence received the 2001 letter in Kinyarwanda, French, and English and the *Pro Justitia* in Kinyarwanda along with the witness's statement to Tribunal investigators dated 30 November 2001. The 2001 plea was disclosed in Kinyarwanda on 1 September 2004. A French version of the plea and its attached letter and the Pro Justitia were made available to the parties on 22 October 2004.

[2] T. 2 September 2004, p. 4.

[3] T. 7 September 2004, p. 48.

tember 2004, while discussing the anticipated testimony of Witness KSU, the Chamber noted that the Defence would be raising issues in relation to that witness's will-say statement. The Chamber emphasised that there was nothing novel about the use of will-say statements in the Tribunal's practice. It explained to the parties that the usual procedure was for the Prosecution to begin its examination and asked the Prosecution to wait with the disputed matters to the end of the examination. The Chamber would then decide the matter after hearing both parties[4].

4. The direct examination of Witness KSU proceeded on 10 September 2004 according to the procedure outlined by the Chamber on 8 September. The Prosecution reserved the matters mentioned in the will say-statement to the end of its examination and ultimately declined to pursue them, thereby rendering any objections relating to Witness KSU moot[5].

5. On 28 October 2004, the Prosecution conducted its examination-in-chief of Witness KDD, the second of the two witnesses with will-say statements. At the commencement of the proceedings, the Defence stated that it was not prepared to proceed with the witness because it had made a motion to exclude Witness KDD's will-say statement, which the Chamber had not yet decided[6]. The Chamber again emphasised that the practice related to will-say statements was for the Defence to raise objections when the issue arises during the examination-in-chief. The Prosecution was requested to lead evidence on the will-say issues to the extent possible at the end of its examination but stated that this could not be done because the witness's testimony was indivisible. The Chamber then explained to the parties that it would consider the disputed issues as they arose during the testimony. During the witness's examination, the Defence made several objections to specific evidence being led. In relation to objections concerning two alleged incidents on 11 April and on 26 or 29 April 1994, the Chamber postponed any further examination until it had fully considered the matter. The Prosecution concluded its direct examination subject to the Chamber's present ruling during the trial session of 28 October 2004.

SUBMISSIONS

6. The Defence made a general objection to the use of will-say statements. In addition, it specifically objected to evidence being led concerning two events that allegedly took place on 11 and on 26 or 29 April 1994. It was argued that these events are not alleged in the Indictment and that a will-say statement is not a proper method for giving notice.

[4] T. 8 September 2004, pp. 51-52.

[5] T. 10 September 2004, p. 27.

[6] The Defence also stated that it had not been able to review all relevant documents. The was a reference to an earlier written motion under Article 28 to request the Rwandan authorities for the full judicial dossier of the witness, which was denied in a written decision just before the opening of the proceedings; *Simba*, Decision on the Defence Request for the Cooperation of Rwandan Government pursuant to Article 28 (TC), 28 October 2004. The issue was also considered in *Simba*, Decision on Matters Related to Witness KDD's Judicial Dossier (TC), 1 November 2004.

7. The Prosecution asserted that the use of will-say statements is an accepted practice in the Tribunal and that the Defence had notice that the evidence would be led. It conceded that the two events in question were not specifically mentioned in the Indictment. The Prosecution stated that it was not seeking to convict the Accused on the basis of the alleged events on 11 April 1994, but to use them to establish preparation or *mens rea*. According to the Prosecution, the Accused had notice of the alleged event on 26 or 29 April because it was mentioned in Witness KDD's statement to ICTR investigators as well as in the will-say statement. The Prosecution argued that jurisprudence requires that the material facts be pleaded, not necessarily all the specific evidence which will be presented in support of them.

DELIBERATIONS

8. At the outset, the Chamber observes that according to the record there was no pending motion, oral or written, concerning the will-say statement of Witness KDD. The Chamber clearly explained the will-say practice to the parties during the proceedings on 7 September 2004 and noted that objections would be considered only at the time the Prosecution sought to lead evidence on a disputed matter. This practice was followed during the testimony of Witness KSU on 10 September 2004. The Defence objection to Witness KDD's will-say statement only became timely when the Prosecution sought to lead such evidence on 28 October 2004.

9. A will-say statement is a communication from one party to the other party and the Chamber anticipating that a witness will testify about matters that were not mentioned in previously disclosed witness statements. They are generally communicated by Counsel immediately after learning of them during the preparation of the witness for examination. The Prosecution's use of will-say statements is different from the normal method of giving notice through a written and signed statement disclosed in conformity with Rule 66 of the Rules of Procedure and Evidence ("the Rules"). The practice is well established and has been sanctioned by Tribunal jurisprudence[7]. It has evolved as a response to the reality previously described by this Chamber in *Bagosora et al.* :

> The Chamber accepts and understands that witness statements from witnesses who saw and experienced events over many months which may be of interest to this Tribunal, may not be complete. Some witnesses only answered questions put to them by investigators whose focus may have been on persons other than the accused rather than volunteering all the information of which they are aware[8].

10. Will-say statements compliment the Prosecution's duties under Rule 67 (D) which require the parties to promptly notify the Chamber and each other of additional evidence, information or materials that should have been previously disclosed under the Rules. Such statements reduce the element of surprise to the Defence. The Cham-

[7] *Bagosora et al*., Decision on Admissibility of Evidence of Witness DP (TC), 18 November 2003; *Bagosora et al*., Decision on Admissibility of Witness DBQ (TC), 18 November 2004.

[8] *Bagosora et al*., Decision on Admissibility of Witness DBQ (TC), 18 November 2004, para. 29.

ber therefore does not accept the Defence's general complaint about the use of will-say statements.

11. Anticipated evidence in the will-say statement which only supplements or elaborates on information that has previously been disclosed does not generally raise any problems[9]. However, new information in will-say statements may raise issues in relation to an accused's right to notice reflected in Article 20 of the Statute and Rule 47 of the Rules. In *Kupreskic*, the Appeals Chamber articulated clear principles on what constitutes fair notice within the meaning of the Statute and the Rules as well as the possible remedy in situations where there is a lack of notice :

> 88. An indictment shall, pursuant to Article 18 (4) of the Statute, contain "a concise statement of the facts and the crime or crimes with which the accused is charged". Similarly, Rule 47 (C) of the Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth "a concise statement of the facts of the case". The Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21 (2) and (4) (a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question 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.
>
> 89. The Appeals Chamber must stress initially that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail. Obviously, there may be instances where the sheer scale of the alleged crimes "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes".
>
> 90. Such would be the case where the Prosecution alleges that an accused participated, as a member of an execution squad, in the killing of hundreds of men. The nature of such a case would not demand that each and every victim be identified in the indictment. Similarly, an accused may be charged with having participated as a member of a military force in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large

[9] *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DP (TC), 18 November 2003, para. 6.

numbers of killings and forced removals. In such a case the Prosecution need not specify every single victim that has been killed or expelled in order to meet its obligation of specifying the material facts of the case in the indictment. Nevertheless, since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so.

…

92. It is of course possible that an indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession. However, in such a situation, doubt must arise as to whether it is fair to the accused for the trial to proceed. In this connection, the Appeals Chamber emphasises that the 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. There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment.

…

114. The Appeals Chamber notes that, generally, an 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. A defective indictment, in and of itself, may, in certain circumstances cause the Appeals Chamber to reverse a conviction. The Appeals Chamber, however, does 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[10].

12. These principles reflect the importance of pleading all material facts in the indictment with as much specificity as reasonably possible. The Appeals Chamber, however, also acknowledged the reality that evidence may sometimes turn out differently than originally anticipated. When faced with such a situation, the Appeals Chamber has instructed the Trial Chambers to take one or more of the steps envisioned in *Kupreskic*, namely adjournment, exclusion of the evidence as outside the scope of the indictment, or ordering the Prosecution to amend the indictment[11].

[10] *Kupreskic*, Judgement (AC), paras. 88-90, 92, 114 (internal citations omitted). The Appeals Chamber has recently reaffirmed these principle in *Niyitegeka*, Judgement (AC), paras. 193-197. See also *Ntahobali and Nyiramasuhuko*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 9.

[11] *Niyitegeka*, Judgement (AC), paras. 194, 196; *Kupreskic et al*., Judgement (AC), para. 92; *Furundzija*, Judgement (AC), para. 61.

13. In certain circumstances, a defective indictment and consequently an accused's lack of notice may be cured "with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her"[12]. The Appeals Chamber in *Niyitegeka* has outlined several considerations in this respect :

> Whether the Prosecution cured a defect in the indictment depends, or course, on the nature of the information that the Prosecution provides to the Defence and on whether the information compensates for the indictment's failure to give notice of the charges asserted against the accused. *Kupreskic* considered that adequate notice of material facts might be communicated to the Defence in the Prosecution's pre-trial brief, during disclosure of evidence, or through proceedings at trial. The time of such communications, the importance of the information to the ability of the accused to prepare his defence, and the impact of the newly-disclosed material facts on the Prosecution's case are relevant in determining whether subsequent communications make up for the defect in the indictment. As has been previously noted, "mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements" of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial[13].

14. Moreover, the Appeals Chamber has also recently explained that the Trial Chamber's authority pursuant to Rule 89 (C) to admit any relevant evidence which it deems to have probative value nonetheless grants it the discretion to admit evidence even where it is not possible to convict an accused on an allegation due to lack of notice :

> 14. However, whilst it may be the case that the allegation of witness RV in relation to Nyiramasuhuko's presence at the installation of Ndayambaje in Muganza commune is not specifically pleaded in the indictment, this alone does not render the evidence inadmissible.
>
> 15. Indeed, pursuant to Rule 89 (C) of the Rules, the Trial Chamber may admit any relevant evidence which it deems to have probative value. It should be recalled that admissibility of evidence should not be confused with the assessment of weight to be accorded to that evidence. Consequently, although on the basis of the present indictment it is not possible to convict Nyiramasuhuko in respect of her presence at the installation of Ndayambaje, evidence of this meeting can be admitted to the extent that it may be relevant to the proof of any allegation pleaded in the Indictment.

[12] *Kupreskic et al*., Judgement (AC), para. 114; *Niyitegeka*, Judgement (AC), para. 195.

[13] *Niyitegeka*, Judgement (AC), para. 197 (internal citations ommitted). See also *Krnojelac*, Judgement (AC), para. 138 ("The Appeals Chamber also considers that it is preferable for an indictment alleging the accused's responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise envisaged. However, this does not, in principle, prevent the Prosecution from pleading elsewhere than in the indictment – for instance in a pre-trial brief – the legal theory which it believes best demonstrates that the crime or crimes alleged are imputable to the accused in law in the light of the facts alleged. This option is, however, limited by the need to guarantee the accused a fair trial.")

16. The Appeals Chamber considers therefore that the Trial Chamber acted within its discretion in dismissing the Appellants' request to declare the evidence of witness RV inadmissible[14].

15. Exclusion of evidence is only one of several possible remedies and not the exclusive one, as suggested by the Defence. The selection of an appropriate remedy is well within the Trial Chamber's discretion mindful of these principles and taking into consideration the particular circumstances of the case[15].

16. Based on these general principles, the Chamber has considered whether the two disputed events involving 11 April and 26 or 29 April 1994 implicate the Accused's right to notice. There is no mention of the alleged events of 11 April 1994 in the Indictment, the Pre-Trial brief, or the witness's statements to investigators. Neither is there any reference to the Accused's involvement with roadblocks in the Indictment, and only a general reference to the Accused's involvement with them in the statement of 18 November 2003. The same is true with respect to the events allegedly occurring on 26 or 29 April 1994. There is, however, a reference to a meeting occurring on 29 April 1994 in the witness's 30 November 2001 statement. The Prosecution to some degree concurs that the events are not specifically pleaded in the Indictment and concedes that the alleged events on 11 April 1994 may not in and of itself be the basis for a conviction.

17. If new material emerges, one appropriate remedy is to allow additional time to prepare. The Chamber observes that the will-say statement for Witness KDD was provided in English to the Defence on 29 August 2004. Co-counsel has English as her mother tongue, and Lead Counsel has good command of English. Following a request of the Defence to have the document translated into French, the Prosecution disclosed an unofficial (albeit materially incomplete) translation on 2 September 2004. The Defence team did not raise any objections to the quality of the translation and its lack of familiarity with the un-translated portion of the document until 28 October 2004[16]. Given that more than two months have elapsed since the initial disclosure, a period similar to the period of notice provided for in Rule 66, the Chamber finds that the Defence had adequate time to prepare for the allegations. An official French translation was made available on the morning of 1 November 2004.

18. At this stage of the case, the Chamber is not in a position to fully appreciate the evidentiary value of all aspects of Witness KDD's anticipated testimony. Moreover, the potential inconsistencies between his anticipated testimony and prior statements may bear on his credibility. Thus, the Chamber will hear Witness KDD and reserves its decision on the weight to accord to the evidence as well as whether to ultimately consider the evidence at all in its final deliberations. This approach is con-

[14] *Ntahobali and Nyiramasuhuko*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, paras. 14-16.

[15] *Krnojelac*, Judgement (AC), paras. 142-144; *Ntahobali and Nyiramasuhuko*, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 16.

[16] French-speaking Lead Counsel demonstrated his familiarity with the untranslated portion of the English version of the will-say statement. T. 28 October 2004, p. 19.

sistent with the Chamber's previous decision on the Defence's motion to exclude the testimony of Witness KSM[17].

19. The Defence has objected to the admission of the disputed areas of testimony as with other evidence based on lack of notice in the Indictment. The Appeals Chamber in *Niyitegeka* has confirmed that this preserves the issue for later consideration. The burden of proof will fall on the Prosecution to demonstrate the Accused's ability to prepare his defence was not materially impaired[18]. The parties should address these issues in their closing briefs. This practice has been followed in many other cases[19].

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence's motion;

DIRECTS the parties to make further submissions in their closing briefs.

Arusha, 1 November 2004

[Signed] : Erik Møse; Sergei Alekseevich Egorov; Dennis C.M. Byron

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[17] *Simba*, Decision on the Defence Motion to Exclude the Testimony of Witness KSM (TC), 4 October 2004, para. 5.

[18] *Niyitegeka*, Judgement (AC), paras. 199-200.

[19] *Semanza*, Judgement (TC), para. 61; *Ntakirutimana*, Judgement (TC), paras. 49-63; *Niyitegeka*, Judgement (TC), para. 44; *Gacumbitsi*, Judgement (TC), para. 189; *Ntagerura et al.*, Judgement (TC), para. 69.

Decision on Defence Request for Information Related to Witnesses YH and KXX 10 November 2004 (ICTR-01-76-T)

(Original : English)

Trial Chamber I

Judges : Erik Mose, presiding; Sergei Alekseevich Egorov; Dermis C. M. Byron

Aloys Simba – information related to witnesses – state of the Prosecution's investigations – Prosecutor's independence – motion denied

International Instruments Cited : Code of Conduct for Defence Counsel, Art. 13 (4) and 14 (1) – Rules of Procedure and Evidence, Rule 90 (E) – Statute, Art. 15 (2) and 17

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

SITTING as Trial Chamber I, composed of Judge Erik Mose, presiding, Judge Sergei Alekseevich Egorov, and Judge Dennis C. M. Byron;

BEING SEIZED OF the "Requête de la défense en vue d'enjoindre au procureur d'avoir à fournir la preuve que des poursuites judiciaires ont été engagées contre les témoins 'KXX' et 'YH' lesquels se sont accusés du crime de génocide", filed on 25 October 2004;

CONSIDERING the Prosecution's response, filed on 28 October 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. At the close of Witness YH's evidence on 23 September 2004, the Defence made an oral motion requesting the Prosecution to investigate the witness in relation to alleged discrepancies between his statement about his criminal activity before the Tribunal and what he had confessed to in Rwanda. The Chamber denied the motion emphasizing the Prosecution's independence in deciding which cases to investigate and prosecute[1]. After the evidence of Witness KXX on 24 September 2004, the Defence made a similar request[2].

[1] T. 23 September 2004, p. 29.
[2] T. 24 September 2004, p. 60.

Décision relative à la requête de la défense aux fins d'obtention de renseignements concernant les témoins YH et KXX 10 novembre 2004 (ICTR-01-76-T)

(Original : Anglais)

Chambre de première instance I

Juges : Erik Mose, Président de Chambre; Sergei Alekseevich Egorov; Dennis C. M. Byron

Aloys Simba – renseignements concernant des témoins – état d'avancement des enquêtes – indépendance du Procureur – requête rejetée

Instruments internationaux cités : Code de déontologie à l'intention des Conseils de la défense, art. 13 (4) et 14 (1) – Règlement de procédure et de preuve, art. 90 (E) – Statut, art. 15 (2) et 17

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIEGEANT en la Chambre de première instance I, composée des juges Erik Mose, Président de Chambre, Sergei Alekseevich Egorov et Dennis C.M. Byron,

SAISI de la Requête de la défense en vue d'enjoindre au Procureur d'avoir à fournir la preuve que des poursuites judiciaires ont été engagées contre les témoins «KXX» et «YH», lesquels se sont accusés du crime de génocide, déposée le 25 octobre 2004,

VU la réponse du Procureur, déposée le 28 octobre 2004,

STATUE sur la requête.

INTRODUCTION

1, À l'issue de la déposition du témoin YH, le 23 septembre 2004, la défense a présenté oralement une requête invitant le Procureur à enquêter sur les divergences qui existeraient entre la déposition de ce témoin devant la Chambre sur ses activités criminelles et les aveux qu'il a faits au Rwanda. La Chambre a rejeté ladite requête, soulignant que le Procureur détermine en toute indépendance quels dossiers il instruira et contre qui il exercera des poursuites[1]. A l'issue du témoignage de KXX, le 24 septembre 2004, la défense a introduit une requête similaire[2].

[1] Compte rendu de l'audience du 23 septembre 2004, p. 31.
[2] Compte rendu de l'audience du 24 septembre 2004, p. 68.

SUBMISSIONS

2. The Defence motion seeks a report within one month concerning whether prosecutions are underway against Witnesses YH and KXX based on their allegedly self-incriminating testimony that was not mentioned in their previously disclosed statements to ICTR investigators. The Defence supports its motion by reference to Rule 90 (E) and Articles 13 (4) and 14 (1) of the Code of Conduct for Defence Counsel.

3. The Prosecution asserts that the Defence motion lacks any basis in the Statute or Rules and should be dismissed as frivolous. The response emphasises the Prosecution's independence and discretion under the Stature to determine when to institute criminal proceedings. The Prosecution would breach the Chamber's witness protection order by disclosing much of the allegedly self incriminating evidence highlighted by the Defence because it was given during closed sessions.

DELIBERATIONS

4. It is recalled that on 23 September 2004, the Chamber denied the Defence motion requesting the Chamber to direct investigation in relation to Witness YH. The Chamber's position is the same in relation to Witness KXX. Alleged discrepancies between prior statements to investigators and the testimony of these witnesses will be considered on the merits after having heard the totality of the evidence.

5. In its present motion, the Defence seeks a report on the state of the Prosecution's investigations concerning Witnesses YH and KXX. It follows from the Prosecution's response that it has not initiated any proceedings and has no intention to do so. According to Article 15 (2) of the Statute, the Prosecutor shall act independently as a separate organ of the Tribunal. He shall not receive instructions from any source. Under Article 17, the Prosecutor has the power to initiate investigations and assess whether the information forms a sufficient basis to proceed.

There is no basis for the Defence motion.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion.

Arusha, 10 November 2004

[Signed] : Erik Mose; Sergei Alekseevich Egorov; Dermis C. M. Byron

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CONCLUSIONS DES PARTIES

2. Dans sa requête, la défense cherche à savoir, dans un délai d'un mois, si des poursuites ont été engagées contre les témoins YH et KXX à raison des déclarations incriminantes qu'ils auraient faites à leur propre égard à l'audience, alors que ces éléments n'ont pas été révélés aux enquêteurs du TPIR lorsque ces derniers ont recueilli leurs déclarations. Au soutien de sa requête, la défense invoque l'article 90 (E) du Règlement et les articles 13 (4) et 14 (1) du Code de déontologie à l'intention des Conseils de la défense.

3. Selon le Procureur, la requête de la défense ne trouve aucun fondement, que ce soit dans le Statut ou dans le Règlement, et doit être rejetée motif pris de ce qu'elle est fantaisiste. La réponse du Procureur met en exergue le fait qu'aux termes du Statut, il décide en toute indépendance et souverainement de l'opportunité des poursuites. Le Procureur violerait l'ordonnance de protection des témoins rendue par la Chambre en révélant une bonne partie des éléments de preuve invoqués par la défense, qui seraient incriminants pour les témoins eux-mêmes, car ceux-ci ont été communiqués à huis clos.

DÉLIBÉRÉ

4. L'on se souviendra que le 23 septembre 2004, la Chambre a rejeté la requête par laquelle la défense la priait d'ordonner au Procureur d'enquêter sur le témoin YH. La position de la Chambre est identique en ce qui concerne le témoin KXX. La Chambre se penchera sur les divergences qui existeraient entre les déclarations recueillies par les enquêteurs et la déposition de ces témoins lorsqu'elle étudiera l'affaire au fond après avoir examiné l'ensemble des éléments de preuve.

5. Dans sa requête, la défense sollicite la communication d'un rapport sur l'état d'avancement des enquêtes menées par le Procureur sur les témoins YH et KXX. Il découle de la réponse du Procureur que celui n'a engagé aucune procédure en ce sens et n'a aucune intention de le faire. Aux termes du paragraphe 2 de l'article 15 du Statut, le Procureur, qui est un organe distinct au sein du Tribunal, agit en toute indépendance. Il ne reçoit d'instructions d'aucune source. L'article 17 du Statut habilite le Procureur à ouvrir une information et à évaluer les renseignements obtenus avant de décider s'il y a lieu de poursuivre. La requête de la défense est par conséquent dénuée de fondement.

PAR CES MOTIFS, LA CHAMBRE

REJETTE la requête de la Défense.

Fait à Arusha, le 10 novembre 2004

[Signé] : Erik Mose; Sergei Alekseevich Egorov; Dennis C. M. Byron

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The Prosecutor v. Protais ZIGIRANYIRAZO

Case N° ICTR-2001-73

Case History

- Name : ZIGIRANYIRAZO
- First Name : Protais
- Date of Birth : 1938
- Sex : male
- Nationality : Rwandan
- Former Official Function : Businessman
- Date of Indictment's Confirmation : 20 July 2001[1]
- Counts : Conspiracy to commit genocide, genocide, or alternatively complicity in genocide, crimes against humanity (extermination, murder)
- Date and Place of Arrest : 26 July 2001, in Brussels, in Belgium
- Date of Transfer : 3 October 2001
- Date of Initial Appearance : 10 October 2001
- Date Trial Began : 3 October 2005

[1] The text of the indictment is reproduced in the *2001 Report*, p. 3388. The text of the Decision to confirm the indictment is reproduced in the *2001 Report*, p. 3398.

Le Procureur c. Protais ZIGIRANYIRAZO

Affaire N° ICTR-2001-73

Fiche technique

- Nom : ZIGIRANYIRAZO
- Prénom : Protais
- Date de naissance : 1938
- Sexe : masculin
- Nationalité : rwandaise
- Fonction occupée au moment des faits incriminés : homme d'affaires
- Date de la confirmation de l'acte d'accusation : 20 juillet 2001
- Chefs d'accusation : crimes contre l'humanité (extermination ou, subsidiairement, assassinat)
- Date et lieu de l'arrestation : 26 juillet 2001, à Bruxelles, en Belgique
- Date du transfert : 3 octobre 2001
- Date de la comparution initiale : 10 octobre 2001
- Date du début du procès : 3 octobre 2005

[1] Le texte de l'acte d'accusation est reproduit dans le *Recueil 2001*, p. 3389. Le texte de la décision de confirmation de l'acte d'accusation est reproduit dans le *Recueil 2001*, p. 3399.

Decision on the Defence Motion to Withdraw Pending Motions 27 January 2004 (ICTR-2001-73-I)

(Original : English)

Trial Chamber III

Judges : Lloyd G. Williams, Presiding; Andrésia Vaz; Khalida Rachid Khan

Protais Zigiranyirazo – Withdrawal of Pending Motions – Motion granted

International Instrument cited :

Rules of Procedure and Evidence, rule 72 (B)(ii)

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

SITTING as Judge Lloyd G. Williams, designated by Trial Chamber III, pursuant to Rule 73 (A) of the Rules of Procedure and Evidence of the Tribunal ("Rules");

BEING SEIZED of the Defence Motion to Withdraw Defence Pending Motions entitled "*Désistement aux requêtes pendantes*", filed on 10 December 2003;

NOTING that on 10 December 2003, the Defence has filed three motions pending before the Trial Chamber, namely :

Requête en exception préjudicielle suivant l'Article 72 (B) (ii) du Règlement de procédure et de preuve, filed on 13 May 2002,

Requête en communication de preuve et rectification du dossier, filed on 21 June 2003, and

Requête (Deuxième) en exception préjudicielle suivant l'Article 72 (B) (ii) du Règlement de procédure et de preuve re : Renseignements personnels (Article 47 (C)), filed on 11 July 2002;

TAKING NOTE of the argument raised by the Defence that this withdrawal does not constitute a waiver to the substantive rights highlighted in those motions;

THE CHAMBER

HEREBY GRANTS the Defence Motion for withdrawal of pending motions listed above.

Arusha, 27 January 2004

[Signed] : Lloyd G. Williams

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Décision relative à la requête de la défense en désistement des requêtes pendantes 27 janvier 2004 (ICTR-2001-73-I)

(Original : Anglais)

Chambre de première instance III

Juges : Lloyd G. Williams, Président ; Andrésia Vaz ; Khalida Rachid Khan

Protais Zigiranyirazo – Désistement des requêtes pendantes – Requête acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 72 (B)(ii)

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la personne du juge Lloyd G. Williams, désigné par la Chambre de première instance III conformément à l'article 73 (A) du *Règlement de procédure et de preuve* (le «Règlement»);

SAISI de la *Requête de la Défense en désistement des requêtes pendantes*, déposée le 10 décembre 2003 ;

NOTANT que le 10 décembre 2003, la Défense a déposé trois requêtes qui restent pendantes devant la Chambre de première instance, à savoir :

La *Requête en exception préjudicielle suivant l'article 72 (B) (ii) du Règlement de procédure et de preuve*, déposée le 13 mai 2002,

La *Requête en communication de preuve et rectification du dossier*, déposée le 21 juin 2003, et

La *Requête (Deuxième) en exception préjudicielle suivant l'article 72 (B) (ii) du Règlement de procédure et de preuve re : Renseignements personnels (article 47 (C)*), déposée le 11 juillet 2002 ;

PRENANT NOTE de la thèse développée par la Défense à l'effet d'établir que ce désistement ne vaut pas renonciation aux droits substantiels articulés dans les requêtes susmentionnées ;

LA CHAMBRE

PAR LA PRÉSENTE, ACCÈDE à la *Requête de la Défense en désistement des requêtes pendantes* susmentionnées.

Fait à Arusha, le 27 janvier 2004.

[Signé] : Lloyd G. Williams

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Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment Rule 72 (A) (ii) of the Rules of Procedure and Evidence 15 July 2004 (ICTR-2001-73-I)

(Original : English)

Trial Chamber III

Judges : Andrésia Vaz, Presiding; Flavia Lattanzi; Florence Rita Arrey

Protais Zigiranyirazo – Defects in the Indictment, Interference of any lack of precision or specificity in an indictment with judicial economy, Purpose of an Indictment, Necessity to cure the Indictment to avoid the reversal of a conviction in Appeal, Lack of a precise link between the pleaded types of responsibility and a respective set of facts, Degree of factual details determined as to avoid imprecision and vagueness, Fundamental issue regarding a defecting Indictment : whether the Accused has sufficient information to adequately prepare his defence, Definition of the formal requirements for the provision of sufficient notice to the Accused – Pleading of various types of responsibility in the Indictment, Necessity of clarity in the pleading of the Prosecutor, Distinction between personal and command responsibility – Prosecutor's right to cure the lack of precision in an indictment – Motion partially granted

International Instrument cited :

Rules of Procedure and Evidence, rules 72 (A) and 72 (A)(ii); Statute, art. 6(1) and 6 (3)

International Cases cited :

I.C.T.R. : Trial Chamber I, The Prosecutor v. Ferdinand Nahimana*, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, 24 November 1997 (ICTR-96-11-T, Rep. 1995-1997, p. 436)); Trial Chamber III,* The Prosecutor v. Protais Zigiranyirazo*, Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment, 15 October 2003 (ICTR-2001-73-I, Rep. 2003, p. 4018); Appeals Chamber,* Eliézer Niyitegeka v. The Prosecutor*, Judgement, 9 July 2004 (ICTR-96-14-A, Rep. 2004, p. XXX)*

I.C.T.Y. : Trial Chamber, The Prosecutor v. Milorad Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 (IT-97-25); Trial Chamber,* The Prosecutor v. Miroslav Kvočka*, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 (IT-99-30); Trial Chamber,* The Prosecutor v. Milorad Krnojelac*, Decision on preliminary motion on form of amended indictment, 1 February 2000 (IT-97-25); Trial Chamber,* The Pros-

Décision relative à l'exception préjudicielle tirée par la défense de vices de forme de l'acte d'accusation modifié Article 72 (A) (ii) du Règlement de procédure et de preuve 15 juillet 2004 (ICTR-2001-73-I)

(Original : Anglais)

Chambre de première instance III

Juges : Andrésia Vaz, Président de Chambre; Florence Rita Arrey; Flavia Lattanzi

Protais Zigiranyirazo – Vices de l'acte d'accusation, Préjudice de tout défaut de clarté et de précision de l'acte d'accusation à l'économie judiciaire, Objet d'un acte d'accusation, Nécessité de remédier aux vices de l'acte de l'accusation pour éviter l'annulation d'une déclaration de culpabilité en appel, lien de connexité précis entre les chefs de responsabilité retenus et une série de faits, Degré de precision requis pour éviter tout défaut de précision ou d'éléments substantiels, Principale question quant à un acte d'accusation défectueux : l'accusé des informations suffisantes pour lui permettre de préparer convenablement sa défense, Définition du degré de précision requis – Cumul de charges du chef de différentes formes de responsabilité dans l'acte d'accusation, Nécessité de clarté dans l'accusation du Procureur, Distinction entre la responsabilité individuelle de l'accusé et sa responsabilité en tant que supérieur hiérarchique – Faculté du Procureur de purger l'acte d'accusation de tout défaut de précision – Requête partiellement acceptée

Instrument international cité :

Règlement de Procédure et de preuve, art. 72 (A) et 72 (A)(ii); Statut, art. 6(1) et 6 (3)

Jurisprudence internationale citée :

T.P.I.R. : Chambre de première instance I, Le Procureur c. Ferdinand Nahimana*, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, 24 November 1997 (ICTR-96-11-T, Rec. 1995-1997, p. 437)); Chambre de première instance III,* Le Procureur c. Protais Zigiranyirazo*, Décision relative à la requête du Procureur en autorisation de modifier 1'acte d'accusation et à la requête urgente de la défense en communication des éléments justificatifs se rapportant à la modification demandée de l'acte d'accusation, 15 octobre 2003 (ICTR-2001-73-I, Rec. 2003, p. 4019); Chambre d'Appel,* Eliézer Niyitega c. Le Procureur*, Jugement, 9 juillet 2004 (ICTR-96-14-A, Rec. 2004, p. XXX)*

T.P.I.Y. : Chambre de première instance, Le Procureur c. Milorad Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 février 1999 (IT-97-25); Chambre de première instance,* Le Procureur c. Miroslav Kvočka*, Décision relative aux exceptions préjudicielles de la défense portant sur la forme de 1'acte d'accusation, 12 avril 1999 (IT-99-30); Chambre de première instance,* Le Procureur c. Milorad Krnojelac*, Decision on preliminary Motion on form of amended Indict-*

ecutor v. Momčilo Krajišnik, *Decision Concerning Preliminary Motion on the Form of the Indictment, 1 August 2000, (IT-00-39); Trial Chamber,* The Prosecutor v. Radoslav Brdjanin and Momir Talic, *Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001 (IT-99-36); Trial Chamber,* The Prosecutor v Zdravko Mucić et al., *Judgement, 20 February 2001 (IT-96-21); Appeals Chamber,* The Prosecutor v. Zoran Kupreškić, *Appeal Judgment, 23 October 2001 (IT-95-16); Trial Chamber,* The Prosecutor v. Enver Hadžihasanović, *Decision on form of indictment, 7 December 2001 (IT-01-47); Trial Chamber,* The Prosecutor v. Miroslav Deronjić, *Decision on Form of the Indictment, 25 October 2002 (IT-02-61); Trial Chamber,* The Prosecutor v. Mile Mrkšić, *Decision on Form of the Indictment, 19 June 2003 (IT-95-13)*

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

SITTING as Trial Chamber III, composed of Judges Andrésia Vaz, Flavia Lattanzi and Florence Rita Arrey ("Chamber");

BEING SEIZED of the Defence "Motion Objecting to the Form of the Amended Indictment and Brief in Support" filed on 27 January 2004 ("Motion");

CONSIDERING the Prosecutor's "Response to the Defence Motion Objecting to the Form of the Amended Indictment" filed on 5 February 2004 ("Response"); the Defence "Brief in Reply to the Prosecution's Response to the Defence Motion Objecting to the Form of the Amended Indictment" filed on 10 February 2004 ("Reply"); and the Defence "Supplementary Case Law in Support of Brief in Reply to Prosecution's Response to Defence Motion Objecting to the Form of the Amended Indictment and Brief in Support" filed on 27 February 2004;

CONSIDERING the Statute of the Tribunal ("Statute") and the Rules of Procedure and Evidence ("Rules");

RECALLING the Decision of Trial Chamber III granting leave to amend the Indictment rendered on 15 October 2003 and filed on 16 October 2003 ("Decision of 15 October 2003")[1];

NOTING that the Prosecutor filed an Amended Indictment, an Annotated Amended Indictment and "The Prosecutor's Annexure Re : Amended Indictment" ("Annexure") on 5 November 2003;

NOW DECIDES solely on the basis of the written briefs of the parties pursuant to Rule 72 (A) of the Rules.

