6/39/H Bis

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

LA CHAMBRE D'APPEL

Before : **Judge Claude JORDA, Presiding**
Judge Lal Chand VOHRAH
Judge Mohamed SHAHABUDDEEN
Judge Rafael NIETO-NAVIA
Judge Fausto POCAR

ICTR-99-52-A

Registrar : **Mr Agwu U. OKALI**

6-1/39/H Bis

Decision of : **5 septembre 2000**

13.09.2000

Hassan NGEZE
(Appelant)
Case No. ICTR 97-27-AR72

and

Ferdinand NAHIMANA
(Appelant)
Affaire n° ICTR 96-11-AR72

v
THE PROSECUTOR
(Respondent)

ICTR Appeals Chamber
Date: 13/Sept/2000
Action: filed & transmitted
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DECISION ON THE INTERLOCUTORY APPEALS

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M. William T. EGBE
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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 ("the Appeals Chamber" and "the Tribunal" respectively);

NOTING the appeals by Ferdinand Nahimana against the following three Decisions:

1. The "Decision on the Prosecutor's Request for Leave to File an Amended Indictment" delivered on 5 November 1999 by Trial Chamber I ("the first impugned Decision");

2. The "Decision on the Prosecutor's Motion for Joinder" delivered on 30 November 1999 by Trial Chamber I ("the second impugned Decision");

3. The "Decision on the Defence Preliminary Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence" delivered on 12 July 2000 by Trial Chamber I ("the third impugned Decision");

NOTING the Notices of Appeal and the supporting documents relating thereto filed by Ferdinand Nahimana, namely:

1. The "*Acte d'appel contre la Décision de la Chambre de premičre instance I en date du 5 novembre 1999 dans l'affaire* Procureur contre Ferdinand Nahimana *(ICTR-96-11-I)*" filed on 16 November 1999 by Ferdinand Nahimana against the first impugned Decision ("the first Notice of Appeal");

2. The "Additional and Amendment Brief in Support of Ferdinand Nahimana's Appeal from the 5 November 1999 Decision of Trial Chamber I" filed on 14 December 1999 by Ferdinand Nahimana in support of the first Notice of Appeal;

3. The "Notice of Appeal against the 30 November 1999 Decision of Trial Chamber I in the Matter of *The Prosecutor vs. Ferdinand Nahimana* ICTR-96-11-I" filed on 7 December 1999 by Ferdinand Nahimana against the second impugned Decision ("the second Notice of Appeal");

4. The "Mémoire en réplique de la Défense dans le cadre de la procédure d'appel contre la Décision de la Chambre de première instance I du 5 novembre 1999

autorisant le Procureur à modifier l'Acte d'accusation" filed on 17 May 2000 by Ferdinand Nahimana against the first impugned Decision;

5. The "Acte d'appel contre la Décision rendue le 12 juillet 2000 par la Chambre de première instance I rejetant la Requête en exceptions préjudicielles déposées par la Défense" filed on 19 July 2000 by Ferdinand Nahimana against the third impugned Decision ("the third Notice of Appeal");

NOTING the appeals by Hassan Ngeze against the following three Decisions:

1. The "Decision on the Prosecutor's Request for Leave to Amend the Indictment" delivered on 5 November 1999 by Trial Chamber I ("the fourth impugned Decision");

2. The oral Decision dismissing the Motions for disqualification and the objections based on lack of jurisdiction which was delivered on 5 November 1999 by Trial Chamber I ("the fifth impugned Decision");

3. The "Decision on the Prosecutor's Motion for Joinder" of Ferdinand Nahimana and Hassan Ngeze delivered on 30 November 1999 by Trial Chamber I ("the second impugned Decision");

NOTING the Notice of Appeal filed by Hassan Ngeze, namely:

1. The "Notice of Appeal and Appellant's Brief Relating to Objections Based on Lack of Jurisdiction under Rule 72 of the Rules" filed on 13 November 1999 by Hassan Ngeze against the fourth impugned Decision ("the fourth Notice of Appeal");

2. The "Notice of Appeal Relating to Objections Based on Lack of Jurisdiction (Rule 72)" filed on 15 November 1999 by Hassan Ngeze against the fourth impugned Decision ("the fifth Notice of Appeal");

3. The "Notice of Appeal Relating to an Objection Based on Lack of Jurisdiction (Rule 72 and following, Rules of Procedure and Evidence)" filed on 2 December 1999 by Hassan Ngeze ("the sixth Notice of Appeal");

4. The "Requête en appel relative aux exceptions d'incompétence (concernant la Décision de jonction d'instances du 30 novembre 1999 (article 27 du Règlement))" filed on 10 December 1999 by Hassan Ngeze ("the seventh Notice of Appeal");

NOTING the Orders delivered on 2 June 2000 by the Appeals Chamber ordering Ferdinand Nahimana and Hassan Ngeze to file schedules of all the issues raised on appeal and to confine their appeals exclusively to objections based on lack of jurisdiction ("the Orders to Consolidate");

NOTING the "Recapitulatory Brief in Support of Appeals Lodged by Ferdinand Nahimana against the Trial Chamber's Decisions of 5 November 1999 and 30 November 1999" filed on 12 June 2000 by Ferdinand Nahimana pursuant to the Order to Consolidate ("Nahimana's Recapitulatory Brief");

NOTING Nahimana's Recapitulatory Brief laying grounds of appeal in that:

1. In the first impugned Decision, Trial Chamber I had ruled *ultra petita* on the Motions submitted by the Prosecution ("the first ground");

2. In the first and second impugned Decisions, the Trial Chamber had overstepped the bounds of its temporal jurisdiction ("the second ground");

3. In its first impugned Decision, the Trial Chamber had acted *ultra vires* by basing itself, in order to deliver its Decision, on submissions which the Prosecution had been time-barred from filing in its defence and had not been disclosed to the Defence ("the third ground");

4. In its first impugned Decision, the Trial Chamber had acted *ultra vires* by considering itself empowered to grant leave for new charges to be added to the indictment solely based on allegations by the Prosecutor ("the fourth ground");

NOTING the "*Mémoire récapitulatif des arguments de la Défense relativement aux différentes Requêtes en appel déposées dans l'affaire ICTR 97 27 I conformément à l'ordonnance du 2 juin 2000 du Président de la Chambre d'appel du TPIR*" filed on 9 June 2000 by Hassan Ngeze pursuant to the Order to Consolidate ("Ngeze's Recapitulatory Brief");

NOTING Ngeze's Recapitulatory Brief and its Annexes setting forth the following grounds of appeal:

1. Annex 1. Appeal against the fourth impugned Decision on the following grounds: (i) lack of temporal jurisdiction; (ii) lack of jurisdiction for having acted *ultra vires*; (iii) lack of jurisdiction of the Trial Chamber to rule *ultra petita* on matters brought

before it; (iv) lack of jurisdiction of the Trial Chamber to replace the Judge who confirmed the indictment; (v) lack of jurisdiction of the Trial Chamber to rule in any subsequent proceedings;

2. Annex 2. Appeal against the fifth impugned Decision on the following grounds: (i) lack of jurisdiction of Trial Chamber I arising from the partiality of the Judges; (ii) lack of jurisdiction of Trial Chamber I under Rule 15 (C) of the Rules of Procedure and Evidence and seeking the disqualification of Judge Pillay;

3. Annex 3. Appeal against the second impugned Decision on the following grounds: (i) lack of jurisdiction of the Trial Chamber to rule on the joinder Motion whereas Notice of Appeal had been lodged against the Decision of 5 November 1999 granting leave to amend the indictment; (ii) lack of jurisdiction of the Chamber to rule on the joinder Motion in the absence of prima facie evidence; (iii) lack of jurisdiction of the Chamber to rule on the basis of an unconfirmed indictment;

NOTING that Rule 72 (D) of the Tribunal's Rules of Procedure and Evidence ("the Rules") in force at that time provides that decisions on preliminary motions are without appeal save when the Chamber has dismissed an objection based on lack of jurisdiction, in which case an appeal lies of right;

