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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-R72

DECISION ON DEFENCE MOTION CHALLENGING THE JURISDICTION OF THE TRIBUNAL – JOINT CRIMINAL ENTERPRISE

Rules 72 and 73 of the Rules of Procedure and Evidence

Office of the Prosecutor:
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Defence Counsel for Mathieu Ngirumpatse:
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nzirorera:
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 Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise", filed on 4 May 2005 ("Motion"); and Mathieu Ngirumpatse's Joinder filed on 11 May 2005 ("Defendants");

CONSIDERING the Prosecutor's Response, filed on 9 May 2005 ("Response"), and the Defence Reply, filed on 10 May 2005 ("Reply");

DECIDES as follows pursuant to Rules 72 and 73(A) of the Rules of Procedure and Evidence ("Rules") on the basis of the written briefs submitted by the parties.

INTRODUCTION

1. An Amended Indictment was filed in this case on 23 February 2005. The trial is set to commence on 5 September 2005. The Defence of Joseph Nzirorera applies to dismiss the Amended Indictment on the ground that there is no jurisdiction to prosecute for the extended form of joint criminal enterprise liability in circumstances where (i) the enterprise is alleged to be of vast scope, (ii) there is no direct relationship alleged between the accused and the physical perpetrators of the crime, (iii) the allegations of rape amount to strict liability, and (iv) the underlying crime is complicity in genocide which is merely a form of liability. In addition, the Motion contained specific applications for dismissal of Counts 4 and 5, which dealt with complicity and rape respectively. The Defence of Mathieu Ngirumpatse has associated itself with the Motion.

2. The Defence contends that this application ought to be addressed as a preliminary motion since it challenges jurisdiction. The Chamber agrees that the Motion falls within Rule 72, which provides for motions that challenge the jurisdiction of the Tribunal.

DISCUSSION

3. The issue in the Motion is narrow. The general application of joint criminal enterprise is accepted by the Defence. It contends that the allegations in the Amended Indictment expand the doctrine of the extended form of joint criminal enterprise beyond permissible boundaries. The Chamber notes that in the *Tadic* Judgement, the Appeals Chamber held the view that the notion of common design as a form of accomplice liability is firmly established in customary international law. In addition, it is upheld, albeit implicitly, in the Statutes of the International Criminal Tribunals. The Chamber found that the notion has been applied to three distinct categories of cases.[1] The *Tadic* Appeals Judgement emphasised that with regard to the extended form of joint criminal enterprise, "it is appropriate to apply the notion of 'common purpose' only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the

[1] *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999, paras. 185-229, especially paras 195 et seq. on the three categories of joint criminal enterprise.

common criminal purpose."[2] The present challenge is in relation to specific allegations of the Amended Indictment.

Jurisdiction to expand the extended form of joint criminal enterprise liability to large-scale enterprises and to individuals indirectly connected to specific perpetrators of a specific crime

4. The Defence contends that, by alleging a joint criminal enterprise whose object was the destruction of the Tutsi population of Rwanda, the Amended Indictment has improperly extended the doctrine of joint criminal enterprise because in all the relevant jurisprudence it has been applied in cases of a smaller scale, limited to a specific operation and a restricted geographical area,[3] and where the Accused was not structurally remote from the actual perpetrators of the crimes. The Defence further argues that in contrast to command responsibility, the extended form of joint criminal enterprise liability does not require proof that the superior knew or had reason to know of the crimes committed by his alleged subordinates, or whether the accused was in effective control of the perpetrators of the alleged crimes. In addition, the Defence states that the accused's contribution to the commission of the crimes does not need to be substantial. It is the Defence's view that applying the extended form of joint criminal enterprise liability to cases with large-scale allegations is contrary to customary international law, and outside the Tribunal's jurisdiction, and must therefore be stricken and dismissed. The Defence has invited the Chamber to apply the *Brdjanin* Judgement in which, after examining the evidence, the Trial Chamber dismissed joint criminal enterprise as a possible mode of liability to describe the individual criminal responsibility of the Accused and expressed the view that:

> "JCE is not an appropriate mode of liability to describe the individual criminal responsibility of the Accused, given the extraordinarily broad nature of this case, where the Prosecution seeks to include within a JCE a person as structurally remote from the commission of the crimes charged in the Indictment as the Accused. Although JCE is applicable in relation to cases involving ethnic cleansing, as the *Tadic* Appeal Judgement recognises, it appears that, in providing for a definition of JCE, the Appeals Chamber had in mind a somewhat smaller enterprise than the one that is invoked in the present case."[4]

5. The Chamber notes that after the prosecution case, the Trial Chamber acquitted the Accused for the crime of genocide on the ground that the specific intent required for a conviction of genocide was incompatible with the lower *mens rea* standard of a third category of joint criminal enterprise.[5] The Defence then presented its case, and at the end of the trial, Radoslav Brdjanin was convicted for crimes other than genocide and complicity in genocide.[6] The Trial Chamber rejected joint criminal enterprise as a basis for liability. It concluded that the "Physical Perpetrators" included persons who were not sufficiently identified in the

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2 *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999, para. 220.

3 *Prosecutor v. Radoslav Brdjanin*, Case No. IT-98-36-T, Judgement (TC), 1 September 2004, paras. 344-355.

