



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

1434/H
ICTR-98-44-AR72.7
14 July 2006

(1434/H - 1431/H)

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Liu Daqun
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Decision of: 14 July 2006

ICTR Appeals Chamber
Date: 14 July 2006
Action: R.T.
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PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-AR72.7

**Decision Pursuant to Rule 72(E) of the Rules of Procedure and Evidence on
Validity of the Prosecution Appeal Regarding the Pleading of Joint Criminal
Enterprise in a Count of Complicity in Genocide**

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Mr. Don Webster
Ms. Linda Bianchi

International Criminal Tribunal for Rwanda
Tribunal pénal International pour le Rwanda
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NAME / NOM: ADEFI KUMELID A. AEMBE
SIGNATURE: [Signature] DATE: 14 July 2006

Counsel for the Defence:

Ms. Dior Diagne Mbaye and Mr. Félix Sow for Édouard Karemera
Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Mathieu Ngirumpatse
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi for Joseph Nzirorera

1433/H

1. This Bench of three Judges of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Bench" and "Tribunal", respectively) is seized of the "Prosecutor's Motion for Determination that the Interlocutory Appeal as of Right May Proceed Immediately, For Leave to File a Written Brief on the Merits of the Appeal, and for a Scheduling Order", filed on 30 May 2006 ("Prosecution Motion").

Discussion

2. This matter is before the Bench pursuant to Rule 72(E) of the Rules of Procedure and Evidence of the Tribunal ("Rules")¹ in order to determine whether the appeal is capable of satisfying the criteria under Rule 72(D) which delimits the types of jurisdictional challenges which may proceed as of right. Rule 72(D) provides:

For purposes of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:

- (i) any of the persons indicated in Articles 1, 5, 6 and 8 of the Statute;
- (ii) the territories indicated in Articles 1, 7 and 8 of the Statute;
- (iii) the period indicated in Articles 1, 7, and 8 of the Statute; or
- (iv) any of the violations indicated in Articles 2, 3, 4 and 6 of the Statute.

3. The Prosecution Motion challenges a Trial Chamber decision holding that the theory of joint criminal enterprise cannot apply to a charge of complicity in genocide since complicity in genocide is itself a mode of liability and not a crime.² The Prosecution submits that in so holding the Trial Chamber erred in law since complicity in genocide, specified in Article 2(3)(e) of the Statute, is a crime and not just a mode of liability.³ In addition, the Prosecution requests leave to file written briefs in conformity with the requirements of paragraph C(2)(d)(1) of the Practice Direction on the Lengths of Briefs and Motions on Appeal ("Practice Direction") and for a scheduling order.⁴

¹ Order of the Presiding Judge Assigning a Bench of Three Judges Pursuant to Rule 72(E) of the Rules of Procedure and Evidence, 1 June 2006. Rule 72 (E) presently provides: "An appeal brought under paragraph (B)(i) may not be proceeded with if a bench of three Judges of the Appeals Chamber, assigned by the presiding Judge of the Appeals Chamber, decides that the appeal is not capable of satisfying the requirements of paragraph (D), in which case the appeal shall be dismissed."

² *The Prosecutor v. Édouard 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; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Separate Opinion of Judge Short on Complicity in Genocide and Joint Criminal Enterprise Theory, 23 May 2006.

³ Prosecution Motion, paras. 2, 6, 12-13.

⁴ Prosecution Motion, paras. 14-18.

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4. Mr. Nzirorera does not oppose the Prosecution Motion.⁵ He requests that the translation requirements of Mr. Karemera and Mr. Ngirumpatse be taken into account in making the scheduling order.⁶ Mr. Karemera and Mr. Ngirumpatse have not filed a response.⁷ The Prosecution has not filed a reply.