CONSIDERING that the purpose of an objection based on lack of jurisdiction is to challenge the very basis on which jurisdiction is exercised;

NOTING the first ground of Annex 1 of Ngeze's Recapitulatory Brief and the second ground of Nahimana's Recapitulatory Brief against, respectively, the fourth impugned Decision and the first impugned Decision, delivered on the same date by Trial Chamber I in relation to the Tribunal's temporal jurisdiction;

NOTING the other grounds of appeal set forth in Nahimana's and Ngeze's Recapitulatory Briefs based on alleged errors which have not vitiated the basis of the Tribunal's jurisdiction;

FINDING on that basis that all the grounds of appeal except the first ground of Annex 1 of Hassan Ngeze's Recapitulatory Brief and the second ground of Ferdinand Nahimana's Recapitulatory Brief are inadmissible as they do not fall within the scope of Rule 72 (D) of the Rules;

NOTING that Article 7 of the Statute of the Tribunal restricts the Tribunal's temporal

jurisdiction to "a period beginning on 1 January 1994 and ending on 31 December 1994";

CONSIDERING therefore that no one may be indicted for a crime that was not committed between 1 January and 31 December 1994;

CONSIDERING however that the above cannot prevent an indictment from making reference, as an introduction, to crimes previously committed by an accused;

NOTING the decision by the Trial Chamber not to refer to events prior to 1994 except for historical purposes or as information and that it would not hold any accused accountable for crimes committed prior to 1994;

CONSIDERING that the question of the Tribunal's temporal jurisdiction does indeed fall within the scope of application of Rule 72 (D) but that in the instant case the question lacks interest in that the Appeals Chamber is convinced that the Trial Chamber will not use events prior to 1994 as the sole factual basis for a count of the indictment; and that therefore the Trial Chamber did not overstep its temporal jurisdiction;

FOR THESE REASONS

DISMISSES the appeals.

Judge Lal Vohrah and Judge Raphael Nieto-Navia append a joint separate opinion; Judge Mohamed Shahabuddeen appends a separate opinion.

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

[signed]

Claude Jorda,
President of the Chamber

Done at The Hague, 5 September 2000.

[Seal of the Tribunal]

JOINT SEPARATE OPINION OF JUDGE LAL CHAND VOHRAH AND JUDGE RAFAEL NIETO-NAVIA

1. We have reservations in respect of today's Decision[1] only in relation to the finding made as to the Appellants' argument that the amended indictments exceed the temporal jurisdiction of the Tribunal.[2] We wish to explain the reasons why we are unable to agree with the approach taken.

2. Both Appellants have argued that certain of the charges in their respective amended indictments include allegations of crimes that fall outside the temporal jurisdiction of the Tribunal. In particular, they argue that certain counts in the amended indictments specifically refer to events occurring prior to 1994 and that the acts referred to are presented as constituent elements of the crimes with which they are charged.[3] When this matter was raised at first instance, the Trial Chamber found in respect of *Ferdinand Nahimana*:

> 27. The Trial Chamber notes that some of the allegations in the proposed amended indictment do fall outside the period 1 January 1994 to 31 December 1994. However, the Trial Chamber accepts the Prosecutor's submission that she intends to rely on these allegations in proving the ingredients of the offences which were allegedly committed within the temporal jurisdiction of the Tribunal.
>
> 28. The Trial Chamber recognises the possibility that these allegations may be subsidiary or interrelated allegations to the principal allegation in issue and thus may have probative or evidentiary value. The Trial Chamber is therefore of the view that it is premature to address the relevance and admissibility of these allegations at this stage of proceedings. The appropriate stage will be at the trial of the accused.[4]

3. It found in respect of *Hassan Ngeze*:

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[1] *Ngeze & Nahimana*, "Decision on Interlocutory Appeals", to which this opinion is appended ("Decision").
[2] Ground 1 in Annex 1 in the *Ngeze Consolidated Brief* and Ground 2 in the *Nahimana Consolidated Brief* (as referenced in the Decision).
[3] *Nahimana Consolidated Brief*, paras. 55-69; *Ngeze Consolidated Brief*, paras. 1-14.
[4] "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", *The Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-T, 5 November 1999, paras. 27 and 28. *See* also, "Decision on the Defence Preliminary Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence", *The Prosecutor V. Ferdinand Nahimana,* Case No. ICTR-96-11-T, 12 July 2000, p. 4: "The Chamber is fully aware of the temporal limits placed upon it by the Statute. However, information that falls outside the temporal jurisdiction of the Tribunal may be useful in helping the accused and the Chamber to appreciate the context of the alleged crimes, particularly due to the complexity of the events that occurred in Rwanda, during 1994. Furthermore, the Chamber is of the view that the proper stage to determine the admissibility and evidential value, if any, of the paragraphs that contain information about events that occurred prior to 1 January 1994, is during the assessment of evidence. Accordingly, these are matters that the Chamber will consider at the trial of the accused. For these reasons, the above mentioned paragraphs may remain in the indictment, and reference to these paragraphs may remain in the counts."

> After careful review of the [relevant] paragraphs, the Chamber holds that many of the events, while related to a time period preceding 1994, provide a relevant background and a basis for understanding the accused's alleged conduct in relation to the Rwandan genocide of 1994....Thus, such information is directly relevant to events that occurred in 1994. The Chamber has considered the totality of the facts alleged and has noted that the Prosecution does not rely solely on the information in the paragraphs cited by the Defence, but also on facts related to the accused's alleged criminal conduct during 1994. Moreover, the Trial Chamber holds that an assessment of the acts alleged in the indictment is an evidentiary matter, the truth of which must be proved at trial.[5]

4. In the case of both Appellants, the Trial Chamber accepted the Prosecution's assertions and it expressed satisfaction that inclusion of these events in the amended indictments did not fall outside the temporal jurisdiction of the Tribunal because the Prosecution merely intended to refer to them to prove the ingredients of offences which were allegedly committed within the temporal jurisdiction of the Tribunal. Similarly, the Decision briefly notes the Trial Chamber's findings and states that it is satisfied that "the Trial Chamber will not rely upon events occurring prior to 1994 as the independent basis of a count and therefore the temporal jurisdiction has not been exceeded".[6]

5. We do not doubt the ability of the trial Judges to properly apply the law and consider facts and evidence in their appropriate context, including their ability to accurately apply the findings of the Decision and their own of 5 November 1999. Nevertheless, we are of the view that reference to these facts, if any, should henceforth be located outside paragraphs underlying the specific counts of the indictments.

6. The essential point to be noted is that this Tribunal has a restricted and clearly defined temporal jurisdiction. This applies without exception to all crimes charged, including inchoate or continuing crimes. Temporal jurisdiction is defined in the Statute in Article 1 (Competence of the International Tribunal for Rwanda),[7] Article 7 (Territorial and Temporal Jurisdiction)[8] and Article 15(1) (The Prosecutor)[9] which provide that the temporal

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[5] "Decision on the Prosecutor's Request for Leave to Amend the Indictment", *The Prosecutor v. Hassan Ngeze,* Case No. ICTR-97-27-I, 5 November 1999, para. 3.

[6] Decision, p. 6.

[7] "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute."

[8] "The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994."

jurisdiction of the Tribunal is limited to adjudication of crimes within the subject-matter jurisdiction of the Tribunal committed between 1 January and 31 December 1994.

7. The Tribunal's subject-matter jurisdiction includes not only war crimes, crimes against humanity and genocide[10] but also the separate and independent crimes of conspiracy to commit genocide and direct and public incitement to commit genocide, so-called inchoate or continuing offences, with which the Appellants have been charged.[11] In addition, Article 6(1) of the Statute provides for individual criminal responsibility in respect of 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." With inchoate crimes in particular, it can be difficult to ascertain when all of the constituent elements of the offence exist so that a potential problem arises if it is intended that a conviction will be based upon not just one defined event occurring on a specific date but upon a series of events or acts which took place over an extended period of time.

