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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

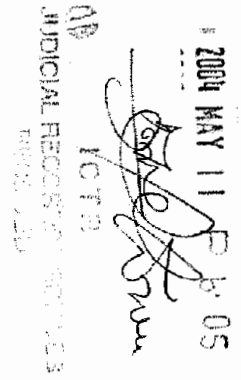
OR: ENG

TRIAL CHAMBER III

Before Judges: Andrésia Vaz, Presiding
Flavia Lattanzi
Florence Rita Arrey

Registrar: Adama Dieng

Date: 11 May 2004



THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
André RWAMAKUBA

Case No. ICTR-98-44-T

DECISION ON THE PRELIMINARY MOTIONS BY THE DEFENCE OF JOSEPH NZIRORERA, ÉDOUARD KAREMERA, ANDRÉ RWAMAKUBA AND MATHIEU NGIRUMPATSE CHALLENGING JURISDICTION IN RELATION TO JOINT CRIMINAL ENTERPRISE

Article 6 (1) of the Statute, Rule 72 of the Rules of Procedure and Evidence

Defence Counsels of the Accused:
Peter Robinson
Dior Diagne and Félix Sow
David Hooper and Andreas O'Shea
Charles Roach and Frédérik Weyl

Office of the Prosecutor:
Don Webster
Dior Sow Fall
Gregory Lombardi
Sunkarie Ballah-Conteh
Tamara Cummings-John
Ayo Fadugba

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

SITTING as Trial Chamber III, composed of Judges Andrésia Vaz, Presiding, Flavia Lattanzi and Florence Rita Arrey ("Chamber");

BEING SEIZED of the "Preliminary motion challenging jurisdiction in relation to joint criminal enterprise" filed by the Defence for Joseph Nzirorera on 18 March 2004 and modified by the withdrawal of the Motion's second ground on 22 March 2004; the "Motion to support motions submitted by Counsel for Édouard Karemera and Joseph Nzirorera" filed by the Defence for Mathieu Ngirumpatse on 23 March 2004; the motion entitled "Requête aux fins d'exception préjudicielle d'incompétence (Art. 72 (A) (i) RPP)" filed on 24 March 2004 by the Defence for Édouard Karemera; the "Preliminary Motion on behalf of Dr. André Rwamakuba – re lack of jurisdiction: The applicability of the doctrine of joint criminal enterprise to the crime of genocide" filed on 24 March 2004; and the "Joinder in Rwamakuba preliminary motion on lack of jurisdiction" filed by the Defence for Joseph Nzirorera on 2 April 2004;

CONSIDERING the Prosecutor's Response to Joseph Nzirorera's motion filed on 23 March 2004; the Prosecutor's Response to Mathieu Ngirumpatse's motion filed on 24 March 2004; the Prosecutor's Response to Édouard Karemera's Motion filed on 29 March 2004; and the Prosecutor's Response to André Rwamakuba's Motion filed on 29 March 2004;

CONSIDERING the Reply Brief to the Prosecutor's Response filed by the Defence for Joseph Nzirorera on 30 March 2004;

NOTING that although the "Preliminary Motion on behalf of Dr. André Rwamakuba" and the "Motion to support Motions submitted by Counsels for Édouard Karemera and Joseph Nzirorera" filed by the Defence for Mathieu Ngirumpatse are not duly signed, the Chamber will, in the interests of justice, take these motions into consideration;

NOTING that although Nzirorera's "Joinder in Rwamakuba preliminary motion on lack of jurisdiction" was filed untimely, the Chamber will, in the interests of justice, take the motion into consideration;

NOTING that the Defence for Mathieu Ngirumpatse joins the motion entitled "Preliminary motion challenging jurisdiction in relation to joint criminal enterprise" filed by the Defence for Joseph Nzirorera on 18 March 2004 and that, contrary to the Prosecutor's submission, the joinder in Nzirorera's motion was timely and will be admitted by the Chamber;

CONSIDERING the Statute of the Tribunal ("Statute") and the Rules of Procedure and Evidence ("Rules"), particularly Article 6 of the Statute and Rule 72 of the Rules;

NOW DECIDES the motions, pursuant to Rule 72 A) of the Rules, solely on the basis of the written briefs filed by the parties.

I. Parties' submissions

1. Defence for Joseph Nzirorera (and Mathieu Ngirumpatse)

Defence Motion

1. The Defence for Joseph Nzirorera moves, pursuant to Rules 72 (A) (i), 72 (D) (iv) and 73, to dismiss the Amended Indictment[1] on the grounds:

> (i) that there is no jurisdiction under Article 6 (1) of the Statute to prosecute a person for committing a crime through the extended form of joint criminal enterprise liability during an internal armed conflict;
>
> (ii) that there is no jurisdiction under Article 4 to prosecute a person for committing the offence of "violence to life, health and physical or mental well-being of persons" by means of participation in a joint criminal enterprise because such offence did not exist under customary international law.

