

ICTR-98-44-T
18-5-2006
(26682-26678)

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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: 18 May 2006

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RECORDS

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T

**DECISION ON DEFENCE MOTIONS CHALLENGING THE PLEADING
OF A JOINT CRIMINAL ENTERPRISE IN A COUNT OF COMPLICITY
IN GENOCIDE IN THE AMENDED INDICTMENT**

Articles 2 and 6(1) of the Statute

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INTRODUCTION

1. The trial in this case started on 19 September 2005. The Amended Indictment charges Édouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera with genocide committed by means of a joint criminal enterprise. In the alternative, it charges the Accused persons with complicity in genocide also committed by means of a joint criminal enterprise.¹

2. On 5 September 2005, the parties were heard on a preliminary motion challenging the applicability of joint criminal enterprise liability to complicity in genocide.² The Chamber found that this challenge was premature, because the count of complicity in genocide was pleaded as an alternative to the count of genocide. In the Chamber's view, in the event that the count of genocide was proved, the issue would become moot. The Chamber's deliberations on the matter were therefore reserved.³ Following Joseph Nzirorera's successful interlocutory appeal of this Decision, the Appeals Chamber ordered the Trial Chamber to render a decision on whether the Appellant could be tried for complicity in genocide under an extended joint criminal enterprise theory.⁴

DISCUSSION

3. Joseph Nzirorera, joined by Ndirumpatse and Karemera, argues that 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.⁵ They therefore contend that there is no jurisdiction to prosecute complicity through the extended form of joint criminal enterprise.

4. The Prosecution denies that complicity in genocide is a mode of liability and it submits that complicity in genocide must be considered as a separate crime.⁶ In its view, a

¹ See Counts 3, 4 and para. 7. On 23 February 2005, the Prosecutor filed an Amended Indictment. A new Amended Indictment dated 24 August 2005 was filed on 25 August 2005 pursuant to the Chamber's Decision on Defects in the Form of the Indictment of 5 August 2005.

² T. 5 September 2005.

³ *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-R72 ("Karemera et al. Case"), Decision on Defence Motions Challenging the Indictment as Regards the Joint Criminal Enterprise Liability (TC), 14 September 2005.

⁴ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44AR72.5 and ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise (AC), 12 April 2006.

⁵ See: Joseph Nzirorera's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise, filed on 4 May 2005; "Mémoire pour M. Ndirumpatse", adopting Joseph Nzirorera's submissions, filed on 11 May 2005; "Requête d'Édouard Karemera en exception préjudicielle pour vices de forme de l'acte d'accusation" and "Requête relative à l'exception préjudicielle pour incompétence *ratione materiae*, *ratione personae*, *ratione temporis* et *nullum crimen, nulla poena sine lege*", filed on 17 May 2005; and oral arguments made by the parties, T. 5 September 2005.

⁶ T. 5 September 2005, p. 29.



person can therefore be found guilty of complicity in genocide through the extended form of joint criminal enterprise if the other member of the joint criminal enterprise is an accomplice in genocide, if that was a natural and foreseeable consequence of the enterprise, and if the accused was both aware of this, and with that awareness, participated in the enterprise.⁷

5. Joint criminal enterprise does not appear expressly in the Statute nor in the Rules of Procedure and Evidence. This legal concept appeared for the first time in the *Tadic* Appeals Judgment of 15 July 1999.⁸ According to established jurisprudence, joint criminal enterprise is considered as a form of participation in a crime coming from the word *committing* contained in Article 7(1) of the Statute of the International Criminal Tribunal for former Yugoslavia and Article 6(1) of this Tribunal's Statute. As the Appeals Chamber recently reiterated, it is clear that there is a basis in customary international law for joint criminal enterprise liability.⁹ It is also well established that joint criminal enterprise can apply to the crime of genocide.¹⁰

6. Conversely, complicity in genocide is explicitly provided for Article 2(3) of the Statute.¹¹ Chambers have defined complicity as referring to "all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide".¹²

Prosecutor's Response to Nzirorera's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise, filed on 9 May 2005; and oral arguments, T. 5 September 2005, p. 29.

⁸ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgment (AC), 15 July 1999, paras. 185-229.