8. Conspiracy is an example of an offence that may be carried out over an extensive period of time. In such cases (as the instant), what weight should be placed on events which occurred before 1 January 1994? What is the impact of a statutory limitation to the temporal jurisdiction of the Tribunal on offences such as conspiracy or incitement to commit genocide? Is it intended that the limitations to the Tribunal's jurisdiction should apply in relation to these crimes such that evidence of pre-1994 incitement or conspiracy to commit genocide is excluded even when the alleged crimes were completed in 1994?

9. The Statute does not expressly define how its jurisdiction should be interpreted in relation to continuing or inchoate offences such as conspiracy or incitement. At the same time, there is no provision providing an exception to the temporal limitation in respect of these offences.

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[9] "The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."

[10] Articles 2-4 of the Statute provide for prosecution of genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, respectively.

[11] Article 2(3) provides: "The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide."

10. On a plain reading of the language of the Statute, the limitation on the Tribunal's temporal jurisdiction is clear: "The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994."[12] The "ordinary meaning" of this phrase is to us unambiguous and stipulates a precise period of time over which the Tribunal exercises this jurisdiction.[13] Therefore, an accused may not be charged with or convicted of a crime that took place before 1 January 1994 or after 31 December 1994, regardless of its nature.

11. There is no express guidance in relation to the temporal limitation on inchoate crimes, and therefore the intention of the Security Council, as a confirming indicator of the object and purpose of the Statute should guide the Tribunal in interpreting *lacunae* or ambiguities, if any.[14]

12. In construing this intention, it is helpful initially to consider certain views expressed in the Security Council meetings relating to the crisis in Rwanda which were held prior to the establishment of the Tribunal. The delegate of Rwanda repeatedly emphasised that October 1990 was when the war began. In May 1994, he stated before the Security Council that "perpetrators must be identified and punished. But this applies to the entire duration of the war, that is, since 1 October 1990."[15] Again, in June 1994, the delegate asserted that a military solution to the crisis "would only perpetuate the suffering endured by the Rwandese people for nearly four years"[16], thus again reminding the members of the Security Council that the Government of Rwanda deemed the conflict to have begun in 1990.

13. Finally, although the Government of Rwanda had requested that the Tribunal be established there were several provisions in the Statute that resulted in Rwanda voting against Resolution 955 establishing the Tribunal and adopting the Statute. The delegate of Rwanda cited the limited temporal jurisdiction as the first of several reasons why it was voting against the Statute of the Tribunal:

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[12] Article 7 of the Statute.
[13] In interpretation, the Tribunal is guided by the principles which may be drawn from Article 31(1) of the Vienna Convention on the Law of Treaties (1969), U.N. Doc. A/CONF.39/27: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." These principles are considered today as general principles to be applied in the interpretation of all international instruments.
[14] Article 32 of the Vienna Convention on the Law of Treaties.

> In spite of many meetings with the sponsors of the draft resolution, and despite some amendments to the initial text, my Government is still not satisfied with the resolution or with the statute of the International Tribunal for Rwanda as it stands today, for the following reasons. First, my delegation regards the dates set for the *ratione temporis* competence of the International Tribunal for Rwanda from 1 January 1994 to 31 December 1994 as inadequate. In fact, the genocide the world witnessed in April 1994 was the result of a long period of planning during which pilot projects for extermination were successfully tested. For example [massacres, exterminations, torture, rape and other crimes were committed in 1990, 1991, 1992, and 1993.] . . . My delegation proposed that account be taken of the period from 1 October 1990, the beginning of the war, to 17 July 1994, the end of the war. This proposal was rejected without any valid reason. An international tribunal which refuses to consider the causes of the genocide in Rwanda and its planning, and that refuses to consider the pilot projects that preceded the major genocide of April 1994, cannot be of any use to Rwanda.... In this respect, there is a contradiction between articles 6 and 7 of the statute.[17]

14. The 1994 genocidal regime was considered to have taken place between 6 April 1994 and 17 July 1994. The Security Council was well informed about allegations of serious crimes perpetrated in Rwanda prior to 6 April 1994.[18] It decided, however, not to extend the jurisdiction to cover all serious violations of international criminal law committed in Rwanda but, instead, to limit the jurisdiction of the Tribunal exclusively to crimes committed during the 1994 genocide and war. It extended the jurisdiction to 1 January 1994 instead of 6 April 1994 precisely in order to capture the planning stages of the crimes. In the Security Council meeting which brought about the establishment of the Tribunal, the delegate of France stated: "The Tribunal will be competent to deal with offences committed between 1 January and 31 December 1994. *The choice of this time period makes it possible to take into account possible acts of planning and preparation of genocide which took place beginning on 6 April of this year.*"[19] The delegate of New Zealand concurred: "*The temporal jurisdiction of the Tribunal has been expanded backwards, from April, as originally proposed, to January 1994, so as to include acts of*

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[15] UN SCOR, 49th Sess., 3377th Mtg., UN Doc. S/PV.3377, 16 May 1994.
[16] UN SCOR, 49th Sess., 3392nd Mtg., UN Doc. S/PV.3392 and Corr.1, 22 June 1994.
[17] UN SCOR, 49th Sess., 3453rd Mtg., UN Doc. S/PV.3453, 8 November 1994.
[18] Additionally, the Security Council had before it the report of the Commission of Experts. The Commission of Experts on Rwanda established to investigate serious violations of international humanitarian law in Rwanda and to make recommendations as to holding responsible individuals accountable provided detailed information to the Security Council. The Final Report of the Commission of Experts twice stressed that there was overwhelming evidence indicating that the genocide had been planned *months* in advance of its actual execution. The Commission of Experts was sufficiently knowledgeable about violence occurring prior to 1994. In providing background information leading up to the 1994 genocide, the Final Report noted: "A number of massacres have been perpetrated in Rwanda in the last 45 years. In particular, the years 1959, 1963, 1966, 1973, 1990, 1991, 1992 and 1993 were marked by massacres in Rwanda." However, the Commission of Experts concluded that the *1994* genocide was not planned years in advance, but months in advance. See *Final Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994)*, S/1994/1405 (Annex), 9 December 1994, at paras. 31, 101-08, and 156.

planning for the genocide that occurred in April."[20] No other member of the Security Council expressed a differing opinion as to the scope of the temporal jurisdiction or as to the reasons for restricting the temporal jurisdiction to the year 1994.

15. Consequently, in establishing the Tribunal, the Report of the Secretary-General provides:

> The temporal jurisdiction of the Tribunal is limited to one year, beginning on 1 January 1994 and ending on 31 December 1994. Although the crash of the aircraft carrying the Presidents of Rwanda and Burundi on 6 April 1994 is considered to be the event that triggered the civil war and the acts of genocide that followed, the Council decided that the temporal jurisdiction of the Tribunal would commence on 1 January 1994, *in order to capture the planning stage of the crimes.*[21]

16. Clearly, in adopting the Statute, even crimes involving planning and preparation were specifically anticipated and debated among members of the Security Council. Aware of this fact and also of the view expressed by the Rwanda delegate that the temporal jurisdiction of the Tribunal should commence in 1990, the Security Council nevertheless decided to limit the jurisdiction to crimes committed during the 1994 genocide. It extended the temporal jurisdiction of the Tribunal to January instead of April 1994 in order to capture crimes that may have involved planning and preparation. Extending it back further was rejected – thus only crimes committed after 1 January 1994 may be prosecuted before the International Tribunal.

