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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Karin Hökborg
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 5 August 2005

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

***Case No. ICTR-98-44-A44*(a)**

DECISION ON COUNT SEVEN OF THE AMENDED INDICTMENT – VIOLENCE TO LIFE, HEALTH AND PHYSICAL OR MENTAL WELL-BEING OF PERSONS

Article 4(a) of the Statute

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Peter Robinson

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Karin Hökborg, and Gberdao Gustave Kam ("Chamber");

BEING SEIZED of "Joseph Nzirorera's Motion to Dismiss Count Seven" filed by the Defence of the Accused ("Defence") on 24 March 2005;

CONSIDERING the Prosecution's Response thereto, filed on 31 March 2005, and the Defence' Reply thereto filed on 4 April 2005;

HEREBY DECIDES the Motion, pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

INTRODUCTION

1. Following the Decision of 14 February 2005,[1] an Amended Indictment against the Accused was filed on 23 February 2005. The Appeals Chamber Decision of 28 September 2004[2] made it necessary for a new hearing of this case before a differently composed Bench. The new trial is now scheduled to begin on 5 September 2005. On 24 March 2005, the Defence filed a Motion seeking dismissal of Count 7 of the Amended Indictment charging the Accused, under Article 4 of the Statute, with "killing and causing violence to health and physical or mental well-being as serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II".

2. Article 4 of the Tribunal Statute ("Statute") specifically provides for the power to prosecute for serious violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II ("Common Article 3") including "(a) 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" ("violence to life").

DISCUSSION

3. In a Decision of 11 May 2004, the prior Chamber denied an identical Motion.[3] As a preliminary matter, the Prosecutor submits that the prior Decision remains in effect and the Motion should therefore be denied. The Chamber notes that, since the filing of the present Motion, the Chamber has ruled that the Decision of 24 May 2005 is no longer in effect.[4] As a result, this motion is appropriately submitted to the Chamber.

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1 *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-PT, Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

2 *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44, Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material (AC), 28 September 2004.

3 *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, and *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, 11 May 2004, paras. 49-52.

4 *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera* ("*Karemera et al.* Case"), Case No. ICTR-98-44, ("*Karemera et al.*"), Decision on Joseph Nzirorera's Motion for Order Finding Prior Decisions to Be of No Effect (TC), 24 May 2005.

4. The Defence contends that violence to life as defined in Common Article 3 was not an offence under customary international law in 1994 and that the scope of the Tribunal's jurisdiction is determined by customary international law as it existed at the time when the acts charged in the Indictment were allegedly committed. It relies on the *Vasiljevic* Trial Chamber Judgement, a case before the International Criminal Tribunal for Former Yugoslavia ("ICTY"), where the Accused was acquitted of violence to life on the ground that such an offence did not exist under customary international law because it was not sufficiently defined in State practice.[5] The Defence submits that this finding has been cited with approval in the *Ntakirutimana* Trial Chamber Judgement, an ICTR case.[6] The Defence further contends that the reference to killing in addition to violence to life does not save the situation because Article 4(a) of the Statute mentions "murder", which is different from "killing".

5. The Chamber considers that the *Vasiljevic* Trial Chamber Judgement differs from the other ICTY cases on this issue. The Chamber does not accept the Defence's contention that the *Ntakirutimana* Trial Chamber Judgement approved the conclusion that violence to life was not an offence under customary international law. The acquittal in the *Ntakirutimana* case on that count resulted from the absence of reliable evidence and the conclusion that the material elements of the offence were not established.[7]

6. In the *Tadic* Appeals Chamber Decision on Jurisdiction, the leading ICTY case on this issue, the Appeals Chamber "determined that a range of provisions of international humanitarian law – such as the prohibition of treacherous killing, attacks on civilian populations, and the use of certain weapons – also extend[ed] under customary international law to non-international armed conflicts."[8] This Judgement held that the crime of violence to life referred to in Common Article 3 is part of customary international law, and imposed individual criminal responsibility for its violation.[9] Accordingly, and having found the underlying evidence reliable, it convicted Dusko Tadic of wilful killings as a grave breach of the Geneva Conventions, and of murder as a violation of the laws or customs of war.[10]

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5 *Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-21-T, Judgement (TC), 29 November 2002, para. 193.