[1] Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment, 15 October 2003.

ment, 1 février 2000 (IT-97-25); Chambre de première instance, Le Procureur c. Momčilo Krajišnik*, Décision relative à l'exception préjudicielle du défendeur fondée sur des vices de forme de l'acte d'accusation, 1er août 2000 (IT-00-39); Chambre de première instance,* Le Procureur c. Radoslav Brdjanin et Momir Talic*, Décision relative à 1'exception préjudicielle soulevée par Momir Talic pour vices de forme de 1'acte d'accusation modifié, 20 février 2001 (IT-99-36); Chambre de première instance,* Le Procureur c. Zdravko Mucić et consorts*, Jugement, 20 février 2001 (IT-96-21); Chambre d'Appel,* Le Procureur c. Zoran Kupreškić*, Arrêt, 23 Octobre 2001 (IT-95-16); Chambre de première instance,* Le Procureur c. Enver Hadžihasanović*, Décision relative à la forme de l'acte d'accusation, 7 décembre 2001 (IT-01-47); Chambre de première instance,* Le Procureur c. Miroslav Deronjić*, Décision relative à 1'exception préjudicielle pour vices de forme de 1'acte d'accusation, 25 Octobre 2002 (IT-02-61); Chambre de première instance,* Le Procureur c. Mile Mrkšić*, Décision relative à 1'exception préjudicielle pour vices de forme de 1'acte d'accusation, 19 juin 2003 (IT-95-13)*

LE TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»)

SIÉGEANT en la Chambre de première instance III composée des juges Andrésia Vaz, Flavia Lattanzi et Florence Rita Arrey (la «Chambre»),

SAISI de l'exception préjudicielle tirée par la défense de vices de forme de l'acte d'accusation modifié et du mémoire y relatif déposée le 27 janvier 2004 (la «requête»),

VU la réponse à l'exception préjudicielle intitulée «Prosecutor's Response to the Defence Motion Objecting to the Form of Arnended Indictment» produite par le Procureur le 5 février 2004 (la «réponse»), la dite «Brief In Reply to the Prosecutor's Response to the Defence Motion Objecting to the Form of the Amended Indictrnent» déposée par la défense le 10 février 2004 (la «réplique») et les éléments de jurisprudence dits «Supplementary Case Law in Support of Brief in Repty to Prosecution's Response to Defence Motion Objecting to the Form of Amended lndictment and Brief in Support» déposée le 27 février 2004,

VU le Statut (le «Statut») et le Règlement de procédure et de preuve (le «Règlement») du Tribunal,

RAPPELANT la décision de la Chambre en date du 15 octobre 2003 autorisant le Procureur à modifier l'acte d'accusation, décision enregistrée le 16 octobre 2003 (la «décision du 15 octobre 2003»)[1],

PRENANT ACTE de ce que le Procureur a déposé, le 5 novembre 2003, un acte d'accusation modifié, un acte d'accusation modifié annoté et l'annexe du Procureur à l'acte d'accusation modifié» («annexe»),

STATUANT sur la requête sur la seule base des mémoires produits par les parties en vertu de l'article 72 (A) du Règlement.

[1] *Decision on Prosecutor's Request for Leave to Amend the Indictment and Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to amend the Indictment*, 15 octobre 2003.

SUBMISSION OF THE PARTIES

Defence Motion

1. The Defence contends that the Amended Indictment lacks specificity and does therefore not fully comply with the Decision of 15 October 2003.

2. In particular, the Amended Indictment does not distinguish between acts and relationships that give rise to individual responsibility and acts and relationships that give rise to superior responsibility, as the Trial Chamber had explicitly ordered.[2] The Defence seeks, throughout the Amended Indictment, clarification on the allegations of cumulative responsibility of the Accused pursuant to Article 6 (1) and 6 (3) of the Statute.

3. The Defence argues that the Prosecutor's cumulative charges of different types of personal criminal responsibility (Article 6 (1) of the Statute) causes unacceptable ambiguity and prevents the Accused from knowing the case against him. The Defence requests that the Prosecutor be ordered to limit, throughout the Amended Indictment, the allegations of different modalities of Article 6 (1) of the Statue to the modalities he intends to rely on and to specify, individually, event by event, the form of personal liability he intends to invoke. Alternatively, the Defence moves the Chamber to strike all charges based upon personal liability without specifying the type of personal responsibility.

4. With respect to Count I[3], the Defence seeks furthermore an order compelling the Prosecutor :

(a) to provide the names and functions of all co-conspirators and to describe the circumstances (including dates, times and sites) of the alleged conspiracy[4];

(b) to define the "tight circle" around Juvénal Habyarimana[5];

(c) to describe or identify the business interests, political beliefs and persons that the Amended Indictment refers to[6];

(d) to provide a precise factual foundation for the alleged involvement of the Accused with the *Interahamwe*[7];

(e) to either strike the reference to Ms. Agathe Kanziga as a co-conspirator or to provide a factual basis for the allegations of a conspiracy between her and the Accused[8]; and

(f) to provide in detail all additional facts and circumstances permitting any inference that the Accused participated in a conspiracy to commit genocide[9].

[2] *Ibid*., par. 26.
[3] I.e. Conspiracy to Commit Genocide, see paragraphs 4-11 of the Amended Indictment.
[4] See paragraphs 4-11 of the Amended Indictment.
[5] See paragraph 7 of the Amended Indictment.
[6] See paragraphs 8 and 13 (Count 2) of the Amended Indictment.
[7] See paragraphs 5 and 9-11 of the Amended Indictment.
[8] See paragraphs 4 and 6 of the Amended Indictment.
[9] See paragraphs 4-11 of the Amended Indictment.

ARGUMENTS DES PARTIES

Requête de la défense

1. La défense fait valoir que l'acte d'accusation modifié manque de précision et ne satisfait donc pas aux prescriptions de la décision du 15 octobre 2003.

2. En particulier, l'acte d'accusation modifié ne distingue pas entre les agissements et relations qui donnent prise à la responsabilité individuelle et ceux qui engageraient sa responsabilité en tant que supérieur hiérarchique, ainsi que la Chambre l'avait expressément prescrit[2]. Selon la défense, l'acte d'accusation modifié ne précise pas les allégations fondant le cumul de charges du chef des paragraphes 1 et 3 de l'article 6 du Statut.

3. La défense soutient que le cumul de charges du chef de différentes formes de responsabilité pénale individuelle (article 6 (1) du Statut) crée une ambiguïté inacceptable et ne permet pas à l'accusé de connaître la nature des charges retenues contre lui. Elle prie la Chambre d'ordonner au Procureur de circonscrire, dans tout le texte de l'acte d'accusation, les allégations du chef des différentes formes de responsabilité dérivant de l'article 6 (1) du Statut, aux seules formes de responsabilité qu'il entend retenir et de préciser, s'agissant de chaque fait incriminé, le type de responsabilité qu'il entend retenir contre l'accusé. Subsidiairement, elle prie la Chambre d'écarter de l'acte d'accusation toutes les charges qui retiennent la responsabilité individuelle de l'accusé sans en préciser la forme.

4. S'agissant du chef d'accusation 1[3], la défense prie en outre la Chambre d'ordonner au Procureur :

a. d'indiquer les noms et qualités de toutes les parties à l'entente et de décrire les circonstances (dates, heures et lieux notamment) de l'entente présumée[4];

b. de définir le «cercle fermé» formé autour de Juvénal Habyarimana[5];

c. de définir et d'identifier les intérêts d'affaires, les convictions politiques et les personnes visés dans l'acte d'accusation modifié[6];

d. de préciser les faits fondant l'allégation que l'accusé avait des liens avec les *Interahamwe*[7];

e. de supprimer l'évocation d'Agathe Kanziga comme partie à l'entente ou de préciser les faits fondant les allégations d'entente entre elle et l'accusé[8], et

f. de fournir des précisions sur tous autres faits et circonstances autorisant à conclure que l'accusé était partie à une entente en vue de commettre le génocide[9].

[2] *Ibid*., para. 26.
[3] Entente en vue de commettre le génocide, voir paras. 4 à 11 de l'acte d'accusation modifié.
[4] Voir paras. 4 à 11 de l'acte d'accusation modifié.
[5] Voir para. 7 de l'acte d'accusation modifié.
[6] Voir paras. 8 et 13 (Chef 2) de l'acte d'accusation modifié.
[7] Voir paras. 5, puis 9 à 11 de l'acte d'accusation modifié.
[8] Voir paras. 4 et 6 de l'acte d'accusation modifié.
[9] Voir paras. 4 à 11 de l'acte d'accusation modifié.

5. The Defence maintains that Counts II, III, IV and V[10] do not contain sufficiently precise factual allegations relating to joint criminal enterprise. The Defence submits that the Accused has not received due notice of the details of the joint criminal enterprise imputed to him. The Defence therefore moves the Chamber to order the Prosecutor to strike from the Amended Indictment the term "or in concert with others in pursuit of a common purpose". Alternatively, the Defence seeks an order compelling the Prosecutor to specify :

(a) the nature and purpose of the joint criminal enterprise in which he allegedly participated;

(b) its period of existence;

(c) its other participants;

(d) the implication of the Accused in it; and

(e) the facts and circumstances from which the Prosecution infers the existence of and the Accused's participation in the alleged joint criminal enterprise.

6. The Defence requests that the Prosecutor should support his allegations of command responsibility of the Accused with respect to Counts II, III, IV and V[11] by detailed factual information.

7. With respect to the events at Gashihe Hill involving the Accused[12], the Defence submits that, as far as the Prosecutor anticipates to hold the Accused liable on the basis of individual criminal responsibility, his pleadings have to be more detailed. The Defence thus seeks an order that the Prosecutor be compelled to indicate :

(a) the exact date and time of these events;

(b) the names of all known victims and perpetrators;

(c) the means of killing; and

(d) the means by which the Accused allegedly ordered the killings.

8. The Defence further argues that the charges of superior responsibility for the events at Gashihe Hill[13] are not supported by any specific factual allegations. The Defence moves the Chamber to order the Prosecutor either to remove his allegations of superior responsibility for the events at Gashihe Hill or to provide a factual basis for them.

9. With respect to the allegations of the involvement of the Accused in the mounting and operating of the roadblocks at Giciye[14], "La Corniche"[15] and Kiyovu[16], the Defence requests to receive detailed information on :

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[10] I.e. Counts II and III Genocide, alternatively Complicity in Genocide, Count IV Extermination as a Crime Against Humanity, Count V Murder as a Crime against Humanity, see paragraphs 12-47.

[11] See paragraphs 12-47.

[12] See paragraphs 14-16 of the Amended Indictment in conjunction with paragraph 12, 2nd subparagraph.

[13] See paragraphs 14-16 of the Amended Indictment in conjunction with paragraph 12, 3d subparagraph.

[14] See paragraphs 17-20 of the Amended Indictment.

[15] See paragraphs 17 and 21-23 of the Amended Indictment.

[16] See paragraphs 17, 24 and 25 of the Amended Indictment.

5. La Défense soutient que les chefs II, III, IV et V[10] n'articulent pas d'allégations assez précises de participation à une entreprise criminelle commune et que l'accusé n'a pas été dûment informé de la nature précise du chef de participation à une entreprise criminelle retenu contre lui. Elle prie par conséquent la Chambre d'ordonner au Procureur de supprimer de l'acte d'accusation modifié les mots «ou de concert avec d'autres dans la poursuite d'un dessein commun». Subsidiairement, elle prie la Chambre d'ordonner au Procureur de préciser :

a. la nature et l'objet de l'entreprise criminelle commune à laquelle l'accusé aurait été partie;

b. la durée de l'entreprise;

c. les noms des autres parties à l'entreprise;

d. l'implication personnelle de l'accusé dans les faits;

e. les faits et circonstances dont le Procureur tire l'allégation qu'il y a eu entreprise criminelle à laquelle l'accusé était partie.

6. La défense demande que le Procureur étaye, par des éléments de fait précis, les allégations de responsabilité de supérieur hiérarchique portées aux chefs d'accusation II, III, IV et V[11].

7. S'agissant des faits survenus sur la colline de Gashihe[12] auxquels l'accusé aurait pris part, la défense fait valoir que dans la mesure où il envisage de poursuivre l'accusé du chef de responsabilité pénale individuelle, le Procureur devrait préciser encore ses allégations. La défense demande par conséquent à la Chambre d'ordonner au Procureur de préciser :

a. la date et l'heure exactes des faits incriminés;

b. les noms de tous auteurs et victimes de massacres connus;

c. les moyens utilisés pour commettre ces massacres;

d. les moyens par lesquels l'accusé aurait ordonné les massacres.

8. La défense fait valoir en outre que les chefs de responsabilité de supérieur hiérarchique retenus contre l'accusé à raison des faits survenus sur la colline de Gashihe[13] ne reposent sur aucune allégation factuelle précise. Elle prie donc la Chambre d'ordonner au Procureur de retirer de l'acte d'accusation modifié les allégations de responsabilité de supérieur hiérarchique à raison de ces faits ou d'en établir la base factuelle.

9. S'agissant de l'allégation que l'accusé aurait convenu à dresser et à tenir des barrages routiers à Giciye[14], «La Corniche»[15] et Kiyovu[16], la défense souhaite voir décrire précisément :

[10] Chefs d'accusation II et III : génocide ou, à titre subsidiaire, complicité dans le génocide. Chef d'accusation IV : crime contre l'humanité (Extermination). Chef d'accusation V : crime contre l'humanité (Assassinat), voir paras. 12 à 47.

[11] Voir paras. 12 à 47.

[12] Voir paras. 14 à 16 de l'acte d'accusation modifié ainsi que le paragraphe 12, alinéa 2.

[13] Voir paras. 14 à 16 de l'acte d'accusation modifié ainsi que le paragraphe 12, alinéa 3.

[14] Voir paras. 17 à 20 de l'acte d'accusation modifié.

[15] Voir paras. 17, puis 21 à 23 de l'acte d'accusation modifié.

[16] Voir paras. 17, 24 et 25 de l'acte d'accusation modifié.

(a) the exact locations of roadblocks;

(b) the dates of their existence;

(c) their manning;

(d) their operation;

(e) the identity of perpetrators and victims;

(f) the modalities of the involvement of the Accused; and

(g) the mass grave adjacent to the Giciye roadblock.

10. With respect to the Prosecutor's allegations concerning the implication of the Accused in the killing of the Sekimonyo family[17] and the Bahoma Tutsi[18], the Defence requests more detailed information.

11. With respect to Count IV and V[19], the Defence argues that the Prosecutor ought to provide the same additional information as requested for Counts II and III[20]. Furthermore, the Defence moves the Chamber for an order compelling the Prosecutor to provide more detailed information on the alleged murder of three gendarmes at the Giciye roadblock.

12. The Defence requests that the Chamber render the following orders :

(a) The Prosecutor shall abide by the decision rendered on this motion within 15 days.

(b) All details or particulars provided pursuant to the decision on the present motion shall be provided in French for the benefit of the Accused.

Prosecutor's Response

13. The Prosecutor requests that the Trial Chamber deny the Motion in its entirety. In the alternative that the Chamber obliges him to provide further details to the Accused, the Prosecutor moves the Chamber to allow him to provide the required details by means of filing particulars rather than a further amendment of the Indictment.

14. The Prosecutor submits that the level of specificity demanded by the Defence exceeds the requirements established by the jurisprudence of this Tribunal. Moreover, he qualifies the specifications sought by the Accused as matters of evidence.

15. The Prosecutor argues that the Defence neglects the uniqueness of the crimes in Rwanda in 1994. He claims that, due to the context of the crimes, detailed information concerning dates or the identity of victims is not available and cannot therefore be reasonably requested by the Defence.

16. The Prosecutor asserts that the Amended Indictment provides sufficient notice to the Accused to prepare his defence, especially in view of additional information contained in other instruments, such as witness statements.

[17] See paragraph 26 of the Amended Indictment.
[18] See paragraph 27 of the Amended Indictment.
[19] I.e. Extermination and Murder as Crimes against Humanity, see paragraphs 28-47.
[20] See above, paragraphs 5-9.

a. l'emplacement exact des barrages routiers,

b. la période pendant laquelle ils étaient en place,

c. les individus qui y étaient affectés,

d. la manière dont ils étaient tenus,

e. l'identité des auteurs et de leurs victimes,

f. les modes de participation de l'accusé,

g. la fosse commune proche du barrage routier de Giciye.

10. La défense souhaite voir mieux précisée l'allégation que l'accusé était impliqué dans le massacre de la famille Sekimonyo[17] et du clan tutsi des Bahoma[18].

11. Touchant les chefs IV et V[19], la défense fait valoir que le Procureur devrait fournir le même complément d'informations qu'au titre des chefs II et III[20]. Elle demande en outre à la Chambre d'ordonner au Procureur de fournir plus de détails sur le meurtre allégué de trois gendarmes au barrage routier de Giciye.

12. La défense prie la Chambre d'ordonner au Procureur :

a. d'exécuter, dans un délai de 15 jours, la décision relative à la présente requête ;

b. de fournir en langue française, à l'intention de l'accusé, tous détails et précisions prescrits par la décision faisant suite à la présente requête.

Réponse du Procureur

13. Le Procureur prie la Chambre de rejeter la requête de la défense en son entier. Au cas où elle lui ordonnerait de fournir d'autres précisions à l'accusé, le Procureur prie la Chambre de l'autoriser à le faire sous forme d'indications complémentaires et non d'une nouvelle modification de l'acte d'accusation.

14. Le Procureur fait valoir que la défense exige davantage de précisions que la jurisprudence du Tribunal n'autorise à demander, précisions qui, d'après lui, relèvent de l'administration de la preuve.

15. Selon le Procureur, la défense méconnaît la spécificité des crimes commis au Rwanda en 1994, et ne saurait raisonnablement réclamer des précisions quant aux dates des faits, ou à l'identité des victimes qui ne sont pas disponibles, étant donné les circonstances qui ont entouré les faits.

16. Il estime qu'au vu de l'acte d'accusation, l'accusé est suffisamment prévenu pour pouvoir préparer sa défense, d'autant plus qu'il peut trouver des informations complémentaires dans d'autres documents, les déclarations de témoins par exemple.

[17] Voir para. 26 de l'acte d'accusation modifié.
[18] Voir para. 27 de l'acte d'accusation modifié.
[19] Voir paras. 28 à 47, crime contre l'humanité (Extermination et Assassinat).
[20] Voir ci-dessus, paras. 5 à 9.

17. The Prosecutor submits that his investigations are ongoing, interviews with Prosecution witnesses have not yet begun, and the witness's actual testimony might vary in minor details from the evidence that he presently anticipates. In view of the possible variances, an exaggerated degree of specificity in the present Indictment might necessitate further time-consuming amendments.

18. The Prosecutor argues that his charges of the Accused's participation in a joint criminal enterprise, as well as in a conspiracy, rely upon factual allegations that he describes in the Amended Indictment with all the details that he is aware of. The Prosecutor submits that, in this regard, the Accused is not hampered to prepare his defence.

19. The Prosecutor submits that he has clearly indicated which paragraphs of the Amended Indictment are charged under Article 6 (1) and 6 (3) of the Statute respectively. He submits that command and individual responsibility, as well as the various modes of individual responsibility, are not mutually exclusive, and that the same set of facts may fall under all of the modes of responsibility.

Defence Reply to the Prosecutor's Response

20. The Defence reiterates its position. It moves the Chamber either to :

(a) grant the Defence Motion and order the Prosecutor to provide as part of the Amended Indictment the requested particulars; or

(b) grant the Defence Motion and order the Prosecutor to provide a full "Bill of Particulars" for the requested information.

21. While the Defence recognises the difficulty in providing details of all victims in the context of the Rwandan conflict, it maintains that a proper application of *Kupreškić* demands that the Prosecutor considers dropping charges for which he lacks the necessary material details.

22. In answer to the Prosecutor's suggestion that material details be provided by way of the disclosure process, the Defence states that the time restraints of the disclosure process disable it to prepare a proper defence. The Defence warns that this approach would cause delays in the trial. Furthermore, the Defence contends that, in the present case, the criteria established by the *Kupreškić* decision, namely that the provision of detail by way of the disclosure process be clear, consistent and timely, are not met.

23. The Defence argues that the Prosecution cannot cure a defective indictment through the supporting material and pre-trial brief.

24. The Defence submits that it has been requesting precisely the type of details that were provided through the particulars in *Bikindi*. However, the Defence understands such particulars to be part of an indictment. Hence it argues that any future variance in the particulars would be subject to the same procedure as the amendment of an indictment.

25. With respect to the events at Gashihe Hill, the Defence concedes that the names of the victims are of lesser importance. However, it reiterates its request to be informed about the date of the alleged events.

17. Le Procureur avance qu'il poursuit ses enquêtes, qu'il n'a pas commencé de s'entretenir avec les témoins à charge et que la déposition de tel ou tel témoin pourrait légèrement s'écarter de ce qui est envisagé à ce stade. Cela étant, trop de précision dans l'acte d'accusation actuel risquerait de conduire par la suite à y apporter des modifications, ce qui ferait perdre encore du temps.

18. Le Procureur soutient qu'il reproche à l'accusé d'avoir été partie à une entreprise criminelle commune et à une entente sur la base d'allégations factuelles décrites dans l'acte d'accusation modifié avec tous les détails à sa connaissance et que, dès lors, l'accusé ne saurait prétendre être gêné dans la préparation de sa défense.

19. Le Procureur prétend avoir clairement indiqué les paragraphes de l'acte d'accusation modifié qui se rapportent aux paragraphes 1 et 3 de l'article 6 du Statut respectivement. Il fait valoir que la responsabilité pénale individuelle et la responsabilité en tant que supérieur hiérarchique, ainsi que les autres formes de responsabilité, ne s'excluent pas les unes les autres, les mêmes faits pouvant à la fois donner prise à toutes les formes de responsabilité.

Réplique de la défense à la réponse du Procureur

20. Campant sur sa position, la défense prie la Chambre

a. de faire droit à sa requête et d'ordonner au Procureur d'insérer les précisions demandées dans l'acte d'accusation, ou

b. de faire droit à sa requête et d'ordonner au Procureur de fournir «une liste complète des précisions» demandées.

21. Tout en reconnaissant la difficulté qu'il y a, dans le contexte du conflit rwandais, à fournir des renseignements détaillés sur toutes les victimes, la défense réitère qu'une application judicieuse de l'arrêt *Kupreskic* commanderait que le Procureur abandonne les charges qu'il ne peut étayer par des éléments de fait détaillés.

22. S'agissant de la proposition du Procureur de fournir les précisions demandées dans le cadre de la procédure de communication de pièces, la défense estime que les contraintes de temps imposées par ladite procédure ne lui permettraient pas de se préparer efficacement, et craint qu'une telle solution ne retarde le procès. De plus, la défense soutient que les critères dégagés par l'arrêt *Kupreskic*, à savoir que les renseignements fournis par voie de communication de pièces soient clairs, cohérents et opportuns, ne sont pas satisfaits en l'espèce.

23. La défense soutient que le Procureur ne peut purger l'acte d'accusation de ses vices au moyen des éléments justificatifs et du mémoire préalable au procès.

24. Elle ajoute que les précisions demandées sont précisément celles qui ont été fournies dans l'affaire *Bikindi*. Toutefois, de ce que ces précisions font partie de l'acte d'accusation selon son interprétation, elle conclut que tout nouveau changement à apporter à ces précisions relèverait de la même procédure que la modification de l'acte d'accusation.

25. S'agissant des faits survenus sur la colline de Gashihe, la défense admet que les noms des victimes revêtent moins d'intérêt, mais demande de nouveau à être informée de la date des faits allégués.

26. The Defence notes that the Prosecution relied on the existence of new evidence to request leave to amend the Indictment, but has failed to include details pertaining to that new evidence in its Amended Indictment. The Defence reserves its right to seek remedies based on this contradiction at a later stage.

27. The Defence is also requesting that the relevant case material be provided to them in French and challenges the Prosecutor's assertion that this matter is entirely the responsibility of "Languages and Conference Section". The Defence submits that the Prosecution has the capacity to submit in French and thereby facilitate the expeditious conduct of the proceedings.

DELIBERATIONS

28. As a preliminary matter, the Chamber observes that any lack of precision or specificity in an indictment interferes with judicial economy. Not only does a clear and unambiguous indictment lie in the interest of the Accused as a matter of right; but the Prosecutor also benefits from a clear and unambiguous indictment since it enables him to focus his case and hence to allocate his limited resources reasonably. During the trial, a precise and specific indictment ensures an efficient use of valuable court time. The Chamber emphasizes thus the importance of a specific, precise, clear and unambiguous indictment as an essential prerequisite for a fair and expeditious trial.

29. The Chamber recalls that a defective indictment may cause the Appeals Chamber to reverse a conviction[21]. It is therefore of utmost importance that any formal defects of an indictment be cured before proceeding to trial.

30. Since this case is still in its pre-trial phase the Chamber finds no merit in the Defence requests for striking extensive parts from the Amended Indictment. At this preliminary stage of proceedings, the Prosecutor can easily correct purely formal defects in his pleadings.

As to the specific type of alleged responsibility pursuant to Article 6 (1) of the Statute

31. With respect to the pleading of various types of responsibility pursuant to Article 6 (1) of the Statute, the Chamber recalls the *Talic* decision in which the Trial Chamber held :

> «It has been firmly stated that pleading individual responsibility by reference merely to all the terms of Article 7 (1) is likely to cause ambiguity. The nature of the Prosecution case should not depend on such ambiguity»[22]

[21] *Niyitegeka v. The Prosecutor*, Case N° ICTR 96-14-A, Judgement (AC), 9 July 2004, paragraph 195 (f).

[22] *The Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case N° IT-99-36 "Decision on Objections by Momir Talic to the Form of the Amended Indictment", 20 February 2001, par. 10.

26. La défense fait observer que ayant tiré argument de ce qu'il disposait d'éléments de preuve nouveaux pour demander l'autorisation de modifier l'acte d'accusation, le Procureur ne renseigne cependant pas sur ces éléments de preuve nouveaux dans l'acte d'accusation modifié. La défense se réserve le droit de demander plus tard réparation à raison de cette contradiction.

27. La défense demande également que les documents en cause lui soient communiqués en langue française et conteste l'affirmation du Procureur selon laquelle cette question relève de l'entière responsabilité de la «Section des langues et services de conférence». Elle fait valoir que le Procureur peut soumettre ses documents en français et contribuer ainsi à accélérer le cours de l'instance.

DÉLIBÉRATIONS

28. La Chambre fait observer avant tout que tout défaut de clarté et de précision de l'acte d'accusation nuit à l'économie judiciaire. Un acte d'accusation clair et net de toute ambiguïté va de plein droit dans le sens des intérêts de l'accusé, mais sert également ceux du Procureur en ceci qu'il lui permet de circonscrire sa cause et d'utiliser judicieusement les ressources limitées dont il dispose. Un tel acte d'accusation garantit une utilisation efficace du temps précieux imparti pour les débats. D'où il suit de l'avis de la Chambre qu'un acte d'accusation détaillé, précis, clair et net de toute ambiguïté est une condition *sine qua non* d'un procès rapide et équitable.

29. La Chambre rappelle qu'un acte d'accusation vicié peut conduire la Chambre d'appel à annuler une déclaration de culpabilité[21]. Il est donc primordial que l'acte d'accusation soit purgé de tout vice de forme avant l'ouverture de l'instance.

30. La procédure en étant encore à la phase de mise en accusation, la Chambre juge la demande de la défense tendant à voir supprimer des pars entiers de l'acte d'accusation d'autant moins fondée qu'à ce stade précoce de la procédure, le Procureur peut facilement purger l'acte de ses simples vices de forme.