17. The fact that the Security Council specifically considered the impact of a limitation to the temporal jurisdiction of the Tribunal on such crimes and the fact that it extended the jurisdiction of the Tribunal to include any criminal planning that took place in the months before April 1994 indicate that the Security Council intended that reference to events which occurred prior to 1 January 1994 (irrespective of the crime to which they pertain) was to be excluded from forming the basis of charges for 1994 crimes. In our view, this intention of the Security Council is a confirming indicator of the "object and purpose" behind the provisions of the Statute relating to temporal jurisdiction. As is within our competence, we

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[19] UN SCOR, 49th Sess., 3453rd Mtg., UN Doc. S/PV.3453, 8 Nov. 1994 [emphasis added].
[20] *Ibid.* [emphasis added]. The jurisdiction was extended to the end of 1994 in order to capture crimes that continued to be committed after the cease-fire in July 1994, especially in refugee camps. *Ibid.* (delegate of France).
[21] *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, S/1995/134, 13 February 1995, at para. 14 [emphasis added].

believe that the relevant provisions of the Statute should be interpreted in a restrictive fashion in order to fulfil this intention.[22]

18. In accordance with this interpretation, no reliance should be placed on events that took place before 1 January 1994 to support and prove the gravamen of substantive offences.

19. On a reading of the amended indictments in this matter, it is unclear if it is intended that these pre-1994 facts and events – which are stated as facts and indeed referred to as crimes but which have not been proved and will not need to be proved at trial as they occurred prior to 1994 – will be relied upon to form the basis of a subsequent finding of individual criminal responsibility. In the event, the inference can be drawn that the Appellants might be expected to defend themselves in relation to pre-1994 allegations. This would be in breach of the terms of the temporal jurisdiction of the Statute and Article 20(4)(a) of the Statute, according to which an accused will be entitled, in full equality: "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."[23]

20. The latter statutory requirement includes an obligation to ensure that an accused can fairly anticipate the charges in relation to which he or she will be required to defend himself or herself at trial.[24] An accused does this by consulting the indictment, which should:

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[22] It is a principle of international law that the Tribunal has the competence to interpret its own jurisdiction, without departing from the express terms of the Statute. *See,* "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", *The Prosecutor v. Duško Tadić,* Case No. IT-94-1-AR72, 2 October 1995, para. 13 *et seq.* This accords also with Article 36.6 of the Statute of the International Court of Justice: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Because this is such a wide-ranging power, international tribunals should interpret their jurisdiction in a restrictive fashion. In this regard, the International Court of Justice has on many occasions refused to entertain cases following a decision that it lacked competence to do so. *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question),* Judgement of 15 June 1954, I.C.J. Reports (1954), p. 19, *East Timor (Portugal v. Australia)* Judgement, I.C.J., Reports (1995), p. 90. *See* also, *Status of Eastern Carelia,* P.C.I.J., Series B, No. 5 and *Interpretation of Peace Treaties,* Advisory Opinion, I.C.J. Reports (1950), p. 65.

[23] *See* also Article 17(4) of the Statute, which provides *inter alia*: "[T]he Prosecution shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute"; and Rule 47(C).

[24] *See,* for example: "Decision on the Form of the Indictment", *Prosecutor v. Dragoljub Kunarac and Radomir Kovač,* Case No. IT-96-23-PT, 4 November 1999, paras. 5-7; "Decision on the Defence Preliminary Motion on the Form of the Indictment", *Prosecutor v. Milorad Krnojelac,* Case No. IT-97-25-PT, 24 February 1999, paras. 12-13: "What must clearly be identified by the prosecution so far as the individual responsibility of the accused in the present case is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility" and, "Decision on Defence

> ...make clear to an accused (a) the nature of the responsibility alleged against him and (b) the material facts by which his particular responsibility will be established....In other words, the capacity in which the accused allegedly committed the charged offence must be clearly defined.[25]

21. It is our view that indictments in this Tribunal should be more explicit by including any pre-1994 events exclusively in an historical or introductory section. In this way, an accused would be more fully informed and could distinguish between those material facts by which it is intended that their particular individual criminal responsibility will be established and those facts which are being brought simply for historical or introductory purposes.

22. In reviewing Section 8 of the amended indictments, headed "The Charges", each count commences with the following statement: "By the acts or omissions described in paragraphs [numbered paragraphs included]...and more specifically in the paragraphs referred to below:". In several instances, the paragraphs refer to events or acts by the accused that took place before 1 January 1994, and in some instances, they refer exclusively to events or acts – including crimes – that occurred prior to 1994.[26] Each count continues by naming the accused and charging him with a specific offence. The format and placing of these references used by the Prosecution could suggest that the Prosecution intends to rely on these events to prove the charges.

23. Pre-1994 acts or events should not, in our view, be included to support the specific counts of the indictments. The assurance provided to both Appellants in today's Decision wherein the Appeals Chamber notes it is satisfied that "the Trial Chamber will not rely upon events occurring prior to 1994 as the independent basis of a count"[27] does not, we think, provide a sufficient guarantee to adequately protect the accused's rights and expectations. We would have preferred if the Decision had determined that the Trial Chamber was prevented from taking these facts and allegations into account and that reference to them should have been removed from the specific counts of the amended indictments. In fairness

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Preliminary Motions on the Form of the Indictment", *Prosecutor v. Miroslav Kvočka et al.,* Case No. IT-98-30-PT, 12 April 1999.

[25] "Decision on the Form of the Indictment", *Prosecutor v. Dragoljub Kunarac and Radomir Kovač,* Case No. IT-96-23-PT, 4 November 1999, para. 6 (footnote reference omitted).

[26] *See* for example, Amended Indictment in respect of *Hassan Ngeze,* paras. 5.3, 5.4, 5.6, 5.7, 5.8, 5.9, 5.11, 5.21, 5.22, 5.27, 5.28, 5.29, 6.7, 6.8, 6.9, 6.11, and 6.12.

[27] Decision, p. 6.

to the Appellants this would remove any ambiguity and uncertainty and would have informed them in greater detail of the "nature and cause of the charge against [them]."[28]

24. Nevertheless, the reasons we have given do not, in our view, suffice to require us to register a dissent to this part of today's Decision. Although the Decision, in our considered opinion, could have gone further, we understand it in essence to preclude the facts and events occurring prior to 1994 from forming the underlying basis of the charges in the amended indictments.

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

Judge Lal Chand Vohrah

Judge Rafael Nieto-Navia

Done this fifth day of September 2000
At The Hague
The Netherlands

[Seal of the Tribunal]

[28] Article 20(4)(a) of the Statute.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

(i) Introduction

1. I respectfully agree with the decision of the Appeals Chamber but propose to say something on a point on which there is some difference of opinion. The difference does not affect the outcome of the case, but it is important. It concerns the question whether the amended indictment exceeds the temporal jurisdiction of the Tribunal.

2. In my view, the position is this: There is no uncertainty in the Statute requiring recourse to principles for resolving an ambiguity. There is no dispute that the Statute gives jurisdiction to the Tribunal only in respect of crimes committed during 1994. There is accordingly no dispute that an indictment cannot present a count for a crime committed before that year. There is also no dispute that, in appropriate circumstances, this does not preclude the presentation of introductory evidence of such prior crimes having been committed by the appellant. In the words of the Appeals Chamber, the Trial Chamber held "that it will rely on events occurring prior to 1994 solely in an historical or informative context and that it will not hold an accused accountable for crimes committed prior to 1994". In effect, in the view of the Trial Chamber, the appellants are not indicted for such prior crimes. That was what the appellants wanted to know. So what are they appealing from?

(ii) The issues

3. It will be convenient to explain these matters with reference to the case of Mr. Ngeze. Mr. Ngeze contends that the amended indictment charges him with crimes committed before the commencement of the jurisdictional period prescribed by the Statute of the Tribunal – 1 January 1994 to 31 December 1994 ("the mandate year"). Obviously, if such crimes are charged they would be beyond the temporal jurisdiction of the Tribunal; the amended indictment would have to be struck down *pro tanto*. This is not contested by the prosecution. It is also recognised by the Trial Chamber. Its decision does not deny that such prior crimes are included in the amended indictment; it takes the position that those are not crimes for which the appellant is charged, but are part of the

events which "provide a relevant background and a basis for understanding the accused's alleged conduct in relation to the Rwandan genocide of 1994".[1] I understand it to be saying that this is what the indictment means. Is that what the indictment means? If so, is the indictment valid?