2. The Defence submits that the Tribunal has only jurisdiction under Article 6 (1) of the Statute if the following preconditions established by the Appeals Chamber are satisfied:

> "(i) it (the liability) must be provided for in the Statute, explicitly or implicitly;
> (ii) it must have existed under customary international law at the relevant time;
> (iii) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such way; and
> (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended."[2]

3. The Defence submits that it has never been decided by either Tribunal whether customary international law recognized the extended form of "joint criminal enterprise" as a form of liability for internal conflicts.

4. The Defence notes that, according to the Tribunals' jurisprudence, the extended form of joint criminal enterprise liability was part of customary international law for international conflicts. The Defence points out that, according to the Appeals Chamber in *Tadic*, most countries had not integrated the notion of common purpose in their national laws.[3] The Defence adds that under Rwandan law, an individual may not be held responsible for acts of another person without having agreed to these acts or aided and abetted in them. The Defence claims that, for lack of state practice and supporting *opinio iuris* recognizing the extended form of joint criminal enterprise liability for internal conflicts, it is not part of customary international law.

5. The Defence submits that therefore the application of the extended form of joint criminal enterprise liability to this case would violate the principle of legality and the doctrine of *nullum crimen sine lege*.

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[1] Amended Indictment of 18 February 2004 filed pursuant to Trial Chamber III Order of 13 February 2004.
[2] The Defence cites *Prosecutor v. Ojdanic*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise (AC), 21 May 2003, para. 21.
[3] *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999, para. 225.

6. In respect of its second submission, the Defence argues that the Tribunal has no jurisdiction under Article 4 of the Statute to prosecute a person for committing the offence of "violence to life, health and physical or mental well-being of persons" as this offence does not constitute a crime under customary international law.[4] The Defence therefore requests the dismissal of Count Seven of the Amended Indictment charging Mr. Nzirorera with violation of Article 4 ("killing and causing violence to health and physical or mental well-being") by virtue of joint criminal enterprise liability.

Prosecutor's Response

7. The Prosecutor moves that the Motion be dismissed.

8. He submits that the concept of joint criminal enterprise is inherently embodied in the wording of Article 6 (1) of the Statute. He argues that the extended form of joint criminal enterprise is recognized as a form of liability under customary international law for crimes committed in internal armed conflicts.[5] He alleges that there is no jurisprudence to the contrary.

9. The Prosecutor points out that Rwandan Law recognizes the principle of joint criminal enterprise by defining a functional equivalent. Hence, joint criminal enterprise liability is applicable to an internal armed conflict in Rwanda and the principle of *nullum crimen sine lege* has not been violated.

10. The Prosecutor submits that the Chamber has jurisdiction under Article 4 of the Statute to try the Accused for committing the offence of "violence to life, health and physical or mental well-being of persons".[6]

Defence Reply to Prosecutor's Response

11. The Defence disagrees with the Prosecutor that Rwandan law provides for liability for the foreseeable acts of others not agreed to by the accused.

12. The Defence further submits that the Prosecutor failed to distinguish the present charges from those held by the Trial Chamber in *Prosecutor v. Vasiljevic* as not constituting a crime under customary international law.

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[4] The Defence refers to *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Judgement (TC), 29 November 2002, and *Prosecutor v. Ntakirutimana*, No. ICTR-96-10-T, Judgement and Sentence (TC), 21 February 2003.

[5] Three categories of joint criminal enterprise have been identified by the Tribunal's jurisprudence. These have been summarized in the *Vasiljevic* Decision as follows: " The first category is a 'basic' form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention. (...) The second category is a 'systemic' form of joint criminal enterprise. It is a variant of the basic form, characterised by the existence of an organised system of ill-treatment. (...) The third category is an 'extended' form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose." *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgement (AC), 25 February 2004, paras. 97-99 referring to *Prosecutor v. Tadic*, Judgement (AC), paras. 195-226.

[6] The Prosecutor refers to *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement (TC), 3 March 2000; *Prosecutor v. Ntakirutimana*, para. 859.

2. Defence for Édouard Karemera

Defence Motion

13. The Defence for Édouard Karemera moves, pursuant to Rule 72 (A) (i) of the Rules, to dismiss the Amended Indictment, or alternatively to delete any provision relating to joint criminal enterprise.

