

## Tortured Law/Tortured “Justice” – Joint Criminal Enterprise in the Case of Aloys Simba, by Beth S. Lyons, Esq.<sup>1</sup>

### Introduction

Joint criminal enterprise (JCE) – a judicially interpreted doctrine<sup>2</sup> – has become a “hallmark” mode of liability at the international Tribunals. This concept has been referred to as the “magic bullet of the OTP”<sup>3</sup> and the “nuclear bomb of the international prosecutor’s arsenal.”<sup>4</sup> It is obvious as to why: with these three words, the Prosecution has charged collective and institutional guilt, in one fell swoop. At the ICTR, the Prosecution encapsulates its theory of a conspiracy of government (both at the national and local level)-military-selected Hutu intelligentsia who committed the crimes of 1994 – all within the allegation of JCE.

Perhaps more than any other judicial doctrine, these three words “joint criminal enterprise” have routinely violated the fair trial rights of defendants at the Tribunals, and diluted the requirements for the special intent needed for genocide. Many legal scholars have identified and criticized the legal problems of this “guilt by association” template, especially in respect to the third category of JCE and the mens rea,<sup>5</sup> the conflation and

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<sup>2</sup>JCE has been held to be part of “committing” under 6(1) and 7(1); see, for example, Prosecutor v. Milutinovic et al. (“Decision on Ojdanic Challenge to JCE Jurisdiction”), 21 May 2003, particularly Separate Opinion by Judge David Hunt.

<sup>3</sup>Schabas, William A., “Mens Rea and The International Criminal Tribunal for the Former Yugoslavia,” *New England Law Review*, Summer 2003, 1032.

<sup>4</sup>Danner, Allison Marston and Martinez, Jenny S., “Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law,” *California Law Review*, January 2005, 137, 107.

<sup>5</sup>There is a plethora of literature on this point, especially in the last five years. See, for example, Symposium: Guilty by Association: Joint Criminal Enterprise on Trial (edited by G.Sluis), *Journal of International Criminal Justice*, March 2007; see also, Danner and Martinez, supra. at fn. 4; Schabas, supra. at fn. 3; Nersessian, David L., “Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes,” *Fletcher Forum of World Affairs*, Summer, 2006; Osiel, Mark, “The

confusion between conspiracy and JCE by the Prosecution,<sup>6</sup> and the distinction, if any, between JCE and acting in concert,<sup>7</sup> to name just a few issues. These problems inherent in the JCE doctrine are exacerbated by the additional failures of the Prosecution and Tribunals to follow the jurisprudence, which mandates strict construction in the pleading and proof of JCE.<sup>8</sup>

It is evident to anyone who has had to defend a client against the charge of JCE that the notion is legally convoluted, and its use or application is illogical and violates the rights of defendants. Its ubiquitous presence in ICTR and ICTY cases illustrates the urgency of the Tribunals to assign collective guilt – even if that is based on unpleaded and unproven allegations involving a named defendant and an unnamed, amorphous infinite universe of JCE members – allegations against which a defendant can neither legally, nor logically completely defend himself.<sup>9</sup> Thus, in the quest for collective guilt, blame and punishment, the legally defective doctrine of JCE has been permitted, wrongly in my view, to assume “center stage” in the convictions at the Tribunals.

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Banality of Good: Aligning Incentives Against Mass Atrocity,” Columbia Law Review, October 2005, Section III (discusses elasticity and vagueness problems, and quotes from interview with ICTY Prosecutor that “it is really rather haphazard who gets tossed into the pot” of a given enterprise).

<sup>6</sup>Despite the Prosecution’s erroneous and continuous practice of treating conspiracy and JCE as legally fungible, appellate jurisprudence draws a distinction between a substantive crime and a mode of liability. See, Kvočka et al. Appeal Judgment, 28 February 2005, para. 91 (“joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself”).

<sup>7</sup> See, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm in Simic et al., Trial Chamber Judgment, 17 October 2003, para. 2 (“I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally. The so-called basic form of joint criminal enterprise does not, in my opinion, have any substance on its own. It is nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as international criminal law, namely co-perpetration. . .”)