4. Not all of the points involved are disputed, but some are. In my opinion, it is necessary to visit all of them briefly in order to appreciate the matters which fall for decision. These questions, which admittedly overlap, may be asked:

(a) Is the appellant charged with crimes committed before the commencement of the mandate year?

(b) Can the prosecution present background material containing evidence of prior crimes?

(c) If so, did the Statute limit the competence of the prosecution to do so by prohibiting the presentation of background material containing evidence of prior crimes if they ante-dated the commencement of the mandate year?

(d) Do the speeches made in the Security Council help to determine the claim by the appellant that he is being charged with crimes committed before the commencement of the mandate year?

(e) If the appellant is not charged with crimes committed before the commencement of the mandate year, does it follow that any objection by him as to "lack of jurisdiction" is not well-founded and that his interlocutory appeal should be dismissed?

(iii) Whether the appellant is charged with crimes committed before the mandate year

5. As to question (a), which asks whether the appellant is charged with crimes committed before the commencement of the mandate year, it is necessary to read the amended indictment as a whole. The document is twenty-nine pages long, typed in single space. It is broken down into sections. These sections are entitled:

[1] Decision on the Prosecutor's Request for Leave to Amend the Indictment, 5 November 1999, para.3

(1) Historical Context
(2) Territorial, Temporal and Material Jurisdiction
(3) The Power Structure
(4) The Accused
(5) Concise Statement of the Facts: Preparation
(6) Concise Statement of the Facts: *Kangura* Newspaper
(7) Concise Statement of the Facts: Other Violations of International Humanitarian Law
(8) The Charges

6. Paragraph 2.1 of the amended indictment, placed under "Territorial, *Temporal* and Material *Jurisdiction*",[2] states that the "crimes referred to in this indictment took place in Rwanda between 1 January and 31 December 1994". The language is not as precise as may be wished: it could have spoken of the "crimes with which the accused is charged in this indictment ..." instead of the "crimes referred to in this indictment ...". But it is reasonably clear that *temporal jurisdiction* was being asserted only in respect of crimes which "took place in Rwanda between 1 January and 31 December 1994". Crimes committed before that period were not the subject of charges.

7. The appellant does not seem to be disputing that crimes can be stated in the amended indictment as part of the background even if they were committed prior to the commencement of the mandate year. What he says is that " 'such background and basis' could be included in other sections of the indictment namely 'the Historical context', 'the power structure' and specially the Sub-section on the Press in Rwanda".[3] In other words, the prior crimes were set out in the wrong place in the amended indictment; and, having been set out in the wrong place, the appellant was entitled to the view that he was in fact being charged with those crimes. I do not think that is right if, as I consider, the amended indictment, read as a whole, made it reasonably clear that the appellant was charged only with crimes committed in the course of the mandate year.

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[2] Emphasis added.
[3] Notice of Appeal and Appellant's Brief relating to objections based on lack of jurisdiction under Rule 72 of the Rules, para. 28, filed 25 November 1999.

8. This view is consistent with the location of paragraphs 5.21 and 5.22 of the amended indictment, which, I believe, should really be numbered 5.28 and 5.29. These paragraphs refer to acts some of which were allegedly done by the appellant before the commencement of the mandate year. The appellant relies on these paragraphs for saying that he is being charged with crimes relating to those prior acts. However, it is to be noticed that these paragraphs fall under a sub-heading entitled "Precursors Revealing a Deliberate Course of Action". The introductory character of these paragraphs, dealing with matters of a precursory nature, is not belied by the fact that that sub-heading itself falls under the more general heading "Concise Statement of the Facts: Preparation". If introductory matters are admissible, it is not apparent why they may not constitute facts and why these facts may not be presented as part of the "Concise Statement of the Facts" envisaged by Rule 47(C) of the Rules of Procedure and Evidence. There is no reason for supposing that all facts forming part of the "Concise Statement of Facts" are necessarily facts setting out a charge; some facts could be introductory even though mentioned in that Statement.

9. It may be said that to adduce evidence showing that a required element of a crime alleged to have been committed within the mandate year existed prior to that year is effectively to charge the appellant with a crime committed before the commencement of that year. But there is a distinction between the legal elements of a crime and the evidence of their existence. 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.

10. If, for example, a man was charged with a crime committed on a certain date, it would be necessary (setting aside arguments about offences of strict liability or absolute offences) 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[4] or that he even intended to commit the particular crime. A reasonable inference could, in some circumstances, 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.

11. 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. Thus, evidence of earlier genocidal developments is admissible to prove the genocidal character of an act committed during the prescribed period: regarded by itself, the act may not appear to be genocidal, but it could so appear if viewed in the light of previous developments. This aspect is taken up below.

12. A particular problem arises in the case of the crime of conspiracy, with which the appellant was also charged. The making of an agreement (though this need not be of a contractual nature) is of the essence of that crime: the crime is complete on the making of the agreement. So the appellant says that he cannot be charged with a crime of conspiracy if the conspiracy agreement was made before the commencement of the mandate year. In my view, that contention is not correct.

13. It is helpful to consider the issue within a framework which involves two states. With respect to the traditional view that criminal jurisdiction is territorial in character, it is good law that a conspiracy made in one state to commit a crime in another may be prosecuted in the latter even if no overt act to implement the conspiracy has taken place in the latter. The reasoning is twofold. The first reason is that, as long as the contemplated act remains to be committed in the other state, the conspiracy is a

[4] See *R.v.Ball* [1911] A.C. 47, at 68 per Lord Atkinson, followed, despite doubts, by the English Court of

continuing threat against the society of the other state, with which it consequently has a material connection. The second reason is that, also as long as the contemplated act remains to be committed in the other state, the parties to the conspiracy agreement continue to adhere to the agreement; they stand to be regarded as constantly renewing it, and therefore as having also made it in the other state.[5] For both of these reasons, the traditional requirement of territoriality of criminal jurisdiction is satisfied.

14. In this case, the temporal limitation on the jurisdiction of the Tribunal provides a persuasive analogy, a kindred problem of juridical nexus arising as between matters begun before but completed after the commencement date of the jurisdictional period. By parity of reasoning, a conspiracy agreement made before the commencement of the mandate year but remaining to be fulfilled in Rwanda during that year is the exertion within that year of a continuing threat against the society of Rwanda; and the agreement may also be regarded as having been renewed within that year. On this basis, the Tribunal would have jurisdiction. In the result, the charge could correctly be for a conspiracy made in, or continuing into, the mandate year even though the original conspiracy agreement was made prior thereto.

15. This conclusion is in harmony with the general position taken by the Human Rights Committee. In *Ibrahima Gueye et al. v. France,* the Committee had occasion to recall "that in a number of earlier cases ..., it had declared that it could not consider an alleged violation of human rights said to have taken place prior to the entry into force of the [International] Covenant [on Civil and Political Rights] for a State party, unless it is a violation that continues after that date or has effects which *themselves* constitute a violation of the Covenant after that date".[6] In the instant case, it is clear that the conspiracy agreement, though made before the date of commencement of the mandate year, continued to produce effects after that date.

Appeal in *Fulcher* [1995] 2 Cr. App. R. 251, at 258.

[5] See the reasoning in *Ford v. United States* (1927) 273 U.S. 593, at 621; *DPP v. Doot and Others* (1973) 57 Cr. App. R. 600, HL; *Somchai Liangsiriprasert v. Government of United States of America and Another* (1991) 92 Cr. App. R. 77, PC; and *Alec James Sansom and others* (1991) 92 Cr. App. R. 115, CA.

[6] Communication No. 196/1985 (3 April 1989) Official Records of the Human Rights Committee 1988/89, II, para. 5.3, original emphasis; and see, ibid., para. 10.