14. According to the Defence the Prosecutor introduces the concept of joint criminal enterprise for lack of evidence of the individual criminal responsibility of Édouard Karemera. The Defence submits that the Amended Indictment includes several passages mentioning that Édouard Karemera committed the crimes alleged by participating in a joint criminal enterprise, and that these passages are not sufficiently clear and precise.

15. The Defence argues that Articles 2, 3, 4 and 6 of the Statute do not foresee the perpetration of crimes by participation in a joint criminal enterprise. The Defence claims that the Tribunal can only establish the individual criminal responsibility if the preconditions established by the Appeals Chamber are satisfied.[7]

16. The Defence submits that neither common Article 3 of the Geneva Conventions nor Additional Protocol II include provisions relating to joint criminal enterprise liability. The Defence notes that, according to the Appeals Chamber, joint criminal enterprise liability is implicitly included in the notion "committed" of Article 2 of the Statute and exists under customary international law for international armed conflicts. According to the Defence, the Appeals Chamber's finding in *Prosecutor v. Tadic* that the extended form of joint criminal enterprise is part of customary international law was based on a review of cases involving conflicts of exclusively international character. The Appeals Chamber found that most countries had not integrated the notion of common purpose in their national laws. The Defence concludes that the notion of joint criminal enterprise is therefore not applicable to internal armed conflicts.

17. The Defence further submits that under Rwandan law, an individual may not be held responsible for acts of another person without having agreed to these acts or having aided and abetted in them.

Prosecutor's Response

18. The Prosecutor moves that the Motion be dismissed.

19. The Prosecutor notes that the first part of the motion does not need to be further discussed as it relates to the alleged imprecision of the indictment, an issue which is outside the scope of Rule 72 D).

20. The Prosecutor points out that according to the Appeals Chambers' jurisprudence, participation in a joint criminal enterprise was implicitly included in the Statute as a form of criminal responsibility and its elements are established in customary international law. The Appeals Chamber in *Tadic, Ojdanic* and *Brdanin*[8] did not limit the applicability of joint

[7] The Defence cites *Prosecutor v. Ojdanic*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise (AC), para. 21.
[8] *Prosecutor v. Brdanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004.

criminal enterprise liability to international armed conflicts. The application of this form of liability to internal armed conflicts does not therefore violate the principle of legality.

3. Defence for André Rwamakuba (and Joseph Nzirorera)

Defence Motion

21. The Defence for André Rwamakuba moves that explicit and implicit references to the joint criminal enterprise to commit genocide or to destroy the Tutsi population be struck from the indictment for the reason that the Tribunal lacks subject-matter jurisdiction to try the Accused for joint criminal enterprise to commit genocide.

22. The Defence submits that neither the Statute nor the Genocide Convention provide jurisdiction over this form of criminal responsibility.

23. The Defence points out that the joint criminal enterprise liability is neither explicitly mentioned in the Statute, nor can it be considered to be implicitly included in Article 6 (1) of the Statute as it did not constitute an established form of criminal responsibility in international law before the adoption of the Statute.

24. The Defence notes that Article 2 of the Statute, in addition to defining genocide, also defines the modes of commission of that crime. The general provision of Article 6 (1) determining the different forms of criminal responsibility for other crimes within the jurisdiction of the Tribunal, is therefore not applicable to the crime of genocide.

25. The Defence alleges that the Genocide Convention was concluded at a time when the doctrine of common criminal purpose was well established by the jurisprudence under Control Council Law No. 10, and that if the State parties had intended to include such a form of liability they would have done so explicitly. The Defence considers that even if joint criminal enterprise liability was implied in the Genocide Convention, it is a customary form of liability which can only be established if general state practice outside the Genocide Convention supported by *opinio iuris* recognizes this form of liability. The Defence submits that state practice before 1994 did not recognize joint criminal enterprise liability to commit genocide.

Prosecutor's Response

26. The Prosecutor submits that according to the Appeals Chamber's Decision in *Tadic*[9] and *Ojdanic*[10], joint criminal enterprise is a form of liability that existed under customary international law in 1994.

27. The Prosecutor considers that joint criminal enterprise is a form of liability under Article 6 (1) which applies to all crimes within the jurisdiction of the Tribunal and therefore also to genocide.

28. The Prosecutor notes that the Appeals Chamber in *Brdanin*[11] confirmed the count of genocide by virtue of joint criminal enterprise liability.

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[9] *Tadic*, Judgement (AC), 15 July 1999.
[10] *Prosecutor v. Ojdanic*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise (AC).
[11] *Prosecutor v. Brdanin*, Decision on Interlocutory Appeal (AC).

29. The Prosecutor further claims that whether joint criminal enterprise is a form of liability is to be decided under the Statute and not under the Genocide Convention.