Karemera et al., Decision on Jurisdictional Appeals: Joint Criminal Enterprise (AC), 12 April 2006, para. 16.

¹⁰ See in particular: *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide (AC), 22 October 2004; see also: *Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-32-A, Judgment (AC), 25 February 2004, para. 102; *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgment (AC), 19 April 2004, paras. 134 and 144.

¹¹ Articles 2(2) and (3) of the Statute read as follows:

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.

3. 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.* (emphasis added)

¹² *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment (TC), 15 May 2003, para. 395. Prior jurisprudence (See: *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (TC), 2 September 1998, paras. 533, 535, 537 ("Akayesu Judgment (TC)"); *Prosecutor v. Ignace Bagilishema*,

7. Contrary to the Prosecution's assertion, jurisprudence of both *ad hoc* Tribunals has determined that complicity is one of the forms of criminal responsibility that is applicable to the crime of genocide, and not a crime itself.¹³ There is no need for this Chamber to reiterate this explicit finding of the Appeals Chamber, which has been constantly applied by Trial Chambers of both *ad hoc* Tribunals on this matter.¹⁴

8. Whereas the genocide is the crime, joint criminal enterprise and complicity in genocide are two modes of liability, two methods by which the crime of genocide can be committed and individuals held responsible for this crime. It is therefore impossible to plead that complicity in genocide has been committed by means of a joint criminal enterprise. Complicity can only be pleaded as a form of liability for the crime of genocide.

9. Furthermore, since an individual cannot be both the principal perpetrator of a particular act and the accomplice thereto, it is well recognized that complicity must be pleaded as an alternative form of responsibility.¹⁵

Case No. ICTR-95-1A-T, Judgment (TC), 7 June 2001, paras. 69-70 ("*Bagilishema* Judgment (TC)"); *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgment (TC), 27 January 2000, paras. 177 and 179 ("*Musema*, Judgment (TC)") has taken into consideration the general meaning of complicity in the common and civil law, as well as the domestic law of Rwanda, has defined the term complicity as aiding and abetting, instigating, and procuring. The Trial Chamber in *Semanza* case emphasized rightly that there is no compelling reason for explicitly defining a legal term in its Statute, which is drawn *verbatim* from an international instrument, by reference to a particular national code.

¹³ Reference can also be made to the Statute of the International Criminal Court ("ICC"), 17 July 1998, art. 6, UN Doc. A/Conf.183/9. All forms of criminal responsibility, even those uniquely applicable to genocide, are listed in Article 25 of the ICC Statute while Article 6 provides the definition of the crime of genocide as follows:

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

¹⁴ *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgment (AC), 13 December 2004, para. 500; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Judgment (AC), 20 May 2005, para. 316; *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgment (AC), 19 April 2004, para. 139; *Bagilishema* Judgment (TC), para. 67: "In the Chamber's view, genocide and complicity in genocide are two different forms of participation in the same offence"; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment (TC), 15 May 2003, para. 390; *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Judgment (TC), 2 August 2001, para. 640; *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Judgment (TC), 31 July 2003, para. 531; *Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-T, Judgment (TC), 1 September 2004, para. 724-725, 727 and 729: the Trial Chamber adds that "complicity is one of the forms of criminal responsibility recognized by the general principles of criminal law, and in respect of genocide, it is also recognized in customary international law" (references omitted); *Prosecutor v. Viduje Blagojevic & Dragan Jokic*, Case No. IT-02-60-T, Judgment (TC), 17 January 2005, para. 684. The Trial Chamber further noted that "in this case, the Prosecution, when submitting the elements of complicity in genocide, explicitly referred to it as a form of liability and not as a crime".

¹⁵ *Bagilishema* Judgment (TC), para. 67:

10. In the present case, the Chamber will therefore consider the count of complicity as a pleading of a specific form of participation in the crime of genocide alternatively to the forms pleaded under the count of genocide. In that regard, there is no need to file a new Amended Indictment.

FOR THE ABOVE REASONS, THE CHAMBER

- I. GRANTS** the Defence Motions in part;
- II. DECIDES** that there is no jurisdiction to prosecute complicity through the form of a joint criminal enterprise; and
- III. DECIDES** that the Amended Indictment against the Accused must be understood as pleading complicity in genocide as an alternative form of participation in the crime of genocide.