6 *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-T & ICTR-96-17-T, 21 February 2003, Judgement (TC), para. 860.

7 *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-T & ICTR-96-17-T, 21 February 2003, Judgement (TC), para. 861: "... the Chamber is not satisfied that the settled elements of the offence, such as the existence of a nexus between the alleged act or acts and the armed conflict, have been proved in the present case."

8 *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (AC), 2 October 1995, paras. 119-127. For the quotation, see Werle (G.), *Principles of International Criminal Law*, The Hague, T.M.C. Asser Press, 2005, para. 813.

9 *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction (TC), 10 August 1995, paras. 66-73, as confirmed on Appeal, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (AC), 2 October 1995, paras. 79-142.

10 *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999, paras. 235-236.

7. The ICTR has concluded on several occasions that "the application of Article 4 of the Statute to the situation in Rwanda during the Tribunal's temporal jurisdiction would not violate the *nullum crimen sine lege* principle."[11] In the *Semanza* case, the Appeals Chamber affirmed convictions for serious violations of Common Article 3.[12] The *Akayesu* Trial Chamber Judgement revealed a different approach to the *Vasiljevic* Trial Chamber Judgement on the issue of State practice when the Trial Chamber stated:

> Moreover, all the offences enumerated under Article 4 of the Statute constituted crimes under Rwandan law in 1994. Rwandan nationals were therefore aware, or should have been aware, in 1994 that they were amenable to the jurisdiction of Rwandan courts in case of commission of those offences falling under Article 4 of the Statute.[13]

8. The Chamber also recalls that the Statute of the ICTY, differs from the one adopted for this Tribunal. The ICTY is only provided with the general power "to prosecute persons violating the laws or customs of war,"[14] which, following the ICTY jurisprudence, includes the "violence to life and person" prescribed under Common Article 3.[15] Conversely, Article 4 of the ICTR Statute specifically incorporates Common Article 3.

9. The Chamber notes that the word *killing* is not in Article 4, which uses the word *murder*, and agrees that this difference is capable of being misleading. However it has been established in the jurisprudence of the ICTY that when referring to violations pursuant to Common Article 3, no substantive difference should be inferred between the definitions of murder and wilful killing. The purpose of Common Article 3 is the extension of the principle of humanity to non-international conflicts and different terminology should not justify any substantive differences. Whereas the unqualified word "killing" is unsatisfactory, it should not be considered as a defect in the pleading leading to a dismissal of the count, but the Prosecutor should bring the pleading into conformity with the statutory provisions.

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11 *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement (TC), 15 May 2003, para. 353; *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgement (TC), 7 June 2001, para. 98; *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement (TC), 27 January 2000, paras. 236-243; *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgement (TC), 6 December 1999, paras. 86-90; *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement (TC), 21 May 1999, paras. 156-158, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (TC), 2 September 1998, para. 617.

12 *Semanza* Trial Chamber Judgement, paras. 365 and seq.

13 *Akayesu* Trial Chamber Judgement, para. 617.

14 ICTY Statute, Article 3:
"The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property."

15 See example *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14, Judgement (TC) 3 March 2000, para. 182.

10. In light of these elements, the Chamber finds that the crime charged under Article 4 of the Statute does not violate the principle of *nullum crimen sine lege*.

FOR THOSE REASONS, THE CHAMBER

DENIES the Motion in its entirety; and

REQUESTS the Prosecutor to amend the Indictment in accordance with Paragraph 9 above.

Arusha, 5 August 2005, done in English.

Dennis C. M. Byron
Presiding

Karin Hökborg
Judge

Gberdao Gustave Kam
Judge

[Seal of the Tribunal]