<sup>8</sup>See, Brdjanin Appeals Decision. Para. 428 (the Appeals Chamber emphasized that “JCE is not an open-ended concept that permits convictions based on guilt by association. On the contrary, a conviction based on the doctrine of JCE can occur only where the Chamber finds all necessary elements satisfied beyond a reasonable doubt”); Kordic and Cerkez, Trial Judgment, 26 February 2001, para. 219 (Trial Chamber warned that “Stretching notions of individual mens rea too thin may lead to the imposition of criminal liability on individuals for what is actually guilt by association, a result that is at odds with the driving principles behind the creation of this international Tribunal”).

<sup>9</sup>As Ohlin points out, “there is no warrant for extending liability to a JCE simply because the very nature of these crimes is collective. The question is not whether it is collective or not but what kind of collective action is criminal under the ICTY Statute.” Ohlin, Jens David, “Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,” Journal of International Criminal Justice, March, 2007, section 72 (Westlaw version).

Although there are clearly multiple contenders for the “lowest point” of Tribunal jurisprudence, JCE continues to make its place in the top of the charts.

### **The Simba Case**

The Simba case was one of the first single defendant cases at the ICTR to allegedly charge JCE.<sup>10</sup> Aloys Simba was charged with genocide, or alternatively, complicity in genocide, and murder and extermination as crimes against humanity.<sup>11</sup> The basic defence in Simba was alibi, which was accepted by the Trial Chamber for part of the period of time in question, but rejected for the period during which his participation was alleged in massacres and killings. On 13 December 2005, the Trial Chamber convicted Aloys Simba, a retired lieutenant colonel in the Rwandan Army and a former member of the Rwandan Parliament for the MRND (which party he left in September 1993), of genocide and extermination as a crime against humanity for participation in a JCE to kill Tutsis civilians at two sites: Murambi Technical School and Kaduha Parish, both in Gikongoro prefecture.<sup>12</sup> Simba was sentenced to twenty-five years. On appeal, the judgment was affirmed. In 2009, he was transferred from Arusha to Benin, where he is now serving his sentence.

Unfortunately, the Tribunal made bad law in respect to JCE (as well as other issues) in the Simba case. This brief paper addresses only two of the erroneous holdings in the Trial Chamber’s judgment: (a) the Trial Chamber’s conclusion that the manner in which the Prosecution gave notice of its theory of JCE did “not in any way render the

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<sup>10</sup>I think there was one single defendant case, prior to Simba, where “common scheme” was charged. However, appellate jurisprudence requires strict adherence to the requirements of JCE notice, regardless of the exact words charged. Giacumbitsi Appeal Judgment, 7 July 2006, paras. 158-179 (Appeals Chamber dismissed Prosecution’s appeal of error in Trial Chamber judgment that it could not make a finding on JCE because it was not pleaded clearly enough to permit the Accused to defend himself [para. 289], holding that although the absence of the words “joint criminal enterprise” is not in itself defective, the question is whether the Accused has been meaningfully informed of the nature of the charge).

<sup>11</sup>The Prosecution withdrew the counts of complicity and murder as a crime against humanity in its Closing Brief, filed 22 June 2005 (paras. 49, 191).

<sup>12</sup>As the Trial Chamber stated in its Summary of the Judgment, this trial was the first case in the Tribunal concerning the events in Gikongoro prefecture [Simba’s prefecture]. Hence, Simba was the first person from this area to be convicted. It was the Defence view that this was significant, and the lack of prior convictions from this area was an added impetus to find Simba guilty.

trial unfair”<sup>13</sup> and (b) the Trial Chamber’s conclusion that Simba possessed “momentary” genocidal intent, at the site, which he shared with the countless unnamed others at the site.<sup>14</sup> Both of these points - the pleading of JCE, particularly in respect to the material element of identity of membership; and the “on the spot” mens rea finding – illustrate the dangers and illegalities of the JCE doctrine. The points on proof in reference to JCE are not addressed here.<sup>15</sup>

### **The “Loose” Application of JCE Pleading Rules, Especially as to the Identity of JCE Members – Fair Trial Abuses in the Trial Chamber and Appeals Judgments**

Specificity in pleading is a general principle of notice. The rules of JCE pleading are simple and direct. JCE must be pleaded in an “unambiguous manner” and the form of JCE on which the Prosecution is relying must be specified.<sup>16</sup> In pleading the form of JCE, the Prosecution must also plead the mens rea, which is specific to each of the three forms.<sup>17</sup> In addition, the Prosecution must plead the following material elements of JCE: its purpose, the identity of the co-participants, and the nature of the accused’s participation in the enterprise.<sup>18</sup> The Prosecution is expected to know its case, and not mould its theory as the evidence evolves.<sup>19</sup>

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<sup>13</sup>Simba Trial Chamber Judgment, 13 December 2005, para. 396.