While Judge Short agrees with the outcome of the decision, he will be filing a Separate Opinion.

Arusha, 18 May 2006, done in English.

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

In the Chamber's view, genocide and complicity in genocide are two different forms of participation in the same offence. The Chamber thus concurs with the opinion expressed in Akayesu that "an act with which an Accused is being charged cannot, therefore, be characterized both as an act of genocide and an act of complicity in genocide as pertains to this accused. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same act"¹⁵. Therefore, the Chamber finds that an accused cannot be convicted of both genocide and complicity in genocide on the basis of the same acts.

See also: *Musema*, Judgment (TC), para. 175; *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment, (TC), 17 June 2004, para. 246 ("*Gacumbitsi* Judgment (TC)").



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International Criminal Tribunal for Rwanda
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OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 23 May 2006

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THE PROSECUTOR
v.
Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

**SEPARATE OPINION OF JUDGE SHORT ON COMPLICITY IN GENOCIDE AND
JOINT CRIMINAL ENTERPRISE THEORY**

Articles 2 and 6 (1) of the Statute and Rule 72 of the Rules of Procedure of Evidence

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SEPARATE OPINION OF JUDGE SHORT

1. I support the conclusion reached in the Decision of 18 May 2006 to the extent that it upheld the Defence submission that the Accused in this case cannot be tried for complicity in genocide under an extended form of joint criminal enterprise ('JCE'). However, I am unable to agree with part of the reasoning in that Decision. I also disagree with the scope of the ruling.

2. First, I am of the view that the Chamber's Decision should have been limited to a consideration of the question which the Appeals Chamber directed it to answer, and which was the subject of the Defence preliminary motions which ultimately became the subject of Nzirorera's appeal. That narrow question relates to whether or not the Accused in this case can be tried for complicity in genocide under an extended joint criminal enterprise theory.¹ Findings with respect to the pleading of complicity and JCE in general were not necessary for the Decision.

3. In the course of their preliminary motions concerning this question, as well as during the oral hearing of 5 September 2005, the Accused argued against pleading complicity in genocide pursuant to a theory of extended JCE on two different grounds. The first ground was a theoretical one, namely, that since both complicity in genocide and JCE are modes of liability, they cannot be pleaded together, since it would amount to pleading that a mode of liability (complicity in genocide) had been committed by means of a JCE. The second ground was a factual one relating specifically to the Count of complicity in genocide in the Indictment against the co-Accused (Count four). With respect to this leg of the Defence argument, the Accused argued that it is factually impossible for the Prosecution to prove the allegations concerning complicity in genocide and extended JCE together, as pleaded in the Indictment.

4. The Decision of 18 May 2006 was based upon findings made with respect to the first of the aforementioned arguments – that since complicity in genocide is a mode of liability, another mode of liability (JCE) cannot be pleaded with respect to it.

5. I have reviewed the relevant provisions of the Statute, as well as the jurisprudence relied upon in the Decision, and I am unable to reach the same conclusion with respect to the status of complicity in genocide. Articles 2, 3 and 4 of the Statute of the Tribunal outline the subject matter jurisdiction of this Tribunal – genocide, crimes against humanity, and violations of common Article 3 of the Geneva Conventions and Additional Protocol II thereto, respectively. Article 2(1) vests jurisdiction in the Tribunal with respect to the crime of genocide, as defined in paragraph 2, or any of the *other acts* outlined in paragraph 3 of that Article. Paragraph 3 provides:

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;

¹ *Karemera et al. v. Prosecutor*, Case Nos. ICTR-98-44AR72.5 and ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise (AC), 12 April 2006, para. 25(c).



- (d) Attempt to commit genocide;
- (e) *Complicity in genocide.*²

It is clear that the so-called “acts” referred to in Articles 2(3) (a) and (b) – genocide and conspiracy to commit genocide – are individual crimes. So are “attempt to commit genocide” and “direct and public incitement to commit genocide”, which are inchoate offences. However, the contention with respect to the status of complicity in genocide, mentioned in paragraph 3(e), arises as a result of an overlap between “complicity” in Article 2(3)(e) of the Statute and forms of accomplice liability in Article 6(1) of the Statute.³

6. The Decision of 18 May 2006 found that “complicity is one of the forms of criminal responsibility that is applicable to the crime of genocide, and not a crime itself”, and that this was an “explicit finding” of the Appeals Chamber.⁴ In reaching such a finding, the Decision relied upon a number of decisions of the *ad hoc* Tribunals which, it said, made such a determination.

