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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: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 14 September 2005

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-R72

DECISION ON DEFENCE MOTIONS CHALLENGING THE INDICTMENT AS REGARDS THE JOINT CRIMINAL ENTERPRISE LIABILITY

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, Emile Francis Short and Gberdao Gustave Kam ("Chamber");

BEING SEIZED of Joseph Nzirorera's Preliminary Motions on the Form of the Indictment and on Jurisdiction, both challenging the Joint Criminal Enterprise liability; and Édouard Karemera's Preliminary Motions challenging the same;

CONSIDERING the Prosecution's Responses[1] and its further submissions filed on 26 August 2005;

RECALLING the Decisions of 5 August 2005 in which the Chamber postponed its deliberation on two issues namely (i) the pleading of the extended form of joint criminal enterprise in relation to the charge of rape in Count 5, when the Indictment does not include any specific acts of rape, and (ii) the pleading of joint criminal enterprise in relation to complicity in genocide in Count 4;[2]

CONSIDERING the oral arguments presented by the parties at the hearing of 5 September 2005;[3]

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

INTRODUCTION

1. The trial of the Accused in this case is set to begin on 19 September 2005. On 5 August 2005, the Chamber decided the preliminary motions filed by the Accused challenging the Amended Indictment of 23 February 2005 on defects in the form of the Amended Indictment and on the use of joint criminal enterprise as a form of liability.[4] The Chamber reserved its decision on two issues that were raised in the Motions and filed a Scheduling Order[5] to receive further submissions and hear oral arguments on the issues. At the first pre-trial hearing on 29 August 2005, the Defence for Karemera brought to the Chamber's attention that his preliminary motion which included arguments contesting the pleading of Joint Criminal Enterprise in the Amended Indictment was not fully treated by the Chamber's prior decisions.[6] The Chamber heard oral arguments on 5 September 2005 on the questions presented in the Scheduling Order and invited the Defence for Karemera to make its additional submissions on the issue of joint criminal enterprise.[7]

2. The Amended Indictment of 23 February 2005 provides in Paragraph 4, "[c]ommitting in this Indictment also refers to participation in a joint criminal enterprise as a co-perpetrator." The relevant counts in the Amended Indictment are as follows:

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1 For those motions and responses, see: *Karemera et. al.*, Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal Enterprise; *Karemera et. al.*, Decision on Defects in the Form of the Indictment, both dated 5 August 2005.

2 See: *Karemera et. al.*, Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal Enterprise, paras. 9-12; and Decision on Defects in the Form of the Indictment, paras. 46-47.

3 T. 5 September 2005.

4 See: footnote 1.

5 *Karemera et. al.*, Scheduling Order – Oral Arguments on Rape, Complicity in Genocide and the Pleading of a Joint Criminal Enterprise in the Amended Indictment, 8 August 2005.

6 T. 29 August 2005.

7 T. 5 September 2005.

"Count Four: Complicity in Genocide
The Prosecutor charges Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera with Complicity in Genocide pursuant to Articles 2 and 6(1) of the Statute of the Tribunal in that during the period of 1 January -17 July 1994 all named accused instigated or provided the means to other persons to kill or cause serious bodily or mental harm to members of the Tutsi population, or to deliberately inflict conditions of life upon the Tutsi population that were calculated to bring about its physical destruction, knowing that those other persons intended to destroy, in whole or in part, the Tutsi racial or ethnic group, committed as follows [...]"

"Count 5: Rape as a Crime Against Humanity
The Prosecutor charges Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera with Rape as a Crime Against Humanity pursuant to Articles 3, 6(1) and 6(3) of the Statute of the Tribunal in that on or between the dates of 6 April and 17 July 1994, throughout the territory of Rwanda, all named accused were responsible for raping persons or causing persons to be raped, as part of a widespread systematic attack against a civilian population on political, ethnic, or racial grounds, committed as follows [...]".

DISCUSSION

Pleading of the extended form of joint criminal enterprise in Count 5 of the Amended Indictment (Rape as Crime against Humanity)

3. The Accused Joseph Nzirorera requests that Count 5 of the Amended Indictment of 24 August 2005 be dismissed because (a) the third form of joint criminal enterprise (the extended form), in relation to sexual offences, was not part of customary international law in 1994, (b) applying the extended form of joint criminal enterprise to rape creates a form of strict liability and (c) because of defects in the pleadings. The other Accused support such arguments.[8]

4. In the *Tadic* Judgement when it was recognised that joint criminal enterprise, as a form of liability, is a form of "commission" well established under customary international law, the Appeals Chamber also held that there are three different forms without limiting its application to any particular crime. The Defence is not therefore correct in arguing that the third form of joint criminal enterprise, in relation to crimes of a sexual nature, was not established under customary international law. Consequently, the first part of the argument related to Count 5 [para. 3(a) above] falls to be dismissed.

