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International Criminal Tribunal for Rwanda
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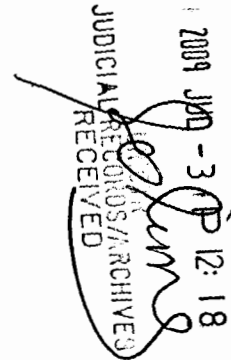
ORIGINAL: ENGLISH

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Florence Rita Arrey

Registrar: Adama Dieng

Date: 3 July 2009



THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-I

**DECISION ON DEFENCE MOTION
CONCERNING DEFECTS IN THE AMENDED INDICTMENT**

The Prosecution
Richard Karegyesa
Adelaide Whest
Didace Nyirinkwaya
Dennis Mabura
Amina Ibrahim

The Defence
Marie-Pierre Poulain

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov and Judge Florence Rita Arrey;

BEING SEIZED OF a Defence motion alleging defects in the Amended Indictment, filed on 22 May 2009;

CONSIDERING the Prosecution responses, filed on 27 and 29 May 2009, as well as the Defence reply, filed on 2 June 2009;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Indictment in this case was filed on 14 December 2000. Following his arrest, Jean-Baptiste Gatete made his initial appearance on 20 September 2002. On 29 March 2004, the Chamber granted a Defence motion, ordering the Prosecution to provide more specific information in relation to several paragraphs of the Indictment.¹ It accepted the Prosecution's proposed amendments on 21 April 2005.² An Amended Indictment was filed on 10 May 2005. It charges Jean-Baptiste Gatete with six counts: genocide, or alternatively complicity in genocide, conspiracy to commit genocide, and extermination, murder and rape as crimes against humanity.³ At the time, the Defence did not challenge the Amended Indictment.
2. On 17 November 2008, a Chamber constituted under Rule 11 *bis* of the Rules of Procedure and Evidence denied the Prosecution request for transfer of the case to Rwanda.⁴ A new Defence counsel was assigned on 24 April 2009. The trial is expected to commence in the next months.
3. The Defence now submits that the Amended Indictment of 10 May 2005 lacks sufficient specificity with respect to locations, perpetrators and victims, dates and alleged criminal acts, and further that the allegation of a joint criminal enterprise under Article (6) (1) of the Statute is not properly pleaded. It also argues that certain pre-1994 events should be removed. The

¹ Decision on Defence Preliminary Motion (TC), 29 March 2004; *Requête de la défense en exception préjudicielles en vertu de l'article 72 du RPF*, filed on 14 April 2003.

² Decision on the Prosecution's Request for Leave to File an Amended Indictment (TC), 21 April 2005; The Prosecutor's Submission and Request for Leave to File an Amended Indictment Complying with the Chamber's Order of 29 March 2004, filed on 27 November 2004.

³ The Amended Indictment did not include four charges contained in the previous Indictment: direct and public incitement to commit genocide; persecution as a crime against humanity; and violence to life and outrages upon personal dignity as violations of Article III. Joint criminal enterprise was not alleged specifically in the original indictment or raised in the Defence initial motion challenging the Indictment, nor was it considered in the First Indictment Decision.

⁴ Decision on Prosecutor's Request for Referral to the Republic of Rwanda (TC), 17 November 2008.

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Prosecution argues that the motion was filed outside the time limit under the Rules of Procedure and Evidence, and that the Amended Indictment is sufficiently detailed and clear.⁵

DELIBERATIONS

(i) Time Limits

4. Under Rule 72 (A)(ii), a preliminary motion alleging defects in the form of an indictment must be brought no later than 30 days after disclosure by the Prosecution to the Defence of all material and statements referred to in Rule 66 (A)(i), which is the supporting material accompanying the indictment when confirmation was sought, as well as all prior statements that the Prosecution obtained from the accused.

5. The Defence acknowledges that the Chamber has ruled on the preliminary motion submitted by the former Defence team on 14 April 2003.⁶ However, it cites Rule 50 (C), which allows the accused a further period of 30 days to file preliminary motions under Rule 72 in respect of new charges in an amended indictment. The Defence submits that this deadline has expired and therefore invites the Chamber to consider the motion under Rule 72 (F), under which the Chamber may allow objections to the form of the amended indictment outside of the time limit if good cause is shown.⁷

6. According to the Defence, good cause exists for several reasons. First, the fact that a previous Defence team opted not to avail itself of Rule 50 (C) should not impair the work of the new team. Second, adequate pleading is an important part of an accused's right to a fair trial. Next, the jurisprudence on defects in indictments has developed since the Chamber last ruled on the subject in this matter in March 2004. Finally, granting the motion would streamline the proceedings and expedite the trial.

7. The Prosecution submits that the motion was filed out of time and is without merit. The Amended Indictment conforms to current charging practice and any details required by the Defence will be provided in the Prosecution Pre-trial Brief.

8. Under Rule 50 (A), after the initial appearance of the accused, the Prosecution may only amend an indictment by leave granted under Rule 73. The Chamber recalls that, on 27 November 2004, the Prosecution requested leave to file an amended indictment.⁸ Rule 73 (E) states that a party must file any response within five days from the date on which Counsel received the motion. The Defence did not respond to the Prosecution's 27 November 2004 motion, and leave was granted on 21 April 2005.⁹ The new indictment was consequently filed on 10 May 2005.

⁵ Defence Preliminary Motion Alleging Defects in the Form of the Amended Indictment, filed on 22 May 2009; Prosecutor's Response to the Defence Preliminary Motion Alleging Defects in the Form of the Amended Indictment, filed on 28 May 2009.

⁶ Above, footnote 1.

⁷ The Defence refers to Rule "72 (G)" but means Rule 72 (F).

⁸ Above, footnote 2.

⁹ Decision on the Prosecution's Request for Leave to File an Amended Indictment (TC), 21 April 2005. In the third preambular paragraph, the Chamber noted that the Defence had not filed a response.

The Defence should have objected to the proposed Amended Indictment within the time limit specified under Rule 73 (E).¹⁰ Its current objection is thus out of time.

9. The Chamber finds it clear that the constitution of a new Defence team is not in itself good cause to consider a submission that is filed out of time. At the same time, the Prosecution's submission that any details required by the Defence will be provided in the Pre-trial Brief "where necessary" is not entirely convincing. To the extent the Prosecution has available information which may reduce vagueness in an indictment, it should be included. The Chamber has discretion to consider late-filed submissions, and in the present situation, chooses to do so. It is in the interests of justice, taking into account the importance of the indictment to the fair and expeditious conduct of the trial, to consider the merits of the present motion.

(ii) *General Principles*

10. Article 17 (3) of the Statute, and Rule 47 (C) both require that an indictment set forth a concise statement of the facts of the case and of the crime with which the suspect of accused is charged. As the Appeals Chamber has held, the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the indictment so as to provide notice to the accused.¹¹ Criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible "the identity of the victim, the time and place of the events and the means by which the acts were committed".¹² Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which form the basis for the charges in question.¹³ An indictment lacking this precision is defective unless "the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes."¹⁴

11. In assessing an indictment, each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment.¹⁵ The materiality of such facts as the identities of the victims, the place and date of the events for which the accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events.

(iii) *Time Frames*

12. Paragraphs 13 to 15 of the Amended Indictment deal with events prior to 7 April 1994. Paragraph 13 refers to the period "Prior to and during April 1994", while paragraph 14 starts with the words "Prior to April 1994", and paragraph 15 uses the phrase "Beginning in October

¹⁰ The Defence has invoked Rule 50 (C) which allows the filing of motions in respect of new charges in an amended indictment. As the Amended Indictment did not contain new charges, that provision is not applicable.

¹¹ *Prosecutor v. Muhimana*, Judgement (AC), 21 May 2007, para. 76; *Prosecutor v. Gacumbitsi*, Judgement (AC), 7 July 2006, para. 49.