7. I do not agree with that interpretation of the jurisprudence. In my view, none of the Appeals Chamber jurisprudence relied upon in the Decision as authority for the proposition that complicity is one of the forms of criminal responsibility that is applicable to the crime of genocide, and not a crime itself, makes such an explicit finding. However, it is conceded that such an explicit statement of law was made concerning the status of complicity in genocide in the *Blagojevic & Jokic* case:

Since complicity in genocide, as recently reiterated by the *Krstic* Appeal Chamber, is a form of liability of the crime of genocide and not a crime itself, Article 7(3) cannot but refer to the crime of genocide.⁵

This statement was made by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, and, in my view, relied upon passages of the *Krstic* Appeals Chamber Decision⁶ which did not make such a categorical finding. The remaining Trial Chamber jurisprudence touching upon this issue is inconsistent and in no way categorical in its treatment of complicity in genocide.⁷

² Emphasis added.

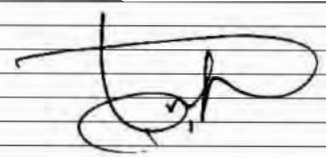
³ See, for example, *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgment (AC), 13 December 2004, para. 500; *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Judgment (AC), 20 May 2005, para. 316; *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgment (AC), 19 April 2004, para. 139 (“*Krstic* Judgment (AC)”); *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Judgment (TC), 2 August 2001, para. 640 (“*Krstic* Judgment (TC)”).

⁴ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, 18 May 2006.

⁵ *Prosecutor v. Vidoje Blagojevic & Dragan Jokic*, Case No. IT-02-60-T, Judgment (TC), 17 January 2005, para. 684.

⁶ *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-A, Judgment (AC), 19 April 2004, para. 139 (“*Krstic* Judgment (AC)”);

⁷ For example, in the *Bagilishema* Judgment the Trial Chamber said: “In the Chamber’s view, genocide and complicity in genocide are two different forms of participation in the same offence”, para. 67; In *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment (TC), 15 May 2003, para. 390, the Trial Chamber said that “Article 2(3) lists the forms of criminal responsibility that are applicable to the crime of genocide under the Statute, namely genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.”; See also *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Judgment (TC), 2 August 2001, para. 640.



8. In my view, complicity in genocide has the indicia of a criminal offence, whilst encompassing a particular mode of liability. It is often charged as an alternative count to the count of genocide, as in the Indictment in this case, and can result in a finding of guilt for “complicity in genocide”. In the case of *Semanza*, for example, the Accused, who was charged with Counts of genocide and complicity in genocide in the alternative, was found not guilty of genocide and convicted of complicity in genocide.⁸ It certainly cannot be said that the Accused in that case was convicted of a mode of liability. I am therefore of the view that the term “complicity in genocide” referred to under Article 2(3)(e) is a crime (genocide) to which a particular mode of criminal responsibility is attached (complicity, or accomplice liability).

9. In my view, however, the question of whether or not the Accused in this case can be tried on a Count of complicity in genocide under an extended joint criminal enterprise theory cannot be resolved by attempting to place complicity in genocide within a ‘crime’ or ‘mode of liability’ category. It is clear from the jurisprudence of both Tribunals that a count of “complicity in genocide” has come to refer to accomplice liability for the crime of genocide – that is, aiding, abetting, or otherwise assisting a principal offender in the commission of one or more of the acts proscribed by Article 2(2).⁹ Furthermore, stating that the term “complicity in genocide” under Article 2(3)(e) refers to a mode of liability does not resolve the issue concerning whether or not an extended form of JCE can be pleaded with it.

10. Instead, I am of the view that it is preferable to resolve this question by reference to the Indictment in this case – that is, by addressing the second leg of the Defence argument that it is factually impossible for the Prosecution to prove the allegations of complicity in genocide committed by means of extended form JCE liability, as outlined in the Indictment. In order to do so, it is necessary to set out the relevant provisions of the Amended Indictment.

