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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

**Before:** Judge Erik Møse, presiding  
Judge Jai Ram Reddy  
Judge Sergei Alekseevich Egorov

**Registrar:** Adama Dieng

**Date:** 6 May 2004

JUDICIAL RECORD  
101  
2004 MAY -6 P 4:08  
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THE PROSECUTOR

v.

Aloys SIMBA

*Case No. ICTR-01-76-I*

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**DECISION ON PRELIMINARY DEFENCE MOTION REGARDING DEFECTS IN THE  
FORM OF THE INDICTMENT**

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**Office of the Prosecutor:**

William T. Egbe  
Sulaiman Khan  
Ignacio Tredici  
Amina Ibrahim

**Counsel for the Defence**

Sadikou Ayo Alao  
Beth Lyons

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**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 prejudicielles et en incompetence 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.

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## 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.<sup>1</sup>

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

<sup>1</sup> *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.

relevant to an offence continuing into 1994; ii) evidence providing a context or background; and iii) similar fact evidence.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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

<sup>2</sup> *Bagosora et al.*, Decision on Admissibility of Proposed Testimony of Witness DBY (TC), 18 September 2003.

<sup>3</sup> *Tadic*, Judgement (AC), 15 July 1999, paras. 189-193.

<sup>4</sup> *Brdnanin and Talic*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (TC), 26 June 2001, para. 33.

<sup>5</sup> *Ibid.*, paras. 34-41.

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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".<sup>6</sup> 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.


**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.

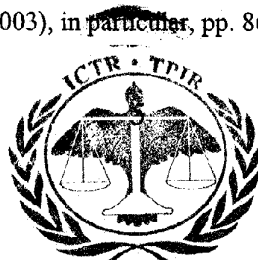
Arusha, 6 May 2004

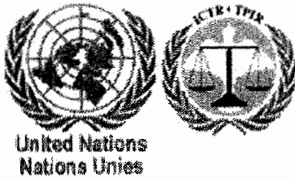
  
Erik Møse  
Presiding Judge

  
Jai Ram Reddy  
Judge  
(Seal of the Tribunal)

  
Sergei Alekseevich Egorov  
Judge

<sup>6</sup> See Cassese, *International Criminal Law* (2003), in particular, pp. 86-89.





# TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

**COURT MANAGEMENT SECTION**  
(Art. 27 of the Directive for the Registry)

### I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

<b>To:</b>	<input checked="" type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
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<b>From:</b>	<input checked="" type="checkbox"/> Chamber <i>G. Gellen</i> (name)	<input type="checkbox"/> Defence (name)	<input type="checkbox"/> Prosecutor's Office (name)	<input type="checkbox"/> Other: (name)
	<b>Case Name:</b> The Prosecutor vs. <i>Shamba</i>			<b>Case Number:</b> ICTR-01-76-Z
<b>Dates:</b>	Transmitted: <i>6/5/04</i>		Document's date: <i>6/5/04</i>	
<b>No. of Pages:</b>	<i>5</i>	<b>Original Language:</b> <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda		
<b>Title of Document:</b>	<i>Decision on Prelim. Motion Regarding Defense in the Rule of the Indictment</i>			
<b>Classification Level:</b>		<b>TRIM Document Type:</b>		
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Confidential		<input checked="" type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
		<input type="checkbox"/> Judgement	<input type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities
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		<input type="checkbox"/> Accused particulars		

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Target Language(s):

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Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

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<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: