



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
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 18 May 2006

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 Ngirumpatse 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 Ngirumpatse 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 Ngirumpatse 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. Ngirumpatse", 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

⁷ 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.

⁹ *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, Judgement (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. Vidoje 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

Gberdao Gustave Kam

Presiding Judge

Judge

Judge

[Seal of the Tribunal]

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)").