Sur la forme de responsabilité précise au paragraphe 1 de l'article 6 du Statut

31. En ce qui concerne les différentes formes de responsabilité envisagées par l'article 6 (1) du Statut, la Chambre rappelle la décision *Talic* dans laquelle la Chambre de première instance avait conclu ce qui suit :

> «Il a été souligné avec fermeté que le fait d'invoquer la responsabilité individuelle en mentionnant toutes les catégories visées à l'article 7 (1) est de nature à introduire une ambiguïté. La thèse de l'accusation ne saurait se fonder sur pareille ambiguïté»[22].

[21] *Niyitega c. Le Procureur*, affaire no ICTR 96-14-A, jugement du 9 juillet 2004, par. 195 f.

[22] *Le Procureur c. Radoslav Brdjanin et Momir Talic*, affaire n° 1T-99-36, Décision relative à l'exception préjudicielle soulevée par Momir Talic pour vices de forme de l'acte d'accusation modifié, 20 février 2001, para. 10.

32. In the light of this holding, the Chamber observes that the wording of the Prosecutor's pleading is ambiguous, as paragraph 4 of the Amended Indictment (Count I) exemplifies. This paragraph appears to aver that the Accused has committed the crime of conspiracy to commit genocide by having aided and abetted the execution of the crime. It also appears to aver that the Accused will face charges of having planned the planning of the crime. The present lack of clarity in the wording of this paragraph results from the cumulative charging of various types of criminal responsibility pursuant to Article 6 (1) of the Statute[23]. This cumulative charging leaves the Accused without sufficient notice of the case he will face at trial and hampers therefore an adequate preparation of the defence.

33. The Chamber holds that it is in the interest of a fair an expeditious trial that the Prosecutor pleads only the types of responsibility pursuant to Article 6 (1) of the Statute that he intends to rely upon on the basis of specific factual allegations.

As to the distinction between the alleged responsibility pursuant to Article 6 (1) of the Statute and Article 6 (3) of the Statute

34. The Chamber recalls its previous holding :

> «The Defence points out that the proposed indictment as amended does not contain a clear statement of the acts stated to give rise to individual and superior responsibility respectively. […] The Trial Chamber is in agreement with this Defence submission and will order the Prosecution to file its amended indictment distinguishing therein for each Count the alleged acts of the Accused that give rise to individual responsibility under Article 6 (1) of the Statute and the alleged acts and relationships that give rise to criminal responsibility under Article 6 (3) of the Statute»[24]

35. The Chamber observes that the Prosecutor has not yet implemented its previous ruling. Instead of distinguishing between personal and command responsibility, the Amended Indictment cumulates the two types persistently and irrespective of the factual allegations underlying the imputed responsibility. To illustrate this observation, the Chamber refers to paragraph 42 of the Amended Indictment, where the Prosecutor pleads responsibility pursuant to Article 6 (3) of the Statute with respect to his allegation that the Accused ordered his son to kill certain persons[25].

[23] The same ambiguity reoccurs in paragraphs 9, 10, 12, 28 and 41 of the Amended Indictment.

[24] Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment, 15 October 2003, paragraph 26.

[25] The same ambiguity reoccurs in paragraphs 13, 15, 16, 17, 18, 19, 20, 22, 23, 25, 26, 27, 30, 31, 32, 33, 34, 35, 37, 38, 40, 43, 44, 45, 46 and 47 (d) of the Amended Indictment.

32. À la lumière de cette constatation, la Chambre trouve ambiguë la formulation retenue par le Procureur. À preuve, le paragraphe 4 de l'acte d'accusation modifié (chef 1) qui reproche à l'accusé l'infraction d'entente en vue de commettre le génocide pour avoir aidé et encouragé l'exécution du crime, et pour avoir également aidé à la planification du crime. Le défaut de clarté du texte de ce paragraphe résulte du cumul de charges du chef de différentes formes de responsabilité sous l'empire de l'article 6 (1) du statut[23]. Du fait de ce cumul, l'accusé n'est pas suffisamment informé des charges retenues contre lui et ne peut dés lors préparer convenablement sa défense.

33. La Chambre estime que l'intérêt d'un procès rapide et équitable commande que le Procureur retienne les seules formes de responsabilité prévues à l'article 6 (1) du Statut qui tirent fondement d'allégation factuelles précises.

Sur la distinction entre les formes de responsabilité envisagées prévues aux paragraphes 1 et 3 de l'article 6 du Statut.

34. La Chambre a précédemment décidé ce qui suit :

> «La défense relève que tel qu'il est proposé, l'acte d'accusation modifié n'énonce pas clairement les actes qui donnent prise tantôt à la responsabilité individuelle de l'accusé, tantôt à sa responsabilité en tant que supérieur hiérarchique (...) La Chambre souscrit à la position de la défense en la matière et invite le Procureur à établir clairement, dans l'acte d'accusation modifié qu'il est appelé à déposer et pour chaque chef qui y est imputé, la distinction entre les actes qui donneraient prise à la responsabilité individuelle de l'accusé en application du paragraphe 1 de l'article 6 du Statut, et ceux qui, en application du paragraphe 3 du même article, engageraient sa responsabilité en tant que supérieur hiérarchique»[24].

35. La Chambre relève que le Procureur n'a pas encore donné suite à cette dernière décision. Au lieu d'établir une distinction entre la responsabilité individuelle de l'accusé et sa responsabilité en tant que supérieur hiérarchique, l'acte d'accusation modifié retient toujours ensemble les deux formes de responsabilité, abstraction faite des allégations factuelles fondant les charges. À titre d'exemple, le paragraphe 42 de l'acte d'accusation modifié retient la responsabilité de l'accusé sur l'empire de l'article 6 (3) du Statut, l'allégation étant que celui-ci a ordonné à son fils de tuer certaines personnes[25].

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[23] Les paragraphes 9, 10, 12, 28 et 41 de l'acte d'accusation modifié souffrent également d'ambiguïté.

[24] Décision relative à la requête du Procureur en autorisation de modifier 1'acte d'accusation et à la requête urgente de la défense en communication des éléments justificatifs se rapportant à la modification demandée de l'acte d'accusation, 15 octobre 2003, para. 26.

[25] Les paragraphes 13, 15, 16, 17, 18, 19, 20, 22, 23, 25, 26, 27, 30, 31, 32, 33, 34, 35, 37, 38, 40, 43.44,45,46 et 47 de l'acte d'accusation modifié souffrent de la même ambiguïté.

36. The Chamber reaffirms its previous holding and requests the Prosecutor to implement it throughout the Amended Indictment as detailed in paragraph 47 of the present Decision.

As to the specific factual basis of the alleged type of responsibility pursuant to Article 6 (1) of the Statute

37. The Chamber observes that the Amended Indictment fails to establish a precise link between the pleaded types of responsibility pursuant to Article 6 (1) of the Statute and a respective set of facts. It is, for instance, not clear why the Prosecutor pleads[26] that the Accused was on the basis of Article 6 (1) of the Statute responsible for the facts alleged in paragraph 6 of the Amended Indictment, i.e. his birthplace and family relations. The Amended Indictment should leave no doubt which facts are linked to which type of responsibility. In order to give the Accused sufficient notice of the charges against him, the Prosecutor has to establish the link between his factual allegations and the alleged specific type of responsibility pursuant to Article 6 (1) of the Statute in a more precise way.

As to the factual basis of the alleged responsibility of the Accused pursuant to Article 6 (3) of the Statute

38. The Chamber recalls its previous holding on the same issue :

«The specific facts and relationships giving rise to the superior responsibility alleged need to be clearly set out»[27]

39. The Chamber recalls the *Mrksic* Decision cited by the Defence :

«In a case based upon superior responsibility, pursuant to Article 7 (3), the following are the minimum material facts that have to be pleaded in the indictment : (a) that the accused is the superior (ii) of 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 accused knew or had reason to know that the crimes were about to be or had been committed by those others, and (ii) the related conduct of those others for whom he is alleged to be responsible. The facts relevant to the acts of those others will usually be stated with less precision, the reasons being that the detail of those acts (by whom and against whom they are done) is often unknown, and, more importantly, because the acts themselves often cannot be greatly in issue ; and (c) the accused failed to take the necessary and rea-

[26] Cf. last sentence of paragraph 6 of the Amended Indictment.

[27] Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment, 15 October 2003, paragraph 26.

36. Réaffirmant sa décision antérieure, la Chambre invite le Procureur à y satisfaire dans l'ensemble du texte de l'acte d'accusation modifié, ainsi qu'il est dit au paragraphe 47 de la présente décision.

Sur la précision des faits qui fondent la responsabilité visée au paragraphe 1 de l'article 6 du Statut

37. La Chambre fait observer que l'acte d'accusation modifié n'établit pas de lien de connexité précis entre les chefs de responsabilité retenus par application de l'article 6 (1) du Statut et telle ou telle série de faits. Par exemple[26] on voit mal en quoi les faits allégués au paragraphe 6 de l'acte d'accusation modifié, soit le lieu de naissance et les liens de parenté de l'accusé, engagent la responsabilité de celui-ci au regard de l'article 6 (1) du Statut. L'acte d'accusation modifié doit clairement établir le lien entre tels faits et telles formes de responsabilité. Afin d'informer suffisamment l'accusé des accusations portées contre lui, le Procureur doit préciser encore le lien qui existerait entre allégations factuelles et telle forme précise de responsabilité envisagée à l'article 6 (1) du Statut.

Sur les faits qui fondent la responsabilité retenue en vertu de l'article 6 (3) du Statut

38. La Chambre rappelle qu'elle a précédemment décidé ce qui suit sur ce sujet :

> «Les faits précis ainsi que les relations hiérarchiques qui engageraient sa responsabilité à ce second titre doivent être clairement énoncés»[27].

39. La Chambre rappelle la décision *Mrskic* invoquée par la défense :

> «Dans une affaire fondée sur la responsabilité d'un supérieur hiérarchique en vertu de l'article 7 (3) du Statut, l'acte d'accusation doit exposer au moins les faits pertinents suivants : (a) (i) l'accusé était le supérieur hiérarchique (ii) de subordonnés suffisamment identifiés (iii) sur lesquels il exerçait un contrôle effectif – c'est-à-dire qu'il avait la capacité matérielle d'empêcher ou de punir un comportement criminel – et (iv) dont les actes engageraient sa responsabilité; (b) (i) l'accusé savait ou avait des raisons de savoir que les auteurs s'apprêtaient à commettre des crimes ou les avaient commis, et (ii) était informé de la conduite des personnes dont il est présumé responsable. Les faits se rapportant aux actes commis par ces auteurs seront généralement exposés de façon moins précise, parce que les détails de ces actes (l'identité précise des auteurs et des victimes) sont souvent inconnus et, plus important encore, parce que, souvent, les actes eux-mêmes ne peuvent pas véritablement être contestés; et (c) l'accusé

[26] Voir la dernière phrase du paragraphe 6 de l'acte d'accusation modifié.

[27] Décision relative à la requête du Procureur en autorisation de modifier l'acte d'accusation et à la requête urgente de la défense en communication des éléments justificatifs se rapportant à la modification demandée de l'acte d'accusation, 15 octobre 2003, para. 26.

sonable measures to prevent such crimes or to punish the persons who committed them»[28]

40. The Chamber observes that the Prosecutor has not yet provided a sufficiently precise factual basis for his averment that the close contact of the Accused with other leaders gave him the possibility to discipline and punish his subordinates or to prevent their criminal conduct[29]; nor has the Prosecutor provided a sufficiently precise factual basis for his averment that the quality of the Accused as an "influential and powerful person" gave him the possibility to discipline and punish his subordinates or to prevent their criminal conduct[30]. Therefore the Amended Indictment does not yet meet the criteria established by the cited jurisprudence[31].

As to the required degree of factual detail

41. In the *Niyitegeka* Judgement[32], the Appeals Chamber reaffirms the law governing the standards for indictments with respect to the required degree of factual detail, as it has been set out in the *Kupreškić* Judgement. In this Judgement, the Appeals Chamber held :

> (88) [...] in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material

[28] *The Prosecutor v. Mrksic*, Case N° IT-95-13/1-PT, "Decision on Form of the Indictment", 19 June 2003, par. 10 with references to *The Prosecutor v. Deronjic*, Case N° IT-02-61-PT, "Decision on Form of the Indictment", 25 October 2002, par. 15 and 19; *The Prosecutor v Delalic and Others*, Case N° IT-96-21-A, Judgement, 20 Feb 2001, ("*Celebici* Appeal Judgment"), par. 256, 196-198 and 266; *The Prosecutor v. Hadzihasanovic*, Case N° IT-01-47-PT, "Decision on form of indictment", 7 December 2001, par. 11 and 17; *The Prosecutor v. Brdjanin and Talic*, Case N° IT-99-36, "Decision on objections by Momir Talic to the form of the amended indictment", 20 February 2001, par. 19; *The Prosecutor v. Krajisnik*, Case N° IT-00-39-PT, "Decision Concerning Preliminary Motion on the Form of the Indictment", 1 August 2000, par. 9; The *Prosecutor v. Krnojelac*, Case N° IT-97-25, "Decision on preliminary motion on form of amended indictment", 1 February 2000, par. 18 and "Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, par. 38; *The Prosecutor v. Kvocka*, Case N° IT-99-30-PT, "Decision on Defence Preliminary Motions on the Form of the Indictment", 12 April 1999, par. 17.

[29] Cf. paragraph 12, 3d sub-paragraph, in conjunction with paragraph 13 of the Amended Indictment.

[30] Cf. paragraph 28 and 41 of the Amended Indictment.

[31] This observation is of particular relevance with respect to paragraphs 21, 24, 36, 39 and 41 (first sub-paragraph) of the Amended Indictment.

[32] *Niyitegeka v. The Prosecutor*, Case N° ICTR 96-14-A, Judgement (AC), 9 July 2004, paragraph 193 ff.

n'a pas pris les mesures nécessaires et raisonnables pour empêcher que les crimes soient commis ou en punir les auteurs»[28].

40. La Chambre observe que le Procureur n'a pas suffisamment précisé les faits qui établissent que les liens étroits qu'entretenait l'accusé avec d'autres responsables lui permettaient de sanctionner et punir ses subordonnés ou d'empêcher leurs actes criminels[29], ou que sa qualité de «personne influente et puissante» lui permettait de sanctionner et punir ses subordonnés ou d'empêcher leurs actes criminels[30]. Cela étant, l'acte d'accusation modifié ne satisfait toujours pas aux critères dégagés par la jurisprudence[31] invoquée.

Sur le degré de précision requis s'agissant des faits incriminés

41. A l'occasion de l'arrêt *Niyitegeka*[32], la Chambre d'appel a précisé des normes régissant l'acte d'accusation en ce qui concerne le degré de précision requis s'agissant des faits incriminés, tel qu'exposé dans l'arrêt *Kupreskic*. La Chambre d'appel a déclaré ce qui suit dans cette dernière espèce :

«(88) [...] que toute personne contre laquelle des accusations sont portées a droit à ce que sa cause soit entendue équitablement, et, plus particulièrement, à être informée de la nature et des motifs des accusations portées contre elle et à disposer du temps et des moyens nécessaires à la préparation de sa défense. La jurisprudence du Tribunal impose dés lors à l'accusation de présenter les faits essentiels qui fondent les accusations portées dans l'acte d'accusation, mais non les éléments de preuve qui doivent établir ces faits. Dès lors, pour qu'un acte d'accusation soit suffisamment précis, il faut en particulier qu'il expose de

[28] *Le Procureur c. Mrksic*, affaire n° IT-95- 1 31 1 -PT, Décision relative à l'exception préjudicielle pour vices de forme de l'acte d'accusation, 19 juin 2003, para. 10 renvoyant aux espèces suivantes, affaire *Le Procureur c. Deronjic*, affaire n° IT-02-61-PT, Décision relative à l'exception préjudicielle pour vices de forme de l'acte d'accusation, 25 octobre 2002, paras. 15 et 19*; Le Procureur c. Delalic et consorts*, affaire n° IT-96-21-A, jugement du 20 février 2001, («affaire *Celebici*, jugement en appel»), paras. 256, 196 à 198, et 266; *Le Procureur c. Hadzihasanovic*, affaire n° IT-01-47-PT, Décision relative à la forme de l'acte d'accusation, 7 décembre 2001, paras. 11 et 17; *Le Procureur c. Brdjanin et Talic*, affaire n° IT-99-36-PT, Décision relative à l'exception préjudicielle soulevée par Momir Talic pour vices de forme de 1'acte d'accusation modifié, 20 février 2001, para. 19; *Le Procureur c. Krajisnik*, affaire n° IT-00-39-PT, Décision relative à 1'exception préjudicielle du défendeur fondée sur des vices de forme de l'acte d'accusation, 1er août 2000, para. 9; *Le Procureur c. Krnojelac*, affaire n° IT-97-25, *Decision on preliminary Motion on form of amended Indictment*, 1er février 2000, para. 18 et *Decision on the Defence Preliminary Motion on the form of amended indicttnent*, 24 février 1999, para. 38; *Le Procureur c. Kvocka*, affaire n° IT-99-30-PT, Décision relative aux exceptions préjudicielles de la défense portant sur la forme de 1'acte d'accusation, 12 avril 1999, para. 17.

[29] Voir l'acte d'accusation modifié, para. 12, alinéa 3 rapproché du para. 13.

[30] Voir l'acte d'accusation modifié, paras. 28 et 41.

[31] Ce constat intéresse spécialement les paragraphes 21, 24. 36, 39 et 41 (1er sous-paragraphe) de l'acte d'accusation modifié.

[32] *Niyitegeka c. Le Procureur*, affaire n° ICTR 96-14-A, arrêt du 9 juillet 2004, paras. 193 *ff*.

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.

(89) [...] A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail. Obviously, there may be instances where the sheer scale of the alleged crimes "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes".

(92) It is of course possible that an indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession. However, in such a situation, doubt must arise as to whether it is fair to the accused for the trial to proceed. In this connection, the Appeals Chamber emphasises that the 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.[33]

42. In the light of these holdings, the Chamber recalls that the Prosecutor has to avoid imprecision and vagueness when setting out his allegations on the conduct of the Accused. In considering whether an indictment is defective by virtue of lack of precision or material details, the fundamental issue is whether the Accused has sufficient information to adequately prepare his defence.

43. The Chamber observes that, throughout the Amended Indictment, the Prosecutor specifies dates of acts and omissions that are imputed to the Accused. The Chamber is satisfied that the Prosecutor gives these indications in good faith and to the best of his knowledge.

44. The Chamber considers that the degree of precision requested by the Defence at the current stage is excessive in view of the nature and the extent of the Prosecutor's charges and the enormity of the events which occurred in Rwanda in 1994[34].

45. The Defence seeks detailed information on the identity of certain persons. However, in its reply brief it concedes that the names of the victims are of lesser importance to its defence. The Chamber notes that an adequate defence does not depend upon the Prosecutor's pleading of the names of individual victims. Moreover, the Chamber observes that certain persons whose names the Defence requests might qual-

[33] *The Prosecutor v. Kupreškić*, Case N° IT-95-16, Appeal Judgment, 23 October 2001 par. 88 f. and 92 (Footnotes omitted).

[34] Cf. *Prosecutor v. Nahimana*, Case N° ICTR-96-11, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, 24 November 1997, par. 30 : "... The Chamber acknowledges that, given the particular circumstances of the conflict in Rwanda and the alleged crimes, it could be difficult to determine the exact times and places of the acts with which the accused is charged."

manière suffisamment circonstanciée les faits incriminés essentiels pour informer clairement un accusé des accusations portées contre lui afin qu'il puisse préparer sa défense.

(80) [...] Un élément décisif pour déterminer le degré de précision avec lequel l'accusation est tenue de détailler les faits de l'espèce dans l'acte d'accusation est la nature du comportement criminel reproché à l'accusé. Ainsi, lorsque l'accusation reproche à un accusé d'avoir personnellement commis des actes criminels, les faits essentiels, tels que l'identité de la victime, le moment et le lieu du crime et son mode d'exécution, doivent être exposés en détail. À l'évidence, il peut exister des cas où l'ampleur même des crimes exclut «que l'on [puisse] exiger un degré de précision aussi élevé sur l'identité des victimes et la date des crimes».

(92) Il est certes possible que l'accusation ne puisse, faute de disposer des informations nécessaires, exposer dans l'acte d'accusation les faits essentiels avec le degré de précision exigé. On doit toutefois en pareil cas se demander s'il n'y a pas quelque iniquité, pour l'accusé, d'ouvrir le procès. Dans cet ordre d'idées, la Chambre d'appel doit souligner que l'accusation devrait connaître son dossier avant de se présenter au procès. Il n'est pas acceptable que l'accusation passe sous silence dans l'acte d'accusation des points essentiels de son dossier afin de pouvoir peaufiner son argumentaire au fur et à mesure que les éléments de preuve sont dévoilés.»[33]

42. Vu ces conclusions, la Chambre rappelle que l'acte d'accusation doit exposer de manière suffisamment claire et précise la conduite criminelle reprochée à l'accusé. En recherchant si un acte d'accusation est vicié pour défaut de précision ou d'éléments substantiels, on s'attachera essentiellement à savoir s'il fournit à l'accusé des informations suffisantes pour lui permettre de préparer convenablement sa défense.

43. La Chambre relève que le Procureur précise partout dans l'acte d'accusation modifié la date des actes et omissions imputés à l'accusé. Elle est convaincue que le Procureur fournit ces informations de bonne foi et pour autant qu'il en ait connaissance.

44. La Chambre trouve excessif le degré de précision exigé par la défense vu la nature et l'ampleur des charges retenues par le Procureur et la gravité des évènements survenus au Rwanda en 1994[34].

45. La défense demande des précisions détaillées sur l'identité de certaines personnes. Or, il reconnaît dans son mémoire en réplique que les noms de certaines victimes présentent moins d'intérêt aux fins de la défense de l'accusé. La Chambre fait remarquer que pour organiser efficacement sa défense, il n'est pas indispensable à l'accusé que le Procureur précise le nom de chaque victime. Elle relève en outre que

[33] *Le Procureur c. Kupreskic*, affaire n° IT- 95-16-A, arrêt du 23 octobre 2001, paras. 88 f et 92 (notes de bas de page omises).

[34] *Le Procureur c. Nahimana*, affaire n° ICTR- 96-11, Décision relative à l'exception soulevée pur la défense pour vices de forme de l'acte d'accusation, 24 novembre 1997, para. 30 : «…La Chambre reconnaît que, compte tenu des circonstances particulières du conflit au Rwanda et des crimes relégués, il pourrait y avoir des difficultés à déterminer avec exactitude les périodes et les endroits où ont été commis les faits reprochés à l'accusé».

ify as protected witnesses[35]. The Amended Indictment shall not compromise the security of protected witnesses by revealing their names.

46. In the light of these observations, the Chamber is satisfied that, with the exception of the formal defects specified in the following paragraph, the Amended Indictment describes in a sufficiently precise and detailed way the acts, omissions, events, locations, dates and other circumstances that it refers to. The Chamber concludes that, in this regard, the Amended Indictment does not suffer from any defects in its form that would fall within the scope Rule 72 (A) (ii) of the Rules.

47. Conversely, in the light of the cited jurisprudence and on the basis of the foregoing observations, the Chamber sets out the matters in respect of which the Amended Indictment requires formal modifications :

(i) With respect to all Counts, the Prosecutor should only plead the types of personal responsibility pursuant to Article 6 (1) of the Statute that he intends to rely upon.

(ii) With respect to all Counts, the Prosecutor should clearly indicate upon which factual allegations he bases his pleadings of personal responsibility pursuant to Article 6 (1) of the Statute.

(iii) With respect to Counts II, III, IV and V, 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.

(iv) With respect to Counts II, III, IV and V, the Prosecutor should, in all instances where he pleads command responsibility pursuant to Article 6 (3) of the Statute, either omit the pleading of command responsibility or complete his pleading so that it consistently includes the following material information :

(a) the factual basis for the allegation that the Accused is a superior;

(b) the factual basis of the effective control of the Accused, in the sense of his material ability to prevent or punish criminal conduct;

(c) the sufficient identification of subordinates;

(d) the criminal conduct of subordinates that is imputed to the Accused;

(e) whether the Accused knew or had reason to know that his subordinates were about to commit or had committed the crimes imputed to him;

(f) whether the Accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.

(v) With respect to Counts II, III, IV and V, the Prosecutor should either indicate the nature and the purpose of the joint criminal enterprise in which the Accused allegedly participated, its period of existence, its other participants, the

[35] See, for instance, paragraphs 26 and 43 of the Amended Indictment.

certaines personnes dont la défense réclame les noms pourraient être des témoins protégés[35]. L'acte d'accusation modifié ne doit pas compromettre la sécurité de ces témoins en divulguant leurs noms.

46. Cela étant, la Chambre est convaincue que, exception faite des vices de forme relevés au paragraphe ci-après, l'acte d'accusation modifié décrit avec suffisamment de clarté et de précision les actes, omissions, faits, lieux, dates et autres circonstances visés. Elle conclut à cet égard que l'acte d'accusation ne comporte pas de vices de formes justiciables de l'article 72 (A) (ii).

47. Par contre, vu la jurisprudence invoquée et les constatations qui précédent, la Chambre indique ci-après les éléments de l'acte d'accusation modifié qui appellent des changements de forme :

i) S'agissant de tous les chefs d'accusation, le Procureur doit se borner à retenir les seules formes de responsabilité envisagées à l'article 6 (1) du Statut qu'il entend prouver.

ii) Concernant chaque chef d'accusation, le Procureur doit indiquer clairement les allégations factuelles sur la base desquelles il entend établir la responsabilité individuelle de l'accusé au regard de l'article 6 (1) du Statut.

iii) S'agissant des chefs II, III, IV et V, le Procureur doit soit renoncer aux charges cumulatives de responsabilité individuelle et de supérieur hiérarchique au regard des paragraphes 1 et 3 de l'article 6 du Statut, soit étayer l'une et l'autre charge par des allégations factuelles visant précisément la forme de responsabilité correspondante.

iv) S'agissant des chefs II, III, IV et V, le Procureur doit, toutes les fois qu'il retient la responsabilité de supérieur hiérarchique en vertu de l'article 6 (3) du Statut, soit renoncer à cette charge, soit l'étoffer en l'accompagnant systématiquement des éléments d'information substantiels ci-après :

a) les bases factuelles de l'allégation que l'accusé a la qualité de supérieur hiérarchique ;

b) les bases factuelles tendant à établir que l'accusé exerçait quelque autorité en ce sens qu'il était effectivement en mesure d'empêcher ou de punir les actes incriminés ;

c) des indications propres à permettre d'identifier ses subordonnés ;

d) la conduite criminelle des subordonnés imputée à l'accusé ;

e) tous éléments permettant de dire que l'accusé savait ou avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre ou avaient commis les crimes qui lui sont imputés ;

f) tous éléments permettant de dire que l'accusé n'avait pas pris les mesures nécessaires et raisonnables pour empêcher que lesdits crimes ne soient commis ou en punir les auteurs ;

v) S'agissant des chefs II, III, IV et V, le Procureur doit soit indiquer la nature et l'objet de l'entreprise criminelle à laquelle l'accusé aurait été partie, la durée de celle-ci, les autres parties à l'entreprise, le degré d'implication de l'accusé et

[35] Voir par exemple les paragraphes 26 et 43 de l'acte d'accusation modifié.

implication of the Accused in it and any facts and circumstances from which the Prosecution infers the existence of and the Accused's participation in the alleged joint criminal enterprise or strike the words "or in concert with others in pursuit of a common purpose" from the respective 2nd sub-paragraphs of paragraphs 12, 28 and 42.

(vi) With respect to Count I, the Prosecutor should, to the best of his knowledge, indicate the facts supporting his inference that, during the period which is covered by the charges of the Amended Indictment the Accused "was a powerful and influential businessman", as it is alleged in paragraphs 8 and 13 of the Amended Indictment.

(vii) With respect to Count I, the Prosecutor should either strike the reference to Ms. Agathe Kanziga as a co-conspirator from the Amended Indictment or provide a factual basis for the allegations of a conspiracy between her and the Accused.

(viii) With respect to Count I, the Prosecutor should, to the best of his knowledge, indicate the approximate dates and locations of the meetings alleged in paragraph 10 of the Amended Indictment.

(ix) With respect to Counts II, III and IV, the Prosecutor should, to the best of his knowledge, indicate the approximate date of the payment to the Interahamwe alleged in paragraphs 20 and 35 of the Amended Indictment.

(x) With respect to Counts II, III and V, the Prosecutor should, to the best of his knowledge, indicate the approximate date of the order alleged in paragraphs 26 and 46 of the Amended Indictment.

As to the required form of fair notice

48. The Chamber recalls the *Kupreškić* Appeals Judgement :

«The Appeals Chamber notes that, generally, an 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. [...] The Appeals Chamber, however, does 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.»[36]

[36] *The Prosecutor v. Kupreškić*, Case IT-95-16, Appeal Judgment, 23 October 2001 par. 114 (footnotes omitted).

tous autres faits ou circonstances d'où il déduit qu'il y a eu entreprise criminelle commune à laquelle l'accusé était partie, soit supprimer les termes «ou de concert avec d'autres dans la poursuite d'un dessein commun» des paragraphes 12, 28 et 42 [sic] de l'acte d'accusation modifié.

vi) concernant le chef 1, le Procureur doit pour autant qu'il en ait connaissance, présenter les faits dont il conclut que l'accusé «était un homme d'affaires puissant et influent» à l'époque des faits visés dans l'acte d'accusation modifié ainsi qu'il est allégué aux paragraphes 8 et 13 de l'acte d'accusation modifié.

vii) S'agissant toujours du chef 1, le Procureur doit soit supprimer de l'acte d'accusation modifié la mention que Mme Agathe Kanziga était partie à l'entente, soit renseigner sur les faits dont tirent fondement les allégations qu'il y a eu entente entre cette dernière et l'accusé.

viii) S'agissant encore du chef 1, le Procureur doit, pour autant qu'il en ait connaissance, indiquer les dates et lieux des réunions alléguées au paragraphe 10 de l'acte d'accusation modifié.

ix) En ce qui concerne les chefs II, III et IV, le Procureur doit, pour autant qu'il en ait connaissance, indiquer les dates approximatives auxquelles l'accusé aurait payé les *Interahamwe*, tel qu'allégué aux paragraphes 20 et 35 de l'acte d'accusation modifié.

x) En ce qui concerne les chefs II, III et IV, le Procureur doit, pour autant qu'il en ait connaissance, indiquer la date approximative à laquelle l'accusé aurait donné l'ordre allégué aux paragraphes 26 et 46 de l'acte d'accusation modifie.