4 *Prosecutor v. Radoslav Brdjanin*, Case No. IT-98-36-T, Judgement (TC), 1 September 2004, para. 355.

5 *Prosecutor v. Radoslav Brdjanin*, Case No. IT-98-36-A, Decision on Interlocutory Appeal (AC), 19 March 2004, para. 12.

6 *Prosecutor v. Radoslav Brdjanin*, Case No. IT-98-36-T, Judgement (TC), 1 September 2004, para. 1152.

Indictment. In relation to the group that was sufficiently identified in the Indictment, the Chamber stipulated:

> "The Accused can only be held criminally responsible under the mode of liability of JCE if the Prosecution establishes beyond reasonable doubt that he had an understanding or entered into an agreement with the Relevant Physical Perpetrators to commit the particular crime eventually perpetrated or if the crime perpetrated by the Relevant Physical Perpetrators is a natural and foreseeable consequence of the crime agreed upon by the Accused and the Relevant Physical Perpetrators."[7]

6. When considered in context, the Judgement demonstrates that although there was jurisdiction to bring the charge, the Prosecutor was unable to prove it on the evidence. Furthermore the Chamber recalls that the Prosecutor appealed the Judgement on that specific issue, even if she did not seek any remedy in case that ground succeeds.[8] It is worth noting that the Trial Chamber recalled that during the pre-trial stage it "ruled that if individual criminal responsibility pursuant to the theory of joint criminal enterprise is charged, the indictment must inform the accused, *inter alia*, of the identity of those engaged in the enterprise so far as their identity is known, but at least by reference to their category as a group."[9] Consequently the Chamber did not entertain any examination of a joint criminal enterprise between the Accused and individuals not adequately identified in the Indictment.

7. The Chamber accepts, as the Prosecutor has stated, that joint criminal enterprise is pleaded before the ICTY in the Indictment against Slobodan Milosevic where the alleged criminal conduct took place in large areas, affecting large portions of the population, and where it is not alleged that the Accused physically committed the crimes.[10] Moreover the Chamber notes that in the Judgement of Acquittal, the Trial Chamber found evidence that there was a joint criminal enterprise in some instances as alleged in the Indictment.[11] Finally, the Chamber does not consider that the scale of a joint criminal enterprise has any impact on such form of liability. The argument that the novelty of making the allegation of a joint criminal enterprise in a large scale operation takes it outside of the scope of the jurisprudence is not therefore persuasive.

8. Finally, the Chamber recalls that allowing the pleading at this stage does not prevent the Chamber from making the ordinary assessment of the evidence at the end of the trial to determine the adequacy of the pleadings to the evidence.

Application of the extended form of joint criminal enterprise to the crime of rape (Count 5)

9. The Amended Indictment seeks to impose liability on the Defendants for unspecified rapes as a foreseeable consequence of a joint criminal enterprise to destroy the Tutsi as a

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7 *Prosecutor v. Radoslav Brdjanin*, Case No. IT-98-36-T, Judgement (TC), 1 September 2004, para. 347.

8 *Prosecutor v. Radoslav Brdjanin*, Case No. IT-98-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal (AC), 5 May 2005. The Appeals Chamber has not yet delivered its final decision on this matter.

9 *Prosecutor v. Radoslav Brdjanin*, Case No. IT-98-36-T, Judgement (TC), 1 September 2004, para. 346.

10 *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54, Judge Richard May, Decision on Review of Indictment, 22 November 2001, paras. 4-9; *Prosecutor v. Slobodan Milosevic*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeals from Refusal to Order Joinder (AC), 18 April 2002, paras. 21 and 30.

11 *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54, Decision on Motion for Judgement of Acquittal (TC), 16 June 2004, paras. 246, 288-289, 292-293, 298-299, and 323.

group. The Defence submits that this violates the *mens rea* requirement. It states that in all genocides, rape is foreseeable and therefore, application of the extended form of joint criminal enterprise liability to cases of rape amounts to strict liability. It believes that this is contrary to customary international law and fundamental principles of fairness and due process. The Defence argues that there is no jurisdiction to prosecute them for extended joint criminal enterprise liability in rape and therefore Count 5 of the Amended Indictment should be dismissed.

10. The Chamber notes that the Defence made overlapping arguments with its motion on defects in the form. The Chamber recalls that there will be an oral hearing on this issue and a scheduling order will be released in due course.

Jurisdiction to apply the extended form of joint criminal enterprise liability to complicity in genocide (Count 4)

11. The Defence argues that Count 4 of the Amended Indictment is legally unsound, because the extended form of joint criminal enterprise liability cannot be applied to complicity in genocide as it is not a crime but a form of liability. The Defence further argues that it is factually unsound because complicity in genocide cannot be outside the scope of a joint criminal enterprise and yet be a foreseeable and a natural consequence of the enterprise at the same time.

12. The Chamber considers that it is necessary to dispose of this matter by providing the parties with the opportunity for further oral arguments. A scheduling order for such arguments will be released in due course.

FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 5 August 2005, done in English.

Dennis C. M. Byron
Presiding Judge

Karin Hökborg
Judge

Gberdao Gustave Kam
Judge

[Seal of the Tribunal]