¹² *Prosecutor v. Muhimana*, Judgement (AC), para. 76, quoting *Prosecutor v. Kupreskić*, Judgement (AC), 23 October 2001, para. 89.

¹³ *Prosecutor v. Ntagerura et al.*, Judgement (AC), 7 July 2006, para. 25.

¹⁴ *Prosecutor v. Kupreskić et al.*, Judgement (AC), 23 October 2001, para. 89.

¹⁵ *Rutaganda v. Prosecutor*, Judgement (AC), 26 May 2003, para. 304.

1990". The Chamber notes the large scale of the operation described in paragraph 15 and potentially large-scale actions in paragraph 14, as well as the further information provided, such as names of alleged perpetrators in paragraph 13 and those of alleged victims in paragraph 15. Even in light of those additional elements, the time frames are broadly formulated. Admittedly, paragraph 13 does provide some specificity as to time frames ("sometime in October 1991 and April 1992" and "every Friday"). Similarly, paragraph 15 contains additional detail ("on or about 3 October 1990" and "on or about 4 October 1990"). However, to the extent the Prosecution has more detailed information in its possession, it should narrow these formulations further to render them more precise.

13. The phrase "on or about" a specific date recurs throughout the Amended Indictment. The Chamber finds that this formulation, which is in conformity with established charging practice, provides sufficient specificity. The Prosecution has also furnished other information, such as locations, names of participants or victims, and descriptions of the acts alleged to have occurred.¹⁶

14. Paragraphs 27 and 46 state that the *Interahamwe* returned to the Kayonza *bureau communal* courtyard "after the rapes and the killings" described in the preceding paragraphs. The Chamber understands this formulation in paragraph 27 to refer to the immediately preceding paragraphs 26 and 26A, and in paragraph 46 to refer to the events in paragraphs 44 and 45. If this is not correct, the Prosecution should clarify the phrases.

15. Paragraph 28 alleges that Gatete arrived in Rulenge, Rukira *commune* in "[m]id to late April 1994" and refers to the *Interahamwe's* actions "the following morning". The Chamber does not find that the two formulations are contradictory here, as the Defence argues.

(iv) *Locations*

16. The Defence argues that paragraphs 15, 18, 23, 31 and 32 do not adequately identify the locations of the crimes alleged. First, the Chamber notes that the Amended Indictment limits Gatete's liability to incidents occurring in the Byumba and Kibungo prefectures.¹⁷ However, paragraph 15 alleges that Gatete arrested Tutsis "throughout Byumba and the surrounding areas". Even if this act cannot in itself support a conviction, relating as it does to pre-1994 events, it should provide greater specificity or circumscribe the liability to Byumba prefecture, if possible. The third and fourth sentences of this paragraph allege that Gatete arrested and killed certain persons, without providing details of the locations, which the Prosecution should specify further.

17. The fifth sentence of paragraph 18 refers to a rape committed by two *Interahamwe*, but does not indicate the location of the crime, other than the fact that the paragraph falls within a heading entitled "Byumba". The sentence does, however, provide the pseudonym of the victim and some identifying information for the two direct perpetrators, as well as an approximate date of on or about 8 April 1994. The context seems to suggest that this crime was committed in Akarambo. If that is not the case, the Prosecution should provide clarification.¹⁸

¹⁶ Other formulations used in the Amended Indictment, such as "on or about and between 12 to 14 April 1994" in paragraph 23, are slightly ambiguous. The Prosecution may therefore wish to clarify them. See, e.g., paragraphs 16, 20, 23, 25, 26, 26A, 33, 36, 44-45.

¹⁷ See Amended Indictment paragraphs 4, 10-12, 16-46.

¹⁸ In paragraphs 18 and 20, reference is made to "Kiramuruzi", whereas paragraphs 17 and 19 mention "Kiramuzi" and "Kiramurzi", respectively. Unless these spellings refer to three different places, they should be harmonised.