16. On the other hand, in reaching the conclusion that the submission of the appellant is not right, I have not placed reliance on an argument founded on the wording of Rule 47(C) of the Rules of Procedure and Evidence. That Rule provides, in the English version, that the "indictment shall set forth ... a concise statement of the facts of the case and of the crime with which the suspect is charged". The Trial Chamber in *Nsengiyumva*[7] held that there was a difference between "the facts of the case and ... the facts of the crime ...", the former being wider than the latter and therefore permissive of facts being stated even if they are not "facts of the crime". With respect, I am not convinced by this course of thought. The French text states that the indictment shall indicate "une relation concise des faits de l'affaire et la qualification qu'ils revêtent". There is no room here for the suggested distinction; without need for recourse to the literature on conflicts in plurilingual texts, it appears to be sufficient to say that the object and purpose of the provision affords no reason for interpreting the French text along the lines of the English. However, if (as argued below) facts forming part of the background of the crime charged are admissible and may include prior crimes, there is no reason why facts relating to prior crimes may not form part of "the facts of the crime" charged.

17. The conclusion, then, is that the prior crimes referred to in the amended indictment were not crimes for which the appellant was charged. On the other hand, a crime charged in the indictment as having been committed within the mandate year is not outside of the temporal limit of the Tribunal's jurisdiction merely because proof of some elements of the crime derives from evidence of matters occurring before the commencement of that year.

(iii) Whether background evidence may include evidence of prior crimes

18. As to question (b), the issue here is whether evidence of prior crimes may be presented as part of the background against which a crime is charged. I do not gather that the appellant is disputing that this could be done; but, as the point goes to the proper appreciation of the issues in the appeal, I may be excused for mentioning certain well-

[7] ICTR-96-12-I of 13 April 2000, para. 24.

known matters.

19. It will be recalled that the leading principle is that, to be admitted at trial, evidence must be relevant, that is to say, it must tend to make credible a fact which has to be established at the trial; if it is not relevant, that alone suffices to exclude it. If it is relevant, there is an additional hurdle. It being recognised that all relevant prosecution evidence is prejudicial to the accused and the more probative the more prejudicial, still it is possible in some cases to say that the probative value of particular evidence is outweighed by its prejudicial effect; in such a case, the evidence is to be excluded.[8] If these criteria are met, evidence of prior crimes committed by the accused may be admitted for certain purposes. Such evidence may not be admitted where the result would be to proceed upon suspicion rather than proof. However, subject on the one hand to this caveat, and on the other hand excluding cases in which the accused has put his character in issue, such evidence is admissible in broadly two situations. I shall draw on one legal system in the belief that the general principles are not materially different in others.

20. Skipping details in a matter which has been described as a "pitted battlefield", the first situation is that relating to what in the common law is called "similar fact evidence". As it was put by the High Court of Australia:

> [I]f the evidence of the other offence or offences goes beyond showing a mere disposition to commit crime or a particular kind of crime and points in some other way to the commission of the offence in question, then it will be admissible if its probative value for that purpose outweighs or transcends its merely prejudicial effect. The cases in which similar fact evidence may have sufficient additional relevance to make it admissible are not confined, but recognised instances occur where the evidence is relevant to prove intent or to disprove accident or mistake, to prove identity or to disprove innocent association ....[9]

In effect, in proper circumstances, evidence of prior offences is admissible to prove a pattern, design or systematic course of conduct by the accused where his explanation on the basis of coincidence would be an affront to common sense.

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[8] This is in preference to "the view that the judge can properly decide that the prejudicial effect of evidence outweighs its probative value, and still admit it". See *Cross and Tapper on Evidence*, 8th edn. (London, 1995), p. 403, where that view is disfavoured.

[9] *Thompson v. R.* (1989) 86 A.L.R. 1.

21. The second situation concerns what may be called background evidence. It "is always legitimate to adduce evidence which sets a particular allegation in its proper context".[10] Evidence of the context may include evidence of the background. Background evidence can establish motive;[11] it is true that "the prosecution does not have to prove motive, [but] evidence of motive is always admissible in order to show that it is more probable that the accused committed the offence charged".[12] Background evidence may in turn include evidence of previous offences.[13] As it was said in one case:

> Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence.[14]

22. These principles are illustrated by a case in which, the accused being charged with conspiracy to possess explosives, evidence was received of his previous acts as a member of a terrorist organisation directed against a special class which included the intended victims in the case.[15] The resemblance of that case to this is obvious.

23. Proof of pre-planning is not legally required in a prosecution for genocide, but evidence of that is admissible as part of the background. In the case at bar, the genocide of 1994 did not come out of the blue; it was not a disembowelled affair. Nor was it of limited range. It is not comprehensible without reaching back into the past. The need to demonstrate the course of development has to be measured against the characteristics of the case. Certainly, the requirements of the Tribunal's own Rules of Procedure and Evidence have to be observed; but, subject thereto, it seems to me that there is substance in the observation of the United States Military Tribunal in *The Justice Trial* that the form of the indictment is "not governed by the familiar rules of American criminal law

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[10] *Archbold, Criminal Pleading, Evidence and Practice 2000* (London, 2000), p. 1301, para. 13-38.
[11] Ibid.
[12] Ibid., p. 1299, para. 13-34.
[13] See *R. v. Underwood* [1999] Crim LR 227, CA.
[14] *R. v. Pettman,* 2 May 1985, CA, unreported, per Purchas LJ; the dictum was accepted by the Court of Appeal of England and Wales in *R. v. Sidhu* (1994) 98 Cr. App. R. 59, at p. 65, in *Fulcher, supra* at 258.
[15] *R. v. Sidhu, supra.*

and procedure",[16] a remark which, in the situation of this Tribunal, holds good in relation to the criminal law and procedure of any national system.

24. The charges in this case do not concern isolated offences: the scale of events, in space and in time, is unknown to normal municipal adjudication. If the demonstration of the course of development relating to the charges advanced in the indictment involves the presentation of evidence of the commission of other crimes by the accused, professional judges would know how to treat that evidence: there is no jury here. In this respect, regard is due to the submission of the prosecution in *The Justice Case, United States of America v. Josef Altstoetter et al.*[17], that "[t]his is a trial by the court - by judges. It is a trial by judges who by training and character rely only upon objective standards in determining guilt or innocence". It is not right to press too far the notion that their professionalism entirely distinguishes judges from jurors as triers of fact; but that there is some difference is not deniable. The difference is pertinent to the capacity of professional judges to consider evidence of prior crime without unfairness to the accused.

25. To continue with the *The Justice Case*, although (as in the municipal cases mentioned above) there was no statutory commencement date for the jurisdiction of the tribunal, counts 2, 3 and 4 of the indictment in that case charged certain offences as having been committed after the outbreak of the war.[18] So, although the jurisdiction of the tribunal was not temporally limited, the charges were. But this did not preclude the introduction of evidence of prior acts. While holding on one point in favour of the accused, the United States Military Tribunal carefully stated that it was not "denying to either prosecution or defense the right to offer in evidence any facts or circumstances occurring either before or after September 1939, if such facts or circumstances tend to prove or to disprove the commission by any defendant of war crimes or crimes against humanity as defined in Control Council Law No. 10."[19] The prosecution having

[16] *The Justice Trial, Trial of Josef Altstötter and others*, Law Reports of Trials of War Criminals, Vol. VI (London, 1948), p. 84.
[17] Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. 3 (Washington, 1951), p. 92.
[18] Ibid., pp. 17-26.
[19] Ibid., p. 956; and, for the position of the prosecution, see ibid., pp. 91-93.

introduced evidence of prior acts, the Tribunal upheld its submission that "[n]one of these acts is charged as an independent offence in this particular indictment."[20] It said:

> Though the overt acts with which the defendants are charged occurred after September, 1939, the evidence now to be considered will make clear the conditions under which the defendants acted *and will show knowledge, intent and motive* on their part, for in the period of preparation some of the defendants played a leading part in moulding the judicial system which they later employed.[21]

On this basis, the tribunal was only considering the prior acts for their evidential relevance to the acts allegedly done within the period mentioned in the indictment; it was not exercising jurisdiction over the prior acts in the sense of determining charges independently based on them. In my opinion, the fact that the jurisdiction of the tribunal was not itself subject to any statutory limitation does not differentiate that case from this.