<sup>14</sup>Ibid., para. 418.

<sup>15</sup>The Defence argued that the Prosecution did not prove beyond a reasonable doubt that a joint criminal enterprise existed, and did not prove that a criminal nexus existed between Aloys Simba and the persons named in paragraph 14. And, the Prosecution could not prove that a criminal nexus existed between Simba “and others” [who were unnamed] alleged to be in the joint criminal enterprise. Lastly, the Defence raised reasonable doubt that Aloys Simba had any criminal connection or relationship to the named persons in paragraph 14 for the purpose of carrying out the objective of a joint criminal enterprise.

<sup>16</sup>Ntagerura Trial Chamber Judgment, 25 February 2004, para. 34 (affirmed on appeal, 7 July 2006); see, Prosecutor v. Brdnanin and Talic, Decision, 26 June 2001 (Trial Chamber ordered that the prosecution plead a) whether the crimes alleged fell within or outside the object of the joint criminal enterprise; and b) that the Accused had the mens rea required for those crimes within the object of the enterprise, para. 81(4a) and (4b)); see, Krnojelac, Decision on Form of the Second Amended Indictment, 11 May 2000, para. 16.

<sup>17</sup>Tadic Appeal Judgment, 15 July 1999, paras. 220-228.

<sup>18</sup>See, Kvočka et al. Appeal Judgment, 28 February 2005, paras. 28, 42.

Despite the abundance of appellate jurisprudence on the requirement of notice, and the due process requirements found in international law and conventions, it often appears that the Prosecution and the Trial Chamber take the position that JCE is somehow exempt from, or not an urgent matter of, notice.<sup>20</sup> These legal requirements are regularly violated by the Prosecution, as illustrated by the multiple pleadings on defects in the indictment, found in Simba and other cases.

But what is significant in Simba is that even where the Trial Chamber initially ruled that the Prosecution's pleadings were lacking in respect to JCE, the Trial Chamber did not take a position that a remedy was mandated as a matter of fair trial. Instead, its position was to justify the Prosecution's defective pleading, particularly in respect to the material element of identity of members in the JCE and the forms of JCE and each's respective mens rea, and to provide "legal" rationales to cover the violations.

### **Procedural History**

It should be noted that the JCE defects in the indictment were in the context of a generally defective indictment, which was vague, lacked specificity to support elements of the crimes and forms of liability charged, lacked time frames, etc. The Defence position was that the JCE allegation was a legal fiction: the allegation was neither pleaded in conformity with the legal requirements<sup>21</sup> nor, as we argued at closing, proved beyond a reasonable doubt.

The three words, "joint criminal enterprise" first appeared in the 1<sup>st</sup> amended indictment, filed in January 2004. In response to Defence objections to the inadequate pleading of JCE, the Trial Chamber acknowledged that the state of mind of the Accused or his alleged partners in the JCE was not specifically pleaded, and "consider[ed] that the

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<sup>19</sup>See, e.g., Muvunyi Appeal Judgment, 29 August 2008, para. 19; see also, Ntagerura Appeal Judgment, para. 27 and Ntagerura Trial Judgment, para. 24; Krupeskic Appeal Judgment, 23 October 2001 para. 92. Note, there is abundant jurisprudence, at both Tribunals, on this point.

<sup>20</sup>Unfortunately, other Trial Chambers have not promptly decided Defence objections on the pleading of JCE. For example, in the "Military II," the Trial Chamber, in a 2006 decision on a Defence motion, deferred ruling on the JCE objections. At the time of closing arguments in June 2009, the Trial Chamber still had not made a ruling on JCE.