11. Paragraph four of the Amended Indictment in this case, whilst attributing Article 6(1) responsibility to the Accused for the crimes referred to in Articles 2, 3 and 4 of the Statute, states that the term “committing” in the Indictment also refers to participation in a JCE as a co-perpetrator. Paragraph five of the Indictment then goes on to set out the allegation concerning the Accused’s participation in a JCE. It also states that the purpose of the JCE was “the destruction of the Tutsi population in Rwanda through the commission of crimes in violation of Articles 2, 3 and 4 of the Statute...” Paragraph six outlines the alleged participants in the JCE, including the Accused, certain named individuals, and classes of persons.

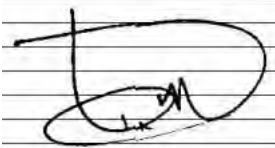
12. Paragraph seven of the Indictment states that the crime¹⁰ of complicity in genocide (Count four), amongst others, was within the object of the JCE. It goes on to state that the

⁸ *Prosecutor v. Laurent Semanza*, Case No, ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003, paras. 433 and 553. This conviction was affirmed on appeal, see *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, p. 128.

⁹ Those are:

- (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.
- with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

¹⁰ The Indictment contemplates ‘complicity in genocide’ as a ‘crime’, and makes several references to it being as such.

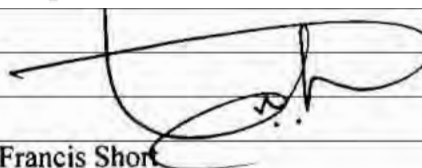


crime of complicity in genocide was the natural and foreseeable consequence of the execution of the object of the JCE and that the accused were aware that this crime was the possible outcome of the execution of the JCE. This is therefore the main statement of the allegation that the co-Accused committed complicity in genocide by virtue of the fact that the commission of that crime, by others, was a natural and foreseeable consequence of their participation in a JCE.

13. Count four, complicity in genocide, is charged as an alternative crime to Count three, genocide. Under Count four, the Accused (the accomplices) are alleged to have instigated or provided the means to other persons (the principal offenders) to commit genocidal acts. Paragraphs 34 to 66 of the Indictment contain the substance of the allegations against the Accused with respect to their Article 6(1) or 6(3) responsibility for the crime of genocide, or alternatively, form the basis of the case against them with respect to their Article 6(1) liability for complicity in genocide. The anomaly in this pleading is that, rather than outlining the acts of the Accused's co-perpetrators, which result in criminal responsibility attaching to the Accused by virtue of the extended form of JCE, paragraphs 34-66 contain, for the most part, allegations concerning the acts of one or more of the co-Accused in this case. This pleading with respect to complicity in genocide is entirely inconsistent with the way in which extended form JCE liability is pleaded in the Indictment.

14. Furthermore, a problem arises in terms of the underlying offence in both cases – the purpose of the joint criminal enterprise, and the unintended but foreseeable crime giving rise to extended form joint criminal enterprise liability - being genocide. The Indictment establishes that the purpose of the JCE entered into by the Accused was the destruction of the Tutsi population through the commission of genocidal acts outlined in Article 2(2), amongst other things.¹¹ The third or “extended” category of joint criminal enterprise liability allows conviction of a participant in a joint criminal enterprise for certain crimes committed by other participants in the joint criminal enterprise, even though those crimes were outside the common purpose of the enterprise, if he or she intended to further the common purpose of the joint criminal enterprise and the crime was a natural and foreseeable consequence of that common purpose.¹² The third form of JCE liability is therefore intended to cover the commission of a crime or crimes which were outside the common purpose of the enterprise. The inconsistency, in this case, is that both the purpose of the JCE, and Count four, contemplate the offence of genocide, even though Count four contemplates the commission of that offence through a particular mode of liability. In my view, the extended form of JCE was not intended to cover this type of scenario. Rather, it was meant to attach liability to the Accused for offences not contemplated by the agreement, but nonetheless foreseeable.

Arusha, 23 May 2006, done in English.



Emile Francis Short

Judge

[Seal of the Tribunal]

¹¹ Amended Indictment, paragraph 5.

¹² *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-A, Judgement (AC), 22 March 2006, paras. 58 and seq.; *Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, paras. 5 and 6.