Sur la manière dont l'accusé doit être informé

48. La Chambre rappelle ici l'arrêt *Kupreskic* :

La Chambre d'appel fait observer qu'en règle générale, un acte d'accusation, principal instrument de mise en accusation, doit présenter, de manière suffisamment détaillée, les points essentiels de l'argumentation de l'accusation, faute de quoi il serait entaché d'un vice grave. Un acte d'accusation ainsi vicié peut à lui seul, dans certaines circonstances, conduire la Chambre d'appel à annuler une déclaration de culpabilité. La Chambre d'appel n'exclut pas toutefois que, dans certains cas, un tel acte d'accusation puisse être purgé si l'accusation fournit en temps voulu à l'accusé des informations claires et cohérentes, concernant les faits sur lesquels reposent les accusations portées contre lui. Toutefois, compte tenu des problèmes complexes que soulèvent habituellement tant sur le plan du droit que des faits les crimes qui sont du ressort du Tribunal, il ne peut exister qu'un nombre limité d'affaires qui entrent dans cette catégorie[36].

[36] *Le Procureur c. Kupreskic*, affaire n° IT- 95- 16, arrêt du 23 octobre 2001, para. 114 (notes de bas de page omises).

49. On the basis of the *Kupreškić* Appeals Judgement, the *Mrksic* decision further elaborates the formal requirements for the provision of sufficient notice to the Accused :

> «Generally, an indictment, as the primary accusatory instrument, must plead with sufficient particularity the material aspects of the Prosecution case, failing which it suffers from a material defect. In the light of the primary importance of an indictment, the Prosecution cannot cure a defective indictment by its supporting material and pre-trial brief. In the situation where an indictment does not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession, doubt must arise as to whether it is fair to the accused for the trial to proceed. The Prosecution is therefore expected to inform the accused of the nature and cause of the case, as set out above, before it goes to trial. It is unacceptable for it to omit the material facts 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. Where the evidence at trial turns out differently than expected, the indictment may be required to be amended, an adjournment may be granted or certain evidence may be excluded as not being within the scope of the indictment»[37]

50. The Chamber reiterates that the Prosecutor's right to cure – in exceptional cases – the lack of precision in an indictment does not imply that all of his accusatory instruments are equivalent. The indictment remains the primary accusatory instrument, and all material aspects must be pleaded in it with sufficient particularity.

51. The Chamber observes that the Prosecutor's mere disclosure of witness statements does not give the Accused sufficient notice of specific charges against him. The respective functions of indictments and witness statements are fundamentally different : An indictment has to inform the Accused of the legal and factual allegations against him; a witness statement provides but a preliminary assessment of the evidence that will be adduced during trial and can therefore not be an instrument to provide sufficient notice to the Accused in order to enable him to prepare his defence adequately.

FOR THE ABOVE REASONS

THE TRIAL CHAMBER

I. Grants the measures requested by the Defence to the extent set out in paragraph 47.

II. Grants the Prosecutor leave to file an Amended Indictment in the form of the text of the Amended Indictment filed on 5 November 2003 with the specific amendments referred to in paragraph 47.

III. Orders the Prosecutor to file its Amended Indictment implementing the required changes by 31 August 2004.

[37] *The Prosecutor v. Mrksic*, Case No. IT-95-13/1 "Decision on Form of the Indictment", 19 June 2003, par. 13 (footnotes omitted).

49. À la suite de l'arrêt *Kupreskic*, la décision *Mrksic* précise encore les conditions de forme à respecter s'agissant d'informer suffisamment l'accusé de la nature et des motifs des accusations portées contre lui :

> En règle générale, un acte d'accusation, principal instrument de mise en accusation, doit présenter, de manière suffisamment détaillée, les points essentiels de l'argumentation de l'accusation, faute de quoi il serait entaché d'un vice grave. Étant donné l'importance fondamentale de cet instrument, l'accusation ne saurait purger un acte d'accusation vicié en présentant des éléments à l'appui et un mémoire préalable au procès. Si l'accusation ne peut, faute de disposer des informations nécessaires, exposer dans l'acte d'accusation les faits essentiels avec le degré de précision exigé, on doit en pareil cas se demander s'il n'y a pas quelque iniquité, pour l'accusé, d'ouvrir le procès. L'accusation doit donc informer l'accusé de la nature et des motifs de la cause, comme il est indiqué plus haut, avant de se présenter au procès. Il n'est pas acceptable que l'accusation passe sous silence dans l'acte d'accusation des points essentiels de son dossier afin de pouvoir peaufiner son argumentaire au fur et à mesure que les éléments de preuve sont dévoilés. Il existe des exemples de procès où la présentation des moyens de preuve ne se passe pas comme prévu. Une telle situation peut exiger une modification de l'acte d'accusation, un ajournement ou l'exclusion de certains éléments de preuve qui n'entrent pas dans le cadre de l'acte d'accusation[37].

50. La Chambre rappelle que reconnaître au Procureur la faculté, dans des cas exceptionnels, de purger l'acte d'accusation de tout défaut de précision, ce n'est pas dire que tous ses instruments de mise en accusation se valent. L'acte d'accusation demeure le principal instrument de poursuite et toutes ses mentions substantielles doivent être présentées de manière suffisamment détaillée.

51. La Chambre fait observer que le seul fait pour le Procureur de lui communiquer des déclarations de témoins ne suffit pas à informer l'accusé des accusations précises portées contre lui. L'acte d'accusation et les déclarations de témoins sont tout à fait différents de par leurs objets respectifs, celui de l'acte d'accusation étant d'informer l'accusé des allégations factuelles et juridiques portées contre lui, la déclaration de témoin ne lui donnant, quant à elle, qu'un premier aperçu des éléments de preuve qui seront produits lors du procès, et ne pouvant dès lors le prévenir suffisamment des charges retenues contre lui afin de lui permettre de préparer utilement sa défense.

PAR CES MOTIFS,

LA CHAMBRE

I. ACCORDE à la défense les mesures sollicitées au paragraphe 47;

II. AUTORISE le Procureur à déposer un acte d'accusation modifié sous la forme du texte de l'acte d'accusation modifié déposé le 5 novembre 2003 auquel y aura apporté les modifications précises prescrites au paragraphe 47;

III. ORDONNE au Procureur de déposer l'acte d'accusation ainsi nouvellement modifié au plus tard le 31 août 2004;

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[37] *Le Procureur c. Mrksic*, affaire n° IT-95-13/1-PT, Décision relative à l'exception préjudicielle pour vices de forme de l'acte d'accusation, 19 juin 2003, para. 13 (notes de bas de page omises).

IV. Denies the Defence Motion in all other respects.

Arusha, 15 July 2004

[Signed] : Andrésia Vaz, Presiding Judge; Flavia Lattanzi; Florence Rita Arrey

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Annotated Amended Indictment 31 August 2004 (ICTR-2001-73-1)

(Original : English)

1. The Prosecutor of the United Nations International Criminal Tribunal for Rwanda, pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda (the "Statute") charges :

Protais ZIGIRANYIRAZO

With :

Count 1 - CONSPIRACY TO COMMIT GENOCIDE
Count 2 - GENOCIDE, or alternatively
Count 3 - COMPLICITY IN GENOCIDE
Count 4 - EXTERMINATION as a CRIME AGAINST HUMANITY
Count 5 - MURDER as a CRIME AGAINST HUMANITY.

II. THE ACCUSED

1. Protais Zigiranyirazo (alias Mr. "Z") was born in north-western Rwanda in 1938 in Giciye commune, Gisenyi prefecture. Giciye, together with the adjoining *commune* of Karago constitutes Bushiro which is also the birthplace of former Rwandan president Juvénal Habyarimana and his wife Agathe Kanziga. Protais Zigiranyirazo is Agathe Kanziga's brother, hence the brother-in-law of President Habyarimana.

Official Gazette of the Republic of Rwanda, Year 38, special number of 31 December 1999, Publication of the Updated List if the First Category Prescribed by Article 9 of Organic Law n° 8/96 of 30th August 1996 (O.G. n° 17 of 1/09/1996), at page 9

Witness Statement by : AFX

Witness statement by : ON

IV. REJETTE la requête de la défense en toutes ses autres prétentions.

Arusha, le 15 juillet 2004

[Signé] : Andrésia Vaz; Florence Rita Arrey; Flavia Lattanzi

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Acte d'accusation modifié 31 août 2004 (ICTR-2001-73-I)

(Original : Anglais)

I. Le Procureur du Tribunal pénal international pour le Rwanda, en vertu des pouvoirs qui lui sont conférés par l'article 17 du Statut du Tribunal pénal international pour le Rwanda (le «Statut»), accuse

Protais ZIGIRANYIRAZO

des crimes suivants :

Chef 1 : ENTENTE EN VUE DE COMMETTRE LE GÉNOCIDE,

Chef 2 : GÉNOCIDE, ou subsidiairement

Chef 3 : COMPLICITÉ DANS LE GÉNOCIDE,

Chef 4 : EXTERMINATION constitutive de CRIME CONTRE L'HUMANITÉ,

Chef 5 : ASSASSINAT CONSTITUTIF DE CRIME CONTRE L'HUMANITÉ.

II. L'ACCUSÉ

1. Originaire du nord-ouest du Rwanda, Protais Zigiranyirazo, alias M. «Z», est né en 1938 dans la commune de Giciye, préfecture de Gisenyi. La commune de Giciye et la commune voisine de Karago forment la région de Bushiro qui est également la région natale de l'ancien Président rwandais Juvénal Habyarimana et de son épouse Agathe Kanziga. Protais Zigiranyirazo est le frère d'Agathe Kanziga et de ce fait le beau-frère du Président Habyarimana.

2. Protais Zigiranyirazo served the Second Republic MRND government of Juvénal Habyarimana as *prefet* of Ruhengeri prefecture from 1974 to 1989. During the events cited in this Amended Indictrnent he was a businessman in Giciye commune.

Witness statement by : KY
Witness statement by : ON
Witness Statement by : SFH
Witness statement by : PA
Witness statement by : SGM
Witness statement by : SGU
Witness Statement by : AFX

3. Under President Habyarimana's rule, political and financial power in Rwanda was consolidated within a tight circle consisting of extended family members of the president and members of an elite drawn almost exclusively from Rwanda's northern prefectures of Gisenyi and Ruhengeri. Protais Zigiranyirazo was a prominent member of this group. By virtue of his membership in this group and by virtue of his relationship with President Habyarimana and with Agathe Kanziga, Protais Zigiranyirazo wielded great power and influence. As such, he had *de facto* control and authority, in the sense of having the material ability to prevent or to punish criminal conduct, over the actions of soldiers, gendarmes, the *Interahamwe*, administrative officials, and members of the civilian population in Rwanda.

Des Forges, Alison, *Leave None To Tell The Story Genocide in Rwanda,* Human Rights Watch, March 1999, New York, page 44

Officia1 Gazette of the Republic of Rwanda, Year 38, special number of 31 December 1999, Publication of the Updated List if the First Category Prescribed by Article 9 of Organic Law N° 8/96 of 30th August 1996 (O.G. n° 17 of 1/9/1996), at page 9

Witness statement by : KY
Witness statement by : ON
Witness Statement by : SFH
Witness statement by : PA
Witness statement by : SGM
Witness statement by : SGU
Witness Statement by : AFX

III. Charges and concise statement of facts

4. At all times referred to in this indictment there existed in Rwanda a minority ethnic group known as Tutsis, officially identified as such by the government. The majority of the population was comprised of an ethnic group known as Hutus, also officially identified as such by the government.

"Legislative Act n° 01/81, dated 16 January 1881, concerning the Census, National Identification Card, residency and Rwandaise Home Address" and "Ministerial Order n° 01/03, dated 19 January 1981, providing for the enforce-

2. Protais Zigiranyirazo a servi le gouvernement MRND de Juvénal Habyarimana sous la Deuxième République en qualité de préfet de Ruhengeri de 1974 à 1989. À l'époque des faits visés dans le présent acte d'accusation modifié, il était homme d'affaires dans la commune de Giciye.

3. Sous le régime du Président Habyarimana, le pouvoir politique et financier était essentiellement détenu par un cercle fermé de la famille élargie du Président et de membres d'une élite presque exclusivement originaire des préfectures de Gisenyi et de Ruhengeri dans le nord du pays. Protais Zigiranyirazo était un membre influent de ce groupe. En raison de son appartenance à ce groupe et de ses rapports avec le Président Habyarimana et Agathe Kanziga, Protais Zigiranyirazo exerçait beaucoup de pouvoir et d'influence. Il jouissait en conséquence d'une emprise et d'une autorité *de facto*, en ce sens qu'il avait le pouvoir matériel de prévenir ou punir la conduite criminelle des militaires, gendarmes, *Interahamwe*, autorités administratives et membres de la société civile du Rwanda.

III. Accusations et exposé succinct des faits

4. Dans tous les cas visés dans le présent acte d'accusation, il existait au Rwanda un groupe ethnique minoritaire appelé les Tutsis et officiellement identifié comme tel par le gouvernement. La majorité de la population appartenait à un groupe ethnique appelé les Hutus et également identifié comme tel par le gouvernement.

ment of Legislative Act n° 01/81, dated 16 January 1981, concerning the Census, National Identification Card, Residency and Rwandaise Home Address", J.O. n° 2 *bis*, dated 20 January 1981.

Count 1 : Conspiracy to commit genocide

The Prosecutor of the International Criminal Tribunal for Rwanda charges Protais Zigiranyirazo with CONSPIRACY TO COMMIT GENOCIDE, a crime stipulated in Article 2 (3) (b) of the Statute, in that on or between the dates of 1 January 1994 and 31 December 1994, Protais Zigiranyirazo did conspire with others, including but not limited to other influential and powerful persons including Colonel Théoneste Bagosora, Colonel Nsengwmva, Colonel Ephrem Setako, Agathe Kanziga, Jean-Bosco Barayagwiza, Raphaël Bikumbi, Bernard Munyagishari, Marc Mpozambezi, Arcade Sebatware and Wellars Banzi to kill or cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group, as such; as follows :

Concise Statement of Fact for Count 1 :

5. Protais Zigiranyirazo agreed with government and military authorities in Kigali-ville prefectures and in Gisenyi, including Colonel Theoneste Bagosora, *Chef de Cabinet* at the Ministry of Defence, Colonel Anatole Nsengiyumva, Colonel Ephrem Setako; political leaders such as Wellars Banzi of the MRND and Jean-Bosco Barayagwiza of the CDR; regional administrative officials such as Gisenyi *sous-prefet* Raphaël Bikumbi, and *Interahamwe* leaders such as Bernard Munyagishari, and with members of the elite including his sister Agathe Kanziga; with the intent to destroy, in whole or in part, the Tutsi ethnic group, to plan, prepare and facilitate attacks on Tutsi during the course of 1994, and in particular between 6 April and 17 July 1994, throughout Rwanda, particularly in Kigali-ville and Gisenyi prefectures, as described in paragraphs 6 through 30 of this Indictment.

6. At an unknown date in 1992, Wellars Banzi told President Habyarimana and Protais Zigiranyirazo that if there was ever a thought to eliminating the Tutsi, they had formed a specialized militia group to eliminate them as they had done in 1959 in Gisenyi. After this date and continuing through July 1994, Protais Zigiranyirazo agreed with Wellars Banzi and Bernard Munyagishari to finance and execute the "specialized militia plan", meaning the creation of the *Interahamwe* in the whole of Rwanda. In furtherance of the plan Protais Zigiranyirazo participated in and facilitated the organising, arming, training and clothing of the *Interahamwe* and the arming of the local population in Gisenyi, including the financing of and purchasing arms for the group, with the purpose of attacking and destroying the Tutsi population.

Witness Statement by : ON
Witness statement by : SFG
Witness statement by : SFI

Premier chef d'accusation :
Entente en vue de commettre le génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Protais Zigiranyirazo d'ENTENTE EN VUE DE COMMETTRE LE GÉNOCIDE, crime prévu à l'article 2 (3) (b) du Statut, en ce que le 1er janvier et le 31 décembre 1994, ou entre ces dates, Protais Zigiranyirazo s'est effectivement entendu avec d'autres personnes influentes et puissantes, dont les colonels Théoneste Bagosora, Nsengiyumva et Ephrem Setako, Agathe Kanziga, Jean-Bosco Barayagwiza, Raphaël Bikumbi, Bernard Munyagishari, Marc Mpozambezi, Arcade Sebatware et Wellars Banzi, pour tuer des membres de la population tutsie ou porter gravement atteinte à leur intégrité physique ou mentale dans l'intention de détruire, en tout ou en partie, un groupe racial ou ethnique comme tel, ainsi qu'il est indiqué ci-après.

Exposé succinct des faits relatifs au premier chef d'accusation

5. Protais Zigiranyirazo s'est entendu avec des autorités administratives et militaires des préfectures de Kigali-Ville et de Gisenyi, dont le colonel Théoneste Bagosora, chef de cabinet au Ministère de la défense, le colonel Anatole Nsengiyumva et le colonel Ephrem Setako; des dirigeants politiques tels que Wellars Banzi du MRND et Jean-Bosco Barayagwiza de la CDR; des autorités administratives régionales telles que Raphaël Bikumbi, sous-préfet de Gisenyi, des dirigeants du mouvement *Interahamwe* tels que Bernard Munyagishari et des membres de l'élite, dont sa soeur Agathe Kanziga, pour planifier préparer et faciliter des attaques lancées partout au Rwanda, notamment dans les préfectures de Kigali-Ville et de Gisenyi, contre les Tutsis au cours de l'année 1994, en particulier entre le 6 avril et le 17 juillet, dans l'intention de détruire en tout ou en partie le groupe ethnique tutsi, comme précisé aux paragraphes 6 à 30 du présent acte d'accusation.

6. À une date indéterminée en 1992, Wellars Banzi a dit au Président Habyarimana et à Protais Zigiranyirazo que, s'il était jamais envisagé d'éliminer les Tutsis, il faudrait savoir qu'une milice spécialisée a été formée pour le faire comme en 1959 dans la préfecture de Gisenyi. Après cette date et jusqu'en juillet 1994, Protais Zigiranyirazo s'est entendu avec Wellars Banzi et Bernard Munyagishari pour financer et mettre en oeuvre le «plan de milice spécialisé», à savoir la création de la milice *Interahamwe* partout au Rwanda. En exécution de ce plan, Protais Zigiranyirazo a non seulement participé à l'organisation, à l'armement, à l'entraînement et à l'habillement des *Interahamwe* de la préfecture de Gisenyi et à l'armement de la population locale de ladite préfecture, y compris au financement de l'achat d'armes destinées à ce groupe et à l'achat de celles-ci, mais aussi facilité ces opérations, dans le but d'attaquer et détruire la population tutsie.

Witness statement by : SGO
Witness statement by : SGP
Witness Statement by : AFX

7. Gisenvi. Protais Zigiranyirazo agreed at various meetings with regional and local administrative officials, including with Gisenyi *sous-prefet* Raphaël Bikumbi, Rubavu *bourgmestre* Marc Mpozambezi, Birembo conseiller de secteur Arcade Sebatware, and MRND party officials and *Interahamwe* leaders such as Wellars Banzi and Bernard Munyagishari, to plan, organise and facilitate attacks on the Tutsi in Gisenyi *prefecture*. In or around September 1993, Protais Zigiranyirazo attended a meeting near his home in Giciye *commune* in Gisenyi *Prefecture* with the conseiller of Birembo *secteur*, Alcade Sebatwe and agreed to take action against local Tutsis. In or around early April 1994, Colonel Bagosora sent a message to Gisenyi addressed to Jean-Bosco Barayagwiza and Protais Zigiranyirazo that signalled that the killings of Tutsis begin. Shortly after, Jean Bosco Barayagwiza and Protais Zigiranyirazo called all the *bourgmestres* and *conseiller de secteurs* to a meeting at the Palm Beach hotel in Gisenyi in order to plan and organise the genocide. In or around mid-April 1994, Protais Zigiranyirazo, in furtherance of this plan instigated the elimination of all Tutsis at a public meeting held at a football field in Gisenyi, at which he spoke together with other officials, including Colonel Theoneste Bagosora and Colonel Ephrem Setako.

Witness Statement by : SGO
Witness Statement by : DCD
Witness Statement by : ATN
Witness statement by : ON
Witness statement by : SFG
Witness statement by : SFI
Witness statement by : SGP
Witness Statement by : AFX
Witness statement by : SGD

8. On or about the 11th of February 1994, Protais Zigiranyirazo agreed with his sister, Agathe Kanziga and a Colonel Anatole Nsengiyumva and other persons to kill the enemy and its accomplices. In furtherance of the agreement they established a list of influential members of the Tutsi ethnic group and "moderate" Hutu to be executed.

Witness Statement by : ATP

9. In April 1994, Protais Zigiranyirazo met with military leaders in Gisenyi and Ruhengeri, including Colonel Nsengiyumva on an almost daily basis in order to plan the organization and execution of the genocide in Gisenyi. In furtherance of this plan, on a date uncertain in April 1994, *Interahamwe* militia mounted a roadblock on the "La Corniche" roadway in Gisenyi town leading toward the main border-crossing into Zaïre. The "La Corniche" roadblock was under the general control of *Interahamwe* leaders, including Omar Serushago, reporting to Colonel Nsengiyumva and Bernard Munyagishari. The roadblock was also manned by CDR-affiliated armed civilians,

7. Gisenvi. À diverses réunions, Protais Zigiranyirazo a convenu avec des autorités administratives régionales et locales, dont Raphaël Bikumbi, sous-préfet de Gisenyi; Marc Mpozambezi, bourgmestre de Rubavu; Arcade Sebatware, conseiller du secteur de Birembo, ainsi que des responsables du MRND et des dirigeants du mouvement *Interahamwe* tels que Wellars Banzi et Bernard Munyagishari, de planifier, d'organiser et de faciliter les attaques contre les Tutsis dans la préfecture de Gisenyi. En septembre 1993 ou vers cette époque, Protais Zigiranyirazo s'est réuni près de chez lui dans la commune de Giciye, préfecture de Gisenyi, avec le conseiller du secteur de Birembo, Alcade Sebatwe. Ils ont décidé d'un commun accord de prendre des mesures contre les Tutsis de la localité. Au début du mois d'avril 1994 ou vers cette époque, le colonel Bagosora a envoyé un message à Jean-Bosco Barayagwiza et Protais Zigiranyirazo à Gisenyi pour ordonner le déclenchement du massacre des Tutsis. Peu de temps après, Jean-Bosco Barayagwiza et Protais Zigiranyirazo ont convoqué tous les bourgmestres et les conseillers de secteur à une réunion qui s'est tenue à l'hôtel Palm Beach à Gisenyi pour planifier et organiser le génocide. À la mi-avril 1994 ou vers cette époque, sur un terrain de football de Gisenyi, Protais Zigiranyirazo a, en exécution du plan génocide ainsi conçu, incité à l'élimination de tous les Tutsis à une réunion publique au cours de laquelle il a pris la parole avec d'autres personnalités, dont les colonels Théoneste Bagosora et Ephrem Setako.

8. Le 11 février 1994 ou vers cette date, Protais Zigiranyirazo a décidé d'un commun accord avec sa soeur Agathe Kanziga, le colonel Anatole Nsengiyumva et d'autres personnes de tuer l'ennemi et ses complices. En application de cet accord, ils ont établi une liste de membres influents du groupe ethnique tutsi et de personnalités hutues «modérées» à exécuter.

9. En avril 1994, Protais Zigiranyirazo a tenu des réunions presque tous les jours à Gisenyi et à Ruhengeri avec des chefs militaires, dont le colonel Nsengiyijmva, pour planifier l'organisation et l'exécution du génocide dans la préfecture de Gisenyi. À une date indéterminée en avril 1994, en exécution de ce plan, des miliciens *Interahamwe* ont établi un barrage routier dans la ville de Gisenyi, sur la route de la Corniche qui mène au principal poste-frontière marquant le point de passage au Zaïre. Le barrage routier de la Corniche était placé sous le contrôle général des chefs des *Interahamwe*, dont Omar Serushago, qui relevaient du colonel Nsengiyumva et de

including Abuba, Bahati and Lionceau, and gendarmes, immigration police and customs officers. The purpose of the roadblock was to prevent Tutsi and "moderate" Hutu from escaping across the border to Zaïre by taking them to be killed in a nearby location. Protais Zigiranyirazo was aware of the closed-border regime and ordered and instigated the *Interahamwe*, CDR-affiliated armed civilians, gendarmes, immigration police and customs officers to operate the roadblock to cause the killing of Tutsi and "moderate" Hutu.

Witness statement by : DCD
Witness statement by : SGP
Witness Statement by : SGO
Witness statement by : SFH

10. On or about 12 or 13 April 1994, Protais Zigiranyirazo agreed with Colonel Bagosora, Colonel Nsengiyumva, and Colonel Setako to instigate and encourage the killings of Tutsis and "moderate" Hutu at a roadblock established by Protais Zigiranyirazo at the road junction in front of his house in Kiyovu. In furtherance of that agreement, Protais Zigiranyirazo, approached the roadblock with the above named persons, whereupon they saw the guards killing passers-by with some 50 corpses on the ground at the roadblock. Colonel Bagosora congratulated the guards that they were "now doing their work" and Protais Zigiranyirazo supported the comments saying "now you are working".

Witness statement by : DAS
Witness statement by : SGH

Criminal Responsibility

Protais Zigiranyirazo is criminally responsible for his own acts alleged in paragraphs 5-10 under the provisions of Article 6 (1) of the Statute based upon the following facts :

11. As described in paragraphs 5 through 10, Protais Zigiranyirazo committed the act of agreeing with the named persons and others on a plan to destroy, in whole or in part, the Tutsi ethnic group. As described in paragraphs 6 through 10, in furtherance of this plan he committed the specified preparatory acts that facilitated the killing, and ordered those over whom he had *de facto* control, as described in paragraph 3, and instigated those over whom he did not have de facto control, to commit the killings.

Witness Statement by : ON
Witness statement by : SFG
Witness statement by : SFI
Witness statement by : SGO
Witness statement by : SGP
Witness Statement by : AFX
Witness Statement by : DCD
Witness Statement by : ATN

Bernard Munyagishari. Il était également tenu par des civils armés militants de la CDR, dont Abuba, Bahati et Lionceau, des gendarmes, des agents de la police des frontières et des douaniers. Le but du barrage routier était d'empêcher les Tutsis et les Hutus «modérés» de s'enfuir au Zaïre en les arrêtant pour les exécuter à un endroit situé non loin de là. Sachant que la frontière était fermée, Protais Zigiranyirazo a donné aux *Interahamwe*, aux civils armés militants de la CDR, aux gendarmes, aux agents de la police des frontières et aux douaniers l'ordre de tenir le barrage routier et les a incités à agir de la sorte pour faire tuer les Tutsis et les Hutus «modérés».

10. Le 12 ou 13 avril 1994 ou vers ces dates, Protais Zigiranyirazo a convenu avec les colonels Bagosora, Nsengiyumva et Setako d'inciter et d'encourager des gens à tuer les Tutsis et les Hutus «modérés» à un barrage routier qu'il avait mis en place au carrefour situé devant sa résidence à Kiyovu. En application de cet accord, Protais Zigiranyirazo s'est rendu au barrage routier en compagnie des personnes citées ci-dessus. Ils y ont vu les gardiens du barrage tuer des passants au moment où une cinquantaine de corps gisaient sur le sol. Le colonel Bagosora a félicité les gardiens en disant qu'ils «faisaient maintenant leur travail», et Protais Zigiranyirazo a souscrit à son observation en ces termes : «Maintenant vous travaillez».

Responsabilité pénale

En application des dispositions de l'article 6 (1) du Statut, Protais Zigiranyirazo est pénalement responsable des actes personnels qui lui sont reprochés aux paragraphes 5 à 10, à la lumière des faits suivants :

11. Comme précisé aux paragraphes 5 à 10, Protais Zigiranyirazo a conçu d'un commun accord avec les personnes citées et d'autres personnes un plan visant à détruire, en tout ou en partie, le groupe ethnique tutsi. En exécution de ce plan, comme précisé aux paragraphes 6 à 10, il a commis les actes préparatoires expressément indiqués qui ont facilité les massacres. De même, il a donné aux personnes placées *de facto* sous son contrôle, comme expliqué au paragraphe 3, l'ordre de perpétrer ces massacres et a incité les gens sur lesquels il n'exerçait aucun contrôle *de facto* à agir de la sorte.

Witness statement by : SFI
Witness statement by : SGD
Witness Statement by : ATP
Witness statement by : SFH
Witness statement by : DAS
Witness statement by : SGH

Count 2 : Genocide

The Prosecutor of the International Criminal Tribunal for Rwanda charges Protais Zigiranyirazo with GENOCIDE, a crime stipulated in Article 2 (3) (b) of the Statute, in that on or between the dates of 1 January 1994 and 14 July 1994 throughout Rwanda, particularly in Kigaliville and Gisenyi prefectures, Protais Zigiranyirazo was responsible for killing or causing serious bodily or mental harm to members of the Tutsi population with intent to destroy, in whole or in part, a racial or ethnic group, as such, including those who sought refuge at various hills in the vicinity of the Rubaya Tea Factory including Gashihe or Kesho and Rurunga hills in Gisenyi prefecture, those at roadblocks in Giciye, "La Corniche" and Kiyovu, the family of Jean-Sapeur Sekimonyo and members of the Bahoma Tutsi clan, as more specifically described in paragraphs 12 through 30.

Or, alternatively

Count 3 : Complicity in genocide

The Prosecutor of the International Criminal Tribunal for Rwanda charges Protais Zigiranyirazo with COMPLICITY IN GENOCIDE, a crime stipulated in Article 2(3)(e) of the Statute, in that on or between the dates of 1 January 1994 and 14 July 1994 throughout Rwanda, particularly in Kigali-ville and Gisenyi prefectures, Protais Zigiranyirazo was responsible for killing or causing serious bodily or mental hann to members of the Tutsi population with intent to destroy, in whole or in part, a racial or ethnic group, as such, including those who sought refuge at various hills in the vicinity of the Rubaya Tea Factory including Gashihe or Kesho and Rurunga hills in Gisenyi prefecture, those at roadblocks in Giciye, "La Corniche" and Kiyovu, the family of Jean-Sapeur Sekimonyo and members of the Bahoma Tutsi clan, as more specifically described in paragraphs 12 through 30.

Deuxième chef d'accusation : Génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Protais Zigiranyirazo de GÉNOCIDE, crime prévu à l'article 2 (3) (b) du Statut, en ce que le 1er janvier et le 14 juillet 1994 ou entre ces dates, partout au Rwanda, et en particulier dans les préfectures de Kigali-Ville et de Gisenyi, Protais Zigiranyirazo a été responsable du meurtre de membres de la population tutsie ou d'atteintes graves à leur intégrité physique ou mentale, commis dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique comme tel, les victimes étant notamment les personnes qui s'étaient réfugiées sur diverses collines dans les environs de l'usine à thé de Rubaya, dont la colline de Gashihe ou de Kesho et celle de Rwunga dans la préfecture de Gisenyi, des personnes arrêtées aux barrages routiers de Giciye, de la Corniche et de Kiyovu, la famille de Jean-Sapeur Sekimonyo et des membres du clan tutsi des Bahoma, comme indiqué avec davantage de précisions aux paragraphes 12 à 30.