5. The Chamber recalls that Count 5 does not charge the Accused with having personally committed any specific rape. Under Article 6(1) of the Statute of the Tribunal ("Statute"), Count 5 rather charges the Accused with being part of a joint criminal enterprise in which rape was a natural and foreseeable consequence of its object. Following the jurisprudence,[9] the pleading of a joint criminal enterprise has to mention (i) a plurality of persons, (ii) the existence of a common plan that amounts to or involves the commission of a crime provided in the Statute, and (iii) the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute.

6. On the argument related to strict liability, the Chamber is not convinced that there is any automatic conclusion that in all genocides, rape is a natural and foreseeable consequence.

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[8] T. 5 September 2005, pp. 7-11.

[9] See: ICTY, *Prosecutor v. Mitar Rasevic*, Case No. IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of the Indictment (TC), 28 April 2004, paras. 14-15.

The Chamber considers that the Prosecution has the burden to prove its pleading in that regard and the Chamber will have to determine whether there is proof beyond a reasonable doubt of such a conclusion. Therefore this argument [para. 3(b) above] also falls to be dismissed.

7. In the present Indictment, the Chamber highlights that the Accused are charged with rape only on the basis that such a crime was a natural and foreseeable consequence of their common plan to destroy Tutsi throughout Rwanda. The Chamber recalls that in *Blaškić* Appeals Judgement, it was stated, in relation to pleading of joint criminal enterprise liability, that "[t]he precise details to be pleaded as material facts are the acts of the accused, not the acts of those persons for whose acts he is alleged to be responsible."[10] Consequently, the particulars of the acts of rape in Count 5 are not material facts which must be pleaded in the Indictment, and the challenge based on defects in the form [para. 3(c) above] cannot therefore succeed. But the Chamber is of the view that such particulars are important for the preparation of the defence of the Accused. It is therefore sufficient in the view of the Chamber that those particulars are disclosed to the Accused in a manner which does not prejudice their preparation. The Chamber notes that details of the acts of rape were disclosed to the Accused through the 143 witnesses statements and the Pre-Trial Brief.[11]

Pleading of joint criminal enterprise liability in a crime of complicity to commit genocide (Count 4)

8. The Accused Joseph Nzirorera and the other Accused argue that (a) complicity in genocide is a form of liability and, as such, cannot be committed through a joint criminal enterprise since the latter is also a form of accomplice liability;[12] and (b) the third form of joint criminal enterprise applies to a situation where there is an escalation between the object of the common plan and its natural and foreseeable consequence, the Defence being of the view that this is not the case in the present Indictment.[13] In his oral reply to the Prosecution arguments, Defence Counsel for Joseph Nzirorera has incidentally requested that the submission of authorities by the Prosecution should be excluded because it was not served on him in due time.

9 The Chamber notes that the *Blagojević* Judgement referred to in the Defence submissions is not pertinent to the present case because it is related to the pleading of command responsibility under Article 6(3) of the Statute, and the Chamber does not find it relevant to this case. The Chamber also considers that the filing on 2 September 2005 by the Prosecution of the authorities supporting its further submissions does not introduce any

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[10] See: ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, para. 210.

[11] The witnesses statements were filed on 5 July 2005, with a supplemental filing on 29 July 2005. The Pre-Trial Brief was filed 27 June 2005.

[12] T. 5 September 2005. p. 11.

[13] T. 5 September 2005, p. 12: "People who agree to genocide, it's foreseeable that another crime, rape, could be committed. In this instance, the foreseeable crime, intended crime, is genocide, and the unintended but foreseeable crime is complicity. And it's our position that it's impossible to intend genocide and be liable for complicity as an unintended but foreseeable crime. If the object of the joint criminal enterprise is genocide, any member who provides acts of assistance is within the scope of that intended crime and, therefore, is doing something that is not an unintended but foreseeable crime, but doing something within the crime intended by the joint criminal enterprise, which is genocide. And, therefore, under those circumstances, if that were proven, the person would be guilty of genocide itself under the basic form of joint criminal enterprise."

substantial argument, nor does it prejudice any of the Accused. The Defence request to exclude such filing is furthermore without legal basis because there is no Rule 27(D) in the Rules.[14] This incidental request therefore falls to be dismissed.

10. Finally, the Chamber is of the view that the challenge to the application of joint criminal enterprise liability to complicity in genocide is premature, because this count is an alternative to the count on genocide: in the event that the count of genocide is proved, the issue will become moot. The Chamber therefore reserves its deliberation on the matter.

FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

DENIES the Motions in the entirety of their challenge of Counts 4 and 5; **AND RESERVES** the deliberation on the application of joint criminal enterprise to complicity in genocide.

Arusha, 14 September 2005, done in English.

Dennis C. M. Byron	Emile Francis Short	Gberdao Gustave Kam
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[14] T. 5 September 2005, p. 37: "First of all, I didn't receive the table of authorities that was referred to and it was filed in violation of Rule 27(D), which requires that anything filed in support of a hearing – an oral hearing be filed 10 days before the hearing."