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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Andresia Vaz, Presiding
Judge Florence Rita Arrey
Judge Flavia Lattanzi
Registrar: Mr. Adama Dieng
Date Filed: 17 March 2004

THE PROSECUTOR

v.

JOSEPH NZIRORERA

PRELIMINARY MOTION CHALLENGING JURISDICTION
IN RELATION TO JOINT CRIMINAL ENTERPRISE

The Office of the Prosecutor:

Mr. Don Webster
Ms. Ifeoma Ojemeni
Ms. Dior Fall
Ms. Holo Makwaia
Mr. Gregory Lombardi

Defence Counsel:

Mr. Peter Robinson

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye for Edouard Karemera
Mr. David Hooper and Mr. Andreas O'Shea for Andre Rwamakuba
Mr. Charles Roach and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera hereby moves, pursuant to Rules 72(A)(i), and (D)(iv) and 73, to dismiss the Amended Indictment on the grounds that there is no jurisdiction under Article 6(1) to charge him with committing crimes through membership in a joint criminal enterprise.[1]

2. There are three grounds for this motion:

(A) There is no jurisdiction under Article 6(1) to prosecute a person for committing a crime through the extended form of joint criminal enterprise liability during an internal armed conflict;

(B) There is no jurisdiction under Article 2 to prosecute a person for genocide committed by the extended joint criminal enterprise form of liability as it would allow for conviction without the *dolus specialis* required for genocide.

(C) There is no jurisdiction under Article 4 to prosecute a person for committing the offence of "violence to life, health and physical or mental well-being of persons" by means of participation in a joint criminal enterprise because such offence did not exist under customary international law.

Joint Criminal Enterprise in Internal Conflicts

3. Mr. Nzirorera contends that:

(A) the Statute of the Tribunal extends only to conduct that was criminal under customary international law;

(B) customary international law for an internal armed conflict is

different from customary international law for an international conflict;

(C) the extended form of joint criminal enterprise liability was part of customary international law for international conflicts, but not for internal armed conflicts.

(D) application of the extended form of joint criminal enterprise liability to this case would violate the principle of legality and the doctrine of *nullem crimen sine lege*.

A. The Statute of the Tribunal Extends Only to Conduct That Was Criminal Under Customary International Law

4. In *Prosecutor v Ojdanic*, the Appeals Chamber recognized that "the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed."[2] The principle of legality demands that the Tribunal shall apply the law which was binding upon individuals at the time of the acts charged, and the personal liability of the accused must be based upon customary international law.[3]

5. The Appeals Chamber said that:

"In order to come within the Tribunal's jurisdiction *ratione*

personae, any form of liability must satisfy three pre-conditions: (i) it must be provided for in the Statute, explicitly or implicitly, (ii) it must have existed under customary international law at the relevant time; (iii) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; and (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended."[4]

6. In *Ojdanic*, the Appeals Chamber held that the "joint criminal enterprise" form of liability was implicitly contained in Article 7(1) of the ICTY statute[5] within the term "committed", and that it existed under customary international law for international conflicts. The issue in this case, which has never been decided in either Tribunal, is whether the extended form of joint criminal enterprise was a recognized form of liability under customary international law for crimes committed in internal armed conflicts.

B. Customary International Law for an Internal Armed Conflict is Different from Customary International Law for an International Conflict

7. The amended indictment alleges that "between 1 January 1994 and 17 July 1994 there existed in Rwanda a state of non-international armed conflict within the meaning of Articles 1 and 2 of Protocol II Additional to the Geneva Conventions of 12 August 1949."[6]

8. It is now well accepted in the jurisprudence of the international tribunals that "it is incorrect to assume that, under customary international law, all the rules applicable to international armed conflicts apply to an internal armed conflict**."**[7] Only some of the rules and principles applicable to international armed conflicts have been extended to apply to internal conflicts.[8]

9. The Final Report of the Commission of Experts for the former Yugoslavia noted:

> "It is necessary to distinguish between customary international law applicable to international armed conflict and to internal armed conflict. The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in common article 3 of the Geneva Conventions, Additional Protocol II, and article 19 of the 1954 Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in these treaty provisions."[9]

10. Indeed, the 1949 Geneva Conventions and 1977 Additional Protocols contain close to 600 articles, of which only common Article 3 and the 28 articles of Additional Protocol II apply to internal conflicts.[10]

11. In *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-T (21 May 1999), the Trial Chamber traced the development of the laws pertaining to international, and internal conflicts.