Ou, subsidiairement

Troisième chef d'accusation : Complicité dans le génocide

Le Procureur du Tribunal pénal international pour le Rwanda accuse Protais Zigiranyirazo de COMPLICITÉ DANS LE GÉNOCIDE, crime prévu à l'article 2 (3) (e) du Statut, en ce que le 1er janvier et le 14 juillet 1994 ou entre ces dates, partout au Rwanda et en particulier dans les préfectures de Kigali-Ville et de Gisenyi, Protais Zigiranyirazo a été responsable du meurtre de membres de la population tutsie ou d'atteintes graves à leur intégrité physique ou mentale, commis dans l'intention de détruire en tout ou en partie un groupe racial ou ethnique comme tel, les victimes étant notamment les personnes qui s'étaient réfugiées sur diverses collines dans les environs de l'usine à thé de Rubaya, dont la colline de Gashihe ou de Kesho et celle de Rurunga dans la préfecture de Gisenyi, des personnes arrêtées aux barrages routiers de Gicige, de la Corniche et de Kiyovu, la famille de Jean-Sapeur Sekimonyo et des membres du clan tutsi des Bahoma, comme indiqué avec davantage de précisions aux paragraphes 12 à 30.

Concise Statement of Fact for Counts 2 and 3 :

Rubaya Tea Factory Area

12. On or about 8 April 1994, the local Tutsi population, numbering approximately 2.000, were in refuge at Gashihe or Kesho Hill in Kabayengo *cellule*, Rwili *secteur*, Gaseke *commune*, in Gisenyi prefecture, within the vicinity of the Rubaya Tea Factory. On or about the said date, Protais Zigiranyirazo, with intent that the Tutsi who sought refuge at Gashihe or Kesho Hill be killed, led a convoy of armed Presidential Guard soldiers, gendarmes, and *Interahamwe* militia as part of the attack on Tutsi seeking refuge on the hill.

Witness statement by : AKP
Witness statement by : AKO
Witness statement by : AKK
Witness statement by : AKL
Witness statement by : AKM

13. Protais Zigiranyirazo ordered and instigated armed Presidential Guard soldiers, gendarmes and *Interahamwe* to attack and kill the said refugees, who did so killing approximately 1.000 of the Tutsi that had sought refuge on Gashihe or Kesho Hill.

Witness statement by : AKO
Witness statement by : AKK
Witness statement by : AKL
Witness statement by : AKM

14. About the second week of April 1994, at a date uncertain, many of the remaining local Tutsi population were in refuge at Rurunga Hill in Kabayengo *cellule*, Rwili *secteur*, Gaseke *commune*, in Gisenyi prefecture, within the vicinity of the Rubaya Tea Factory. On or about the said date, Protais Zigiranyirazo, with intent that the Tutsi who sought refuge at Rurunga Hill be killed, led a convoy of arrned Presidential Guard soldiers, gendarmes, and *Interahamwe* militia as part of the attack on Tutsi seeking refuge on the hill.

Witness statement by : ATM

15. Protais Zigiranyirazo ordered and instigated armed Presidential Guard soldiers, gendarmes and *Interahamwe* to attack and kill the said refugees, who did so, killing all of the Tutsi that sought refuge at the said hill.

Witness statement by : ATM

Criminal Responsibility

Protais Zigiranyirazo is criminally responsible for his own acts alleged in paragraphs 12-15 under the provisions of Article 6 (1) of the Statute based upon the following facts :

Exposé succinct des faits relatifs aux deuxième et troisième chefs d'accusation :

Zone de l'usine à thé de Rubaya

12. Le 8 avril 1994 ou vers cette date, la population locale tutsie, qui comptait environ 2 000 personnes, se trouvait sur la colline de Gashihe ou de Kesho où elle s'était réfugiée, dans la cellule de Kabayengo (secteur de Rwili, commune de Gaseke, préfecture de Gisenyi), aux environs de l'usine à thé de Rubaya. À cette date ou vers cette date, Protais Zigiranyirazo, dans l'intention de faire mourir les Tutsis qui avaient trouvé refuge sur la colline de Gashihe ou de Kesho, a dirigé un convoi de militaires appartenant à la Garde présidentielle, de gendarmes et de miliciens *Interahamwe*, tous armés, dans le cadre de l'attaque lancée contre ces Tutsis sur la colline.

13. Protais Zigiranyirazo a donné à ces éléments de la Garde présidentielle, gendarmes et *Interahamwe* armés l'ordre d'attaquer les Tutsis qui avaient trouvé refuge sur la colline de Gashihe ou de Kesho pour les tuer et les a incités à le faire. Passant à l'acte, ils ont fait un millier de morts parmi les Tutsis en question.

14. Vers la deuxième semaine d'avril 1994, à une date indéterminée, une grande partie du reste de la population locale tutsie se trouvait sur la colline de Rurunga où elle s'était réfugiée, dans la cellule de Kabayengo (secteur de Rwili, commune de Gaseke, préfecture de Gisenyi), aux environs de l'usine à thé de Rubaya. À cette date ou vers cette date, Protais Zigiranyirazo, dans l'intention de faire mourir les Tutsis qui avaient trouvé refuge sur la colline de Rurunga, a dirigé un convoi de militaires appartenant à la Garde présidentielle, de gendarmes et de miliciens *Interahamwe*, tous armés, dans le cadre de l'attaque lancée contre ces Tutsis sur la colline.

15. Protais Zigiranyirazo a donné à ces éléments de la Garde présidentielle, gendarmes et *Interahamwe* armés l'ordre d'attaquer les Tutsis qui avaient trouvé refuge sur ladite colline pour les tuer et les a incités à le faire. Passant à l'acte, ils ont tué tous les Tutsis en question.

Responsabilité pénale

En application des dispositions de l'article 6 (1) du Statut, Protais Zigiranyirazo est pénalement responsable des actes personnels qui lui sont reprochés aux paragraphes 12 à 15, à la lumière des faits suivants :

16. In leading the convoy as described in paragraphs 12 and 14, he was comrnitting an act that facilitated the killing; he was ordering those Presidential Guard soldiers, gendarmes, and *Interahamwe* militia over whom he had *de facto* control by reason of the relationship described in paragraph 3, and was instigating those over whom he did not have *de facto* control, to commit the killing; and he aided and abetted all of the participants in the killing. As described in paragraphs 13 and 15, he was ordering those over whom he had *de facto* control by reason of the relationship described in paragraph 3 above, and instigating those over whom he did not have *de facto* control, to commit the killing. All of his actions were committed in concert with the Presidential Guard soldiers, gendarmes, and *Interahamwe* for the common purpose of killing Tutsis because they were Tutsis, for the period of a criminal enterprise that extended at least from the beginning of the convoy to the killing of the Tutsis on the said hills respectively.

Witness statement by : AKP
Witness statement by : AKO
Witness statement by : AKK
Witness statement by : AKL
Witness statement by : AKM
Witness statement by : ATM

Protais Zigiranyirazo is criminally responsible for the acts of the Presidential Guard soldiers, gendarmes and *Interahamwe* alleged in paragraphs 12-15, under the provisions of Article 6 (3) of the Statute based upon the following facts :

17. Protais Zigiranyirazo's leadership of the convoys described in paragraphs 12 and 15 demonstrated a superior relationship over the Presidential Guard soldiers, gendarmes, and *Interahamwe*, and also because of his effective control of the Presidential Guard soldiers, gendarmes and *Interahamwe*, as described in paragraph 3, in the sense that he had the material ability to prevent or punish their criminal conduct; and because he knew that his subordinates were about to commit and did commit the crimes imputed to him and failed to take necessary and reasonable measures to prevent such crimes and failed to punish the persons that committed them.

Witness statement by : AKP
Witness statement by : AKO
Witness statement by : AKK
Witness statement by : AKL
Witness statement by : AKM
Witness statement by : ATM

Roadblocks

18. On various dates between April and July 1994, Protais Zigiranyirazo ordered and instigated soldiers, *Interahamwe* and armed civilians to establish roadblocks in direct proximity to each of his three residences-in Gasiza *cellule*, Giciye *commune*, Gisenyi prefecture; at the "La Corniche" border, Rubavu commune, Gisenyi

16. En dirigeant le convoi mentionné aux paragraphes 12 et 14, il a commis un acte qui a facilité le massacre; il a donné aux éléments de la Garde présidentielle, aux gendarmes et aux miliciens *Interahamwe* sur lesquels il exerçait un contrôle *de facto*, grâce aux rapports indiqués au paragraphe 3, l'ordre de perpétrer ce massacre; il a incité les personnes sur lesquelles il n'exerçait aucun contrôle *de facto* à le perpétrer et a aidé et encouragé tous les participants à le faire. De même, comme précisé aux paragraphes 13 et 15, il a donné aux personnes sur lesquelles il exerçait un contrôle *de facto*, grâce aux rapports indiqués au paragraphe 3 plus haut, l'ordre de commettre le massacre et a incité celles sur lesquelles il n'exerçait aucun contrôle *de facto* à le commettre. Tous ses actes ont été commis de concert avec les éléments de la Garde présidentielle, les gendarmes et les miliciens *Interahamwe* dans le but commun de tuer les Tutsis parce qu'ils étaient tutsis, pendant la durée d'une entreprise criminelle qui s'est étendue au moins du démarrage du convoi jusqu'au massacre des Tutsis sur chacune des collines susmentionnées.

En application des dispositions de l'article 6 (3) du Statut, Protais Zigiranyirazo est pénalement responsable des actes des éléments de la Garde présidentielle, des gendarmes et des miliciens *Interahamwe* allégués aux paragraphes 12 à 15, à la lumière des faits suivants :

17. Le rôle de premier plan décrit aux paragraphes 12 et 15 que Protais Zigiranyirazo a joué dans les convois témoigne qu'il était le supérieur hiérarchique des éléments de la Garde présidentielle, des gendarmes et des miliciens *Interahamwe*; l'intéressé exerçait un contrôle effectif sur les éléments de la Garde présidentielle, les gendarmes et les miliciens *Interahamwe*, comme précisé au paragraphe 3, en ce sens qu'il avait le pouvoir matériel de prévenir ou punir leur conduite criminelle; et il savait que ses subordonnés s'apprêtaient à commettre les crimes qui lui sont imputés et qu'ils les avaient effectivement commis, mais n'a pas pris de mesures nécessaires et raisonnables pour prévenir ces crimes ni n'en a puni les auteurs.

Barrages routiers

18. À diverses dates situées entre avril et juillet 1994, Protais Zigiranyirazo non seulement a donné à des militaires, à des miliciens *Interahamwe* et à des civils armés l'ordre de mettre en place des barrages routiers tout près de chacune des trois résidences qu'il possédait dans la cellule de Gasiza (commune de Giciye, préfecture de

prefecture; and in Kiyovu *cellule*, Kigaliville prefecture, intending that they would be used in the campaign of killing Tutsi.

19. Giciye Roadblock : On a date uncertain in early May 1994, Protais Zigiranyirazo ordered and instigated soldiers, *Interahamwe*, and armed civilians to establish and command the roadblock next to his residence in Giciye *commune*, Gisenyi prefecture. Persons operating the roadblock were variously armed with guns, grenades and traditional weapons and controlled the traffic of persons fleeing from Rwanda to Zaïre. This stretch of road from Gitarama through Giciye-Karago-Mukamira was the main route of flight during April to July 1994; the Kigali to Gisenyi tarmac road via Ruhengeri was impassable due to fighting between the FAR and the RPF. Soldiers, *Interahamwe*, and armed civilians subject to Protais Zigiranyirazo ordered and instigated soldiers, *Interahamwe*, and armed civilians to kill numerous Tutsi at the Giciye Roadblock.

Witness statement by : SGA
Witness statement by : SGI
Witness statement by : SGK
Witness statement by : SGO
Witness statement by : SGP
Witness statement by : SGS
Witness statement by : AKN

20. Between April and July 1994, Protais Zigiranyirazo, visited various roadblocks in Gisenyi on numerous occasions, including the Giciye roadblock, and ordered and instigated soldiers, *Interahamwe*, and armed civilians to "work" and encouraged them by providing them with drinks and money to buy food. The word "work" was, during the events referred to in this indictment, a coded reference for killing Tutsi and "moderate" Hutu.

Witness statement by : SGP
Witness statement by : AKN

21. Between 6 April and 3 1 July 1994, on a date uncertain, Protais Zigiranyirazo paid *Interahamwe* to dig a mass grave known as "the Pit." The Pit was situated behind the compound of Protais Zigiranyirazo's home in Giciye. The bodies of those killed near Protais Zigiranyirazo's home were first thrown into the Pit and later into the Basera River.

Witness statement by : SGO
Witness statement by : SGP

22. The "La Corniche" Roadblock : On a date uncertain in April 1994, *Interahamwe* militia mounted a roadblock on the "La Corniche" roadway in Gisenyi town leading toward the main border-crossing into Zaïre. As with the roadblocks mentioned in Kiyovu and Giciye, the "La Corniche" roadblock was situated in close proximity

Gisenyi), dans la zone frontière de la Corniche (commune de Rubavu, préfecture de Gisenyi) et dans la cellule de Kiyovu (préfecture de Kigali-Ville), mais encore les a incités à le faire, afin que ces barrages soient utilisés dans le cadre de la campagne de massacre des Tutsis.

19. Barrage routier de Giciye : À une date indéterminée au début du mois de mai 1994, Protais Zigiranyirazo a donné à des militaires, à des miliciens *Interahamwe* et à des civils armés l'ordre de mettre en place et tenir un barrage routier tout près de chez lui dans la commune de Giciye (préfecture de Gisenyi) et les a incités à le faire. Les personnes qui géraient le barrage routier portaient diverses sortes d'armes – armes à feu, grenades et armes traditionnelles – et contrôlaient le flux des populations fuyant le Rwanda pour se réfugier au Zaïre. Le tronçon de route allant de Gitarama à Giciye, Karago et Mukamira sur lequel se situait ce barrage routier était le principal itinéraire suivi par les réfugiés du mois d'avril au mois de juillet 1994. En effet, la route goudronnée allant de Kigali à Gisenyi, en passant par Ruhengeri, était impraticable en raison des combats qui opposaient les FAR au FPR. Des militaires, des miliciens *Interahamwe* et des civils armés soumis à l'autorité de Protais Zigiranyirazo ont ordonné à des militaires, à des miliciens *Interahamwe* et à des civils armés de tuer de nombreux Tutsis au barrage routier de Giciye et les ont incités à le faire.

20. Entre avril et juillet 1994, Protais Zigiranyirazo s'est rendu à plusieurs reprises à divers barrages routiers mis en place dans la préfecture de Gisenyi, notamment à celui de Giciye, a ordonné aux militaires, miliciens *Interahamwe* et civils armés de «travailler», les a incités à le faire et les a encouragés en leur fournissant des boissons et de l'argent pour acheter des vivres. Pendant les faits visés dans le présent acte d'accusation, le terme «travailler» était un signe linguistique codé désignant le fait de tuer les Tutsis et les Hutus «modérés».

21. À une date indéterminée située entre le 6 avril et le 31 juillet 1994, Protais Zigiranyirazo a payé des miliciens *Interahamwe* pour qu'ils creusent un charnier appelé la «Fosse». La Fosse se trouvait derrière sa concession à Giciye. Les corps des personnes tuées près de chez Protais Zigiranyirazo ont été jetés initialement dans la Fosse et, plus tard, dans la rivière Basera.

22. Barrage routier de la Corniche : À une date indéterminée en avril 1994, des miliciens *Interahamwe* ont mis en place dans la ville de Gisenyi un barrage routier sur la Corniche, route menant au principal poste-frontière marquant le point de passage au Zaïre. Comme les barrages de Kiyovu et de Giciye, le barrage routier de la

to one of Protais Zigiranyirazo's residences. The "La Corniche" roadblock was under the general control of *Interahamwe* leaders, including Omar Serushago, reporting to Colonel Nsengmjmva and Bernard Munyagishari. The roadblock was also manned by CDR-affiliated armed civilians, including Abuba, Bahati and Lionceau, and gendarmes, immigration police and customs officers. The purpose of the roadblock was to prevent Tutsi and "moderate" Hutu, characterised as accomplices of "the enemy," being Tutsi, from escaping across the border to Zaïre. The *Interahamwe* routinely checked persons passing through the roadblock on their way to the border crossing. Tutsi and "moderate" Hutu were not allowed to proceed and were removed to a nearby location and killed. Protais Zigiranyirazo was aware of the closed-border regime and ordered and instigated the *Interahamwe*, CDR-affiliated armed civilians, gendarmes, immigration police and customs officers to operate the roadblock to cause the killing of Tutsi and "moderate" Hutu.

Witness Statement by : SGO

Witness statement by : SFH

23. During June 1994, Protais Zigiranyirazo ordered and instigated the *Interahamwe*, gendarmes and immigration police who were manning the "La Corniche" roadblock at the Gisenyi-Goma border to kill Tutsis by asking them "to work" well.

Witness statement by : SFH

24. Kivovu Roadblock : On or about 7 April 1994, soldiers guarding the residence of Protais Zigiranyirazo in Kiyovu *cellule*, Kigali-ville prefecture, who were under his *de facto* control, ordered watchmen employed at homes in the neighbourhood to man a roadblock that was set up between Protais Zigiranyirazo's home and the adjacent Presbyterian church. Soldiers and *Interahamwe*, including Second Lt. Jean-Claude Seyoboka Bonke and Jacques Kanyamigezi, supervised the roadblock, the largest in the Kiyovu *cellule*. The civilians manning the roadblock were armed with machetes and clubs. Approximately one week later, in mid-April 1994, Protais Zigiranyirazo ordered and instigated soldiers, *Interahamwe* and arrned civilians at the roadblock near his Kiyovu residence to search the homes in the neighbourhood and kill any Tutsi that were found. Protais Zigiranyirazo further ordered and instigated the soldiers and *Interahamwe* at the roadblock, including Sec. Lt. Jean-Claude Seyoboka Bonke and Jacques Kanyamigezi, who supervised the roadblock, to kill all Tutsi who attempted to pass through. Shortly thereafter, and on a continuing basis, soldiers and *Interahamwe* killed those who were identified as Tutsi, both in the neighbourhood and attempting to pass through the roadblock.

Witness statement by : DAS

Witness statement by : SGH

Protais Zigiranyirazo is criminally responsible for his own acts alleged in paragraphs 18-24 under the provisions of Article 6 (1) of the Statute based upon the following facts :

Corniche se trouvait tout près de l'une des résidences de Protais Zigiranyirazo. Il était placé sous le contrôle général des chefs des *Interahamwe*, dont Omar Serushago, qui relevaient du colonel Nsengiyumva et de Bernard Munyagishari. Parmi les personnes qui le tenaient figuraient également des civils armés membres de la CDR, notamment Abuba, Bahati et Lionceau, ainsi que des gendarmes, des agents de la police des frontières et des douaniers. Ce barrage routier avait pour but d'empêcher les Tutsis et les «Hutus modérés», qualifiés de complices de «l'ennemi», c'est-à-dire des Tutsis, de traverser la frontière pour se réfugier au Zaïre. Les *Interahamwe* contrôlaient régulièrement les personnes qui passaient par le barrage routier pour se rendre au poste-frontière. Les Tutsis et les Hutus «modérés» n'étaient pas autorisés à poursuivre leur chemin : ils étaient conduits à un endroit situé non loin de là et tués. Sachant que la frontière était fermée, Protais Zigiranyirazo a donné aux miliciens *Interahamwe*, aux civils armés membres de la CDR, aux gendarmes, aux agents de la police des frontières et aux douaniers l'ordre de tenir le barrage routier et les a incités à agir de la sorte pour faire tuer les Tutsis et les Hutus «modérés».

23. Dans le courant du mois de juin 1994, Protais Zigiranyirazo a donné aux *Interahamwe*, aux gendarmes et aux agents de la police des frontières qui tenaient le barrage routier de la Corniche sur la limite séparant Gisenyi de Goma l'ordre de tuer les Tutsis et les a incités à le faire, en leur demandant de bien «travailler».

24. Barrage routier de Kiyovu : Le 7 avril 1994 ou vers cette date, des militaires qui gardaient la résidence de Protais Zigiranyirazo dans la cellule de Kiyovu (préfecture de Kigali-Ville) et étaient sous son contrôle *de facto* ont ordonné aux gardiens employés dans les concessions du quartier de tenir un barrage routier mis en place entre sa résidence et l'église presbytérienne qui la jouxtait. Ce barrage routier, qui était le plus grand dans la cellule de Kiyovu, était contrôlé par des militaires et des *Interahamwe*, notamment le sous-lieutenant Jean-Claude Seyoboka Bonke et Jacques Kanyamigezi. Les civils qui y montaient la garde étaient armés de machettes et de gourdins. Environ une semaine plus tard, à la mi-avril 1994, Protais Zigiranyirazo a donné aux militaires, aux miliciens *Interahamwe* et aux civils armés en faction au barrage routier mis en place près de chez lui dans la cellule de Kiyovu l'ordre de fouiller les maisons du quartier pour tuer tout Tutsi qu'ils y trouveraient et les a incités à agir de la sorte. Il a en outre ordonné aux militaires et aux *Interahamwe* en faction au barrage routier, dont le sous-lieutenant Jean-Claude Seyoboka Bonke et Jacques Kanyamigezi qui en assuraient le contrôle, de tuer tous les Tutsis qui tenteraient de le franchir et les a incités à agir de la sorte. Peu de temps après, les militaires et les *Interahamwe* se sont mis à tuer, sans discontinuer, les personnes identifiées comme étant des Tutsis qui se trouvaient dans le quartier ou tentaient de franchir le barrage routier.

25. His actions in providing drinks and money for food to soldiers, *Interahamwe* and armed civilians as described in paragraph 20 and in paying the *Interahamwe* as described in paragraph 21 constituted the commission of acts that facilitated the killing, the creation of a relationship in the nature of that of an employer and employee giving him power to order, the ordering of persons over whom he had a superior relationship established by this provision of benefits, the instigating by reward, and the aiding and abetting, of the killing and disposal of the bodies. Also as described in paragraphs 18-24, Protais Zigiranyirazo ordered soldiers, gendarmes, immigration police, customs officials, *Interahamwe*, and CDR-affiliated armed civilians over whom he had *de facto* control by reason of the relationship described in Paragraph 3, instigated by reward, and aided and abetted those over whom he did not have *de facto* control, to commit the killings. All of his actions were committed in concert with soldiers, gendarmes, immigration police, customs officials and *Interahamwe* for the common purpose of killing Tutsis because they were Tutsis, for the period of a criminal enterprise that extended at least from the beginning of the establishment of the roadblocks by persons under his *de facto* control up to the killing of the Tutsis and the burial of their bodies as stated in paragraphs 18 through 24.

Witness statement by : SGA
Witness statement by : SGI
Witness statement by : SGK
Witness statement by : SGO
Witness statement by : SGP
Witness statement by : SGS
Witness statement by : AKN
Witness statement by : DAS
Witness statement by : SGH
Witness statement by : SGP
Witness statement by : SFH

Protais Zigiranyirazo is criminally responsible for the acts of the soldiers, gendarmes, Immigration police and *Interahamwe* alleged in paragraphs 18-24, under the provisions of Article 6 (3) of the Statute based upon the following facts :

26. Protais Zigiranyirazo was a superior to soldiers, *Interahamwe*, and armed civilians by reason of his establishment of a relationship in the nature of that of an employer and employee through the provision of benefits as described in paragraphs 20 and 21, and also had effective control over them and over immigration police and

Responsabilité pénale

En application des dispositions de l'article 6 (1) du Statut, Protais Zigiranyirazo est pénalement responsable des actes personnels qui lui sont reprochés aux paragraphes 18 à 24 du présent acte d'accusation, à la lumière des faits suivants :

25. En offrant des boissons et de l'argent destiné à l'achat de vivres aux militaires, aux *Interahamwe* et aux civils armés comme il est dit au paragraphe 20 et en payant les *Interahamwe* comme il est dit au paragraphe 21, Protais Zigiranyirazo a commis des actes qui non seulement ont facilité les massacres susvisés et la création, entre lui et ces gens, de rapports semblables à ceux qui unissent un employeur à ses employés (rapports qui lui ont conféré le pouvoir de leur donner des ordres), mais encore lui ont permis de donner aux personnes placées sous son autorité, du fait de ces avantages fournis, l'ordre de tuer et de se débarrasser des corps des victimes, d'inciter d'autres personnes à le faire par des récompenses, ainsi que de les aider et encourager à agir de la sorte. De même, comme exposé aux paragraphes 18 à 24, il a non seulement donné aux militaires, aux gendarmes, aux agents de la police des frontières, aux douaniers, aux *Interahamwe* et aux civils armés militants de la CDR sur lesquels il exerçait un contrôle *de facto* en raison des rapports indiqués au paragraphe 3 l'ordre de commettre les massacres, mais encore incité par des récompenses et aidé et encouragé les personnes sur lesquelles il n'exerçait aucun contrôle *de facto* à commettre ces massacres. Tous ses actes ont été commis de concert avec les militaires, les gendarmes, les agents de la police des frontières, les douaniers et les *Interahamwe* dans le but commun de tuer les Tutsis parce qu'ils étaient tutsis, pendant la durée d'une entreprise criminelle qui s'est étendue au moins du début de la mise en place des barrages routiers par des gens sur lesquels il exerçait un contrôle *de facto* jusqu'au massacre des Tutsis et à leur inhumation, comme indiqué aux paragraphes 18 à 24.

En application des dispositions de l'article 6 (3) du Statut, Protais Zigiranyirazo est pénalement responsable des actes des militaires, des gendarmes, des agents de la police des frontières et des *Interahamwe* allégués aux paragraphes 18 à 24, à la lumière des faits suivants :

26. Protais Zigiranyirazo était le supérieur hiérarchique des militaires, des *Interahamwe* et des civils armés en ce sens qu'il avait établi entre lui et eux des rapports semblables à ceux qui unissent un employeur à ses employés en leur accordant les avantages visés aux paragraphes 20 et 21; il exerçait un contrôle effectif sur eux ainsi

customs officials for the reasons described in Paragraph 3, in the sense that he had the material ability to prevent or punish their criminal conduct; and because he knew and had reason to know that his subordinates were about to commit and did commit the crimes imputed to him and failed to take necessary and reasonable measures to prevent such crimes and failed to punish the persons that committed them.

Witness statement by : SGA
Witness statement by : SGI
Witness statement by : SGK
Witness statement by : SGO
Witness statement by : SGP
Witness statement by : SGS
Witness statement by : AKN
Witness statement by : DAS
Witness statement by : SGH
Witness statement by : SGP
Witness statement by : SFH

Tutsi Families/Clans

27. On a date uncertain in May 1994, Protais Zigiranyirazo ordered and instigated the *Interahamwe* militia to kill the family of Jean-Sapeur Sekimonyo whom he characterised as *Inyenzi*. The Sekmonyo family had sought refuge at the home of President Habyarimana in Karago *commune*. The *Interahamwe* carried out the order, killing the entire family, resulting in the deaths of more than 30 people.

Witness Statement by : SGO

28. Towards the end of May 1994, Protais Zigiranyirazo ordered and instigated the *Interahamwe* to kill approximately eighteen members of the Bahoma Tutsi clan, who had sought refuge at his Giciye residence. The victims were related to one of Protais Zigiranyirazo's wives.

Witness Statement by : SGO

Criminal Responsibility

Protais Zigiranyirazo is criminally responsible for his own acts alleged in paragraph 27 and 28 under the provisions of Article 6 (1) of the Statute based upon the following facts :

29. As described in paragraph 27 and 28, he ordered those over whom he had *de facto* control by reason of the relationship described in Paragraph 3 above, and instigated those over whom he did not have *de facto* control to make the arrests and commit the killing. All his actions were committed in concert with the *Interahamwe* for the common purpose of killing Tutsis because they were Tutsis, for the period of a criminal enterprise that extended at least from time the first acts of ordering or insti-

que sur les agents de la police des frontières et les douaniers pour les raisons évoquées au paragraphe 3, en ce sens qu'il avait le pouvoir matériel de prévenir ou punir leur conduite criminelle; il savait et avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre les crimes qui lui sont imputés et qu'ils les avaient effectivement commis, mais n'a pas pris de mesures nécessaires et raisonnables pour prévenir ces crimes ni n'en a puni les auteurs.

Familles et clans tutsis

27. À une date indéterminée en mai 1994, Protais Zigiranyirazo a ordonné aux miliciens *Interahamwe* de tuer la famille de Jean-Sapeur Sekimonyo qu'il qualifiait d'*Inyenzi* et les a incités à le faire. La famille Sekimonyo s'était réfugiée chez le Président Habyarimana dans la commune de Karago. En exécution de cet ordre, les *Interahamwe* ont tué tous les membres de ladite famille qui comptait plus de 30 personnes.

28. Vers la fin du mois de mai 1994, Protais Zigiranyirazo a ordonné aux *Interahamwe* de tuer environ 18 membres du clan tutsi des Bahoma qui avaient trouvé refuge chez lui à Giciye et les a incités à le faire. Les victimes avaient des liens de parenté avec l'une des épouses de Protais Zigiranyirazo.

Responsabilité pénale

En application des dispositions de l'article 6 (1) du Statut, Protais Zigiranyirazo est pénalement responsable des actes personnels qui lui sont reprochés aux paragraphes 27 et 28, à la lumière des faits suivants :

29. Comme précisé aux paragraphes 27 et 28, il a donné aux personnes sur lesquelles il exerçait un contrôle *de facto* grâce aux rapports évoqués au paragraphe 3 ci-dessus l'ordre de procéder aux arrestations et aux massacres, et incité celles sur lesquelles il n'exerçait aucun contrôle *de facto* à le faire. Tous ses actes ont été commis de concert avec les *Interaharnwe* dans le but commun de tuer les Tutsis parce qu'ils étaient tutsis, pendant la durée d'une entreprise criminelle qui s'est étendue au moins du moment où il a commencé à donner l'ordre de procéder aux arrestations

gation the arrests and lulling, and up to the killing of the last victim in the Sekimonyo family or the Bahoma Tutsi clan.

Witness Statement by : SGO

Protais Zigiranyirazo is criminally responsible for the acts of the Interahamwe alleged in paragraphs 27 and 28, under the provisions of Article 6 (3) of the Statute based upon the following facts :

30. Protais Zigiranyirazo's order to arrest the approximately eighteen members of the Bahoma Tutsi demonstrated a superior relationship over the *Interahamwe* who carried out the arrest, and because of his effective control, for the reasons described in paragraph 3, over the *Interahamwe* who carried out the arrest and killing of the Sekimonyo family and the killing of the Bahoma Tutsi clan : and because he knew and had reason to know that his subordinates were about to commit and did commit the crimes imputed to him and failed to take necessary and reasonable measures to prevent such crimes and failed to punish the persons that committed them.