30. Citing the *Ojdanic* Decision the Prosecutor confirms that there is no violation of the principle of legality. Furthermore, the Prosecutor affirms that Rwandan law provided for criminal liability for the foreseeable acts of others.

II. Deliberations

On the allegation that parts of the indictment are imprecise

31. The Chamber is satisfied that the allegation, made by the Defence for Édouard Karemera regarding the vagueness of certain passages relating to joint criminal enterprise in the Amended Indictment, need not be considered by the Trial Chamber. Rule 72 (A) (i) under which the Motion was filed does not cover alleged defects in the form of the indictment.

On the allegation that joint criminal enterprise liability is not applicable to internal armed conflicts under customary international law

32. The Defence for Édouard Karemera alleges that joint criminal enterprise liability is not covered by the Statute or customary international law, and that it therefore does not come within the jurisdiction of the Tribunal. Given the authoritative jurisprudence of the Appeals Chambers on this matter,[12] the Chamber is satisfied that its jurisdiction on joint criminal enterprise liability is implied in Article 6 (1) of the Statute on the basis of customary international law, consequently there is no need to reconsider this matter. The doctrine of joint criminal enterprise liability was explicitly endorsed, and applied, in the *Tadic Appeals Judgement*,[13] and has subsequently been applied by the Appeals Chamber in *Milutinovic*, *Krnojelac*, *Vasiljevic* and *Brdanin*.[14]

33. The Chamber notes that it is well established that joint criminal enterprise liability is one of the forms of criminal responsibility under Article 6 (1) of the Statute and that this provision is equally applicable to all crimes within the jurisdiction of the Tribunal, whether committed in the course of international or internal armed conflicts.

34. The Chamber however deems it necessary to further consider the Defence argument that the situation might be different for the applicability of joint criminal enterprise liability to internal armed conflicts as joint criminal enterprise liability is only *implicitly* included in Article 6 (1) on the basis of customary international law for *international armed conflicts*.

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[12] The jurisprudence of the ICTY and ICTR Appeals Chamber is persuasive for the Trial Chambers of both Tribunals. Cf. *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Judgement (AC), 24 March 2000, paras. 112, 113. In *Prosecutor v. Blagojevic* the Trial Chamber had refused to follow the Appeals Chamber Decision in *Jokic*. The Appeals Chamber stated: "In accordance with the *Aleksovski* Judgement of the Appeals Chamber, the Trial Chamber was bound to accept and to apply the decision of the Appeals Chamber in *Jokic*..." (*Prosecutor v. Blagojevic*, Case No. IT-02-60-AR65 & IT-02-60-AR65.2, Decision On Provisional Release Of Vidoje Blagojevic And Dragan Obrenovic (AC), 3 October 2002). See also *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defence Motion On Jurisdiction, 18 June 1997, para. 8.

[13] *Tadic*, Judgement (AC).

[14] See e.g. *Prosecutor v. Milutinovic et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise (AC); *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement (AC), 17 September 2003; *Prosecutor v. Vasiljevic*, Judgement (AC); *Prosecutor v. Brdanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal (AC), 19 March 2004.

35. The Chamber agrees with the Defence submissions that rules applicable to international armed conflicts do not automatically apply to internal armed conflicts. The Chamber nevertheless finds it uncontested that customary international law imposes individual criminal responsibility for serious violations of international humanitarian law committed in the course of internal armed conflicts.[15]

36. The rationale behind the concept of joint criminal enterprise liability was clearly stated in *Tadic*. Having considered the object and purpose of the Statute as well as the structure of international crimes, the Appeals Chamber concluded that

> "to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility."[16]

The Chamber observes that the reasoning of the Appeals Chamber refers explicitly to wartime situations. The Chamber however holds the view that the reasoning cannot be different with regard to internal armed conflicts. The gravity of the participation in a joint criminal enterprise cannot depend on the nature of the conflict. Furthermore, as the Appeals Chamber in *Tadic* authoritatively held, the structure of international crimes requires that joint criminal enterprise liability be applied in order to assure an efficient prosecution. The Chamber does not perceive any difference between the structure of international crimes committed in the course of international armed conflicts and international crimes committed in the course of internal armed conflicts. Therefore the same reasoning of the Appeals Chamber in *Tadic* must equally apply to internal armed conflicts. The nature of the conflict is not relevant to the responsibility of the perpetrator. This criterion only goes to the characteristics of the particular crime and not to the responsibility of the potential perpetrator of an alleged act.