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18. According to paragraph 23, "Gatete instigated, commanded and facilitated displaced Hutu peasants to target Tutsi moving southward through Murambi and Kibungo prefecture". It further states that the Accused "ordered displaced Hutus in those regions to kill the interspersed civilian Tutsi". Gatete is not alleged to have been directly involved in these killings. Moreover, this appears to be a large-scale event, regarding which it may be impracticable to provide further information at this stage. It is not clear, however, where the killings took place ("Tutsi were killed as a result"). The Prosecution should provide more detail, if available, about where the killings took place or where Gatete's actions are alleged to have occurred.

19. Paragraph 31 alleges that, on or about the night of 19 April 1994, Gatete and several named participants attended a security meeting in Kibungo to share intelligence regarding the Rwandan Patriotic Front. The Chamber considers that this information, taken as a whole, is sufficient.

(v) *Identities of Participants and Victims*

20. With regard to paragraph 15 of the Amended Indictment, the Chamber refers to its findings above (para. 12 of this decision). The Prosecution should provide more details, if available, regarding the *Interahamwe* to which the third sentence refers and the 16 victims mentioned in the fourth sentence.

21. The second sentence of paragraph 17 purports to give an example of meetings allegedly held by Gatete on or about 7 April 1994 in Byumba. It states that, at approximately 2.00 a.m., he conducted meetings with local administrative officials in Nyabisindu to distribute weapons and to instigate civilian militias to kill Tutsi civilians whom he blamed for President Habyarimana's death. The reference to Nyabisindu local administrative officials in this sentence, the time of day given, and the content of the meetings provide adequate detail for Gatete to prepare his defence.

22. Paragraph 20 alleges that, between 7 and 12 April 1994, the Accused used a megaphone to command and order *Interahamwe* in Murambi commune sectors, five of which are named, to kill Tutsis. A named co-perpetrator is also alleged to have ordered the *Interahamwe* in Rwankuba sector to start the killings. It is stated that the *Interahamwe* killed Tutsi civilians as a result of Gatete's actions. The Chamber notes his alleged use of a megaphone, the approximate but circumscribed time frame, the name of the alleged co-perpetrator, and the fact that the victims have been identified as members of the targeted group.¹⁹ It therefore considers that adequate information is given in this paragraph.

23. According to paragraph 21, on or about 8 April 1994, at Nyagasambu at a roadblock on the road to Rwankuba, Gatete instigated and ordered civilians to hunt down and exterminate Tutsis and provided dogs for the civilian militia to facilitate the hunt. It is also alleged that "Tutsi civilians were killed as a result of" Gatete's efforts. The location is specified with a good degree of precision, and a time frame centering on one date is included as is the victims' identification as members of the targeted group. Further detail is not necessary.

24. As noted in paragraph 18 above, the limited level of detail in paragraph 23 of the Amended Indictment appears to be due to the large-scale nature of the event alleged. To the extent possible, however, the Prosecution should provide greater detail on the identities of the

¹⁹ Decision on the Defence Preliminary Motion Challenging the Amended Indictment (TC), 30 May 2005, para. 9.

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perpetrators (“displaced Hutu peasants” and “Hutus in those regions [of Murambi and Kibungo prefectures]”).

25. Paragraph 24 states that, following a meeting between Gatete and the *bourgmestre* of Rukara, Jean Mpambara, Tutsi refugees “were ordered” to leave the church in Rukara parish and killed by *Interahamwe* when they refused. Further information should be provided, if available, about who gave that order to the refugees.

26. In paragraph 41, it is alleged that Gatete ordered *Interahamwe* to kill a businessman named Butare on or about 14 April 1994 in Kayonza commune, Kibungo. The Defence seeks identifying details of the *Interahamwe*. The Chamber finds that adequate detail has been given, taking into account the time frame, the location, and the named victim.