Witness Statement by : SGO

Count 4 : Extermination as a crime against humanity

The Prosecutor of the International Criminal Tribunal for Rwanda charges Protais Zigiranyirazo with EXTERMINATION as a CRIME AGAINST HUMANITY, as stipulated in Article 3 (a) of the Statute, in that on or between the dates of 7 April 1994 and 14 July 1994, Protais Zigiranyirazo was responsible, individually and through the acts of his subordinates, for the extermination, as part of a widespread or systernatic attack against the civilian population, on political, ethnic or racial grounds, of persons who sought refuge at various hills within the vicinity of the Rubaya Tea Factory, including Gashihe or Kesho and Rurunga hills, and persons at roadblocks at Giciye, "La Corniche", and Kiyovu;

Concise Statement of Fact for Count 4 :

31. During and in relationship with the events referred to in this indictrnent, particularly from 6 April 1994 through 17 July 1994, there were throughout Rwanda widespread andfor systematic attacks directed against a civilian population on political, ethnic or racial grounds. Notably, *Interahamwe* militias engaged in a campaign of violence against Rwanda's civilian Tutsi population and against Hutu perceived to be politically opposed to the MRND. Hundreds of thousands of civilian Tutsi men, women and children and "moderate Hutu" were killed. The acts described in paragraphs 32 through 46 were part of these attacks.

Rubaya Tea Factory Area

32. On or about 8 April 1994, the local Tutsi population, numbering approximately 2,000, were in refuge at Gashihe or Kesho Hill in Kabayengo cellule, Rwili secteur, Gaseke commune, in Gisenyi prefecture, within the vicinity of the Rubaya Tea Factory. On or about the said date, Protais Zigiranyirazo, with intent that the Tutsi who

et aux massacres ou à inciter à le faire jusqu'au meurtre de la dernière victime appartenant à la famille Sekimonyo ou au clan tutsi des Bahoma.

En application des dispositions de l'article 6 (3) du Statut, Protais Zigiranyirazo est pénalement responsable des actes des *Interahamwe* allégués aux paragraphes 27 et 28, à la lumière des faits suivants :

30. L'ordre d'arrêter les quelque 18 membres du clan tutsi des Bahoma que Protais Zigiranyirazo avait donné témoigne qu'il était le supérieur hiérarchique des *Interahamwe* qui ont effectué l'arrestation; il exerçait un contrôle effectif, pour les raisons exposées au paragraphe 3, sur les *Interahamwe* qui ont arrêté et tué les membres de la famille Sekimonyo et du clan tutsi des Bahoma; il savait et avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre les crimes qui lui sont imputés et qu'ils les avaient effectivement commis, mais il n'a pas pris de mesures nécessaires et raisonnables pour prévenir ces crimes ni n'en a puni les auteurs.

Quatrième chef d'accusation :
Extermination constitutive de crime contre l'humanité

Le Procureur du Tribunal pénal international pour le Rwanda accuse Protais Zigiranyirazo d'EXTERMINATION constitutive de CRIME CONTRE L'HUMANITÉ, crime prévu à l'article 3 (a) du Statut, en ce que le 7 avril et le 14 juillet 1994 ou entre ces dates, Protais Zigiranyirazo a été responsable, par ses actes personnels et ceux de ses subordonnés, de l'extermination, dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale, de personnes qui s'étaient réfugiées sur diverses collines dans les environs de l'usine à thé de Rubaya, dont la colline de Gashihe ou de Kesho et celle de Rurunga, et de personnes arrêtées aux barrages routiers de Giciye, de la Corniche et de Kiyovu.

Exposé succinct des faits relatifs au quatrième chef d'accusation :

31. À l'époque et à l'occasion des faits visés dans le présent acte d'accusation, notamment du 6 avril au 17 juillet 1994, il y a eu partout au Rwanda des attaques généralisées et/ou systématiques dirigées contre une population civile en raison de son appartenance politique, ethnique ou raciale. En particulier, les *Interahamwe* ont lancé une campagne de violences contre la population civile tutsie et les Hutus considérés comme opposants politiques au MRND. Des centaines de milliers de civils tutsis – hommes, femmes et enfants – et de Hutus «modérés» ont été tués. Les actes mentionnés aux paragraphes 32 à 46 ont été commis dans le cadre de ces attaques.

Environs de l'usine à thé de Rubaya

32. Le 8 avril 1994 ou vers cette date, la population locale tutsie, qui comptait environ 2 000 personnes, se trouvait sur la colline de Gashihe ou de Kesho où elle s'était réfugiée, dans la cellule de Kabayengo (secteur de Rwili, commune de Gaseke, préfecture de Gisenyi), aux environs de l'usine à thé de Rubaya. À cette date ou vers

sought refuge at Gashihe or Kesho Hill be killed, led a convoy of armed Presidential Guard soldiers, gendarmes, and *Interahamwe* militia as part of the attack on Tutsi seeking refuge on the hill.

Witness statement by : AKP
Witness statement by : AKO
Witness statement by : AKK
Witness statement by : AKL
Witness statement by : AKM

33. Protais Zigiranyirazo ordered and instigated armed Presidential Guard soldiers, gendarmes and *Interahamwe* to attack and kill the said refugees, who did so killing approximately 1,000 of the Tutsi that had sought refuge on Gashihe or Kesho Hill.

Witness statement by : AKO
Witness statement by : AKK
Witness statement by : AKL
Witness statement by : AKM

34. About the second week of April 1994, at a date uncertain, many of the remaining local Tutsi population were in refuge at Rurunga Hill in Kabayengo *cellule*, Rwili *secteur*, Gaseke *commune*, in Gisenyi prefecture, within the vicinity of the Rubaya Tea Factory. On or about the said date, Protais Zigiranyirazo, with intent that the Tutsi who sought refuge at Rurunga Hill be killed, led a convoy of armed Presidential Guard soldiers, *gendarmes*, and *Interahamwe* militia as part of the attack on Tutsi seeking refuge on the hill.

Witness statement by : ATM

35. Protais Zigiranyirazo ordered and instigated armed Presidential Guard soldiers, gendarmes and *Interahamwe* to attack and kill the said refugees, who did so, killing all of the Tutsi that sought refuge at the said hill.

Witness statement by : ATM

Criminal Responsibility

Protais Zigiranyirazo is criminally responsible for his own acts alleged in paragraphs 32-35 under the provisions of Article 6 (1) of the Statute based upon the following facts :

36. In leading the convoy as described in paragraph 32 and 34, he was committing an act that facilitated the killing; he was ordering those Presidential Guard soldiers, gendarmes, and *Interahamwe* militia over whom he had *de facto* control by reason of the relationship described in paragraph 3, and was instigating those over whom he did not have *de facto* control, to commit the killing; and was aiding and abetting all of the participants in the killing. As described in paragraphs 33 and 35, he was ordering those over whom he had *de facto* control by reason of the relationship described in paragraph 3 above, and instigating those over whom he did not have *de facto* con-

cette date, Protais Zigiranyirazo, dans l'intention de faire mourir les Tutsis qui avaient trouvé refuge sur la colline de Gashihe ou de Kesho, a dirigé un convoi de militaires appartenant à la Garde présidentielle, de gendarmes et de miliciens *Interahamwe*, tous armés, dans le cadre de l'attaque lancée contre ces Tutsis sur la colline.

33. Protais Zigiranyirazo a donné à ces éléments de la Garde présidentielle, gendarmes et *Interahamwe* armés l'ordre d'attaquer les Tutsis qui avaient trouvé refuge sur la colline de Gashihe ou de Kesho pour les tuer et les a incités à le faire. Passant à l'acte, ils ont fait un millier de morts parmi les réfugiés en question.

34. Vers la deuxième semaine d'avril 1994, à une date indéterminée, une grande partie du reste de la population locale tutsie se trouvait sur la colline de Rumga où elle s'était réfugiée, dans la cellule de Kabayengo (secteur de Rwili, commune de Gaseke, préfecture de Gisenyi), aux environs de l'usine à thé de Rubaya. À cette date ou vers cette date, Protais Zigiranyirazo, dans l'intention de faire mourir les Tutsis qui avait trouvé refuge sur la colline de Rurunga, a dirigé un convoi de militaires appartenant à la Garde présidentielle, de gendarmes et de miliciens *Interahamwe*, tous armés, dans le cadre de l'attaque lancée contre ces Tutsis sur la colline.

35. Protais Zigiranyirazo a donné à ces éléments de la Garde présidentielle, gendarmes et *Interahamwe* armés l'ordre d'attaquer lesdits réfugiés pour les tuer et les a incités à le faire. Passant à l'acte, ils ont tué tous les Tutsis qui s'étaient réfugiés sur la colline.

Responsabilité pénale

En application des dispositions de l'article 6 (1) du Statut, Protais Zigiranyirazo est pénalement responsable des actes personnels qui lui sont reprochés aux paragraphes 32 à 35, à la lumière des faits suivants :

36. En dirigeant le convoi mentionné aux paragraphes 32 et 34, il a commis un acte qui a facilité le massacre; il a donné aux éléments de la Garde présidentielle, aux gendarmes et aux miliciens *Interahamwe* sur lesquels il exerçait un contrôle *de facto*, grâce aux rapports indiqués au paragraphe 3, l'ordre de perpétrer ce massacre; il a incité les personnes sur lesquelles il n'exerçait aucun contrôle *de facto* à le perpétrer et il a aidé et encouragé tous les participants à le faire. De même, comme précisé aux paragraphes 33 et 35, il a donné aux personnes sur lesquelles il exerçait un contrôle *de facto*, grâce aux rapports indiqués au paragraphe 3 plus haut, l'ordre de

trol, to commit the killing. All of his actions were committed in concert with the Presidential Guard soldiers, gendarmes, and *Interahamwe* for the common purpose of killing Tutsis because they were Tutsis, for the period of a criminal enterprise that extended at least from the beginning of the convoy to the killing of the Tutsis on the said hills respectively.

Witness statement by : AKO
Witness statement by : AKK
Witness statement by : AKL
Witness statement by : AKM
Witness statement by : ATM

Protais Zigiranyirazo is criminally responsible for the acts of the Presidential Guard soldiers, gendarmes and *Interahamwe* alleged in paragraphs 32-35, under the provisions of Article 6 (3) of the Statute based upon the following facts :

37. Protais Zigiranyirazo's leadership of the convoys described in paragraphs 32 and 34 demonstrated a superior relationship over the Presidential Guard soldiers, *gendarmes*, and *Interahamwe*, and also because of his effective control of the Presidential Guard soldiers, *gendarmes* and *Interahamwe*, as described in paragraph 3, in the sense that he had the material ability to prevent or punish their criminal conduct; and because he knew that his subordinates were about to commit and did commit the crimes imputed to him and failed to take necessary and reasonable measures to prevent such crimes and failed to punish the persons that committed them.

Witness statement by : AKO
Witness statement by : **AKK**
Witness statement by : AKL
Witness statement by : AKM
Witness statement by : ATM

Roadblocks

38. On various dates between April and July 1994, Protais Zigiranyirazo ordered and instigated soldiers, *Interahamwe* and armed civilians to establish roadblocks in direct proximity to each of his three residences in Gasiza *cellule*, Giciye *commune*, Gisenyi prefecture; at the "La Corniche" border, Rubavu commune, Gisenyi prefecture; and in Kiyovu *cellule*, Kigaliville prefecture, intending that they would be used in the campaign of killing Tutsi.

39. Giciye Roadblock : On a date uncertain in early May 1994, Protais Zigiranyirazo ordered and instigated soldiers, *Interahamwe*, and armed civilians to establish and command the roadblock next to his residence in Giciye *commune*, Gisenyi *prefecture*. Persons operating the roadblock were variously armed with guns, grenades and traditional weapons and controlled the traffic of persons fleeing from Rwanda to Zaïre. This stretch of road from Gitarama through Giciye-Karago-Mukamira was the main

commettre le massacre et a incité celles sur lesquelles il n'exerçait aucun contrôle *de facto* à le commettre. Tous ses actes ont été commis de concert avec les éléments de la Garde présidentielle, les gendarmes et les miliciens *Interahamwe* dans le but commun de tuer les Tutsis parce qu'ils étaient tutsis, pendant la durée d'une entreprise criminelle qui s'est étendue au moins du démarrage du convoi jusqu'au massacre des Tutsis sur chacune des collines susmentionnées.

En application des dispositions de l'article 6 (3) du Statut, Protais Zigiranyirazo est pénalement responsable des actes des éléments de la Garde présidentielle, des gendarmes et des miliciens *Interahamwe* allégués aux paragraphes 32 à 35, à la lumière des faits suivants :

37. Le rôle de premier plan décrit aux paragraphes 32 et 34 que Protais Zigiranyirazo a joué dans les convois témoigne qu'il était le supérieur hiérarchique des éléments de la Garde présidentielle, des gendarmes et des miliciens *Interahamwe*; l'intéressé exerçait un contrôle effectif sur les éléments de la Garde présidentielle, les gendarmes et les miliciens *Interahamwe*, comme précisé au paragraphe 3, en ce sens qu'il avait le pouvoir matériel de prévenir ou punir leur conduite criminelle; il savait que ses subordonnés s'apprêtaient à commettre les crimes qui lui sont imputés et qu'ils les avaient effectivement commis, mais n'a pas pris de mesures nécessaires et raisonnables pour prévenir ces crimes ni n'en a puni les auteurs.

Barrages routiers

38. A diverses dates situées entre avril et juillet 1994, Protais Zigiranyirazo non seulement a donné à des militaires, à des miliciens Interahamwe et à des civils armés l'ordre de mettre en place des barrages routiers tout près de chacune des trois résidences qu'il possédait dans la cellule de Gasiza (commune de Giciye, préfecture de Gisenyi), dans la zone frontière de la Corniche (commune de Rubavu, préfecture de Gisenyi) et dans la cellule de Kiyovu (préfecture de Kigali-Ville), mais encore les a incités à le faire, afin que ces barrages soient utilisés dans le cadre de la campagne de massacre des Tutsis.

39. Barrage routier de Giciye : A une date indéterminée au début du mois de mai 1994, Protais Zigiranyirazo a donné à des militaires, à des miliciens *Interahamwe* et à des civils armés l'ordre de mettre en place et tenir un barrage routier tout près de chez lui dans la commune de Giciye (préfecture de Gisenyi) et les a incités à le faire. Les personnes qui géraient le barrage routier portaient diverses sortes d'armes – armes à feu, grenades et armes traditionnelles – et contrôlaient le flux des populations fuyant

route of flight during April to July 1994; the Kigali to Gisenyi tarmac road via Ruhengeri was impassable due to fighting between the FAR and the RPF. Soldiers, *Interahamwe*, and armed civilians subject to Protais Zigiranyirazo ordered and instigated soldiers, *Interahamwe*, and armed civilians to kill numerous Tutsi at the Giciye Roadblock.

Witness statement by : SGA
Witness statement by : SGI
Witness statement by : SGK
Witness statement by : SGO
Witness statement by : SGP
Witness statement by : SGS
Witness statement by : AKN

40. Between April and July 1994, Protais Zigiranyirazo, visited various roadblocks in Gisenyi on numerous occasions, including the Giciye roadblock, and ordered and instigated soldiers, *Interahamwe*, and armed civilians to "work" and encouraged them by providing them with drinks and money to buy food. The word "work" was, during the events referred to in this Indictment, a coded reference for killing Tutsi and "moderate" Hutu.

Witness statement by : SGP
Witness statement by : AKN

41. On an unknown date in early April 1994, Protais Zigiranyirazo paid *Interahamwe* to dig a mass grave known as "the Pit." By so ordering them to act, he was instigating their actions. The Pit was situated behind the compound of Protais Zigiranyirazo's home in Giciye. The bodies of those killed near Protais Zigiranyirazo's home were thrown into the Pit in April and early May 1994. Thereafter in early May 1994 the bodies were removed from the Pit and dumped into the Basera river.

Witness statement by : SGO
Witness statement by : SGP

42. The "La Corniche" Roadblock : On a date uncertain in April 1994, *Interahamwe* militia mounted a roadblock on the "La Corniche" roadway in Gisenyi town leading toward the main border-crossing into Zaïre. As with the roadblocks mentioned in Kiyovu and Giciye, the "La Corniche" roadblock was situated in close proximity to one of Protais Zigiranyirazo's residences. The "La Corniche" roadblock was under the general control of *Interahamwe* leaders, including Omar Serushago, reporting to Colonel Nsengiyumva and Bernard Munyagishari. The roadblock was also manned by CDR-affiliated armed civilians, including Abuba, Bahati and Lionceau, and *gendarmes*, immigration police and customs officers. The purpose of the roadblock was to prevent Tutsi and "moderate" Hutu, characterised as accomplices of "the enemy," being Tutsi, from escaping across the border to Zaïre. The *Interahamwe* routinely checked persons passing through the roadblock on their way to the border crossing. Tutsi and "moderate" Hutu were not allowed to proceed and were removed to a near-

le Rwanda pour se réfugier au Zaïre. Le tronçon de route allant de Gitarama à Giciye, Karago et Mukamira sur lequel se situait ce barrage routier était le principal itinéraire suivi par les réfugiés du mois d'avril au mois de juillet 1994. En effet, la route goudronnée allant de Kigali à Gisenyi, en passant par Ruhengeri, était impraticable en raison des combats qui opposaient les FAR au FPR. Des militaires, des miliciens *Interahamwe* et des civils armés soumis à l'autorité de Protais Zigiranyirazo ont ordonné à des militaires, à des miliciens *Interahamwe* et à des civils armés de tuer de nombreux Tutsis au barrage routier de Giciye et les ont incités à le faire.

40. Entre avril et juillet 1994, Protais Zigiranyirazo s'est rendu à plusieurs reprises à divers barrages routiers mis en place dans la préfecture de Gisenyi, notamment à celui de Giciye, a ordonné aux militaires, miliciens *Interahamwe* et civils armés de «travailler», les a incités à le faire et les a encouragés en leur fournissant des boissons et de l'argent pour acheter des vivres. Pendant les faits visés dans le présent acte d'accusation, le terme «travailler» était un signe linguistique codé désignant le fait de tuer les Tutsis et les Hutus «modérés».

41. À une date indéterminée au début d'avril 1994, Protais Zigiranyirazo a payé des miliciens *Interahamwe* pour qu'ils creusent un charnier appelé la «Fosse». Pour leur avoir ainsi ordonné d'agir, il était l'instigateur de leurs actes. La Fosse se trouvait derrière sa concession à Giciye. Les corps des personnes tuées près de chez Protais Zigiranyirazo étaient jetés dans la Fosse en avril. Par la suite, ils ont été enlevés et jetés dans la rivière Basera au début du mois de mai 1994.

42. Barrage routier de la Corniche : À une date indéterminée en avril 1994, des miliciens *Interahamwe* ont mis en place dans la ville de Gisenyi un barrage routier sur la Corniche, route menant au principal poste-frontière marquant le point de passage au Zaïre. Comme les barrages de Kiyovu et de Giciye, le barrage routier de la Corniche se trouvait tout près de l'une des résidences de Protais Zigiranyirazo. Il était placé sous le contrôle général des chefs des *Interahamwe*, dont Omar Serushago, qui relevaient du colonel Nsengiyumva et de Bernard Munyagishari. Parmi les personnes qui le tenaient figuraient également des civils armés membres de la CDR, notamment Abuba, Bahati et Lionceau, ainsi que des gendarmes, des agents de la police des frontières et des douaniers. Ce barrage routier avait pour but d'empêcher les Tutsis et les Hutus «modérés», qualifiés de complices de «l'ennemi», c'est-à-dire des Tutsis, de traverser la frontière pour se réfugier au Zaïre. Les *Interahamwe* contrôlaient régulièrement les personnes qui passaient par le barrage routier pour se rendre au poste-fron-

by location and killed. Protais Zigiranyirazo was aware of the closed-border regime and ordered and instigated the *Interahamwe*, CDR-affiliated armed civilians, gendarmes, immigration police and customs officers to operate the roadblock to cause the killing of Tutsi and "moderate" Hutu.

Witness Statement by : SGO

Witness statement by : SFH

43. During June 1994, Protais Zigiranyirazo ordered and instigated the *Interahamwe*, gendarmes and immigration police who were manning the "La Corniche" roadblock at the Gisenyi-Goma border to kill Tutsis by asking them "to work" well.

Witness statement by : SFH

44. Kivovu Roadblock : On or about 7 April 1994, soldiers guarding the residence of Protais Zigiranyirazo in Kiyovu *cellule*, Kigali-ville prefecture, who were under his *de facto* control, ordered watchmen employed at homes in the neighbourhood to man a roadblock that was set up between Protais Zigiranyirazo's home and the adjacent Presbyterian church. Soldiers and *Interahamwe*, including Second Lt. Jean-Claude Seyoboka Bonke and Jacques Kanyamigezi, supervised the roadblock, the largest in the Kiyovu *cellule*. The civilians manning the roadblock were armed with machetes and clubs. Approximately one week later, in mid-April 1994, Protais Zigiranyirazo ordered and instigated soldiers, *Interahamwe* and armed civilians at the roadblock near his Kiyovu residence to search the homes in the neighbourhood and kill any Tutsi that were found. Protais Zigiranyirazo further ordered and instigated the soldiers and *Interahamwe* at the roadblock, including Second Lt. Jean-Claude Seyoboka Bonke and Jacques Kanyamigezi, who supervised the roadblock, to kill all Tutsi who attempted to pass through. Shortly thereafter, and on a continuing basis, soldiers and *Interahamwe* killed those who were identified as Tutsi, both in the neighbourhood and attempting to pass through the roadblock.

Witness statement by : DAS

Witness statement by : SGH

Criminal Responsibility

Protais Zigiranyirazo is criminally responsible for his own acts alleged in paragraphs 38-44 under the provisions of Article 6 (1) of the Statute based upon the following facts :

45. His actions in providing drinks and money for food to soldiers, *Interahamwe* and armed civilians as described in paragraph 40 and in paying the *Interahamwe* as described in paragraph 41 constituted the commission of acts that facilitated the killing, the creation of a relationship in the nature of that of an employer and employee giving him power to order, the ordering of persons over whom he had a superior relationship established by this provision of benefits, and the instigating by reward, and the aiding and abetting, of the killing and disposa1 of the bodies. Also as described

tière. Les Tutsis et les Hutus «modérés» n'étaient pas autorisés à poursuivre leur chemin : ils étaient conduits à un endroit situé non loin de là et tués. Sachant que la frontière était fermée, Protais Zigiranyirazo a donné aux miliciens *Interahamwe*, aux civils armés membres de la CDR, aux gendarmes, aux agents de la police des frontières et aux douaniers l'ordre de tenir le barrage routier et les a incités à agir de la sorte pour faire tuer les Tutsis et les Hutus «modérés».

43. Dans le courant du mois de juin 1994, Protais Zigiranyirazo a donné aux *Interahamwe*, aux gendarmes et aux agents de la police des frontières qui tenaient le barrage routier de la Corniche sur la limite séparant Gisenyi de Goma l'ordre de tuer les Tutsis et les a incités à le faire, en leur demandant de bien «travailler».

44. Barrage routier de Kiyovu : Le 7 avril 1994 ou vers cette date, des militaires qui gardaient la résidence de Protais Zigiranyirazo dans la cellule de Kiyovu (préfecture de Kigali-Ville) et étaient sous son contrôle *de facto* ont ordonné aux gardiens employés dans les concessions du quartier de tenir un barrage routier mis en place entre sa résidence et l'église presbytérienne qui la jouxtait. Ce barrage routier, qui était le plus grand dans la cellule de Kiyovu, était contrôlé par des militaires et des *Interahamwe*, notamment le sous-lieutenant Jean-Claude Seyoboka Bonke et Jacques Kanyamigezi. Les civils qui y montaient la garde étaient armés de machettes et de gourdins. Environ une semaine plus tard, à la mi-avril 1994, Protais Zigiranyirazo a donné aux militaires, aux miliciens *Interahamwe* et aux civils armés en faction au barrage routier mis en place près de chez lui dans la cellule de Kiyovu l'ordre de fouiller les maisons du quartier pour tuer tout Tutsi qu'ils y trouveraient et les a incités à agir de la sorte. Il a en outre ordonné aux militaires et aux *Interahamwe* en faction au barrage routier, dont le sous-lieutenant Jean-Claude Seyoboka Bonke et Jacques Kanyamigezi qui en assuraient le contrôle, de tuer tous les Tutsis qui tenteraient de le franchir et les a incités à agir de la sorte. Peu de temps après, les militaires et les *Interahamwe* se sont mis à tuer, sans discontinuer, les personnes identifiées comme étant des Tutsis qui se trouvaient dans le quartier ou tentaient de franchir le barrage routier.

Responsabilité pénale.

En application des dispositions de l'article 6 (1) du Statut, Protais Zigiranyirazo est pénalement responsable des actes personnels qui lui sont reprochés aux paragraphes 38 à 44, à la lumière des faits suivants :

45. En offrant des boissons et de l'argent destiné à l'achat de vivres aux militaires, aux *Interahamwe* et aux civils armés comme il est dit au paragraphe 40 et en payant les *Interahamwe* comme il est dit au paragraphe 41, Protais Zigiranyirazo a commis des actes qui non seulement ont facilité les massacres susvisés et la création entre lui et ces gens, de rapports semblables à ceux qui unissent un employeur à ses employés (rapports qui lui ont conféré le pouvoir de leur donner des ordres), mais encore lui ont permis de donner aux personnes placées sous son autorité, du fait de

in paragraphs 38-44, Protais Zigiranyirazo ordered soldiers, gendarmes, immigration police, customs officials, *Interahamwe*, and CDR-affiliated armed civilians over whom he had *de facto* control by reason of the relationship described in Paragraph **3,** instigated and aided and abetted those over whom he did not have *de facto* control, to commit the killings. All of his actions were committed in concert with soldiers, gendarmes, immigration police, customs officials and *Interahamwe* for the common purpose of killing Tutsis because they were Tutsis, for the period of a criminal enterprise that extended at least from the beginning of the establishment of the roadblocks by persons under his *de facto* control up to the killing of the Tutsis and the burial of their bodies as stated in paragraphs 38 through 44.

Witness statement by : SGA
Witness statement by : SGI
Witness statement by : SGK
Witness statement by : SGO
Witness statement by : SGP
Witness statement by : SGS
Witness statement by : AKN
Witness statement by : DAS
Witness statement by : SGH
Witness statement by : SGP
Witness statement by : SFH

Protais Zigiranyirazo is criminally responsible for the acts of the soldiers, gendarmes, Immigration police and *Interahamwe* alleged in paragraphs 38-44, under the provisions of Article 6 (3) of the Statute based upon the following facts :

46. Protais Zigiranyirazo was a superior to soldiers, *Interahamwe*, and armed civilians by reason of his establishment of a relationship in the nature of that of an employer and employee with them through the provision of benefits as described in paragraphs 40 and 41, and also had effective control over them and over immigration police and customs officials for the reasons described in Paragraph 1, in the sense that he had the material ability to prevent or punish their criminal conduct; and because he knew and had reason to know that his subordinates were about to commit and did commit the crimes imputed to him and failed to take necessary and reasonable measures to prevent such crimes and failed to punish the persons that committed them.

Witness statement by : SGA
Witness statement by : SGI
Witness statement by : SGK
Witness statement by : SGO
Witness statement by : SGP

ces avantages fournis, l'ordre de tuer et de se débarrasser des corps des victimes, d'inciter d'autres personnes à le faire par des récompenses, ainsi que de les aider et encourager à agir de la sorte. De même, comme exposé aux paragraphes 38 à 44, il a non seulement donné aux militaires, aux gendarmes, aux agents de la police des frontières, aux douaniers, aux *Interahamwe* et aux civils armés militants de la CDR sur lesquels il exerçait un contrôle *de facto* en raison des rapports indiqués au paragraphe 3 l'ordre de commettre les massacres, mais encore incité et aidé et encouragé les personnes sur lesquelles il n'exerçait aucun contrôle *de facto* à commettre ces massacres. Tous ses actes ont été commis de concert avec les militaires, les gendarmes, les agents de la police des frontières, les douaniers et les *Interahamwe* dans le but commun de tuer les Tutsis parce qu'ils étaient tutsis, pendant la durée d'une entreprise criminelle qui s'est étendue au moins du début de la mise en place des barrages routiers par des gens sur lesquels il exerçait un contrôle *de facto* jusqu'au massacre des Tutsis et à leur inhumation, comme indiqué aux paragraphes 38 à 44.

En application des dispositions de l'article 6 (3) du Statut, Protais Zigiranyirazo est pénalement responsable des actes des militaires, des gendarmes, des agents de la police des frontières et des *Interahamwe* allégués aux paragraphes 38 à 44, à la lumière des faits suivants :

46. Protais Zigiranyirazo était le supérieur hiérarchique des militaires, des *Interahamwe* et des civils armés en ce sens qu'il avait établi entre lui et eux des rapports semblables à ceux qui unissent un employeur à ses employés en leur accordant les avantages visés aux paragraphes 40 et 41 ; il exerçait un contrôle effectif sur eux ainsi que sur les agents de la police des frontières et les douaniers pour les raisons évoquées au paragraphe 3, en ce sens qu'il avait le pouvoir matériel de prévenir ou punir leur conduite criminelle ; il savait et avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre les crimes qui lui sont imputés et qu'ils les avaient effectivement commis, mais n'a pas pris de mesures nécessaires et raisonnables pour prévenir ces crimes ni n'en a puni les auteurs.

Witness statement by : SGS
Witness statement by : AKN
Witness statement by : DAS
Witness statement by : SGH
Witness statement by : SGP
Witness statement by : SFH

Count 5 : Murder as a crime against humanity

The Prosecutor of the International Criminal Tribunal for Rwanda charges Protais Zigiranyirazo with MURDER as a CRIME AGAINST HUMANITY, as stipulated in Article 3 (a) of the Statute, in that on or between the dates of 7 April 1994 and 14 July 1994, Protais Zigiranyirazo was responsible, individually and through the acts of his subordinates, for the murder, as part of a widespread or systematic attack against the civilian population, on political, ethnic or racial grounds, of three gendarmes at the Giciye roadblock, Gisenyi prefecture; of Stanislas Sinibagiwe, sometimes identified as Stanislas Simbizi; of members of the family of Jean-Sapeur Sekimonyo; and of members of the Bahoma Tutsi clan;

Concise Statement of Fact for Count 5 :

47. During the events referred to in this indictment, particularly from 6 April 1994 through 17 July 1994, there were throughout Rwanda widespread and for systematic attacks directed against a civilian population on political, ethnic or racial grounds. Notably, *Interahamwe* rnilitias engaged in a campaign of violence against Rwanda's civilian Tutsi population and against Hutu perceived to be politically opposed to the MRND. Hundreds of thousands of civilian Tutsi men, women and children and "moderate Hutu" were killed. The acts described in paragraphs 48 through 58 were part of these attacks.