12. The Trial Chamber noted that the four Geneva Conventions were initially applicable only to international armed conflicts. States were almost universally opposed to applying the conventions to internal armed conflicts, and saw this as a violation of state sovereignty. However, there was also a concern to protect victims of internal armed conflicts. Common Article 3 was finally approved in 1949 and bound parties to a non-international conflict to apply certain provisions as a minimum.

13. In 1977, two Protocols additional to the Geneva Conventions of 1949 were adopted. Protocol I dealt with international armed conflict and Protocol II with non-international armed conflict.[11] Unlike the other parts of the Geneva Conventions applicable to international armed conflicts, Common Article 3 and Additional Protocol II contained no provision for individual criminal liability for those who violated its terms.

14. The Appeals Chamber in *Prosecutor v Tadic*, No. IT-94-1 (2 October 1995) rejected a challenge to a prosecution under Common Article 3 and Additional Protocol II on the grounds that violation of these instruments did not result in individual criminal responsibility. The Appeals Chamber held that "customary international law imposes criminal liability for serious violations of common article 3…"[12]

15. In *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-T (21 May 1999), the Trial Chamber noted that it was "cognisant of the ongoing discussions, in other forums, about whether the above-mentioned instruments should be considered customary international law that imposes criminal liability for their serious breaches."

16. It held that:

> "In the present case, such an analysis seems superfluous because the situation is rather clear. Rwanda became a party to the Conventions of 1949 on 5 May 1964 and to Protocol II on 19 November 1984. These instruments, therefore, were in force in the territory of Rwanda at the time when the tragic events took place within its borders.
>
> "Moreover, all the offences enumerated in Article 4 of the Statute, also constituted crimes under the laws of Rwanda. The other Party to the conflict, the RPF, also had stated to the International Committee of the Red Cross (ICRC) that it was bound by the rules of international humanitarian law. Therefore, there is no doubt that persons responsible for the breaches of these international instruments during the events in the Rwandan territories in 1994 could be subject to prosecution."

17. Other Trial Chambers have come to the same conclusion, relying on the fact that the conduct was a crime under the laws of Rwanda, so a person could hardly complain of being prosecuted for conduct which subjected him or her to criminal liability in any event. In *Prosecutor v Akayesu*, No. ICTR-96-4-T (2 September 1998), the Trial Chamber said:

> "Moreover, all the offences enumerated under Article 4

> of the Statute constituted crimes under Rwandan law in 1994. Rwandan nationals were therefore aware, or should have been aware, in 1994 that they were amenable to the jurisdiction of Rwandan courts in case of commission of those offences falling under Article 4 of the Statute."[13]

18. In *Prosecutor v Rutaganda*, ICTR-96-3-T (6 December 1999), the Trial Chamber noted that:

> "In the Akayesu Judgement, the Chamber expressed its opinion that the "norms of Common Article 3 had acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which, if committed during internal armed conflict, would constitute violations of Common Article 3…"
>
> …Thus, Rwandan nationals who violated these international instruments incorporated into national law, including those offences as incorporated in Article 4 of the Statute, could be tried before the Rwandan national courts."[14]

19. Therefore, conduct which may be criminal under customary international law for international conflicts may not necessarily be criminal under customary international law for

internal armed conflicts, depending in part upon whether such conduct was also prohibited by domestic law of the country in which the conflict took place.

