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Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

BEFORE THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Adama Dieng**

Decision of: **17 August 2006**

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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Aloys SIMBA

v.

THE PROSECUTOR

Case No. ICTR-01-76-A

DECISION ON "PROSECUTOR'S MOTION FOR VARIATION OF NOTICE OF APPEAL PURSUANT TO RULE 108"

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of the Prosecutor's Motion for Variation of Notice of Appeal Pursuant to Rule 108 ("Motion for Variation"), filed on 27 March 2006.[1] The Prosecutor seeks leave to amend its Notice of Appeal in accordance with Rule 108 of the Rules of Procedure and Evidence of the Tribunal ("the Rules").

2. The Trial Chamber judgement in the case against Aloys Simba was issued on 13 December 2005.[2] The Prosecutor filed its original Notice of Appeal ("Notice of Appeal") on 12 January 2006, which contained two grounds of appeal.[3] Under Ground 1, the Prosecutor argues that the Trial Chamber erred in fact and in law by failing to find the Appellant criminally responsible for his participation in the Cyanika Parish Massacre.[4] According to the Prosecutor, the Trial Chamber erred in holding that it was necessary to prove the Appellant was physically present at Cyanika Parish in order to hold him responsible for this massacre "by virtue of his participation in a Joint Criminal Enterprise with a common purpose to kill Tutsi at [three] massacres sites, namely, Murambi Technical School, Kaduha Parish, and Cyanika Parish".[5] Ground 2 states that the Trial Chamber erred in law by imposing a sentence of 25 years, which the Prosecutor argues is "manifestly unfit" and should be increased to life imprisonment given various factors such as the gravity of the crimes and the individual circumstances.[6]

1. Arguments of the Parties

3. The Motion for Variation seeks to amend both Grounds 1 and 2.[7] In relation to Ground 1, the Prosecutor seeks to provide "clarification and better notice by identifying as a distinct error of law" the Trial Chamber's alleged misapplication of the *mens rea* standard for the first category of joint criminal enterprise.[8] The Prosecutor states that the Trial Chamber required proof that Aloys Simba "shared the common purpose" whereas the requisite standard according to the Prosecutor is "the intent to further the common purpose, this being the shared intent on the part of all co-

[1] *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Prosecutor's Motion for Variation of the Notice of Appeal Pursuant to Rule 108, 27 March 2006 and its Attachment A: Prosecutor's Amended Notice of Appeal ("Amended Notice of Appeal").
[2] *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Trial Judgement, 13 December 2005 ("Judgement").
[3] *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Prosecutor's Notice of Appeal, 12 January 2006. The Prosecutor's Notice of Appeal was filed within the 30 days limit from judgement prescribed in Rule 108 of the Rules.
[4] Notice of Appeal, para. 1
[5] Notice of Appeal, paras 2-3, which refers to paragraphs 122-132, 399-402 and 407 of the Judgement.
[6] Notice of Appeal, paras 8-10.
[7] Motion for Variation, para. 1; Amended Notice of Appeal, paras 2, 4 and 12.
[8] Motion for Variation, para. 4.

perpetrators, which is different from sharing the common purpose."[9] The Prosecutor submits that this additional error of law was identified only upon the preparation of its Appellant's brief and "is influenced by and derives from the original errors of facts and law listed" in the Notice of Appeal.[10] In relation to Ground 2, the Prosecutor asserts, again, that the proposed variation provides clarification and better notice, this time in relation to the alleged errors of the Trial Chamber in determining the sentence, by specifying that the Trial Chamber "erred by not considering Rwanda's sentencing practice"[11]. The Prosecutor argues that the Notice of Appeal, by using the term "*inter alia*" listed "without exhaustion the errors committed by the Trial Chamber" in this respect.[12] The Prosecutor points out that it anticipated the need to make amendments to the Notice of Appeal by referring to "[s]uch other grounds of appeal as this Chamber may authorize [...]".[13]

4. On 12 June 2006, Aloys Simba filed his Response.[14] He opposes the Motion for Variation, arguing that, pursuant to Rule 108 of the Rules, it should have filed within thirty days from the issuing of the Judgement. In its Reply[15], the Prosecutor argues that the Respondent misread Rule 108 and that the Motion for Variation was timely as it was filed on the same day as the Appellant's Brief.

2. Discussion

5. Rule 108 of the Rules reads as follows:

> A party seeking to appeal a judgement or sentence shall, not more than thirty days from the date on which the judgement or the sentence was pronounced, file a notice of appeal, setting forth the grounds. The Appellant should also identify the order, decision or ruling challenged with specific reference to the date of its filling, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought. The Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal.