48. Between 1 and 31 May 1994, Protais Zigiranyirazo ordered his son, Jean-Marie Vianney Makiza to kill three gendarmes that were detained by the *Interahamwe* at the Giciye roadblock. Following orders from his father, Jean-Marie Vianney Makiza, armed with a Kalashnikov gun, used the weapon to shoot and kill the gendarmes at the roadblock in front of the Zigiranyirazo Giciye residence. The gendarmes were travelling toward Gisenyi and were identified as Tutsi or characterized as RPF accomplices or infiltrators.

Witness statement by : SGC
Witness statement by : SGD
Witness statement by : SGO

49. Protais Zigiranyirazo further ordered and instigated several local residents to make false official reports of the killing about the killing of the three gendarmes. The false reports indicated that the gendarmes had been killed as defensive acts at the roadblock : in order to prevent an assault by one of them or to thwart their escape.

Cinquième chef d'accusation :
Assassinat constitutif de crime contre l'humanité

Le Procureur du Tribunal pénal international pour le Rwanda accuse Protais Zigiranyirazo D'ASSASSINAT constitutif de CRIME CONTRE L'HUMANITÉ, crime prévu à l'article 3 (a) du Statut, en ce que le 7 avril et le 14 juillet 1994 ou entre ces dates, Protais Zigiranyirazo a été responsable, par ses actes personnels et ceux de ses subordonnés, de l'assassinat, dans le cadre d'une attaque généralisée ou systématique dirigée contre une population civile en raison de son appartenance politique, ethnique ou raciale, de trois gendarmes au barrage routier de Giciye dans la préfecture de Gisenyi, de Stanislas Sinibagiwe, parfois appelé Stanislas Simbizi, des membres de la famille de Jean-Sapeur Sekimonyo et de membres du clan tutsi des Bahoma.

Exposé succinct des faits relatifs au cinquième chef d'accusation

47. À l'époque des faits visés dans le présent acte d'accusation, notamment du 6 avril au 17 juillet 1994, il y a eu partout au Rwanda des attaques généralisées et/ou systématiques dirigées contre une population civile en raison de son appartenance politique, ethnique ou raciale. En particulier, les *Interahamwe* ont lancé une campagne de violences contre la population civile tutsie et les Hutus considérés comme opposants politiques au MRND. Des centaines de milliers de civils tutsis – hommes, femmes et enfants – et de Hutus «modérés» ont été tués. Les actes mentionnés aux paragraphes 48 à 58 ont été commis dans le cadre de ces attaques.

48. Entre le 1er et le 31 mai 1994, Protais Zigiranyirazo a ordonné à son fils Jean-Marie Vianney Makiza de tuer trois gendarmes qui étaient détenus par les *Interahamwe* au barrage routier de Giciye. Donnant suite aux ordres de son père, Jean-Marie Vianney Makiza, qui était armé d'une kalachnikov, a utilisé cette arme pour abattre lesdits gendarmes au barrage routier en question situé devant la résidence de la famille Zigiranyirazo. Ces gendarmes se rendaient à Gisenyi et avaient été identifiés comme étant des Tutsis ou qualifiés de complices du FPR ou de personnes qui s'étaient infiltrées dans le pays.

49. Protais Zigiranyirazo a également ordonné à plusieurs habitants de la localité de faire des comptes rendus officiels mensongers sur ces assassinats et les a incités à agir de la sorte. Selon ces comptes rendus mensongers, les gendarmes avaient été tués à titre défensif au barrage routier : leur meurtre visait à prévenir des voies de

The reports also characterized the gendarmes as brigands, impostors or deserters from the battlefront. In ordering and instigating local residents to make the false reports, Protais Zigiranyirazo was aiding and abetting the killing of the gendarmes.

Witness statement by : SGA
Witness statement by : SGI

Criminal Responsibility

Protais Zigiranyirazo is criminally responsible for his own acts alleged in paragraphs 48-49 under the provisions of Article 6 (1) of the Statute based upon the following facts :

50. Protais Zigiranyirazo, as head of his family, had *de facto* control over his son, whom he ordered to commit the killings described in paragraph 48. He ordered those local residents over whom he had *de facto* control for the reasons set forth in paragraph 3, and instigated those over whom he did not have *de facto* control, to make the false reports. All his actions were committed in concert with his son for the common purpose of killing Tutsis because they were Tutsis or persons who were not willing to kill Tutsis, for the period of a criminal enterprise that extended at least from the time the order was given for the killing, and up to the time of the making of a false report regarding their killing.

Witness statement by : SGC
Witness statement by : SGD
Witness statement by : SGO
Witness statement by : SGA
Witness statement by : SGI

Protais Zigiranyirazo is criminally responsible for the acts of his son and the *Interahamwe* alleged in paragraphs 48, under the provisions of Article 6 (3) of the Statute based upon the following facts :

51. Protais Zigiranyirazo, by reason of his role of head of his family, had a superior relationship over his son, in the sense that he had the material ability to prevent or punish his son's criminal conduct; and because he knew or had reason to know that his son was about to commit the crimes imputed to him and he failed to take necessary and reasonable measures to prevent such crimes and failed to punish the person who committed them.

Witness statement by : SGC
Witness statement by : SGD
Witness statement by : SGO
Witness statement by : SGA
Witness statement by : SGI

fait de la part de l'un d'eux ou à contrecarrer leur projet d'évasion. Dans ces comptes rendus, les gendarmes étaient en outre qualifiés de brigands, d'imposteurs ou de déserteurs partis du front. Pour avoir ordonné à des habitants de la localité de déformer les faits et incité ces personnes à agir de la sorte, Protais Zigiranyirazo s'est rendu complice de l'assassinat des gendarmes.

Responsabilité pénale

En application des dispositions de l'article 6.1 du Statut, Protais Zigiranyirazo est pénalement responsable des actes personnels qui lui sont reprochés aux paragraphes 48 et 49, à la lumière des faits suivants :

50. En sa qualité de chef de famille, Protais Zigiranyirazo exerçait un contrôle *de facto* sur son fils à qui il a donné l'ordre de commettre les meurtres mentionnés au paragraphe 48. Il a ordonné aux habitants de la localité sur lesquels il exerçait un contrôle *de facto* pour les raisons exposées au paragraphe 3 de déformer les faits et a incité ceux sur lesquels il n'exerçait aucun contrôle *de facto* à agir aussi de la sorte. Tous ses actes ont été commis de concert avec son fils dans le but commun de tuer les Tutsis parce qu'ils étaient tutsis ou de tuer les personnes qui ne voulaient pas faire mourir les Tutsis, pendant la durée d'une entreprise criminelle qui s'est étendue au moins du moment où l'ordre de tuer a été donné jusqu'au moment où des comptes rendus mensongers ont été faits sur l'assassinat des gendarmes.

En application des dispositions de l'article 6 (3) du Statut, Protais Zigiranyirazo est pénalement responsable des actes de son fils et des *Interahamwe* allégués au paragraphe 48, à la lumière des faits suivants :

51. En sa qualité de chef de famille, Protais Zigiranyirazo était le supérieur hiérarchique de son fils, en ce sens qu'il avait le pouvoir matériel de prévenir ou punir la conduite criminelle de son fils; il savait ou avait des raisons de savoir que son fils s'apprêtait à commettre les crimes qui lui sont imputés, mais n'a pas pris de mesures nécessaires et raisonnables pour prévenir ces crimes ni n'en a puni l'auteur.

Killing of Stanislas Sinibagiwe

52. Protais Zigiranyirazo, on an unknown date during the month of June 1994, aided and abetted in the killing of Stanislas Sinibagiwe, former director of the *Imprimerie Scolaire*, by identifying him to *Interahamwe* that were controlling the "La Corniche" roadblock. Stanislas Sinibagiwe, sometimes identified as Stanislas Simbizi, had been previously targeted as an accomplice of the enemy in RTLM radio broadcasts. Protais Zigiranyirazo ordered and instigated the *Interahamwe* at the roadblock, to take Stanislas Sinibagiwe away and kill him. The *Interahamwe* removed Stanislas Sinibagiwe to the "Commune Rouge" and killed him. They later returned to the roadblock and reported to Protais Zigiranyirazo and to others that Stanislas Sinibagiwe had been killed.

Witness statement by : SFH

Criminal Responsibility

Protais Zigiranyirazo is criminally responsible for his own acts alleged in paragraph 52 under the provisions of Article 6 (1) of the Statute based upon the following facts :

53. As described in paragraph 52, Protais Zigiranyirazo ordered those *Interahamwe* over whom he had *de facto* control by reason of the relationship described in paragraph 3 and instigated others over whom he did have directed control. All of his actions were committed in concert with the *Interahamwe* for the common purpose of killing Stanislas Sinibagiwe because he was a moderate Hutu who opposed the killing of Tutsis, for the period of a criminal enterprise that extended at least from the identification of Stanislas Sinibagiwe up to the time that he was killed.

Witness statement by : SFH

Protais Zigiranyirazo is criminally responsible for the acts of the *Interahamwe* alleged in paragraph 52, under the provisions of Article 6 (3) of the Statute based upon the following facts :

54. Protais Zigiranyirazo's had effective control of the *Interahamwe* who killed Stanislas Sinibagiwe for the reasons set forth in paragraph 3 above, in the sense that he had the material ability to prevent or punish their criminal conduct; and because he knew and had reason to know that his subordinates were about to commit and did commit the crimes imputed to him and failed to take necessary and reasonable measures to prevent such crimes and failed to punish the persons that committed them.

Witness statement by : SFH

Tutsi FamiliesIClans

55. On a date uncertain in May 1994, Protais Zigiranyirazo ordered and instigated the *Interahamwe* militia to kill the family of Jean-Sapeur Sekimonyo whom he characterised as *Inyenzi.* The Sekimonyo family had sought refuge at the home of President Habyarimana in Karago commune. The *Interahamwe* carried out the order, killing the entire family, resulting in the deaths of more than 30 people.

Assassinat de Stanislas Sinibagiwe

52. À une date indéterminée au mois de juin 1994, Protais Zigiranyirazo a aidé et encouragé à tuer Stanislas Sinibagiwe, ancien directeur de l'Imprimerie scolaire, en donnant son signalement aux *Interahamwe* qui tenaient le barrage routier de la Corniche. Stanislas Sinibagiwe, parfois appelé Stanislas Simbizi, avait déjà été qualifié de complice de l'ennemi et pris pour cible de ce fait dans des émissions de la radio RTLM. Protais Zigiranyirazo a ordonné aux *Interahamwe* qui se trouvaient au barrage routier d'emmener Stanislas Sinibagiwe pour le tuer et les a incités à le faire. Ils l'ont emmené à la «commune rouge» où ils l'ont tué. Plus tard, ils sont rentrés au barrage routier pour annoncer à Protais Zigiranyirazo et à d'autres personnes qu'ils avaient tué Stanislas Sinibagiwe.

Responsabilité pénale

En application des dispositions de l'article 6 (1) du Statut, Protais Zigiranyiiuzo est pénalement responsable des actes personnels qui lui sont reprochés au paragraphe 52, à la lumière des faits suivants :

53. Comme exposé au paragraphe 52, Protais Zigiranyirazo a donné des ordres aux *Interahamwe* sur lesquels il exerçait un contrôle *de facto* en raison des rapports indiqués au paragraphe 3 et il a incité les autres sur lesquels il n'exerçait aucun contrôle *de facto* à agir. Tous ses actes ont été commis de concert avec les *Interahamwe* dans le but commun de tuer Stanislas Sinibagiwe au motif qu'en tant que Hutu «modéré», il s'opposait au massacre des Tutsis, pendant la durée d'une entreprise criminelle qui s'est étendue au moins du moment de l'identification de Stanislas Sinibagiwe jusqu'à celui de son assassinat.

En application des dispositions de l'article 6 (3) du Statut, Protais Zigiranyirazo est pénalement responsable des actes des *Interahamwe* allégués au paragraphe 52, à la lumière des faits suivants :

54. Protais Zigiranyirazo exerçait un contrôle effectif sur les *Interahamwe* qui ont tué Stanislas Sinibagiwe, pour les raisons exposées au paragraphe 3 ci-dessus, en ce sens qu'il avait le pouvoir matériel de prévenir ou punir leur conduite criminelle; il savait et avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre les crimes qui lui sont imputés et qu'ils les avaient effectivement commis, mais n'a pas pris de mesures nécessaires et raisonnables pour prévenir ces crimes ni n'en a puni les auteurs.

Familles et clans tutsis

55. À une date indéterminée en mai 1994, Protais Zigiranyirazo a ordonné aux miliciens *Interahamwe* de tuer la famille de Jean-Sapeur Sekimonyo qu'il qualifiait d'*Inyenzi* et les a incités à le faire. La famille Sekimonyo s'était réfugiée chez le Président Habyarimana dans la commune de Karago. En exécution de cet ordre, les *Interahamwe* ont tué tous les membres de ladite famille qui comptait plus de 30 personnes.

Witness Statement by : SGO

56. Towards the end of May 1994, Protais Zigiranyirazo ordered and instigated the *Interahamwe* to kill approximately eighteen members of the Bahoma Tutsi clan, who had sought refuge at his Giciye residence. The victims were related to one of Protais Zigiranyirazo's wives.

Witness Statement by : SGO

Criminal Responsibility

Protais Zigiranyirazo is criminally responsible for his own acts alleged in paragraph 55 and 56 under the provisions of Article 6 (1) of the Statute based upon the following facts :

57. As described in paragraph 55 and 56, he ordered the *Interahamwe* over whom he had *de facto* control by reason of the relationship described in Paragraph 1, and instigated those over whorn he did not have *de facto* control to make the arrests and commit the killing. Al1 his actions were committed in concert with the *Interahamwe* for the comrnon purpose of killing Tutsis because they were Tutsis, for the period of a criminal enterprise that extended at least fi-om time the first acts of ordering or instigation the arrests and killing, and up to the killing of the last victim in the Sekimonyo family or the Bahoma Tutsi clan.

Witness Statement by : SC0

Protais Zigiranyirazo is criminally responsible for the acts of the *Interahamwe* alleged in paragraphs 55 and 56, under the provisions of Article 6 (3) of the Statute based upon the following facts :

58. Protais Zigiranyiraz07s order to arrest the approximately eighteen members of the Bahoma Tutsi demonstrated a superior relationship over the *Interahamwe* who carried out the arrest, and because of his effective control, for the reasons described in Paragraph 3 above, over the Interahamwe who carried out the arrest and killing of the Sekimonyo family and the killing of the Bahoma Tutsi clan, in the sense that he had the material ability to prevent or punish theircriminal conduct; and because he knew and had reason to know that his subordinates were about to commit and did commit the crimes imputed to him and failed to take necessary and reasonable measures to prevent such crimes and failed to punish the persons that committed them.

Witness Statement by : SGO

The acts and omissions of Protais Zigiranyirazo detailed herein are punishable under Articles 22 and 23 of the Statute.

Signed at Arusha, this 31st day of August 2004.

[Signed] : Bongani Majola, Deputy Prosecutor

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56. Vers la fin du mois de mai 1994, Protais Zigiranyirazo a ordonné aux *Interahamwe* de tuer environ 18 membres du clan tutsi des Bahoma qui avaient trouvé refuge chez lui à Giciye et les a incités à le faire. Les victimes avaient des liens de parenté avec l'une des épouses de Protais Zigiranyirazo.

Responsabilité pénale

En application des dispositions de l'article 6 (1) du Statut, Protais Zigiranyirazo est pénalement responsable des actes personnels qui lui sont reprochés aux paragraphes 55 et 56, à la lumière des faits suivants :

57. Comme précisé aux paragraphes 55 et 56, il a donné aux *Interahamwe* sur lesquels il exerçait un contrôle *de facto* grâce aux rapports évoqués au paragraphe 1, l'ordre de procéder aux arrestations et aux massacres et incité ceux sur lesquels il n'exerçait aucun contrôle *de facto* à le faire. Tous ses actes ont été commis de concert avec les *Interahamwe* dans le but commun de tuer les Tutsis parce qu'ils étaient tutsis, pendant la durée d'une entreprise criminelle qui s'est étendue au moins du moment où il a commencé à donner l'ordre de procéder aux arrestations et aux massacres ou à inciter à le faire jusqu'au meurtre de la dernière victime appartenant à la famille Sekimonyo ou au clan tutsi des Bahoma.

En application des dispositions de l'article 6 (3) du Statut, Protais Zigiranyirazo est pénalement responsable des actes des *Interahamwe* allégués aux paragraphes 55 et 56, à la lumière des faits suivants :

58. L'ordre d'arrêter les quelques 18 membres du clan tutsi des Bahoma que Protais Zigiranyirazo avait donné témoigne qu'il était le supérieur hiérarchique des *Interahamwe* qui ont effectué l'arrestation; il exerçait un contrôle effectif, pour les raisons exposées au paragraphe 3 ci-dessus, sur les *Interahamwe* qui ont arrêté et tué les membres de la famille Sekimonyo et du clan tutsi des Bahoma, en ce sens qu'il avait le pouvoir matériel de prévenir ou punir leur conduite criminelle; il savait et avait des raisons de savoir que ses subordonnés s'apprêtaient à commettre les crimes qui lui sont imputés et qu'ils les avaient effectivement commis, mais n'a pas pris de mesures nécessaires et raisonnables pour prévenir ces crimes ni n'en a puni les auteurs.

Les actes et omissions de Protais Zigiranyirllzo décrits dans le présent acte d'accusation sont punissables conformément aux dispositions des articles 22 et 23 du Statut.

Arusha, le 31 août 2004

[Signé] : Bongani Majola, Procureur adjoint

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Ordonnance portant calendrier
Article 54 du Règlement de procédure et de preuve
2 septembre 2004 (TPIR-2001-73-R54)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente ; Flavia Lattanzi ; Florence Rita Arrey

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance III (la «Chambre»), composée des Juges Andrésia Vaz, Présidente, Flavia Lattanzi et Florence Rita Arrey ;

CONSIDÉRANT la requête du Procureur intitulée «Prosecutor's Conditional Motion for Leave to Amend Indictment», déposée le 31 août 2004 ;

CONSIDÉRANT le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve du Tribunal (le «Règlement») et particulièrement les Articles 54 et 73 (E) du Règlement qui disposent respectivement :

> Article 54
>
> A la demande d'une des parties ou de sa propre initiative, un juge ou une Chambre de première instance peut délivrer les ordonnances, citations à comparaître, assignations, injonctions, mandats et ordres de transfert nécessaires aux fins de l'enquête, de la préparation ou de la conduite du procès.
>
> Article 73 (E)
>
> La partie défenderesse dépose sa réponse au plus tard cinq jours après la date à laquelle elle a reçu la requête.

LA CHAMBRE,

ORDONNE à la défense, au cas où elle souhaiterait répondre à la requête du Procureur, de le faire dans les cinq jours à compter de la réception de la version française de ladite requête.

Arusha, 2 septembre 2004

[Signé] : Andrésia Vaz ; Flavia Lattanzi ; Florence Rita Arrey

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Decision on Motion for Protective Measures for Defence Witnesses 9 September 2004 (ICTR-2001-73-R75)

(Original : French)

Trial Chamber III

Judges : Andrésia Vaz. Presiding; Flavia Lattanzi; Florence Rita Arrey

Protais Zigiranyirazo – Protective measure requested for witnesses, Measures requested out of the jurisdiction of the Chamber, States obligation to cooperate with The Tribunal as emanating from a Chapter VII resolution of the Security Council, Protection of witnesses enshrined in the international instruments governing the relationship between the Tribunal and States – Motion partially granted

International Instrument cited :

Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the International Tribunal for Rwanda, art. XVIII; Rules of Procedure and Evidence, rules 69 (A) and 75 (A); Statute, art. 14, 19, 20, 21 and 28

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

SITTING as Trial Chamber III (the "Chamber") composed of Judges Andrésia Vaz, presiding, Flavia Lattanzi and Florence Rita Arrey;

BEING SEIZED OF the *Requête pour les mesures de protection des témoins de la défence* [Motion for Protective Measures for Defence witnesses], filed on 3 February 2004, and of the *Addendum à la Requête pour des measures de protection des témoins de la Défense*, filed on 5 February 2004 (the "Motion" and the "Addendum" respectively);

CONSIDERING "The Prosecutor's Response to the *Requête pour des mesures de protection des témoins de la défense* and *Addendum*" filed on 10 February 2004, and the "Reply to the Prosecutor's Response to the Motion for Protective Measures for Defence Witnesses", filed on 11 February 2004 (the "Response" and the "Reply" respectively);

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence of the Tribunal (the "Rules"), particularly Articles 14, 19, 20 and 21 of the Statute, and Rules 69 (A) and 75 (A) of the Rules;

DECIDES as follows, based solely on the written briefs of the parties, pursuant to Rule 73 (A) of the Rules.

Décision portant protection des témoins à décharge 9 septembre 2004 (TPIR-2001-73-R75)

(Original : Français)

Chambre de première instance III

Juges : Andrésia Vaz, Présidente; Flavia Lattanzi; Florence Rita Arrey

LE TRIBUNAL PÉNAL INTERNATIONAL POUR LE RWANDA (le «Tribunal»),

SIÉGEANT en la Chambre de première instance III (la «Chambre»), composée des Juges Andrésia Vaz, Présidente, Flavia Lattanzi et Florence Rita Arrey;

SAISI de la «Requête pour des mesures de protection des témoins de la défense», déposée le 3 février 2004, et de «l'addendum à la requête pour des mesures de protection des témoins de la défense», déposée le 5 février 2004 (respectivement la «requête» et le «mémoire ampliatif»);

CONSIDÉRANT «The Prosecutor's Response to 'Requête pour des mesures de protection des témoins de la Défense' and 'addendum'», déposée le 10 février 2004, et la «Réplique à la 'Prosecutor's response' à la requête pour des mesures de protection des témoins de la défense», déposée le 11 février 2004 (respectivement la «réponse» et la «réplique»);

CONSIDÉRANT le Statut du Tribunal (le «Statut») et le Règlement de procédure et de preuve du Tribunal (le «Règlement»), et particulièrement les articles 14, 19, 20 et 21 du Statut, et les articles 69 (A), 75 (A) du Règlement;

STATUE comme suit, sur la base des mémoires écrits des parties, conformément à l'Article 73 A) du Règlement.

SUBMISSIONS OF THE PARTIES

Defence submissions

1. The Defence submits that the Tribunal's protection system for witnesses is inadequate and guarantees neither the anonymity nor the safety of Defence witnesses or, worse still, protection against possible extradition to Rwanda. In support of its argument, the Defence cites the case of a protected Defence witness in the case of The Prosecutor v. Emmanual Ndindabahizi, living in a European country, who came to testify before the Tribunal in November 2003, and whom Tanzania wanted to extradite to Rwanda.

2. The defence alleges that its witnesses run a real risk of being extradited to Rwanda. The fact that there are no legal safeguards to protect defence witnesses from such an eventuality prevents them from testifying. Consequently, in order to ensure that they appear in court, the Defence is requesting written guarantees from the Chamber.

3. Thus, the Defence prays the Chamber to render a decision enjoining the Registrar :

(a) to obtain from Tanzania guarantees that no Defence witness will be extradited to Rwanda;

(b) to obtain from Rwanda a guarantee that it will refrain from requesting the United Republic of Tanzania to extradite Defence witnesses;

(c) to order the holding of an ADAD-assisted inquiry into the extradition incident that occurred in *Ndindabahizi*;

(d) to make public the results of the approaches and the guarantees obtained;

(e) to report back to the Chamber in writing.

4. The Defence emphasized that witnesses from Rwanda must benefit from full and specific protection. The Defence further requests that protection of witnesses from African countries other than Rwanda, and those from non-African countries, should be guaranteed.

5. The Defence is of the opinion that a legal solution that would ensure that its witnesses are protected from being prosecuted by the courts of countries like Rwanda and Tanzania, and a possible request for extradition to Rwanda, would be to issue them safe conducts during their stay in Arusha.

6. In the light of the above, the Defence prays the Chamber to order the protective measures contained in Paragraph 42 of its Motion.

Prosecutor's submissions

7. The Prosecutor agrees that the same protective measures granted Prosecution witnesses by the Trial Chamber Decision of 25 February 2003 may also be granted to Defence witnesses.

ARGUMENTS DES PARTIES

Arguments de la défense

1. La défense soutient que le système de protection des témoins du Tribunal est défaillant et ne garantit ni l'anonymat ni la sécurité des témoins de la Défense, encore moins une protection contre une éventuelle extradition vers le Rwanda. Elle cite, à l'appui de cet argument, le cas d'un témoin protégé de la défense dans l'affaire *Procureur c. Emmanuel Ndindabahizi*, résidant dans un pays européen, venu témoigner devant le Tribunal en novembre 2003, et que la Tanzanie entendait extrader vers le Rwanda.

2. La défense allègue que le risque encouru par ses témoins de se voir extrader vers le Rwanda demeure réel. Le fait qu'aucune garantie légale ne protège les témoins de la défense contre une telle éventualité est une entrave à leur comparution. Aussi pour assurer celle-ci, la défense demande à la Chambre des garanties écrites.

3. Ainsi la défense prie la Chambre de rendre une décision ordonnant au Greffier :

a) d'obtenir de la Tanzanie des garanties de non extradition vers le Rwanda;

b) d'obtenir du Rwanda qu'il renonce à demander à la Tanzanie l'extradition de tout témoin de la défense;

c) d'ordonner une enquête avec la collaboration de l'ADAD sur l'épisode de l'extradition survenue dans l'affaire *Ndindabahizi*;

d) de rendre publics les résultats des démarches et des garanties obtenues;

e) de fournir à la Chambre un rapport écrit.

4. La défense souligne que les témoins en provenance du Rwanda doivent bénéficier d'une protection complète et spécifique. Elle demande également que la protection des témoins en provenance de pays africains autres que le Rwanda et celle des témoins venant de pays non africains soit garantie.

5. La défense considère que la solution juridique permettant de protéger ses témoins contre toute emprise juridictionnelle d'États tels que le Rwanda et la Tanzanie, et toute éventuelle demande d'extradition vers le Rwanda, consiste à leur délivrer des sauf- conduits pendant leur séjour à Arusha.

6. Compte tenu de tous ces faits, la défense sollicite de la Chambre qu'elle ordonne les mesures de protection demandées au paragraphe 42 de sa requête.

Arguments du Procureur

7. Le Procureur ne voit aucune objection à ce que les mêmes mesures de protection accordées aux témoins de l'accusation par la Chambre dans sa décision du 25 février 2003, le soient également en faveur des témoins de la défense.

8. The Prosecutor submits that it would be inappropriate for the Tribunal to request any form of guarantees from the Office of the United Nation High Commissioner for Refugees without first determining whether voluntary cooperation was available.

9. The Prosecutor underscored that the issuance of "safe-conducts" is at the discretion of the Witnesses and Victims Support Section, and that such a practice cannot be changed in the instant case.

10. Besides, the Prosecutor is of the opinion that it would be inappropriate for the Chamber to intervene to protect Defence witnesses against a possible extradition to Rwanda. A solution should be found to this problem within the framework of the Agreement between the Tribunal and the United Republic of Tanzania. Furthermore, the Prosecutor suggests that the Defence should identify those who are on the lists of accused individuals published by the Rwandan government to establish if its potential witnesses are on such list. On that basis, confidential communication to the Registrar would enable him to personally obtain from the Tanzanian authorities the guarantee that no State will prevent them from testifying before the Tribunal.

Defence Reply

11. The Defence submits that it does not know the details of the Rwandan Government's many lists of alleged wanted criminals.

12. The Defence criticizes the Prosecution for avoiding to raise before the Tribunal the key issue of Defence witness confidence. The Defence is of the view that the Chamber should be concerned about the interference of the Rwandan Government in the business of the Tribunal and acknowledge its role as guarantor of a fair trial for the Accused. Thus, the Defence reiterates the submissions and requests in its Motion.

DELIBERATION

13. In addition to the protective measure requested for its witnesses, the Defence submitted some other motions relating to the case of the *Prosecutor v. Emmanuel Ndindabahidzi*. Trial Chamber III holds that all the Defence motions relating thereto are inadmissible.

14. The Defence further requests measures, which, by their general nature, do not fall within the jurisdiction of the Chamber, which restricts itself to issuing appropriate protective measures for Defence witnesses. Therefore, such requests are also inadmissible. However, the Chamber notes that the current provisions on testimonies already offer some of the guarantees that the Defence is seeking.

15. The Chamber will now examine the other Defence requests in the light of article 21 of the Statute and Rule 75 of the Rules. The Chamber notes that the Accused's right to a public hearing as provided for in Article 20 only applies subject to Article 21 of the Statute.

8. Le Procureur estime qu'il serait inopportun pour le Tribunal de solliciter une quelconque garantie du Haut Commissariat des Nations Unies pour les réfugiés sans avoir déterminé au préalable si cet organisme n'est pas disposé à coopérer volontairement.

9. Le Procureur souligne que la question de la délivrance des sauf-conduits est du ressort de la Section d'aide aux victimes et aux témoins, et qu'il n'y a pas lieu en l'espèce de modifier une telle pratique.

10. En outre, le Procureur est d'avis qu'il est inapproprié pour la Chambre d'intervenir pour protéger les témoins de la Défense contre une éventuelle extradition vers le Rwanda. La solution à cette question devrait être envisagée dans le cadre de l'Accord signé entre le Tribunal et la République-Unie de Tanzanie. Par ailleurs, le Procureur suggère que la Défense identifie sur les listes des personnes accusées de crimes publiées par le gouvernement rwandais, si ses potentiels témoins y figurent. Sur cette base, des demandes confidentielles auprès du Greffier devraient lui permettre d'obtenir des autorités tanzaniennes la garantie qu'aucun État n'entravera leur comparution devant le Tribunal.

Réplique de la défense

11. La défense souligne qu'elle n'a pas une connaissance détaillée des multiples listes établies par les autorités rwandaises au sujet des prétendus criminels recherchés.

12. Elle reproche au Procureur d'éviter de poser la question clef de la confiance des témoins de la défense devant le Tribunal. La défense estime que la Chambre devrait se préoccuper de l'ingérence du gouvernement Rwandais dans le fonctionnement du Tribunal, et assumer son rôle de garant du droit de l'accusé à un procès juste et équitable. Pour ce faire, la Défense réitère les arguments et les demandes contenues dans sa requête.

DÉLIBÉRATIONS

13. En dehors des mesures de protection demandées pour ses témoins, la défense présente un certain nombre de requêtes liées à l'affaire *Le Procureur* c. *Emmanuel Ndindabahizi*. La Chambre de première instance III considère que toutes les demandes de la défense y relatives sont irrecevables.