5. Having considered the parties' submissions, the Bench finds that this appeal involves a question of jurisdiction within the meaning of Rule 72(D)(iv) of the Rules as it relates to the violations indicated in Articles 2 and 6 of the Statute and that, as such, it satisfies the requirements to proceed as of right. In light of this conclusion, the Bench authorizes the parties to file written submissions pursuant to paragraph C(2)(d)(1) of the Practice Direction. In setting out a scheduling order for this appeal, the Bench is mindful that in order to be able to present a full answer, Mr. Karemera and Mr. Ngirumpatse need French translations of the Prosecution's appeal brief.⁸

Disposition

6. For the foregoing reasons, the Prosecution Motion, Judge Schomburg dissenting, is **GRANTED**. The Prosecution is **DIRECTED** to file its brief no later than 28 July 2006. The Registry is **DIRECTED** to provide to Mr. Karemera and Mr. Ngirumpatse and their counsel, on an urgent basis, French translations of the Prosecution's brief and the present decision. Mr. Karemera, Mr. Ngirumpatse, and Mr. Nzirorera may file their responses within ten days from the date on which the French translation of the last of these documents is served on them respectively. The Prosecution may reply to any response within four days. The Registry is also **DIRECTED** to inform the Appeals Chamber of the date on which the translated documents are served on the parties.

Judge Shomburg appends his dissenting opinion.

⁵ Joseph Nzirorera's Response to Prosecution Request to Appeal as of Right, 31 May 2006, para. 2 ("Nzirorera Response").

⁶ Nzirorera Response, para. 3.


⁷ The Appeals Chamber delayed consideration of this decision, based on requests by Mr. Karemera and Mr. Ngirumpatse, to allow for translation of the Prosecution Motion and other related materials. See Decision on Request for Extension of Time, 9 June 2006, paras. 3, 4 ("Decision on Request for Extension of Time").

⁸ Mr. Karemera and Mr. Ngirumpatse work in French, and not in English, which the Appeals Chamber has already found to be good cause for a reasonable extension of time. See Decision on Request for Extension of Time, para. 3.

Done in English and French, the English version being authoritative.

1431/H

Done this 14th day of July 2006,
At The Hague,
The Netherlands.



Judge Mehmet Güney
Presiding

[Seal of the Tribunal]





Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

1436/H
ICTR-98-44-AR72.7
17 July 2006
(1436/H - 1435/H)

DA

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney
Judge Liu Daqun
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Declaration of: 14 July 2006

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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SIGNATURE: *Thibaut Schomburg*

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PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-AR72.7

DISSENTING OPINION OF JUDGE SCHOMBURG
to
DECISION PURSUANT TO RULE 72 (E) of the RULES of PROCEDURE and EVIDENCE on VALIDITY of the PROSECUTION APPEAL REGARDING the PLEADING of JOINT CRIMINAL ENTERPRISE in a COUNT of COMPLICITY in GENOCIDE

Office of the Prosecutor

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ICTR Appeals Chamber

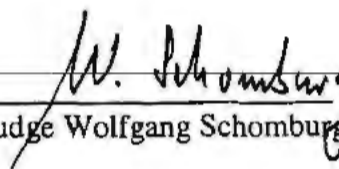
Date: *17 July 2006*
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C. P. Tchidi

DISSENTING OPINION OF JUDGE SCHOMBURG

1. With respect, I disagree with today's decision of the majority to grant the Prosecution Motion. The Prosecution appeal does not fulfill the requirement pursuant to Rule 72 (D)(iv) of the Rules. The Tribunal has jurisdiction over the case at hand, irrespective of whether the theory of joint criminal enterprise will be applied and irrespective of whether the charge of complicity in genocide will be characterized as a crime or as a mode of liability. Thus, the appeal does not lie as of right.
2. It is not for the Appeals Chamber to decide already now questions of law which have to be decided first by the competent Trial Chamber. Only if at the end of the trial phase an appeal might be lodged on this issue, the Appeals Chamber might be called upon to finally decide the matter based on the Trial Chamber's findings and holdings.
3. Deciding already today would mean to accept an upward delegation of a legal matter from the competent trial level to the appeal level, thereby may be even *de facto* undermining the fundamental right to effectively lodge an appeal against a Trial Judgement. Furthermore it amounts to an abuse of an interlocutory appeal.

Done in English and in French, the English text being authoritative.


Judge Wolfgang Schomburg

Dated this fourteenth day of July 2006
At The Hague
The Netherlands