<sup>21</sup>See, Tadic Appeals Judgment, paras. 220-228, and its progeny.

amended indictment should be amended to plead the mens rea element of JCE.”<sup>22</sup> However, its Order to the Prosecution to provide details was tempered with, “if it is in a position to do so.” This essentially left the Prosecution an option to decide what it could or, more accurately, would do....if anything. Of course, the Prosecution was never in a position to comply with the legal pleading requirements for JCE.

In the 2<sup>nd</sup> amended indictment, filed 10 May to conform with the 6 May decision, the Prosecution simply tacked on the phrase “in concert with others as part of a joint criminal enterprise” to the statutory definition of Article 6(1).<sup>23</sup> The Prosecution did not plead mens rea for each form, nor specify any form of JCE, but simply added paragraph 58 which stated that Simba “intended to commit the acts above, this intent being shared by all other individuals involved in the crimes perpetrated.”

The Prosecution amendment (paragraph 58) was essentially a “one-size fits all” mens rea for the three forms of JCE, and a good example of what the Kronjelic Appeals Chamber refers to as “persistent ambiguity” in the pleading of JCE.<sup>24</sup> The Defence filed another motion on defects in this 2<sup>nd</sup> amended indictment, which was denied by the Trial Chamber. It held that the indictment, as a whole, provided adequate notice. The Chamber, however, acknowledged that the indictment referred to JCE without specifying the particular form, but understood this to mean that the Prosecution was relying on all three forms. The Trial Chamber cautioned that each paragraph should not be read “in isolation” and should be considered in the “context” of the other paragraphs of the indictment. Thus, with ICTR “jurisprudence parlance,” the Trial Chamber proceeded to “remedy-away” the defect in pleading.<sup>25</sup> In its closing brief, the Prosecution – for the first time – gave notice that it was basically pursuing only JCE I.<sup>26</sup>

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<sup>22</sup>Decision on Preliminary Defence Motion Regarding Defects in the Form of the Indictment, 6 May 2004, paras. 11-12.

<sup>23</sup>See, Amended Indictment pursuant to 6 May 2004 Decision on ICTR website. Numerous cases have rejected this practice and have held that tracking of elements in an indictment does not provide notice. See, Muvunyi Appeal Judgment, para. 44.

<sup>24</sup>Kronjelic Appeal Judgment, 17 September 2003, para. 144.

<sup>25</sup>Decision on the Defence’s Preliminary Motion Challenging the Second Amended Indictment, 14 July 2004, para. 6, which reads: “The Chamber notes that the indictment only refers to joint criminal enterprise without specifying the particular form. In the Chamber's view, the indictment's failure to point to a particular form of joint criminal enterprise reflects the Prosecution's intention to rely on all three forms.

In its judgment, the Trial Chamber stated that the Prosecution provided additional detail in its Pre-Trial Brief.<sup>27</sup> This was its first reference in any decision to the Prosecution Pre-Trial Brief (“PTB”), filed 10 May 2004, as a form of notice. But, again, the Trial judgment was less than equivocal in its findings. The Trial Chamber also stated that it “does not exclude that the Prosecution could have pleaded the requisite elements of joint criminal enterprise in a more clear and organized manner in the Indictment.”<sup>28</sup>

However, the PTB sections on the joint criminal enterprise suffered from the same problems of vagueness and lack of specificity as the facially defective amended indictments, and the only specific material element alleged was the time frame: 6 April – 17 July 1994.<sup>29</sup> As to the forms of JCE, the Prosecution stated it was adducing evidence for all three categories of JCE,<sup>30</sup> but there was no indication of the different mens rea for each. On membership in the JCE, the Prosecution included broad, general categories as members of the joint criminal enterprise, and identified by name only a few of the persons who had already been named in the Indictment, paragraph 14.<sup>31</sup> In addition, although the Pre-Trial brief incorporated and referred to the indictment allegations to

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Consequently, the indictment must plead the distinct mens rea for each form of joint criminal enterprise. In assessing an indictment, the Chamber is mindful that each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment.”

<sup>26</sup>Simba Trial Judgment, para. 386.

<sup>27</sup>*Ibid.*, para.391.

<sup>28</sup>*Ibid.*, para. 391.