37. The Defence for Joseph Nzirorera correctly states that the international Tribunals have up to now not explicitly addressed the particular question whether the joint criminal enterprise doctrine encompasses the extended form of responsibility in view of acts committed during an internal armed conflict. The Chamber holds the view that this lack of a precedent does, however, not imply that the doctrine would not be applicable to internal armed conflicts. The Appeals Chamber in *Hadzihasanovic* authoritatively held: "(W)here a principle can be shown to have been so established, it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle."[17] The Chamber considers that this is a well-established approach in international law.[18] However, the Chamber observes that the question

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[15] The finding of the Appeals Chamber in the *Tadic* Decision in this regard is authoritative: "...customary international law imposes criminal responsibility for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife" (*Prosecutor v. Dusko Tadic*, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction (AC), para. 134)

[16] *Tadic*, Judgement (AC), 15 July 1999, para. 192.

[17] *Prosecutor v. Hadzihasanovic et al.*, Affaire No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 12.

[18] Judge Hunt in his Partially Dissenting Opinion to the Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility in *Hadzihasanovic*, made reference to several instances where this principle was applied: Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders at the London Conference, presented on behalf of the United States to the Foreign Ministers of the Allied Powers and to their representatives at San Francisco, on 30 April 1945, re-

regarding the applicability of specific forms of joint criminal enterprise and their elements is closely related to the merits of the case and will therefore be decided at a later stage.

38. The Chamber is satisfied that under customary international law joint criminal enterprise liability applies to internal and international armed conflicts, and therefore comes within the Tribunal's jurisdiction.

On the allegation that the application of the extended form of joint criminal enterprise liability to internal armed conflicts violates the principle of legality

39. The Chamber agrees with the Defence that, in deciding on the present issue, the Chamber is bound to respect the principle *nullum crimen sine lege*. The Chamber also agrees with the Defence that this principle requires, firstly, that a criminal conviction be based on a norm which existed at the time the acts or omission alleged were committed; secondly, that it was sufficiently foreseeable for the accused that the conduct in question may be criminally sanctioned, and that the law providing for such liability was sufficiently accessible at the relevant time[19]

40. With regard to the first requirement, the Chamber is satisfied that joint criminal enterprise liability was applicable to internal armed conflicts under customary international law at the time when the crimes alleged were committed.

41. With regard to the second requirement, the Chamber needs to examine whether an accused had sufficient notice that he could be found criminally liable for taking part in the commission of crimes under the Statute as part of a joint criminal enterprise in the course of an internal armed conflict.

42. The Trial Chamber in *Celebici* stated with regard to the principle *nullum crimen sine lege*:

> "Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States. It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective of maintaining balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order."[20]

43. The Chamber holds that, given the specificity of international criminal law, the principle of legality does not apply to international criminal law to the same extent as it applies in certain national legal systems.[21] The standards applicable to the assessment of

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printed in the Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London 1945; *United States v. Alstoetter et al.* case, Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No. XIV, Vol. III; *United States v. Alfred Krupp et al.* case, Law Reports of Trials of War Criminals (UNWCC, 1949), Vol. X; *Attorney-General v. Adolf Eichmann*, 1962, 36 International Legal Reports 277.

[19] *Prosecutor v. Ojdanic*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise (AC), para. 37.

[20] *Prosecutor v. Celebici*, Case No. IT-96-21, 16 November 1998, paras. 404, 405.

[21] See in this sense also *Prosecutor v. Ojdanic*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise (AC). There the Appeals Chamber cited in para. 39 the following

foreseeability and *accessibility* of a criminal offence before the international tribunals have been established and confirmed by the Appeals Chamber in various cases. In *Hadzihasanovic* the Appeals Chamber noted that as to *foreseeability*, the accused "must be able to appreciate that the conduct is criminal in the sense *generally* understood, *without reference to any specific provision*".[22] With regard to *accessibility* the Appeals Chamber in *Hadzihasanovic* stated that, "in the case of an international tribunal such as this, *accessibility* does not exclude reliance being placed on a law which is based on custom".[23] The Appeals Chamber in *Ojdanic* furthermore recognized that the "accessibility (of customary law) may not be as straightforward as would be the case had there been an international criminal code".[24]

44. The Trial Chamber considers that there exist numerous judicial decisions, international instruments and domestic legislations which convey that the commission of crimes under the Statute through participation in a joint criminal enterprise would entail criminal responsibility.[25] Even if the aforementioned judicial decisions refer to conflicts of an international character, any potential perpetrator was able to understand that the criminalization of acts of such gravity did not depend on the international or internal nature of the armed conflict.

45. The Chamber therefore concludes that the application of joint criminal enterprise liability to internal armed conflicts does not infringe the principle *nullum crimen sine lege*.