14. La défense sollicite aussi des mesures qui, par leur caractère général ne sont pas du ressort de la Chambre qui se limite à prendre les mesures appropriées pour la protection des témoins de la défense. Ces demandes sont donc également irrecevables. Cependant, la Chambre note que le droit en vigueur qui régit le témoignage offre déjà un certain nombre des garanties que la défense recherche.

15. La Chambre va maintenant examiner les autres demandes de la défense à la lumière des articles 21 du Statut et 75 du Règlement. Elle note que le droit à la publicité des audiences que l'article 20 reconnaît à l'accusé ne s'applique que sous réserve des dispositions de l'article 21 du Statut.

16. The Chamber recalls that Article 28 of the Statute obliges States to cooperate with the Tribunal. States are required to comply with this provision, which emanates from a UN Security Council Resolution under Chapter VII of the United Nations Charter. Unless a State fails to fulfil this obligation, or more specific requests are submitted before the Chamber, the Defence cannot seek an order from the Chamber requesting cooperation from States. Wherefore, the Defence's request is denied.

17. The Chamber further reminds the Defence that legal guarantees for the protection of witnesses are enshrined in the international instruments governing the relationship between the Tribunal and States. Article XVIII of the Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the International Tribunal for Rwanda provides that the host county shall not exercise its "criminal jurisdiction" over witnesses and experts appearing before the Tribunal and that

> "[w]itnesses and experts referred to in paragraph 1 above shall not be subjected by the host country to any measure which may affect the free and independent exercise of their functions for the Tribunal".

The willingness of the United Republic of Tanzania to fulfil its commitments was reaffirmed in its letter to the Registar dated 24 November 2003. Consequently, the Chamber holds the view that no other legal guarantee for the protection of witnesses is required. Wherefore, the Defence's request relating to the issuance of safe-conducts to Defence witnesses is denied.

18. Pursuant to Article 75 of the Rules, and to ensure a fair trial for the Accused and equality between the parties, while bearing in mind the situation of potential Defence witnesses and the unstable security situation in the Great Lakes Region in general, the Chamber considers that it would be necessary to order appropriate protective measures for Defence witnesses.

THE CHAMBER

GRANTS the following protective measures for all Defence witnesses or potential witnesses residing in Rwanda, in African countries other than Rwanda and outside the continent of Africa, who have not expressly waived their rights to benefit from protective measures and to all other Defence witnesses or potential witnesses who submit a request;

I. ORDER that the names, addresses and whereabouts of, and any other information serving to identify the protected persons referred to in this Decision appearing in any existing file of the Tribunal be kept under seal by the Registry;

II. ORDERS that the names, addresses and whereabouts of, and any other information serving to identify the protected persons referred to in the present Decision be communicated only to the Witness and Victims Support Section ("WVSS") in conformity with established procedures and only in order to implement protection measures for these witnesses;

16. La Chambre rappelle qu'en vertu de l'article 28 du Statut, les Etats ont l'obligation de coopérer avec le Tribunal, et les Etats sont supposés mettre en œuvre cette disposition qui résulte d'une résolution du Conseil de sécurité agissant dans le cadre du Chapitre VII de la Charte des Nations Unies. Sauf à rapporter qu'un Etat ne s'est pas plié à cette obligation, ou à saisir la Chambre de demandes plus spécifiques, la Défense ne saurait prétendre à une ordonnance de la Chambre requérant la coopération des Etats. La demande de la défense doit dès lors être rejetée.

17. La Chambre rappelle en outre à la défense que des garanties légales de protection de témoins existent dans les textes juridiques internationaux régissant les rapports entre le Tribunal et les Etats. L'article XVIII de l'Accord entre les Nations Unies et la République-Unie de Tanzanie concernant le siège du Tribunal dispose que le pays hôte n'exerce pas sa «juridiction criminelle» sur les «témoins et experts comparaissant devant le Tribunal» et que «le pays hôte ne prend à l'égard des témoins et experts visés au paragraphe 1 aucune mesure qui pourrait compromettre l'exercice libre et indépendant de leurs fonctions auprès du Tribunal». La volonté de la République-Unie de Tanzanie de respecter ces engagements à l'égard du Tribunal a été réaffirmée comme il ressort de la lettre du Greffier en date du 24 novembre 2003. Par conséquent, la Chambre est d'avis qu'aucune autre garantie légale de protection des témoins n'est nécessaire. La demande de la Défense relative à la délivrance de sauf-conduits aux témoins à décharge doit dès lors être rejetée.

18. La Chambre considère que sur la base de l'article 75 du Règlement, pour garantir à l'accusé un procès équitable, et dans le souci d'assurer l'égalité entre les parties, tenant compte la situation propre des témoins potentiels de la défense et de la situation de sécurité en général instable dans la région des Grands Lacs, il échet de prendre les mesures de protection appropriées pour les témoins à décharge.

PAR CES MOTIFS,

LA CHAMBRE

ACCORDE les mesures de protection suivantes en faveur de tous les témoins ou potentiels témoins à décharge résidant actuellement au Rwanda, dans des pays africains autres que le Rwanda et en dehors du continent africain, qui n'ont pas expressément renoncé au bénéfice des mesures de protection et de tous les autres témoins à décharge ou potentiels témoins si ceux-ci en font la demande :

I. ORDONNE au Greffe de placer sous scellés les noms des personnes protégées par la présente décision, leurs adresses, les lieux où elles se trouvent et les autres renseignements permettant de les identifier, partout où ils figurent dans les dossiers du Tribunal;

II. ORDONNE au Greffe de ne communiquer les noms de toutes les personnes protégées par la présente décision, leurs adresses, les lieux où elles se trouvent et tout autre renseignement permettant de les identifier qu'au personnel de la Section d'aide aux victimes et aux témoins, conformément à la procédure établie, et à seule fin de mettre en œuvre les mesures de protection ordonnées en faveur de ces personnes;

III. ORDERS that the names, addresses and whereabouts of the protected persons referred to in the present Decision and any other information identifying them in any existing files at the Tribunal be kept under seal;

IV. ORDERS the prohibition of the disclosure to the public or media of the names, addresses and whereabouts of the protected persons referred to in the present Decision and of any other information serving to identify them, in particular information contained in supporting documentation or in the records filed with the Registry, to mention but a few, and DECIDES that the present measure shall remain in force after the conclusion of the trial.

V. ORDERS the Prosecutor not to disclose, discuss or reveal to any individual or entity, other than his immediate colleagues, directly or indirectly, any documents or any other information contained in the records filed with the Registry and any other information for which disclosure has been ordered above, subject to details contained in measure VI;

VI. ORDERS the Prosecutor :

(i) to indicate to the Witness and Victims Support Section of the Tribunal all his immediate colleagues who will have access to the protected information in compliance with the non-disclosure measures mentioned above;

(ii) to advise the said Section in writing of any changes in the composition of the immediate team of the Prosecutor;

(iii) to ensure that any immediate colleague leaving the team has remitted all documents and information capable of contributing to the identification of the protected persons referred to in the present Decision;

VII. ORDERS the prohibition of the disclosure to the Prosecutor of the names, addresses and whereabouts of the protected witnesses or potential witnesses referred to in the present Decision and of any other information serving to identify them and any information contained in supporting documentation or in the records filed with the Registry more than 21 days before they testify.

VIII. ORDERS that the Prosecutor shall make a written request, on reasonable notice, to the Defence when it wishes to contact any of the protected witnesses referred to in the present decision; upon reception of such a request, the Defence shall facilitate such contact provided that the person (or his or her parents or guardian where he or she is under the age of 18 years) consents to an interview with the Prosecutor;

IX. ORDERS the public and the media not to make any audio recording, film or take photographs or sketches of the protected persons referred to in the present Decision without leave of the chamber or the consent of the witness;

X. ORDERS that the immediate members of the Prosecutor's team shall not attempt to make any independent determination of the identity of any of the protected persons referred to in the present Decision or encourage or otherwise aid any person in any other way to attempt to determine the identity of any such protected persons;

III. ORDONNE que les noms de toutes les personnes protégées par la présente décision, leurs adresses, les lieux où elles se trouvent et tout autre renseignement permettant de les identifier qui figurent dans les dossiers du Tribunal soient placés sous scellés;

IV. ORDONNE de ne pas révéler au public ou aux medias le nom de toute personne protégée par la présente décision, son adresse, le lieu où elle se trouve et tout autre renseignement susceptible de faire connaître son identité, notamment les informations figurant dans les pièces justificatives ou dans les dossiers déposés au Greffe, pour ne citer que ceux-là, et DECIDE que la présente mesure restera en vigueur après la clôture du procès;

V. ORDONNE au Procureur de ne pas communiquer ni examiner ni révéler directement ou indirectement à toute personne physique ou morale, à l'exception de ses collaborateurs immédiats, tout document ou tout renseignement figurant dans un document ou encore tout autre renseignement dont la divulgation a été prescrite ci-dessus, sous réserve des précisions constitutives de la mesure VI;

VI. ORDONNE au Procureur :

i) D'indiquer à la Section d'aide aux victimes et aux témoins du Tribunal tous les membres de l'équipe immédiate du Procureur qui auront accès à tout renseignement protégé en application des mesures de non divulgation susmentionnées;

ii) D'informer par écrit ladite Section de tout changement survenu dans la composition de l'équipe immédiate du Procureur;

iii) De veiller à ce que tout membre appelé à quitter cette équipe restitue à son départ toutes les pièces susceptibles de faire découvrir l'identité des personnes protégées par la présente décision;

VII. ORDONNE de ne pas communiquer au Procureur les noms des témoins cités ou potentiels protégés par la présente décision, leurs adresses, les lieux où ils se trouvent et tout autre renseignement susceptible de révéler leur identité, ainsi que tout renseignement de cette nature figurant dans les pièces justificatives déposées au Greffe, plus de 21 jours avant la date prévue pour leur déposition à l'audience;

VIII. ORDONNE au Procureur d'informer la défense par écrit et en temps utile lorsqu'il souhaite prendre contact avec toute personne protégée par la présente décision; après réception d'une telle notification, la défense prend immédiatement les dispositions nécessaires pour faciliter ce contact, sous réserve du consentement préalable de la personne protégée ou, si celle-ci est âgée de moins de 18 ans, de celui d'un de ses parents ou de son tuteur légal;

IX. ORDONNE au public et aux medias de ne pas enregistrer sur bande sonore les propos des personnes protégées par la présente décision sur un support audio, de filmer ces personnes, de les photographier ou de les dessiner, sauf avec l'autorisation de la Chambre ou le consentement du témoin;

X. ORDONNE à tout membre de l'équipe immédiate du Procureur de ne pas tenter de découvrir par lui-même l'identité de toute personne protégée par la présente décision ou d'encourager ou aider de toute autre manière quiconque à tenter de découvrir l'identité d'une telle personne;

XI. MAKES IT CLEAR that the measures ordered in V and XI above shall not be interpreted as preventing the Prosecutor from conducting normal investigations, as long as such investigations are not a deliberate attempt aimed at identifying the protected witnesses;

XII. ORDERS the Defence to designate a pseudonym for all the protected persons referred to in the present Decision to be used whenever referring to such witnesses in Tribunal proceedings, communication and discussions between the parties and the public;

XIII. DENIES the other measures sought in the Motion.

Arusha, 9 September 2004.

[Signed] : Andrésia Vaz; Flavia Lattanzi; Florence Rita Arrey

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XI. PRÉCISE que les mesures V et XI ci-dessus ne doivent pas être interprétées comme interdisant au Procureur de mener des enquêtes normales pour autant que celles-ci ne constituent pas une manœuvre délibérée visant à découvrir l'identité de témoins qu'elle sait protégés;

XII. ORDONNE à la défense d'attribuer à chaque personne protégée par la présente décision un pseudonyme par lequel elle sera désignée dans le cadre de la procédure devant le Tribunal, dans les communications et les échanges de vues entre les parties au procès et vis-à-vis du public;

XIII. REJETTE la requête pour le surplus.

Arusha, le 9 septembre 2004

[Signé] : Andrésia Vaz; Flavia Lattanzi; Florence Rita Arrey

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ICTR Activities
From 1 January to 31 December 2004

Judges :

Appeals Chamber : Mehmet Güney (Turkey), Theodore Meron (United-States), Florence Ndepele Mwachande Mumba (Zambia), Fausto Pocar (Italy), Wolfgang Schomburg (Germany), Mohamed Shahabuddeen (Guinea), Inés Monica Weinberg de Roca (Argentina)

Trial Chamber : Florence Rita Arrey (Cameroun), Charles Michael Dennis Byron (Saint-Kitts-et-Nevis), Solomy Balungi Bossa (Ouganda), Asoka de Zoysa Gunawardana (Sri Lanka), Sergey Alekseevich Egorov (Russian Federation), Asoka de Zoysa Gunawardana (Sri Lanka), Flavia Lattanzi (Italy), Winston C. Matanzima Maqutu (Lésotho), Eric MÆse (Norway), Lee Gacuiga Muthoga (Kenya), Khalida Rachid Khan (Pakistan), Arlette Ramaroson (Madagascar), Jai Ram Reddy (Fiji), William Hussein Sekule (Tanzania), Emile Francis Short (Ghana), Andrésia Vaz (Senegal), Lloyd George Williams (Saint-Kitts-et-Nevis)

Registrar : Adama Dieng (Senegal)

***

Activités du TPIR du 1er janvier au 31 décembre 2004

Juges :

Chambre d'appel : Mehmet Güney (Turquie), Theodore Meron (Etats-Unis d'Amérique), Florence Ndepele Mwachande Mumba (Zambie), Fausto Pocar (Italie), Wolfgang Schomburg (Allemagne), Mohamed Shahabuddeen (Guyana), Inés Monica Weinberg de Roca (Argentine)

Chambre de première instance : Florence Rita Arrey (Cameroun), Charles Michael Dennis Byron (Saint-Kitts-et-Nevis), Solomy Balungi Bossa (Ouganda), Asoka de Zoysa Gunawardana (Sri Lanka), Sergey Alekseevich Egorov (Fédération de Russie), Asoka de Zoysa Gunawardana (Sri Lanka), Flavia Lattanzi (Italie), Winston C. Matanzima Maqutu (Lesotho), Eric MÆse (Norvège), Lee Gacuiga Muthoga (Kenya), Khalida Rachid Khan (Pakistan), Arlette Ramaroson (Madagascar), Jai Ram Reddy (Fiji), William Hussein Sekule (Tanzanie), Emile Francis Short (Ghana), Andrésia Vaz (Sénégal), Lloyd George Williams (Saint-Kitts-et-Nevis)

Greffier : Adama Dieng (Sénégal)

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A. Amended Indictments or New Indictments in 2004

1. Amended or Redacted Indictments in 2004

Case n°	Accused	Date on which the Indictment was amended or redacted	Original Counts	Amended or redacted part
ICTR-95-1B	Mikaeli Muhimana	22 January 2004[1]	Genocide, Crimes against Humanity, Violation of Article 3 common to the 1949 Geneva Conventions and violation of the 1977 Additional Protocol II	- new counts : rape as a crime against humanity and complicity in genocide in the alternative to the charge of genocide - Increase of the factual allegations (now describing the place and date of events, the presence of other persons, and the names of victims, in respect of four counts) - Prosecution theory of criminal liability enhanced
ICTR-99-52	Jean Bosco Barayagwiza, Ferdinand Nahimana et Joseph Nzirorera	3 februari 2004	Genocide or in the alternative, complicity in genocide, extermination as a crime against humanity and murder as a crime against humanity	- Addition of facts to existing charges
ICTR-2001-76	Aloys Simba	10 May 2004	Genocide, Complicity in genocide, Conspiracy to commit genocide, Crimes against Humanity, Violation of Article 3 common to the 1949 Geneva Conventions and violation of the 1977 Additional Protocol II	- Withdrawal of the Counts of Genocide and Complicity in Genocide against François-Xavier Nzuwonemeye and Innocent Sagahutu - Withdrawal of the Count of persecution as a Crime Against Humanity against all Accused - Withdrawal of the Count of inhumane acts as a Crime Against Humanity against all Accused - Addition of the count of murder as a Crime and Humanity for all the Accused - Addition of the count of murder as Violation of Article 3 Common to the Geneva Convention and Additional Protocol II - Clarification of Augustin Ndindiliyimana's rank (Major)
ICTR-2000-56	Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu	23 August 2004	Complicity in genocide, Conspiracy to commit genocide, Direct and public incitement to commit genocide, Murder and Persecution as Crimes against Humanity	- Minor corrections

[1] Corrigendum on the 3rd of February 2004.

A. Actes d'accusation modifiés ou émis par le Procureur en 2004

1. Actes d'accusation modifiés ou caviardés en 2004

N° de l'affaire	Accusé(s)	Date à laquelle l'acte d'accusation a été modifié ou caviardé	Chefs d'accusation initiaux	Contenu de la modification ou du caviardage
ICTR-95-1B	Mikaeli Muhimana	22 janvier 2004[1]	Génocide, Crimes contre l'humanité, Violations de l'article 3 commun aux Conventions de Genève de 1949 et au Protocole Additionnel II de 1977	- Nouveaux chefs d'accusation : viol en tant que crime contre l'humanité et complicité de génocide en tant que chef alternatif à celui de génocide - Développement des éléments factuels (Indication des lieux et dates des événements, de la présence d'autres personnes, et du nom des victimes relativement à 4 chefs d'accusation) - Précision de la théorie du Procureur quant à la responsabilité criminelle
ICTR-99-52	Jean Bosco Barayagwiza, Ferdinand Nahimana et Joseph Nzirorera	3 février 2004	Génocide ou alternativement complicité de génocide, extermination en tant que crime contre l'humanité et meurtre en tant que crime contre l'humanité	- Addition de nouveaux faits en supports des chefs d'accusation existants
ICTR-2001-76	Aloys Simba	10 mai 2004	Génocide, Complicité de génocide, Entente en vue de commettre le génocide, Crime contre l'humanité, Violations de l'article 3 commun aux Conventions de Genève de 1949 et au Protocole Additionnel II de 1977	- Retrait des chefs d'accusation de Génocide et de Complicité de génocide contre François-Xavier Nzuwonemeye et Innocent Sagahutu - Retrait du chef d'accusation de persécution en tant que crime contre l'humanité contre tous les accusés - Retrait du chef d'accusation concernant d'autres actes inhumains en tant que crime contre l'humanité contre tous les accusés - Ajout du chef d'accusation de meurtre en tant que crime contre l'humanité contre tous les accusés - Ajout du chef d'accusation de meurtre en tant que violations de l'article 3 commun aux Conventions de Genève de 1949 et au Protocole Additionnel II de 1977 - Clarification du rang militaire d'Augustin Ndindiliyimana rank (Major)
ICTR-2000-56	Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye et Innocent Sagahutu	23 août 2004	Complicité de génocide, Entente en vue de commettre le génocide, Incitation directe et publique à commettre le génocide, Meurtre et persécution en tant que crimes contre l'humanité	- Corrections mineures

[1] Rectificatif au 3 février 2004.

ICTR-2001-72	Simon Bikindi	31 August 2004	Conspiracy to commit genocide, genocide, or alternatively complicity in genocide, crimes against humanity (extermination, murder)	- Increase of the accuracy of the pleading of personal responsibility pursuant to Article 6 (1) of the Statute - Development of the factual allegations - Addition of elements relating to the command responsibility pleadings - Precision of the nature and the purpose of the joint criminal enterprise - Precision of the facts supporting the factual allegation that the Accused was a powerful and influential businessman - Addition of factual basis supporting the allegations of a conspiracy with Agathe Kanziga - Addition of facts and circumstances permitting inference that the Accused participated in a conspiracy to commit genocide
ICTR-2001-73	Protais Zigiranyirazo	31 August 2004	Genocide, Complicity in the genocide, Murder as crime against humanity	- Addition of the counts of : Rape as a Crime against Humanity; Murder as a Violation of Article 3 Common to the Geneva Conventions of 1949 and Additional Protocol II of 1977 and Rape as a Violation of Article 3 Common to the Geneva Conventions of 1949
ICTR-97-31	Tharcisse Renzaho	20 September 2004	Genocide	- Addition of the counts of Complicity in the genocide (alternative count) and Extermination as a Crime Against Humanity - Clarification of the responsibility of the Accused - Development of the factual allegations
ICTR-2001-66	Jean Mpambara	27 November 2004	Genocide, Conspiracy to commit genocide, Complicity in genocide, Direct and public incitement to genocide, Crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and of 1977 Additional Protocol II	- Development of the factual allegations
ICTR-98-44	Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba	23 January 2004 18 February 2004	Génocide, Crimes contre l'humanité et Violations de l'article 3 commun aux Conventions de Genève de 1949 et au Protocole Additionnel II de 1977	- Nouveaux chefs d'accusation : viol en tant que crime contre l'humanité et Complicité de génocide comme chef d'accusation alternatif à l'accusation de génocide - Développement des éléments factuels (Indication des lieux et dates des événements, de la présence d'autres personnes, et du nom des victimes relativement à 4 chefs d'accusation) - Précision de la théorie du Procureur quant à la responsabilité criminelle

ICTR-2001-72	Simon Bikindi	31 août 2004	Entente en vue de commettre le génocide, Génocide ou alternativement Complicité de génocide, Crimes contre l'humanité (extermination et meurtre)	- Précision apportée au plaidoyer du Procureur quant à la responsabilité personnelle de l'article 6 (1) du Statut - Développement des allégations factuelles - Addition d'éléments concernant la responsabilité en tant que supérieur hiérarchique - Précision de la nature et de l'objet de l'entreprise criminelle commune - Précision des faits supportant l'allégation que l'accusé était un businessman puissant et influent - Ajout de base factuelle supportant l'allégation de conspiration avec Agathe Kanziga - Ajout de faits et circonstances permettant d'inférer l'entente en vue de commettre le génocide
ICTR-2001-73	Protais Zigiranyirazo	31 août 2004	Génocide, Complicité de génocide, Meurtre en tant que Crime contre l'humanité	- Ajout des chefs de viol en tant que crime contre l'humanité, de meurtre en tant que violations de l'article 3 commun aux Conventions de Genève de 1949 et au Protocole Additionnel II de 1977 et de viol en tant que violations de l'article 3 commun aux Conventions de Genève de 1949
ICTR-97-31	Tharcisse Renzaho	20 septembre 2004	Génocide	- Ajout des chefs d'accusation de Complicité de génocide (chef d'accusation alternatif) et d'Extermination en tant que crime contre l'humanité - Clarification de la responsabilité de l'accusé - Développent des allégations factuelles
ICTR-2001-66	Jean Mpambara	27 novembre 2004	Génocide, Entente en vue de commettre le génocide, Complicité de génocide, Incitation directe et publique à commettre le génocide, Crimes contre l'humanité et sérieuses violations de l'article 3 commun aux Conventions de Genève de 1949 et au Protocole Additionnel II de 1977	- Développent des allégations factuelles
ICTR-98-44	Edouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera et André Rwamakuba	23 janvier 2004 18 février 2004	Génocide, Crimes contre l'humanité et Violations de l'article 3 commun aux Conventions de Genève de 1949 et au Protocole Additionnel II de 1977	- Nouveaux chefs d'accusation : viol en tant que crime contre l'humanité et Complicité de génocide comme chef d'accusation alternatif à l'accusation de génocide - Développement des éléments factuels (Indication des lieux et dates des événements, de la présence d'autres personnes, et du nom des victimes relativement à 4 chefs d'accusation) - Précision de la théorie du Procureur quant à la responsabilité criminelle

2. New Indictments in 2004

Case n°	Accused	Date of the Indictment	Date of the Decision confirming the Indictment	Counts
ICTR-2004-81	Ephrem Setako	22 March 2004	22 March 2004	Genocide; Complicity in Genocide; Murder as a Crime against Humanity; Extermination as a Crime against Humanity; and War Crimes

B. Final Judgements on First Instance or Appeals pronounced by the Tribunal in 2004

Case n°	Accused	Judgment	Content of the decision	Appeals Judgment	Place of detention
ICTR-99-54A	Jean de Dieu Kamuhanda	22 January 2004	Guilty of Genocide and Extermination as a Crime against Humanity Sentenced to imprisonment for remainder of his life	19 September 2005 Appeal dismissed	Jean de Dieu Kamuhanda is serving his sentence in Mali.
ICTR-97-36	Emmanuel Bagambiki, Samuel Imanishimwe and André Ntagerura	25 February 2004	Emmanuel Bagambiki : Conditional release	Emmanuel Bagambiki : 8 February 2006, Acquittal confirmed	Emmanuel Bagambiki : Released
			Samuel Imanishimwe : Sentenced to 27 years imprisonment	Samuel Imanishimwe : 7 July 2006 Sentence reduced to 12 years	Samuel Imanishimwe : Released after the completion of its sentence.
			André Ntagerura : Conditional release	André Ntagerura : 8 February 2006, Acquittal confirmed	André Ntagerura : Released
ICTR-2001-64	Sylvestre Gacumbitsi	17 June 2004	Guilty of Genocide, Extermination and Rape as Crimes Against Humanity Sentenced to 30 years imprisonment	7 July 2006 Sentence increased to imprisonment for remainder of his life	Sylvestre Gacumbitsi is serving his sentence in Mali.
ICTR-96-14	Eliezer Niyitegeka	15 May 2003	Guilty of Genocide, Conspiracy to Commit Genocide, direct and public incitement to commit genocide, Crimes against humanity (murder, extermination and other inhumane acts) Sentenced to imprisonment for the remainder of his life	9 July 2004 Appeal dismissed	Eliezer Niyitegeka is serving his sentence in Mali.
ICTR-2001-71	Emmanuel Ndindabahizi	15 July 2004	Guilty of Genocide, Extermination and Murder as a Crime Against Humanity Sentenced to imprisonment for the remainder of his life	16 January 2007 Appeal dismissed	Emmanuel Ndindabahizi is serving his sentence in Benin.
ICTR-96-10 and ICTR-96-17	Gérard and Elizaphan Ntakirutimana	19 February 2003	Gérard Ntakirutimana : Guilty of genocide Sentenced to 25 years imprisonment Elizaphan Ntakirutimana : Guilty of genocide Sentenced to 10 years imprisonment	13 December 2004	Gérard Ntakirutimana is serving his sentence in Benin. Elizaphan Ntakirutimana deceased at AICC Hospital Arusha, Tanzania having been Released after completion of sentence on the 6th December 2006.

2. NOUVEAUX ACTES D'ACCUSATION ÉMIS EN 2004

N° de l'affaire	Accusé(s)	Date de l'acte d'accusation	Date de confirmation de l'acte d'accusation	Chefs d'accusation
ICTR-2004-81	Ephrem Setako	22 mars 2004	22 mars 2004	Génocide, Complicité de génocide, Meurtre en tant que crime contre l'humanité, Extermination en tant que crime contre l'humanité et Crimes de guerre

B. Jugements ou appels relatifs à un jugement rendus par le Tribunal en 2004

N° de l'affaire	Accusé	Jugement portant condamnation	Contenu de la décision	Décision rendue en appel	Lieu de détention
ICTR-99-54A	Jean de Dieu Kamuhanda	22 janvier 2004	Coupable de génocide et d'extermination en tant que crime contre l'humanité Condamné à l'emprisonnement à vie	19 septembre 2005 Appel rejeté	Jean de Dieu Kamuhanda purge sa peine au Mali.
ICTR-97-36	Emmanuel Bagambiki, Samuel Imanishimwe et André Ntagerura	25 février 2004	Emmanuel Bagambiki : Libération conditionelle	Emmanuel Bagambiki : 8 février 2006, Acquittement confirmé	Emmanuel Bagambiki : Libéré
			Samuel Imanishimwe Condamné à 27 ans d'emprisonnement	Samuel Imanishimwe : 7 juillet 2006 Peine réduite à 12 ans d'emprisonnement	Samuel Imanishimwe : Libéré après avoir purgé sa peine
			André Ntagerura : Libération conditionelle	André Ntagerura : 8 février 2006, Acquittement confirmé	André Ntagerura : Libéré
ICTR-2001-64	Sylvestre Gacumbitsi	17 juin 2004	Coupable de génocide et d'extermination en tant que crime contre l'humanité Condamné à 30 ans d'emprisonnement	7 juillet 2006 Peine augmentée à l'emprisonnement à vie	Sylvestre Gacumbitsi purge sa peine au Mali.
ICTR-96-14	Eliezer Niyitegeka	15 mai 2003	Coupable de génocide, Entente en vue de commettre le génocide, Incitation directe et publique à commettre le génocide, Crimes contre l'humanité (meurtre, extermination et autres actes inhumains) Condamné à l'emprisonnement à vie	9 juillet 2004 Appel rejeté	Eliezer Niyitegeka purge sa peine au Mali.
ICTR-2001-71	Emmanuel Ndindabahizi	15 juillet 2004	Coupable de génocide et d'extermination en tant que crime contre l'humanité Condamné à l'emprisonnement à vie	16 janvier 2007 Appel rejeté	Emmanuel Ndindabahizi purge sa peine au Benin.
ICTR-96-10 and ICTR-96-17	Gérard et Elizaphan Ntakirutimana		Gérard Ntakirutimana Coupable de génocide Condamné à 25 ans d'emprisonnement Elizaphan Ntakirutimana : Coupable de génocide Condamné à 10 ans d'emprisonnement	13 décembre 2004	Gérard Ntakirutimana purge sa peine au Benin Elizaphan Ntakirutimana est décédé à l'hôpital AICC à Arusha, en Tanzanie après avoir purgé sa peine au 6 décembre 2006

Some statistical figures on the International Criminal Tribunal on the 31st December 2004

- Budget granted by the United Nations General Assembly to the ICTR (A/58/253, 13 January 2004) : 111.029,950 $ net
- Number of files in progress : 36 concerning 60 Accused
- Number of detainees at the ICTR Detention Facility Unit (on 31 December 2004) : 60
- Number of Decisions pronounced by the Tribunal (including scheduling orders, decisions on the assignment of judges, etc.) : 530 different decisions (334 solely in English, 59 solely in French and 137 available in both languages)
- Number of sentencing judgement : 6
- Number of final sentencing judgement : 2

Le Tribunal pénal international en quelques chiffres au 31 décembre 2004

- Budget alloué par l'Assemblée Générale des Nations Unies (A/58/253, 13 janvier 2004) : 111.029,950 $ net
- Nombre de dossiers en cours : 36 concernant 60 accusés
- Nombre d'accusés détenus au Quartier pénitentiaire du TPIR (au 31 décembre 2004) : 60
- Nombre de décisions rendues par le Tribunal (y compris les décisions portant calendrier, assignation de juges à une chambre, ...) : 530 décisions différentes (334 uniquement en anglais, 59 uniquement en français et 137 disponibles dans les deux langues)
- Nombre de jugement portant condamnation : 6
- Nombre de décisions définitives : 2