<sup>29</sup>Prosecutor’s Pre-Trial Brief, filed 10 May 2004, para. 141.

<sup>30</sup>*Ibid.*, para. 127.

<sup>31</sup>For example: Paragraph 141 stated: “As noted in the factual allegations above, the Prosecution will lead evidence to prove that between 6 April and 17 July 1994, Aloys SIMBA directly participated in and substantially contributed to the realization of a common criminal enterprise, scheme or purpose of eliminating Tutsis. The Prosecution will prove and demonstrate that this criminal enterprise was constituted, orchestrated, espoused, implemented and/or executed by the 1994 Rwandan leadership, including the government of the day.” Para. 143 stated: “Furthermore, the Prosecutor will lead evidence demonstrating the execution of the criminal enterprise of eliminating Tutsis by other members of the local administration and security services in Gikongoro prefecture. These include the Prefet, Laurent BUCYIBARUTA, sub prefet, Damien BINIGA, Bourgmestres, local Tea factory directors, Juvenal NDABARINZI and Denis KAMODOKA, gendarmerie commander Faustin SEBUHURA and others. All structures of authority in Gikongoro prefecture, including the army gendarmerie, the Interahamwe, the civil defence, Impuzamugambi , prefets, bourgmestres, etc. were mobilized to the service of the genocide.”

support Simba’s alleged participation in a JCE, there was no nexus alleged between specific allegations and joint criminal enterprise. In fact, these same paragraphs were also used to support liability under command responsibility [6(3)]. Thus, the Defence argued that reliance on the PTB to remedy material defects in an indictment was in error, and, in the alternative, even if the PTB were accepted, it did not cure any defective notice.<sup>32</sup>

In its judgment, the Trial Chamber took the position, following its earlier decision, that in the absence of any form being pleaded, all three forms were being alleged. As to the problem that the mens rea specified in para. 58 of the indictment applied to only one form, the judgment “resolved” this defect by holding that the Prosecution had, at the close of its case, stated it was principally pursuing form one only, and the Trial Chamber, no doubt, was satisfied that form one mens rea was pleaded [referring to para. 58].<sup>33</sup>

This “logical” perspective on the [non] pleading of form is a disingenuous representation. In fact, what had occurred was that the Prosecution had molded its case, based on the evidence at trial – a practice legally opposed by a long line of trial and appellate jurisprudence holding that the Prosecution is expected to “know its case” before proceeding to trial.<sup>34</sup> The Trial Chamber never held the Prosecution accountable for its failure to plead (or prove) what it had claimed as its theory of JCE liability – all three forms of JCE liability. The Trial Chamber basically “covered up” the Prosecution’s failure to give notice on the form and mens rea in any way which was meaningful to the defendant. Even the Prosecution, on appeal, effectively conceded this defect in the indictment: “. . .it is true that the Indictment did not expressly indicate the specific form,

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<sup>32</sup> Use of the PTB to cure defects in the indictment has been held to be a “less preferred practice.” See, Kronjelic Appeal Judgment, 17 September 2003, para. 138 (“this option, however, is limited by the need to guarantee the accused a fair trial”).

<sup>33</sup> Simba Trial Judgment, para. 386. But see, Bikindi Trial Judgment, 2 December 2008, where the Trial Chamber held that “by pleading all three categories of joint criminal enterprise, the Prosecution failed to properly inform Bikindi as to which form of joint criminal enterprise was being alleged” (para. 400). In Bikindi, as in Simba, the Prosecution stated that it intended to rely on all three categories of JCE.

<sup>34</sup> See, Muvunyi Appeal Judgment, 29 August 2008, para. 18, fn. 47 for additional citations.

*as seems to be* required by the Appeals Chamber in Kvočka. . . ” [*italics added*]<sup>35</sup>

Based on this, the elementary fair trial principle of notice, i.e., that the defendant has a right to be informed in detail of the charges against him before (and not after) he presents his case, was violated by the Prosecution, and – at times – with the complicity of the Trial Chamber.