On the allegation that joint criminal enterprise liability is not applicable to the crime of genocide

46. The Chamber notes that it is well established that joint criminal enterprise liability is one of the forms of criminal responsibility under Article 6 (1) of the Statute and that this provision is applicable to all crimes within the jurisdiction of the Tribunal. Joint criminal enterprise liability is therefore also applicable to genocide.

47. The Defence for Rwamakuba argues that the Tribunal lacks subject-matter jurisdiction to try the accused for joint criminal enterprise to commit genocide. The Defence alleges in particular that Article 2 (3) of the Statute provides explicitly for the different forms of criminal responsibility governing genocide, so that Article 6 (1) as general provision does not apply. The Chamber considers the interpretation of Articles 2 and 6 of the Statute by the Defence to be erroneous. Article 6 (1) entails a general provision on individual criminal responsibility applicable to *all* crimes under the Statute. Article 2 (3) provides for forms of

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passage of the *Justice* case: "Under written constitutions the *ex post facto* rule condemns statutes which define as criminal, acts committed before the law was passed, but the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. (..) International law is not the product of statute for the simple reason that there is yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the events. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle the law at birth." Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. III ("*Justice* case"), pp. 974-975,

[22] *Prosecutor v. Hadzihasanovic et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, para. 34. *Emphasis added.*

[23] *Ibid.*

[24] *Prosecutor v. Ojdanic*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise (AC), para. 41.

[25] *Tadic*, Judgement (AC), paras. 195 et seq.

criminal responsibility for the crime of genocide only. This provision reproduces verbatim Article III of the Genocide Convention.[26] As the Trial Chamber in *Krstic* correctly notes this provision provides for *additional* forms of criminal responsibility which are not included in the general provision of Article 6 (1), such as "conspiracy to commit genocide" and "attempt to commit genocide".[27] The drafters of the Statute incorporated this provision in the Statute in order to ensure "that the Tribunal has jurisdiction over all forms of participation in genocide prohibited under customary international law."[28]

48. The Chamber furthermore takes note of the Appeals Chamber Decision on Interlocutory Appeal in *Brdanin*. The Appeals Chamber decided that the Trial Chamber had wrongly acquitted Brdanin of the count of genocide with respect to the third category of joint criminal enterprise liability[29] and, consequently recognized that joint criminal enterprise liability does apply to genocide. The Chamber is satisfied that it has subject-matter jurisdiction to try the accused for joint criminal enterprise to commit genocide.

On the allegation that the Tribunal lacks jurisdiction under Article 4 for committing the offence of "violence to life, health and physical or mental well-being of persons"

49. The Defence for Nzirorera requests the dismissal of Count Seven of the Amended Indictment charging Mr. Nzirorera with violation of Article 4 ("killing and causing violence to health and physical or mental well-being") on the ground that the Tribunal, according to the Decisions of two Trial Chambers, lacks subject-matter jurisdiction.

50. The Chamber holds that, as the Security Council Resolution No. 955[30] provides for the jurisdiction *ratione materiae* of the Tribunal and explicitly includes the jurisdiction over the crime of "violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment" as a serious violation of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977, the Tribunal's jurisdiction over this crime is beyond doubt.

51. The Chamber recalls that state practice, international jurisprudence and doctrine universally consider the crimes under Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977 as part of international customary law[31]. The crime of violence to life and person including cruel treatment is the first one in the list of crimes provided by this Article.

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[26] Article III of the Convention on the Prevention and Punishment of Genocide, adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, reads as follows: "The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide."

[27] *Prosecutor v. Krstic*, Case No. IT-98-33, Judgement (TC), 2 August 2001, para. 640.

[28] *Ibid.*

[29] *Prosecutor v. Brdanin*, Decision on Interlocutory Appeal.

[30] Resolution No. 955 adopted by the Security Council on 8 November 1994.

[31] The Chamber notes that whereas many crimes contemplated in the provisions applicable to international armed conflicts had deliberately not been included in the Rome Statute for the situations of non-international armed conflicts because the participating States considered that these crimes had not reached the state of customary international law, the crime of "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as a serious violation of Article 3 common to the four Geneva Conventions had been accepted by the State delegations for such situations. (*Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc A/CONF.183/9, Article 8 (2)(c)(i)).

52. The Chamber points out that a further specification of the elements of this offence is clearly not a matter of jurisdiction and will be considered by the Chamber at a later stage.

FOR THE ABOVE REASONS,

THE CHAMBER

DISMISSES THE MOTIONS.

Judge Lattanzi appends a Separate Opinion to this Decision.