26. Subject, as mentioned below, to the right of the Trial Chamber at the time of trial to pass on the matter as being one of evidence, I am of the view that at this stage, when all that is being considered is the correctness of the amended indictment as framed having regard to the temporal limitations on the jurisdiction of the Tribunal, evidence of prior crimes may be regarded as admissible under the similar fact rule to prove intent. If it is not, it is admissible, for the like purpose, as an integral part of the background; without it the story of the background would be truncated, incomplete and artificial.

(iv) Whether the Statute prohibited presentation of background evidence of crimes committed before the commencement of the mandate year

27. As to question (c), if the prosecution can in general present evidence of prior crimes as part of the background against which a crime is charged, did the Statute impose a particular limitation on the competence to do so by excluding background matters containing evidence of prior crimes if these occurred before the commencement of the mandate year? The appellant does not offer an affirmative answer; but I think it is useful to consider the question in order to determine the issues raised.

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[20] *The Justice Trial, Trial of Josef Altstötter and others*, Law Reports of Trials of War Criminals, Vol. VI (London, 1948), p. 73.
[21] Law Reports of Trials of War Criminals (London, 1949), Vol. XV, p. 56, original emphasis.

28. In this case, it is true that the bulk of the crimes occurred during the 103-day period between the crash of the plane taking the President of Rwanda and the President of Burundi on 6 April 1994 and the declaration of the cease-fire on 15 July 1994. Yet an assumption that crimes could only be indicted if they occurred during that period would be misleading. The Statute specifically speaks of violations committed "between 1 January 1994 and 31 December 1994". Thus, on the face of the Statute, killings occurring on 1 January 1994 could, in appropriate circumstances, be the subject of an indictment for genocide. What are the implications?

29. It may help to refer to two cases which bear upon the general jurisprudential questions involved. The first, *Kerojärvi v. Finland*, concerned a complaint of a breach of the fair hearing requirement of Article 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the allegation being that the applicant had been wrongfully denied access to certain material. The municipal proceedings had taken place before an Insurance Court and thereafter, on appeal, before the Supreme Court. The proceedings before the former occurred before the commencement of the relevant jurisdictional period (beginning with the date on which the Convention entered into force for Finland), but the proceedings before the latter lay within the period. The European Court of Human Rights said:

> In the instant case, the Court lacks jurisdiction *ratione temporis* to review the proceedings in the Insurance Court ... They may however be taken into account as background to the issue whether those in the Supreme Court were fair.[22]

30. The second case is *Yağci and Sargin v. Turkey*. It concerned an allegation that there was a breach of Article 5, paragraph 3, of the European Convention for the Protection of Human Rights and Fundamental Freedoms guaranteeing an arrested or detained person an entitlement to "trial within a reasonable time or to release pending trial". The relevant jurisdictional period began on 22 January 1990. The applicants were arrested on 16 November 1987 and provisionally released on 4 May 1990. If only the short period of detention subsequent to 22 January 1990 were considered, it might be said that there was no breach; *aliter* if the earlier period were taken into account. The Court

could not consider the earlier period, in the sense of determining whether it constituted a breach of the Convention, but it could take it into account in determining whether the later period constituted a breach. In its words:

> However, when determining whether the applicants' continued detention after 22 January 1990 was justified under Article 5 § 3 of the Convention, it must take into account the fact that by that date the applicants, having been placed in detention on 16 November 1987 ... , had already been in custody for two years and two months.[23]

The reasoning was similar in respect of an allegation that there was a breach of Article 6, paragraph 1, of the Convention relating to a right to a "hearing within a reasonable time".[24]

31. In effect, as both cases suggest, seen by themselves the later events might not be a violation of the guaranteed right; they could, however, be a violation when seen in the light of the earlier events. Likewise, in this case, seen by themselves, killings on the first day of the mandate year could be merely homicides; seen in the light of previous developments, they could be acts of genocide. If the Statute excluded evidence of previous developments, it would present a contradiction: it would authorise a charge being brought for genocide committed on the first day of the mandate year, but would make it largely impracticable to prove the charge. I put it that way because, as I have already recognised, proof of the making of a previous plan is not a necessary legal ingredient of the crime of genocide; however, evidence of the making of a plan is admissible as tending to prove or to disprove guilt.

32. Therefore, since the Statute of the Tribunal authorised it to find that an act of genocide was committed on the first day of the mandate year, the reasonable inference is that the Statute also recognised the practical need for background evidence to be given even if it included evidence of criminal acts committed by the appellant before the commencement of that year.

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[22] Eur. Court H.R. (1995), Series A no. 322, p. 15, para. 41.
[23] Eur. Court H.R. (1995), Series A no. 319-A, p. 18, para. 49.
[24] Ibid., p. 20, para. 58. See also *Pandolfelli and Palumbo v. Italy*, Eur. Court H.R. (1992), Series A no. 231, pp. 18-19, para. 14.

(v) Do the speeches made in the Security Council help to determine the claim by the appellant that he was being charged with crimes committed before the commencement of the mandate year?

33. As to question (d), the speeches made in the Security Council by the representatives of France, New Zealand and Rwanda are indeed consistent with the view that, under the Statute, charges could only be brought for crimes committed during the mandate year; but no one disputes that this is what the Statute means. As noted above, if the appellant is correct in saying that the amended indictment charges him with crimes committed before the commencement of the mandate year, the amended indictment would be *pro tanto* bad. However, this would involve argument not as to the meaning of the Statute but as to the meaning of the amended indictment. The speeches, if admissible, go only to the meaning of the Statute and not to the question whether the amended indictment conflicts with that meaning. There is no issue as to the meaning of the Statute. There would only be an issue as to the meaning of the Statute if it were contended that, under the Statute, evidence of crimes committed before the commencement of the mandate year cannot be presented as the background against which crimes were committed during the mandate year; but that would not be right, and, as has been noted, it is not the appellant's argument.

34. There may, however, be utility in emphasising that the speeches in question do not suggest that it was the understanding of delegates that evidence of crimes committed before the commencement of the mandate year could not be presented as background material. The speeches conveyed a sense that, in so far as charges for other crimes were necessary to explain the happenings during the 103-day period, such *charges* should be limited to crimes occurring in 1994 before and after that period. The speeches were not directed to the question of the admissibility of evidence of crimes committed before that year as the background against which crimes were committed within that year. Background evidence of such pre-1994 crimes would even be admissible to explain any 1994 crimes which themselves explained any crimes committed within the 103-day period during that year. This would apply even in respect of a charge of planning. Such a charge could not be brought for an act of planning which occurred before 1994. But if an act of

planning occurred in 1994 and it was made the subject of a charge, background evidence (inclusive of pre-1994 crimes of planning committed by the accused) could be tendered. Nothing in the concern of the Security Council or of any members thereof to limit the prosecution of crimes to crimes committed in the course of 1994 excluded the normal competence to introduce background evidence of prior crimes, including crimes committed before that year. I do not find that this conclusion is at variance with any Report of the Secretary-General.

35. The foregoing is not inconsistent with the position taken by Rwanda both in the Security Council and in its enactment of the Rwanda Organic Law No.08/96. Rwanda's position need not mean that Rwanda assumed that the Statute meant that evidence deriving from a time anterior to the commencement of the mandate year (inclusive of evidence of pre-1994 crimes) would be inadmissible to prove that the elements of a crime were in existence on a date within that year when the crime was alleged to have been committed. Rwanda's complaint could be understood as addressed to the limited temporal competence of the Tribunal, in the sense that the Tribunal was being excluded from jurisdiction to prosecute and, if appropriate, to convict and punish persons for crimes committed between 1 October 1990 and 31 December 1993; that is a different matter from the question whether evidence of such pre-1994 crimes could be adduced by way of background.