27. Paragraphs 44 to 46 appear to refer to large-scale events. Paragraph 44 states that Gatete and a named co-perpetrator transported soldiers to a specified parish where the Tutsi who had take refuge were attacked and raped. Paragraph 45 alleges that Gatete and a named co-perpetrator commanded *Interahamwe* to rape Tutsi women in the “bureau command” courtyard in Kayonza, Kibungo. According to paragraph 46, the *Interahamwe* returned to the courtyard where Gatete ordered and instigated them to go to three named adjoining sectors to rape and exterminate the remaining Tutsis. Approximate time frames of a few days and locations are given in some detail, including the name of the *bourgmestre* alleged to have collaborated with Gatete in all three of these events. In the circumstances, the Chamber deems that sufficient detail has been provided here.²⁰

(vi) *Specificity of Gatete's Acts*

28. The Defence asserts that the allegations in paragraphs 18, 20, 21, 23, 26A, 27, 44 and 46 that Gatete’s actions caused certain events to occur are unclear. In the Chamber’s view, all are adequately clarified.²¹

(vii) *Temporal Jurisdiction*

29. Paragraphs 13 to 15 of the Amended Indictment detail pre-1994 allegations against Gatete. The Defence submits that paragraph 15 should be withdrawn because it falls outside the temporal jurisdiction of the Tribunal and is more prejudicial than probative. The Prosecution seeks to rely upon evidence of pre-1994 allegations to show a consistent pattern of conduct, prior to 1994, for the purposes of inferring intent, with respect to the crimes committed in 1994.²²

30. Rule 93 states that evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the statute may be admissible in the interests of justice. Moreover, although the Tribunal only has jurisdiction in respect of crimes committed between 1 January and 31 December 1994, it follows from case law that a Chamber may admit and consider relevant evidence concerning events that occurred in whole or in part prior to

²⁰ The Chamber notes that paragraph 45 of the English version mentions the “bureau command courtyard”, whereas the other references correctly state the “*bureau communal* courtyard”.

²¹ The Prosecution should, however, remove the double reference to “instigating” in paragraph 46.

²² Prosecution Corrigendum, 29 May 2009, para. 2 (inserting a new paragraph 13 into the Prosecution Response).

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1994.²³ The proper stage to determine the admissibility and evidential value, if any, of the paragraphs that contain information about events occurring prior to 1 January 1994 is during the assessment of evidence.

(viii) *Joint Criminal Enterprise*

31. Paragraphs 7 to 9 of the Amended Indictment charge Gatete with joint criminal enterprise (JCE) under Article 6 (1) of the Statute. The Defence submits that the references in paragraph 7 to some of the co-participants in the JCE (“the *Interahamwe*, the Forces Armées Rwandaises, the Presidential Guard, communal police, civilian militia”) are too broad. It also argues that the form of the JCE and its time period are inadequately pleaded. The Prosecution is of the view that the participants in the JCE are to the extent possible sufficiently identified. It cites the Chamber’s finding that “the formulation of the allegation of joint criminal enterprise in the Amended Indictment indicates that Prosecution’s intent to argue all three forms” without disputing that conclusion.²⁴ Furthermore, given the multiplicity of crimes, perpetrators and locations alleged in the Amended Indictment, it intends to specifically articulate its theory of liability in respect of each factual allegation in its Pre-trial Brief.

32. The Appeals Chamber has held that, if the Prosecution intends to rely on the theory of JCE, it must plead the nature and purpose of the enterprise, the period of the enterprise, the identity of the participants, and the nature of the accused’s participation in the enterprise.²⁵ The Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial. The Chamber has already stated that the manner in which the Prosecution has pleaded JCE reflects its intention to pursue all three forms. The Prosecution should provide any additional detail on its theory or theories of liability under JCE in its Pre-trial Brief.²⁶