### **“Never Too Late” – The Prosecution’s Change – in its Closing Brief - of the Material Element of Identity in the Alleged JCE**

The issue of the timing of “notice” was particularly egregious in respect to the identity of the participants of the alleged JCE. Paragraph 14 of the indictment stated that “In preparing and planning the massacres, which occurred in Gikongoro and Butare prefectures in April and May 1994, Aloys SIMBA acted in concert with” eight named persons and others not known to the Prosecution.<sup>36</sup> The Defence prepared its case<sup>37</sup> based on the allegations that the eight named individuals in paragraph 14, according to the Prosecution, comprised the members of the alleged joint criminal enterprise. The Defence questioned witnesses about Simba’s relationship, if any, to these named persons. The Trial Chamber, as well, questioned witnesses similarly on the names in paragraph 14. Thus, the Defence - as well as the Prosecution and the Trial Chamber - relied on paragraph 14 of the Simba indictment as the factual support for the material element of identity of the named persons in the alleged joint criminal enterprise.

In its Closing Brief, filed on 22 June 2005, the Prosecution changed the identity of the alleged joint criminal enterprise members, by close to 50%. The Prosecution identified a new total of fifteen individuals,<sup>38</sup> almost twice as many as in paragraph 14.

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<sup>35</sup>Prosecutor’s Respondent’s Brief, 1 December 2006, para. 132.

<sup>36</sup>Paragraph 14 included eight named individuals, and others: Faustin SEBUHURA, Laurent BUCYIBARUTA, Damien BINIGA, Denys KAMODOKA Juvenal NDABARINZE, Lt. Col. Augustin RWAMANYA, Joachim HATEGEKIMANA, Charles MUNYANEZA and OTHERS not known to the Prosecution.

<sup>37</sup>Throughout, the Defence maintained that JCE was not pleaded, and did not waive its objections to the defective pleading of joint criminal enterprise.

<sup>38</sup>The new “Closing Brief” participants in the JCE were: Faustin SEBUHURA, Laurent BUCYIBARUTA, Damien BINIGA, Denys KAMODOKA Juvenal NDABARINZE,, Joachim HATEGEKIMANA, Charles MUNYANEZA, one NGOGA, one NKUSI, one GAKURU, Francois GASANA, Joseph

Eight new persons<sup>39</sup> who did not appear on the paragraph 14 list, had been added in the Closing Brief. Thus, almost half of the names in the Closing Brief had not appeared in paragraph 14, and one of the original names (Lt. Col. Augustin RWAMANYA) had been removed, as well as the category of “OTHERS not known to the Prosecution.”

The Defence, obviously taken by surprise, had been – more accurately – ambushed.<sup>40</sup> But the judgment is silent on this fair trial violation. No where can one find a reference to the Prosecution’s nearly 50% change of the alleged JCE membership in its Closing Brief.

In fact, the Trial Chamber found that the indictment “adequately identifies the participants alleged to have materially committed the crimes forming part of the common criminal purpose.”<sup>41</sup> The Trial Chamber held that “some are named in various paragraphs throughout the Indictment in connection with planning of the attack,” which included references to the four named Interahamwe who appeared in the Prosecution Closing Brief.<sup>42</sup> But the judgment fails to also add that two of the new names do not appear in the indictment at all – a point so obvious that even the Prosecution had to concede.<sup>43</sup>

On appeal, the Defence argued that the identity of participants in the joint criminal enterprise is a material element, and should be pleaded in the indictment. The

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NTEGEYINTWALI, Felcien SEMAKWAVU, Israel NSENGIYUMVA and Landouald KARAMAGE.

<sup>39</sup> One NGOGA, one NKUSI, one GAKURU, Francois GASANA, Joseph NTEGEYINTWALI, Felcien SEMAKWAVU, Israel NSENGIYUMVA and Landouald KARAMAGE.

<sup>40</sup> The Defence was informed of this change in the JCE composition late, when it was impossible to defend against the allegations of the new named members, and preserved objections to this fair trial violation in its subsequent closing arguments.

<sup>41</sup> Simba Trial Judgment, para. 392.

<sup>42</sup> Ibid., 392, fn. 402.