C. The Extended Form of Joint Criminal Enterprise Liability Was Part of Customary International Law for International Conflicts, but not for Internal Armed Conflicts

20. In *Prosecutor v Ojdanic*, the ICTY Appeals Chamber held that the joint criminal enterprise form of liability was encompassed in section 7(1) of the Statute and existed under customary international law for crimes committed in international conflicts, such as the ones in Bosnia and Kosovo.[15] However, no case has applied the doctrine of joint criminal enterprise liability to internal armed conflicts.

21. The basis for joint criminal enterprise liability, or the "common purpose doctrine" as it was then called, was found to exist in customary international law in the case of *Prosecutor v Tadic*, No. IT-94-1-A (15 July 1999). In that case, the Appeals Chamber recognized three forms of joint criminal enterprise liability. It is the third form—liability for conduct of others which was foreseeable but not agreed to—that is at issue in this case. This has been termed the "extended" form of joint criminal enterprise liability.

22. The *Tadic* court described this form of joint criminal enterprise as follows:

> "The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the

> common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose."[16]

23. The Appeals Chamber gave as an example a common design to engage in expulsions as part of a campaign of ethnic cleansing, where one or more of the perpetrators committed murder. The Appeals Chamber said:

> "While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians."[17]

24. In our case, the prosecution alleges the extended form of joint criminal enterprise by claiming that there was a plan to exterminate the Tutsis, and that it was a foreseeable consequence that one or more of the perpetrators would commit rapes in the course of executing the plan of extermination.

25. In finding that the extended form of joint criminal enterprise was part of customary international law, the Appeals Chamber in *Tadic* based its decision on a number of authorities. All those authorities involved wars of international character.[18] Not a single authority from an internal armed conflict was cited.

26. The *Tadic* court also acknowledged that it was not the case that most countries had adopted the notion of common purpose in their national legislation and case law, and therefore

domestic laws could not be relied upon to establish the common purpose doctrine as customary law.[19] This is a further reason why the extended form of joint criminal enterprise liability cannot be said to apply to internal conflicts.

27. In Rwanda, there was no domestic law which made a person criminally responsible for the acts of another to which he had not agreed, or which he had not aided and abetted. Therefore under Rwanda law, a person could not be convicted of rape by a showing that he had agreed to murder, and that someone had raped in the course of the murder. The Amended Indictment seeks to impose just that sort of liability to the accused through the extended form of joint criminal enterprise liability.

28. In order for a rule to be said to have been part of customary international law applicable to internal armed conflicts, the Trial Chamber must be satisfied that State practice recognized the principle on the basis of supporting *opinio juris.*[20] This is simply not the case for the extended form of joint criminal enterprise.

D. Application of the Extended Form of Joint Criminal Enterprise Liability to this Case Would Violate the Principle of Legality And the Doctrine of *Nullem Crimen Sine Lege*

29. Application of the extended form of joint criminal enterprise to an internal armed conflict is therefore not justified by any known customary international law or by established domestic practice. To allow Mr. Nzirorera to be prosecuted for this form of liability violates the principle of legality and the doctrine of *nullem crimen sine lege*.

30. The principle of legality provides that the crime charged must be such that the accused must be able to appreciate that the conduct is criminal and the law or custom setting forth the criminality of his conduct must be accessible to him or her.[21]

31. The doctrine of *nullem crimen sine lege* holds that "a criminal conviction can only be based upon a norm which existed at the time the acts or omission with which the accused is charge was committed. The Tribunal must be further satisfied that the criminal liability in question was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the head of responsibility selected by the prosecution."[22]

32. In our case, it cannot be said that a person involved in an internal armed conflict in Rwanda would be on notice that he could be prosecuted for a crime which he did not personally commit or agree to have committed by virtue of the extended form of joint criminal enterprise liability. Such a creature was simply unapplied and unknown to internal armed conflicts and Rwanda domestic law.