[9] Motion for Variation, para. 8.
[10] Motion for Variation, para. 4.
[11] Motion for Variation, para. 9 and Amended Notice of Appeal, para. 12.
[12] Motion for Variation, paras 1, 9.
[13] Motion for Variation, para. 10.
[14] *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Réponse de la Défense à la Requête du Procureur en Modification de l'Acte d'Appel Conformément à l'Article 108 du Règlement de Procédure et de Preuve (RPP), 27 March 2006, paras 5-6 ("Response"). As allowed by the Pre-Appeal Judge in the *Decision on Respondent Motion for Extension of Time*, 13 April 2006, this Response was filed within 10 days of the service of the French translation of the Motion for Variation.
[15] *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Prosecutor's Reply to "Réponse de la Défense a la Requête du Procureur en Modification de l'Acte d'Appel Conformément à l'Article 108 du Règlement de Procédure et de Preuve (RPP)", 19 June 2006 paras 4-5 and 8. ("Reply")

6. As a preliminary matter, the Appeals Chamber notes that contrary to the Defence assertion,[16] a proposed variation to the Notice of Appeal is not bound by the thirty day time-limit which applies to the filing of the Notice of Appeal,[17] although the lateness of a motion for variation of Notice of Appeal can weigh against the appellant, particularly considering the need to avoid delays in the proceedings and prejudice to the other party in the case.[18]

7. The Appeals Chamber may grant a motion to vary the Notice of Appeal upon the showing of "good cause". The concept of "good cause" applies to both good reason for including new or amended grounds in the Notice of Appeal and good reason for failing to include grounds or correctly phrase them in the initial filing of the Notice of Appeal.[19] The assessment of "good cause" is made on a case by case basis[20] and various factors can be taken into account.[21] Most recently, the Appeals Chamber has summarized some of these factors as follows:

> These have included the fact that the variation is so minor that it does not affect the content of the notice of appeal; the fact that the opposing party would not be prejudiced by the variation or has not objected to it; and the fact that the variation would bring the notice of appeal into conformity with the appeal brief. Where the appellant seeks a substantive amendment broadening the scope of the appeal, "good cause" might also, under some circumstances, be established. The Appeals Chamber notes that it has never established a cumulative list of requirements that must be met each time a substantive amendment is to be granted.[22]

8. In the Motion for Variation, the Prosecutor submits that good cause exists for the Appeals Chamber to accept the two proposed amendments. The Prosecutor makes three arguments common to both proposed amendments, namely that the omissions to the Notice were only discovered during the preparation of the Appellant's Brief; that the proposed amendments are mere clarifications; and

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[16] Response, para. 5.
[17] The Appeals Chamber has granted amendments to the Notice of Appeal made relatively late in the appeals process, such as during the oral hearing, *see The Prosecutor v. Jelisić*, Case No. IT-95-14/2-A, Appeal Judgement, 5 July 2001, para. 18; and over 12 months after the filing of the initial Appellant's Brief, *see The Prosecutor v. Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Requests to Withdraw Previous Motions, to Revise Appellant's Brief and to Amend Notice of Appeal, 19 July 2005, pp. 3-4.
[18] *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006, para. 8.
[19] *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006, para. 7.
[20] *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Decision Granting Leave to Dario Kordić to Amend his Grounds of Appeal, 9 May 2002, para. 5.
[21] *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005, para. 7; *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Decision Granting Leave to Dario Kordić to Amend his Grounds of Appeal, 9 May 2002, para. 7.
[22] *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006, para. 7.

that there is no material prejudice as the amendment puts the Notice in conformity with the Appellant's Brief.

9. First, the Prosecutor argues that the omissions in its Notice of Appeal only became apparent during the drafting of its Appellant's Brief.[23] The Appeals Chamber notes that this, in and of itself, cannot constitute good cause. As previously stated by the Appeals Chamber:

> Obviously, any amendment sought to any notice of appeal is the result of further analysis having been undertaken over the course of time; this fact cannot constitute good cause for an amendment taken alone.[24]

Under Rule 108 of the Rules, the parties have the obligation to file a Notice of Appeal setting forth their grounds of appeal not more than thirty days from the date of the Trial Judgement.[25] They are therefore expected to have conducted a comprehensive review of the Judgement within this timeframe. Allowing the Prosecutor to amend its Notice of Appeal simply because it has gained more familiarity with the case in drafting its Appellant's Brief essentially would allow the parties to "restart the appeal process at will."[26]

10. Secondly, the Prosecutor contends that good cause exists to introduce the two new proposed amendments to the Notice of Appeal because they do not seek to provide entirely new grounds of appeal. Rather, according to the Prosecutor, they simply provide clarification to the two grounds in the Notice of Appeal and are necessary "in order to furnish better notice to both the Respondent and the Appeals Chamber of the issues involved."[27] The Appeals Chamber does not agree. Such a justification can only apply to a narrow set of circumstances, such as minor formal modifications.[28] Both amendments go beyond being minor variations that provide mere clarification and are substantive amendments affecting the content of the Notice of Appeal, broadening its scope and, in fact, alleging additional grounds of appeal. The first proposed amendment adds an entire paragraph