<sup>43</sup> Prosecutor’s Respondent’s Brief, supra., fn. 195. Here, the Prosecution acknowledged that two members of the JCE listed in its Closing Brief for the first time, Gasana and Ntegeyintwali, are not named in the indictment. But, they argued, notice was given through a witness statements and a will-say statement (which was ultimately rejected as inadmissible by the Trial Chamber). NOTE: Mere disclosure of witness statements does not provide notice. Prosecutor v. Zigiranyirazo, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, 15 July 2004, para. 51; Naletilic et al. Appeal Judgment, 3 May 2006 para. 27 (citations omitted); Mpambara Trial Judgment, 11 September 2006, para. 30 (judgment of acquittal not appealed by the Prosecution).

change in close to fifty percent of the composition of the joint criminal enterprise after the close of evidence can hardly be deemed a “minor discrepancy.”<sup>44</sup> Further, such a material change causes prejudice to the Defence, and misleads the Defence.<sup>45</sup> The Defence also argued that Prosecution opted to “surprise” the Defence with its changes in the Closing Brief, after the trial, rather than choose the option of Rule 50 (Rules of Procedure and Evidence) which provides procedures for amendment of the indictment. The Prosecution did not make any motion, pursuant to Rule 50, to amend the indictment in respect to the names.

In addition, the Defence pointed out that the Trial Chamber’s findings that Simba “acted in concert” as part of a joint criminal enterprise with six of the named participants in the Prosecution Closing Brief - Nsengiyumva and Karamage, and Ngogo, Gakuru, Nkusi and Bakundukize - is inconsistent with its own holdings in the judgment.<sup>46</sup>

As to the vagueness of the category of participants, the Trial Chamber held that “. . . named individuals, as well as the attackers, should be considered as participants in the joint criminal enterprise.”<sup>47</sup> The Chamber continued that it is “not satisfied that the Prosecution could have provided more specific identification,” and held that identification by category, such as gendarmes and Interahamwe, is sufficient.<sup>48</sup>

In sum, the Trial Chamber position was so broad as to eviscerate the meaning of notice for material elements of joint criminal enterprise as held by the Appeals Chamber in Kronjelic and other cases, and to nullify the legal elements such as findings of shared mens rea, required by Tadic.

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<sup>44</sup>Cf., Kunarac Appeal Judgment, 12 June 2002, para. 217 (“minor discrepancies” between the dates in the Trial Judgment and those in the Indictment in respect to rapes not found to be unreasonable).

<sup>45</sup>See, Rutaganda Appeal Judgment, 26 May 2003, para. 303.

<sup>46</sup>Nsengiyumva and Karamage are named in para. 15, but this paragraph was found to be defective, and the evidence of Simba’s 2<sup>nd</sup> visit to Gasarenda Centre (to Karamage’s bar) is not a basis of conviction. (Simba Trial Judgment, para. 23). Ngogo, Gakuru, Nkusi and Bakundukize are named in para. 57, but the Trial Chamber found no evidence to support the allegations. (Judgment, para. 86)

<sup>47</sup>Simba Trial Judgment, para. 393.

<sup>48</sup>Ibid.

The Appeals Chamber dismissed all the Appellant's arguments on JCE and notice. It affirmed that a) the indictment provided adequate notice of the JCE<sup>49</sup> and adequate notice of the identity of the participants in the JCE,<sup>50</sup> and b) the pleading of pleading of the category of JCE was not inadequate.<sup>51</sup>

On the issue of identity of the members of the JCE, the Appeals Chamber adopted the reasoning of the Trial Chamber judgment in paragraphs 392 and 393. The Appeals Chamber found that the Defence arguments about lack of notice in the Closing Brief were "misconceived." It stated that "Prosecution final trial briefs are only filed at the end of a trial, after the presentation of all the evidence, and therefore are not relevant for the preparation of an accused's case."<sup>52</sup>

Where the Prosecution gives legally compliant and timely notice to the Defence, one cannot disagree with this statement on final trial briefs. However, the Appeals Chamber totally disregarded the pleadings the Defence that it was taken by surprise with the Prosecution's "post-trial notice." At such a point, the Defence could do nothing, for example, to defend against the two names which were allegedly part of the JCE, and not mentioned anywhere in the Indictment, even according to the Prosecution!<sup>53</sup>

### **The "on the spot" intent**

The legal and factual impossibility of defending against the unknown is a truism. How can an Accused defend against allegations of "shared genocidal intent" as well as an intent to be part of a JCE with an infinite universe of alleged nameless JCE members?