36. Thus, there is nothing in the speeches made in the Security Council which suggests that background evidence would be inadmissible if it contained evidence of the commission of crimes before the commencement of the mandate year. Besides, the Statute, read in the light of the settled jurisprudence, seems clear on the point. It must be remembered that that instrument provided for criminal liability of individuals. Also, it required states to cooperate with the Tribunal. [25] Concerned individuals and states would

[25] As to the juridical basis on which the Security Council acts, it may be noticed that the representative of Brazil said in the Security Council in the course of the discussion of the Statute: "The authority of the Security Council is not self-constituted. It originates from the delegation of powers conferred upon it by the whole membership of the Organization under Article 24(1) of the Charter". See S/PV.3453 of 8 November 1994, p. 13. In accordance with the *S.S. "Wimbledon"* principle, limitations on the sovereignty of states which are parties to the Charter (almost all states are), arising from the obligation to cooperate imposed by the Security Council, are really expressions by those states of their sovereignty and not contradictions of it. See PCIJ (1923), Series A, No.1, p.25. For this reason, such limitations are not at

be primarily interested in the text of the Statute. It is only if the text is ambiguous that they should be sent to consult speeches made in the Security Council. There is no ambiguity in this case as to the admissibility of such background material. Consequently, there is no need to seek elucidation from the speeches.[26]

37. To conclude, the speeches in question are indeed consistent with the view (which no one disputes) that the Statute limited indictments to crimes committed during the mandate year and did not authorise charges being brought for crimes committed prior thereto. But the speeches do not help to determine the appellant's complaint that the amended indictment in this case in fact charged him with crimes committed before the commencement of the mandate year.

(vi) Concerning the disposition of the interlocutory appeal

38. As to question (e), concerning whether the appeal should be dismissed if the appellant was not charged with crimes committed before the commencement of the mandate year, Rule 72(D) of the Rules of Procedure and Evidence reads: "Decisions on preliminary motions are without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as of right". The appellant has not argued that, provided that he did unsuccessfully make such an objection and has a consequential right of appeal, he is entitled to raise non-jurisdictional matters on which the Trial Chamber's decision was based. A reasonable reading of the Rules would be that if, on such an appeal, the Appeals Chamber finds that there was jurisdiction, the appeal should thereupon stand dismissed.

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variance with the concept of sovereignty as it exists under customary international law, which recognises the role of consent. As to states not parties to the Charter, the same remarks apply on the basis of the voluntariness of their acceptance of the obligation to cooperate as stipulated by the Appeals Chamber of the ICTY in *Blaškić*, IT-95-14-AR108*bis* of 29 October 1997, para. 26. For an alternative basis in relation to such states, see Article 2(6) of the Charter, but views as to the meaning and operation of this provision differ; see, *inter alia*, Hans Kelsen, *The Law of the United Nations* (London, 1950), pp. 106-110; Rudolf L. Bindschedler, *La délimitation des compétences des Nations Unies*, 108 Hague Recueil des cours (1963-I), pp. 404-406; *Oppenheim's International Law*, 9th edn., Vol. 1, p. 322, note 6, and p. 1265, note 7; and Ahmed Mahiou, at pp. 133-138 of Jean-Pierre Cot et Alain Pellet, *La Charte des Nations Unies*, 2ième éd. (Paris, 1991).

[26] See *Tadić*, 15 July 1999, IT-94-1-A, ICTY Appeals Chamber, paras. 298-304.

39. On my holding that the prior crimes in this case were not the subject of independent charges, the Trial Chamber would have had jurisdiction to proceed with the trial on the basis of the amended indictment. Accordingly, that should be enough to ground a dismissal of the appeal.

40. What would remain is an issue as to whether evidence of such prior crimes should or should not be admitted *at trial* as part of the background. My holding is only that the amended indictment does not charge the appellant with any crimes committed before the commencement of the mandate year. That holding does not exclude the competence of the Trial Chamber in the course of the actual trial from shutting out evidence of previous crimes on the ground that, in the circumstances of the case, the particular evidence is not in fact relevant or that, if it is, its prejudicial effect on the accused exceeds its probative value. That is an evidentiary issue, not a jurisdictional one falling within the compass of interlocutory appeals permitted by Rule 72(D) of the Rules of Procedure and Evidence of the Tribunal.

41. In this respect, there is weight on the following remark of the Trial Chamber in *Prosecutor v. Nahimana*:[27]

> The Trial Chamber recognises the possibility that these allegations may be subsidiary or interrelated allegations to the principal allegation in issue and thus may have probative or evidentiary value. The Trial Chamber is therefore of the view that it is premature to address the relevance and admissibility of these allegations at this stage of proceedings. The appropriate stage will be at the trial of the accused.

I understand that to mean that, where the crimes committed before the mandate year are referred to in the indictment but are not independently charged, no question of an excess of temporal jurisdiction arises; the issue, if any, is really one as to admissibility of evidence relating to them, and, as such, is to be determined at the trial. I respectfully agree.

(vii) Conclusion

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[27] Case No. ICTR-96-11-T, Decision on the Prosecutor's Request for Leave to file an Amended Indictment, 5 November 1999, para. 28.

42. As mentioned above, I do not understand Mr Ngeze to be saying that prior crimes cannot be included as part of background evidence if committed before the commencement of the mandate year. What he is saying is that the prior crimes in this case were not included merely as part of the background but were the subject of independent charges against him.

43. However, it seems to me that the test as to whether the appellant was charged with the prior crimes in question is whether he was in danger of being convicted of them. The prosecution says that he was not. The Trial Chamber, which is hearing the case and which has to decide it at the end, also says that he was not. The decision of the Trial Chamber means that, if there was any doubt on the matter, the Trial Chamber has now resolved that doubt by in effect giving a definitive interpretation that there is no question of the appellant being charged with prior crimes.

44. After that stage, the appellant can not be heard to say that he is exposed to the risk of conviction for such crimes or that he is misled on the point. The matter has been duly clarified along the very lines desired by the appellant. To ensure that the appellant is not misled it is not necessary to say, as is proposed by the appellant, that the references to crimes committed before the commencement of the mandate year may be retained in the amended indictment provided that they are removed from the counts and "included in other sections of the indictment namely, 'the Historical context', 'the power structure' and specially the Sub-section on the Press in Rwanda."[28] Such a reformulation is not a substantial basis for allowing the appeal on the appellant's contention that the amended indictment charges him with crimes in excess of the Tribunal's temporal jurisdiction. He knows that he is not being charged with such crimes and is not at risk of being convicted of them; the Trial Chamber told him so. There is nothing unfair in the proceedings going forward on the basis indicated by the Trial Chamber. It is not the mission of the Appeals Chamber to intervene on matters of form if the appellant has no complaint in substance.

45. In effect, the appellant's concern that he should not be charged with crimes committed before the commencement of the mandate year or be at risk of being convicted

and punished for them has been met; he has in substance secured his object in the very decision against which he is appealing. That being so, to press for the reversal of that decision on the basis of the mere wording of the amended indictment is to exploit reasoning of some fragility. A tribunal, it is said, "must not pursue consistency at the expense of the merits of individual cases".[29] That observation, admittedly made in different circumstances, is in my view worth remembering in this case. The appeal is more meretricious than meritorious. I respectfully support the decision of the Appeals Chamber to dismiss it on all points and to uphold the decision appealed from in its entirety.

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

Mohamed Shahabuddeen

Dated this fifth day of September 2000
At The Hague
The Netherlands

[28] Notice of Appeal and Appellant's Brief relating to objections based on lack of jurisdiction under Rule 72 of the Rules, para. 28, filed 25 November 1999.
[29] *Merchandise Transport Ltd. v. British Transport Commission* [1962] 2 Q.B. 173, at 193, per Devlin L.J., adopting an observation by Jenkins L.J. in *R.v. County Licensing (Stage Plays) Committee of Flint C.C., Ex p. Barrett* [1957] 1All ER 112, at p.122 H-I.