33. Regarding the identities of JCE participants, paragraph 7 is a *chapeau* paragraph setting out a concise statement of the factual allegations of the enterprise. Paragraph 9 contains the JCE charge itself, which states that the “crimes enumerated within this Indictment were within” the enterprise’s object. To refer to categories or groups of persons in this context is not impermissibly vague.²⁷ The references to co-perpetrators must be read in context with the more specific allegations in the following paragraphs of the Amended Indictment that form the factual basis underpinning the six counts. Moreover, the crimes purportedly within the object of the JCE

²³ See *Prosecutor v. Nahimana et al.*, Judgement (AC), 28 November 2007, para. 313. For example, it is open to the Chamber to rely on evidence of events prior to 1994 where such evidence is aimed at: i) clarifying a given context; ii) establishing by inference the elements (in particular criminal intent) of criminal conduct occurring in 1994; and iii) demonstrating a deliberate pattern of conduct (para. 315).

²⁴ Decision on the Prosecution’s Request for Leave to File an Amended Indictment (TC), 21 April 2005, para. 5.

²⁵ *Prosecutor v. Simic*, Judgement (AC), 28 November 2006, para. 22; *Prosecutor v. Ntagerura et al.*, Judgement (AC), 7 July 2006, para. 24.

²⁶ It is “preferable for an indictment... to refer to the particular form ... of joint criminal enterprise envisaged. However, this does not, in principle, prevent the Prosecution from pleading elsewhere than in the indictment – for instance in a pre-trial brief – the legal theory which it believes best demonstrates that the crime or crimes alleged are imputable to the accused in the light of the facts alleged.” This option is limited by the need to guarantee the accused a fair trial. *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana* (AC), 13 December 2004, para. 475 (citation omitted).

²⁷ *Prosecutor v. Limaj et al.*, Judgement (AC), 27 September 2007, para. 99, *Prosecutor v. Static*, Judgement (AC), 22 March 2006, para. 69.

include several large-scale events, such that requiring a higher degree of specificity would be impracticable.²⁸ For example, paragraph 22 alleges a massacre in which several thousand Tutsis were killed, *inter alia*, by FAR soldiers and *Interahamwe*. Paragraph 29 states that policemen and *Interahamwe* killed approximately 400 persons.

34. According to the Defence, the time frame in paragraph 7 (“During the period covered by this indictment”) is too vague, because the indictment refers to pre-1994 events. The Chamber disagrees. It is clear that the formulation refers to the period after Gatete ended his affiliation with the local government administration.²⁹ Furthermore, he cannot be convicted of any crimes that occurred in whole or in part before 1 January 1994.

35. The Defence has raised the question whether the JCE described in paragraph 7 of the Amended Indictment is the same as that in paragraph 9. In the Chamber’s view, paragraph 9 appears to be a more specific enunciation of Gatete’s liability under paragraph 7. If this is not the case, the Prosecution should clarify the situation further.

²⁸ *Prosecutor v. Kupreskic et al.*, Judgement (AC), 23 October 2001, para. 89.

²⁹ Para. 4 of the Amended Indictment states “[d]uring the period covered by this indictment, Jean Baptiste Gatete was an *Interahamwe* leader. Though no longer formally affiliated with the local public administration, he continued to exercise influence over communal police, gendarmes and civilian militias in Byumba and Kibungo prefectures due to his former status as bourgmestre of Murambi commune, his national leadership role in the MRND political party and his leadership status among the *Interahamwe*.”

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FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the motion in part, and

ORDERS the Prosecution to supplement the Amended Indictment with further particulars to the extent available, regarding the following issues:

1. time frames or dates in paragraphs 13 to 15, 27 and 46;
2. locations in paragraphs 15, 18 and 23;
3. identities in paragraphs 15, 23 and 24;
4. if the joint criminal enterprise described in paragraph 7 is different from that described in paragraph 9, to make that clear; and

ORDERS the Prosecution to file a Second Amended Indictment within five days of the filing of this Decision.


Arusha, 3 July 2009.



Erik Møse
Presiding Judge



Sergei Alekseevich Egorov
Judge



Florence Rita Arrey
p.p. Judge

[Seal of the Tribunal]