Arusha, 11 May 2004

Andrésia Vaz Presiding Judge	Flavia Lattanzi Judge	Florence Rita Arrey Judge

[Seal of the Tribunal]

ICTR-98-44-T
11-5-2004
(12254 - 12251)

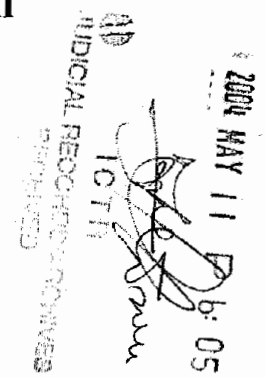
12254

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: FR

CHAMBRE DE PREMIÈRE INSTANCE III



Devant le Juges: Andrésia Vaz, Présidente
Flavia Lattanzi
Florence Rita Arrey

Greffier: Adama Dieng

Date: 11 mai 2004

LE PROCUREUR

c

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
André RWAMAKUBA

Affaire No. ICTR-98-44-T

OPINION INDIVIDUELLE DE LA JUGE FLAVIA LATTANZI RELATIVE À LA "DECISION ON THE PRELIMINARY MOTIONS BY THE DEFENCE OF JOSEPH NZIRORERA, ÉDOUARD KAREMERA, ANDRÉ RWAMAKUBA AND MATHIEU NGIRUMPATSE CHALLENGING JURISDICTION IN RELATION TO JOINT CRIMINAL ENTERPRISE"

Conseils de la Défence:
Peter Robinson
Dior Diagne et Félix Sow
David Hooper et Andreas O'Shea
Charles Roach et Frédérik Weyl

Bureau du Procureur:
Don Webster
Dior Sow Fall
Gregory Lombardi
Sunkarie Ballah-Conteh
Ayo Fadugba
Tamara Cummings-John

OPINION INDIVIDUELLE DE LA JUGE FLAVIA LATTANZI RELATIVE À LA "DECISION ON THE PRELIMINARY MOTIONS BY THE DEFENCE OF JOSEPH NZIRORERA, ÉDOUARD KAREMERA, ANDRÉ RWAMAKUBA AND MATHIEU NGIRUMPATSE CHALLENGING JURISDICTION IN RELATION TO JOINT CRIMINAL ENTERPRISE"

1. Je partage la décision de la Chambre affirmant sa compétence à utiliser également la "notion" d'entreprise criminelle conjointe[1] dans l'évaluation de l'innocence ou de la responsabilité des accusés dans la présente affaire. Je partage donc la décision de rejet de toutes les requêtes des accusés soulevant, sur la base de l'Article 72 du Règlement, l'exception d'incompétence de la Chambre en relation avec la "notion" d'entreprise criminelle conjointe utilisée dans l'Acte d'accusation en vigueur. Je partage également la décision de renvoyer au stade du jugement la détermination des différentes formes de l'entreprise criminelle conjointe.

2. Je joins à la Décision la présente opinion individuelle seulement parce que je ne partage pas les motivations données par la majorité de la Chambre dans l'établissement du fondement de la "notion" d'entreprise criminelle conjointe. Il est affirmé, dans ces motivations, l'existence d'une norme de droit international coutumier qui prévoirait l'utilisation d'une telle notion dans la détermination des formes de la responsabilité pénale, même si le crime en cause est commis dans le contexte d'un conflit armé interne[2].

3. Je ne partage pas un tel recours au droit international coutumier. A mon avis, plutôt que l'objet d'une norme internationale coutumière, dont la fonction est toujours de créer une situation juridique subjective, telle qu'un droit, un pouvoir, une faculté, une obligation, la "notion" d'entreprise criminelle conjointe est un moyen - ou, si l'on préfère, un principe - de logique juridique permettant de déterminer la responsabilité pénale individuelle dans le cas d'un concours de personnes ayant participé à la réalisation d'un crime. La "notion" en cause a donc pour fonction de clarifier, en présence d'un tel concours, la forme de participation de chacune des personnes impliquées dans la réalisation d'un crime donné, que ce crime soit de droit interne ou de droit international.