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[23] Motion for Variation, paras 1 and 8.
[24] *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005, para. 10.
[25] Rule 108 of the Rules.
[26] *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006, para. 8.
[27] Motion for Variation, para. 4.
[28] *The Prosecutor v. Ntakirutimana*, Case Nos. ICTR-96-101-A and ICTR-96-17-A, Décision sur les Demandes en Modification des Moyen d'Appel et les Requêtes aux Fins d'Outrepasser la Limite de Pages Dans le Mémoire de l'Appelant, 21 July 2003, p. 3; *The Prosecutor v. Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Motion to Amend Notice of Appeal, 21 October 2004, p. 3. This may also arise when the opposing party concedes that the proposed amendment was already included in the Original Notice, *see The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Decision (on Motion to Amend the Appellant's Notice of Appeal), 5 April 2001, p. 6. *Cf. The Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Decision on Defence Motion for Variation of the Notice of Appeal, 29 January 2004, p. 3.

to the first ground of appeal alleging an additional error of the Trial Chamber, i.e. a legal error in the assessment of *mens rea* for the first form of joint criminal enterprise. The second proposed amendment invites the Appeals Chamber to consider the sentencing practice of Rwanda, an exercise which could involve a substantial review of the procedures in Rwanda and thus, cannot be considered mere clarification of the initial arguments on sentencing.

11. Thirdly, the Prosecutor suggests that the Defence has suffered no material prejudice because the Motion for Variation and the Amended Notice of Appeal were filed on the same day as the Appellant's Brief.[29] While the absence of prejudice for the opposing party is an important factor to be taken into account by the Appeals Chamber when assessing a request to vary grounds of appeal, the Appeals Chamber does not consider that it constitutes good cause in and of itself. The mere fact that an appellant files proposed amendments before or the same day that the appellant's brief is filed is not sufficient to justify a variation of the notice of appeal, in particular when the variation sought consists of the addition of an entirely new error, as in the present case. In this respect, the Appeals Chamber notes that it has previously accepted amendments, which put the notice of appeal in conformity with the appellant's brief only because other factors or specific circumstances existed.[30] In this case, the Prosecutor has identified no such special circumstances. Granting leave to amend a notice of appeal just because the amendment would cause no prejudice would circumvent Rule 108 of the Rules, the time-limits it imposes, and the "good cause" requirement.

12. In the Motion for Variation, the Prosecutor also provides a specific argument for each proposed amendment. Under Ground 1, the Prosecutor argues that the question of the correct *mens rea* under the first category of joint criminal enterprise falls within the ambit of the original Notice of Appeal which referred to the acquittal of the Accused for the events at Cyanika Parish as he was found not to have been present during the massacres.[31] The original Notice of Appeal referred to paragraph 402 of the Trial Judgement which indeed mentioned the *mens rea* formula which the Prosecutor disputes,[32] but the Trial Judgement itself does not state that it is citing a *mens rea* standard.[33] This vague reference in the original Notice of Appeal to a paragraph of the Trial Judgement does not suffice in itself to show that the legal error alleged in the Amended Notice falls within the ambit of the original Ground 1. The Prosecutor has therefore not demonstrated how the

[29] Motion for Variation, para. 1; *see also* Response, para. 8.
[30] *The Prosecutor v. Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Motion to Amend Notice of Appeal, 21 October 2004, p. 3; *The Prosecutor v. Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić to Amend Notice of Appeal, 16 September 2004, pp. 4-5; *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Prosecution's Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005, pp. 3-4.
[31] Motion for Variation, para. 4.
[32] Notice of Appeal, para. 2.
[33] Judgement, para. 402.

paragraph in the Amended Notice is articulating a point allegedly implicit in the original Notice of Appeal.[34]

13. Under the second ground in the Amended Notice concerning the appeal on the sentence, the Prosecutor seeks to include an appeal on the Trial Chamber's alleged failure to consider the sentencing practices in Rwanda.[35] The Prosecutor states that the original Notice of Appeal was not exhaustive of its discussion of the alleged errors of the Trial Chamber, as reflected by the use of the terms "*inter alia*".[36] The Prosecutor argues that therefore it is permitted to include a reference to sentencing practices in Rwanda in the Amended Notice. However, simply inserting catch-all phrases such as "*inter alia*" or "[s]uch other grounds of appeal as this Chamber may authorize [...]"[37] to provide for any amendments to the Notice of Appeal that an appellant may later seek, does not establish good cause for the Appeals Chamber to authorize those amendments under Rule 108 of the Rules.

3. Disposition

14. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Prosecutor's Motion for Variation in its entirety; **INFORMS** the parties that paragraphs 65 to 74 of the Prosecutor's Appellant's Brief - relating to the intent to further the common purpose - and paragraphs 108 to 114 of that brief - relating to the Rwandan sentencing practice – will be disregarded; **FINDS** that there is no need for the Prosecutor to re-file his Appellant's Brief; and **AFFIRMS** the time-limits for briefing set by the Pre-Appeal Judge.[38]

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

Fausto Pocar
Presiding Judge

Done this 17th day of August 2006,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

[34] *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Prosecution's Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005, pp. 3-4.
[35] Motion for Variation, para. 9.
[36] Motion for Variation, para. 9.
[37] Motion for Variation, para. 10.
[38] *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on Defence Motion for Extension of Time to Respond to the Prosecutor's Appellant's Brief, 20 June 2006.

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THE PROSECUTOR
v.
Aloys SIMBA

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