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<sup>49</sup>Simba Appeal Judgment, 27 November 2007, para. 68.

<sup>50</sup>Ibid., para. 75 (adopting the reasoning of the Trial Chamber judgment, paras. 392 and 393, which refer to paragraph 14 as the listing for the JCE members, and holds that others are named throughout the indictment, and that the Prosecution could not have provided more details about the general categories of participants (Interahamwe or gendarmes).

<sup>51</sup> Ibid., paras. 76-80. The Appeals Chamber, like the Trial Chamber, made the same observation of the Prosecution's failure to specifically name the category of JCE on which it intended to rely in the Indictment. But, it agreed that paragraph 58 gave sufficient notice of the mens rea requirement for JCE I, when read together with the rest of the indictment.

<sup>52</sup> Ibid., para. 73.

<sup>53</sup> See fn. 44, supra.

The JCE doctrine, inherently defective, and especially in the hands of a less than legally rigorous and scrupulous Prosecution, raises this absurd and illogical scenario to a legal travesty.

The Trial Chamber, in respect to the two massacre sites (Kaduha and Murambi) found that “the only reasonable conclusion, even accepting his [Aloys Simba] submissions as true, is that at that moment, he acted with genocidal intent.”<sup>54</sup> The legal issue on appeal was whether the finding that “on the spot” or “momentary” genocidal intent is supported in law. The Defence argued that for the crime of genocide to occur, the mens rea must be formed prior to the commission of the genocidal acts.<sup>55</sup> The Defence also argued that mens rea requirement for the JCE and the mens rea as an element of the crime are two distinct legal concepts. Hence, JCE requires two separate intents – the intent to be part of the JCE, and the intent of the object of the JCE, in this case, the special intent for genocide.<sup>56</sup> But both the trial and appellate judgments collapse these two intents into one intent - which could, at the moment, be formed.

The Appeals Chamber found no merit in this position, stating that the “inquiry is not whether the specific intent was formed prior to the commission of the acts, but whether at the moment of commission the perpetrators possessed the necessary intent. The Trial Chamber correctly considered whether Appellant and the physical perpetrators possessed genocidal intent at the time of the massacres.”<sup>57</sup>

These holdings could be read to contradict the Prosecution thesis that there was a conspiracy to plan genocide, a point which has been rejected by the appellate jurisprudence in the “Media” case and others, and recently by the Military I trial judgment acquitting the defendants of conspiracy to commit to genocide. If the intent is formed spontaneously or “at the moment” as Simba holds, then planning genocide or conspiring to commit genocide, both of which suggest a prior formation of intent, are

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<sup>54</sup> Trial Judgment, para. 418.

<sup>55</sup> Kayishema and Ruzindana (TC), 21 May 1999, para. 91 (holding undisturbed on appeal). Admittedly the jurisprudence on this point is minimal.

<sup>56</sup> See, Brdjanin Appeal Judgment, 3 April 2007, para. 365 (where convictions under the first category of JCE are concerned, the accused must both intend the commission of the crime and intend to participate in a common plan aimed at its commission) – footnotes omitted (751 and 752).

<sup>57</sup> Simba Appeal Judgment, p. 266.

repugnant legal notions. This may be an unintended consequence of the bad law! Not exactly a “silver lining” though, when one considers the legal injustices committed in the name of “JCE.”

## **Conclusion**

When we first started to litigate JCE in the Simba case, the number of articles on JCE was limited. Perusing the literature today, there is definitely a larger and vocal critique of JCE, in addition to the body of Defence litigation at both Tribunals. This is a positive step, but unfortunately offers no redress to those wrongly convicted under the theory of JCE. Cases can not be “re-opened” based on the increasing acknowledgement of the defects inherent in JCE, and these convictions cannot be written off as “collateral damage” in the quest to assign collective blame and responsibility. The defective doctrine of JCE has been a lynchpin in the injustices of the Tribunals, and illustrates how legal doctrine, often nurtured by the Chambers, services the political agenda of the Prosecution. The result is a political and legal legacy of tortured law and tortured “justice.”