4. En fait, cette "notion" est surtout appliquée – et l'a été **avant tout** –, dans les jurisprudences nationales, en ce qui concerne tant les crimes de droit interne que les crimes de droit international. A partir de la jurisprudence interne, cette "notion" a été reprise et appliquée aussi au niveau de la jurisprudence internationale, notamment dans la jurisprudence des deux Tribunaux *ad hoc*, en ce qui concerne en particulier le génocide, les crimes contre l'humanité et les crimes de guerre. Dans la jurisprudence du Tribunal pénal international pour l'ex-Yougoslavie (TPIY), en première instance comme en appel, on a eu l'occasion de traiter l'entreprise criminelle conjointe comme une modalité de la responsabilité pénale individuelle selon l'Article 7 par. 1 du Statut[3], dans le cas de l'existence de plusieurs personnes associées dans un dessein criminel commun. Cette « notion » a été déduite de l'interprétation logique

[1] J'utilise le mot « notion » (entre guillemets) pour des raisons de brièveté.
[2] Je me permets d'observer à ce propos que l'habitude de faire appel au droit international coutumier même lorsque cela n'est pas nécessaire semble se répandre trop facilement. La détermination de l'existence de normes non écrites, surtout dans un cadre tel que celui du droit pénal, constitue une opération très délicate.
[3] V., entre autres, *Prosecutor v. Milutinovic et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise (AC), 21 May 2003 par. 19.

faite par les Chambres de cette disposition statutaire, qui détermine les formes de la responsabilité pénale individuelle de façon très synthétique ; d'où la nécessité d'une délicate opération d'interprétation.

5. Le fait que les Statuts de ces deux Tribunaux ne fassent aucune référence explicite à une telle notion ne limite donc en rien la faculté pour les Chambres de l'utiliser afin d'interpréter l'esprit de l'Article 6 par. 1 (et de l'Article 7 par. 1, pour le TPIY), qui exprime bien la volonté de ses rédacteurs – c'est-à-dire du Conseil de Sécurité - de rendre personnellement responsable de l'un quelconque des crimes relevant de la compétence du Tribunal non seulement la personne qui a matériellement commis l'acte incriminé, mais aussi toute autre personne qui a participé, de toute autre manière, directe ou indirecte, à sa réalisation. C'est justement une telle volonté qui doit être recherchée par tous les moyens de logique juridique dont disposerait l'interprète, dans le respect du droit des accusés d'être jugés de façon équitable et donc de ne pas être tenus responsables pour des crimes à la réalisation desquels ils n'ont pas participé, directement ou indirectement, par commission ou omission.

6. La notion d'entreprise criminelle conjointe a donc une fonction générale, indépendante de la nature et de la qualification du crime, tout comme de son contexte factuel – paix ou conflit armé. Justement le caractère général de cette fonction emporte comme conséquence, à mon avis, l'application naturelle de cette "notion" dans le contexte du conflit armé interne également. Le fait que, jusqu'à présent, la jurisprudence n'ait pas fait référence explicite à un tel contexte n'est donc pas pertinent. D'ailleurs, le TPIY exerce sa compétence en ce qui concerne le génocide et les crimes contre l'humanité sans avoir besoin d'en déterminer le contexte, de conflit armé international ou interne[4] (ou même, désormais, d'absence d'un conflit armé). Pourtant, ce Tribunal applique souvent la "notion" d'entreprise criminelle conjointe à ces deux catégories de crimes également, tant en première instance qu'en Appel.

7. L'autre conséquence de rechercher le fondement de cette "notion" dans un principe de logique juridique plutôt que dans une règle juridique opérationnelle est que même l'argument de la défense selon lequel des législations nationales ne prévoient pas l'entreprise criminelle conjointe - en particulier la législation rwandaise - n'est pas pertinent. L'absence d'une mention expresse dans la loi interne n'a jamais empêché la jurisprudence de référence de déterminer la responsabilité pénale individuelle pour participation à un crime en s'appuyant, entre autre, sur la « notion » d'entreprise criminelle conjointe: justement parce qu'il s'agit d'un principe de logique juridique et non pas d'une règle opérationnelle. Il convient de noter, à ce propos, que le recours à cette « notion » en tant que principe de logique juridique et non en tant que règle figée, a conduit les jurisprudences nationales à y faire référence, de façon plus ou moins extensive selon la nature du crime et les circonstances d'espèce, toujours avec une certaine prudence. Les juridictions nationales font alors preuve de la prudence nécessaire dans la détermination de la responsabilité pénale personnelle, particulièrement en cas de participation indirecte à la réalisation d'un crime.

8. Il résulte de ces considérations que la référence à une telle notion dans l'Acte d'accusation en vigueur ne saurait être analysée comme un nouveau chef d'accusation ou une charge nouvelle au procès. La Chambre aurait pu recourir à un tel moyen même si le Procureur ne l'avait pas indiqué dans son Acte. Le principe de légalité, dans son aspect *nullum crimen sine lege*, n'est donc pas en cause.

[4] La nécessité de la qualification du contexte factuel – de conflit armé international ou interne - s'impose au contraire, dans le cadre du TPIY, pour les crimes de guerre.

Fait à Arusha, le 11 mai 2004

Flavia Lattanzi
Judge

[Seal of the Tribunal]