33. As President Meron has observed:

> "Future defendants may well challenge Article 4 of the Rwanda Statute as contrary to the principle prohibiting retroactive penal measures. The prohibition of retroactive penal measures is a fundamental principle of criminal justice and a customary, even peremptory, norm of international law that must be observed in all circumstances by national and international tribunals. The Security Council

could not have intended in Resolution 955 to oblige the Tribunal to act counter to this fundamental principle."[23]

34. Therefore, there is no jurisdiction under Article 6 of the ICTR Statute to prosecute an accused for commission of crimes committed by the extended form of joint criminal enterprise liability. The Amended Indictment should therefore be dismissed, or alternatively, the allegations of joint criminal enterprise dismissed from the Amended Indictment.

Joint Criminal Enterprise and Genocide

35. Mr. Nzirorera contends that there is no jurisdiction under Article 2 of the ICTR statute to prosecute a person for committing genocide by virtue of membership in a joint criminal enterprise, and that therefore, dismissal of Counts 3 and 4 of the Amended Indictment is required.

36. Mr. Nzirorera's position is supported by the recent decision of the Trial Chamber in *Prosecutor v Brdjanin, Decision on Motion for Acquittal Pursuant to Rule 98 bis*, No. IT-99-36-T (28 November 2003). In that decision, the Trial Chamber held:

> "The Trial Chamber relies upon the definition of the third category of JCE ['joint criminal enterprise'] put forward by the Appeals Chamber in the *Tadic* case, according to which it consists of "a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and

> foreseeable consequence of the effecting of that common purpose."[24]
>
> "The Trial Chamber reiterates that the specific intent required for genocide is set out in paragraph 52, above.[25] This specific intent cannot be reconciled with the *mens rea* required for a conviction pursuant to the third category of JCE. The latter consists of the Accused's awareness of the risk that genocide would be committed by other members of the JCE. This is a different *mens rea* and falls short of the threshold needed to satisfy the specific intent required for a conviction for genocide under Article 4(3)(a). For this reason, the Trial Chamber has found that there is no case to answer with respect to count 1 in the context of the third category of JCE."[26]

37. There is no jurisprudence from the ICTR on this issue, because this is the first case in which the doctrine of joint criminal enterprise has been charged at this Tribunal.

38. In our case, the amended indictment charges Mr. Nzirorera with genocide in Count 3 and complicity in genocide in Count 4.[27] These charges contain allegations that the crimes were committed by virtue of his participation in a joint criminal enterprise.

39. Count 3 provides in pertinent part:

> "During 1994, particularly between 6 April and 17 July, **Mathieu NGIRUMPATSE, Joseph NZIRORERA, Edouard KAREMERA,** and **André RWAMAKUBA** planned, instigated, ordered, participated in [*committed*], or otherwise aided or abetted a campaign of destruction against the Tutsi throughout Rwanda. In so doing ***all named accused***, individually and severally, and acting in concert with others in the nature of a joint criminal enterprise, mobilized the physical and logistical resources of their respective political parties and the Interim Government ministries controlled by those parties, and the military, to target Rwanda's Tutsi population as "the enemy" or as "accomplices of the enemy" and to attack, kill and destroy the Tutsi as a group."[28]

40. Thus Mr. Nzirorera is charged with genocide through the joint criminal enterprise form of liability. However, as set forth in *Brdjanin*, the extended form of joint criminal enterprise does not apply to genocide because it is incompatible with the specific intent requirements of that crime. Therefore, there is no jurisdiction under Article 2 to prosecute a person for committing genocide by virtue of his membership in such a joint criminal enterprise.

41. Because the amended indictment charges Mr. Nzirorera with conduct that does not amount to a crime under Article 2, the charges in Counts 3 and 4 must be dismissed, or alternatively, the joint criminal enterprise allegations dismissed from those counts.

Joint Criminal Enterprise and War Crimes

42. Mr. Nzirorera is charged in Count Seven of the Amended Indictment with violation of Article 4, which incorporates Common Article 3 to the Geneva Conventions and Additional Protocol II. The specific violation of these instruments is "killing and causing violence to health and physical or mental well-being. Mr. Nzirorera is said to be liable for these crimes as a "natural and foreseeable consequence of such joint criminal enterprise to destroy the Tutsi as a group."[29]

43, Two Trial Chambers have held that the crime listed in Common Article 3(a)—"violence to life, health and physical or mental well-being of persons"—did not exist under customary international law and cannot form the basis of a conviction.[30] Therefore, there is no jurisdiction under Article 4 to prosecute Mr. Nzirorera for committing this crime by means of the joint criminal enterprise form of liability.

44. As a result, Count Seven of the Amended Indictment must be dismissed.

Conclusion

45. For any and all of the above reasons, the Tribunal lacks jurisdiction under Articles 2, 4, and 6(1) to prosecute Mr. Nzirorera for committing the offenses charged in the Amended

Indictment through the extended joint criminal enterprise form of liability. It is respectfully submitted that, as a consequence the indictment should be dismissed, or, alternatively, the joint criminal enterprise allegations be ordered stricken from the indictment.

Respectfully submitted,

PETER ROBINSON

Lead Counsel for Joseph Nzirorera

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[1] This is the first occasion any Trial Chamber at the ICTR has had to consider a challenge to the joint criminal enterprise doctrine, which has never before been applied in this Tribunal.

[2] *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise*, No. IT-99-37-AR72 (21 May 2003) at para 9

[3] Para 10

[4] Para 21

[5] identical to Article 6(1) of the ICTR statute

[6] Para. 56. While Mr. Nzirorera disputes that the conflict was non-international, for purposes of this motion, it is the allegations of the Amended Indictment that are at issue.

[7] *Prosecutor v Hadzihasanovic et al., Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, No. IT-01-47-AR72 (16 July 2003) at para. 12.

[8] *Prosecutor v Tadic*, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* No. IT-94-1-A (2 October 1995) at para 126.

[9] Final Report of the Commission of Experts S1994/674-27 May 1994, para 52

[10] Stewart, "Towards a Single Definition of Armed Conflict in International Humanitarian Law," *International Review of the Red Cross*, Vol 850, page 313,320 (2003)

[11] Paras 159-68

[12] Para 134

[13] Para 617

[14] Paras 86-87

[15] *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise*, No. IT-99-37-AR72 (21 May 2003) at para 29

[16] Para 204

[17] Para 204

[18] See paras 207-09 (*Essex Lynching* case—World War II); paras. 210-13 (*Borkum Island* case—World War II); paras. 214-19 (Italian cases from World War II)

[19] Para 225

[20] *Prosecutor v Hadzihasanovic et al., Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, No. IT-01-47-AR72 (16 July 2003) at para. 12.

[21] *Hadzihasanovic*, *supra*, at para. 34

[22] *Prosecutor v Ojdanic, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise,* No. IT-99-37-AR72 (21 May 2003) at para 37

[23] Meron, "International Criminalization of Internal Atrocities," 89 *American Journal of International Law*, 554, 565 (1995)

[24] Para 56, citing *Prosecutor v Tadic*, No. IT-94-1-A (15 July 1999) at para 204

[25] "The specific intent required for genocide under Article 4(3)(a) of the Statute is the "intent to destroy in whole or in part, a national, ethnical, racial, or religious group, as such."

[26] Para 57.

[27] The complicity count incorporates by reference the allegations of the genocide count, including those of joint criminal enterprise. (para 41)

[28] Para 27.

[29] Para 66

[30] *Prosecutor v Vasilejevic*, No. IT-98-32-T (29 November 2002) at para 203; *Prosecutor v Ntakirutimana*, No. ICTR-96-10-T (21 February 2003) at para. 860