



International Residual Mechanism  
for Criminal Tribunals

Case No.: MICT-18-116-PT

Date: 28 June 2019

Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Carmel Agius, Presiding  
Judge Alphons Orie  
Judge Florence Rita Arrey

**Registrar:** Mr. Olufemi Elias

**Decision of:** 28 June 2019

**PROSECUTOR**

v.

**MAXIMILIEN TURINABO  
ANSELME NZABONIMPA  
JEAN DE DIEU NDAGIJIMANA  
MARIE ROSE FATUMA  
DICK PRUDENCE MUNYESHULI**

***PUBLIC***

**DECISION ON PROSECUTION APPEAL AGAINST  
DECISION ON CHALLENGES TO JURISDICTION**

**The Office of the Prosecutor:**

Mr. Serge Brammertz  
Mr. Rashid S. Rashid

**Counsel for the Defence:**

Mr. Stéphane Bourgon for Mr. Maximilien Turinabo  
Mr. Geoffrey Roberts for Mr. Anselme Nzabonimpa  
Mr. Philippe Laroche for Mr. Jean de Dieu Ndagijimana  
Mr. Gatera Gashabana for Ms. Marie Rose Fatuma  
Mr. Kurt Kerns for Mr. Dick Prudence Munyeshuli

**Received by the Registry**

**International Residual Mechanism for Criminal Tribunals**

**28/06/2019 14:31**

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1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively)<sup>1</sup> is seised of an appeal filed by the Office of the Prosecutor (“Prosecution”) against a decision of a Single Judge in *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116, which, *inter alia*, granted a motion challenging the Mechanism’s jurisdiction over the application of joint criminal enterprise liability for contempt.<sup>2</sup>

## I. BACKGROUND

2. On 24 August 2018, a Single Judge confirmed an indictment that charged in count 1 Mr. Maximilien Turinabo (“Turinabo”), Mr. Anselme Nzabonimpa (“Nzabonimpa”), Mr. Jean de Dieu Ndagijimana, and Ms. Marie Rose Fatuma (“Fatuma”) (collectively, “Accused”) with commission, through participation in a joint criminal enterprise or, in the alternative, physical commission, of contempt in violation of Article 1(4)(a) of the Statute of the Mechanism (“Statute”) and Rule 90(A)(iv) of the Rules of Procedure and Evidence of the Mechanism (“Rules”).<sup>3</sup> Specifically, the Indictment alleged that the Accused participated in, significantly contributed to, and shared the intent for a joint criminal enterprise that sought to overturn Mr. Augustin Ngirabatware’s (“Ngirabatware”) final conviction by interfering with the administration of justice through the commission of crimes, including by pressuring witnesses, instructing witnesses on how to answer questions in proceedings before the Mechanism, and offering bribes to protected witnesses and intermediaries.<sup>4</sup>

3. On 24 December 2018, Turinabo, Nzabonimpa, and Fatuma filed a motion challenging the jurisdiction of the Mechanism over contempt committed through participation in a joint criminal enterprise.<sup>5</sup> On 12 March 2019, the Single Judge found that the Mechanism has no jurisdiction over joint criminal enterprise liability for contempt, granted the defence request, and ordered the

<sup>1</sup> Order Assigning Judges to a Bench of the Appeals Chamber, 4 April 2019.

<sup>2</sup> Prosecution Appeal of Decision on Challenges to Jurisdiction, 19 March 2019 (“Appeal”); Book of Authorities to Prosecution Appeal of Decision on Challenges to Jurisdiction, 19 March 2019 (“Book of Authorities”). See Decision on Challenges to Jurisdiction, 12 March 2019 (confidential; public redacted version filed on the same day) (“Impugned Decision”). All references to paragraph numbers in the Impugned Decision correspond to the public redacted version. The Appeals Chamber notes that the case number assigned to the Appeal is not consistent with the Practice Direction on Filings Made Before the Mechanism for International Criminal Tribunals, MICT/7/Rev.2, 4 January 2019 (“Practice Direction on Filings Before the Mechanism”). See Article 6(2)(a), Practice Direction on Filings Before the Mechanism.

<sup>3</sup> Impugned Decision, para. 2.

<sup>4</sup> Order on Confirmation of Indictment, 24 August 2018 (strictly confidential and *ex parte*; declassified on 18 September 2018). See also Indictment, 5 June 2018 (strictly confidential; public redacted version filed on 5 September 2018) (“Indictment”), paras. 17-25. All references to paragraph numbers in the Indictment correspond to the public redacted version. The Appeals Chamber notes that the Indictment is also against a fifth accused, Mr. Dick Prudence Munyeshuli, who, however, does not face charges of contempt through participation in a joint criminal enterprise.

<sup>5</sup> Impugned Decision, paras. 1, 4.

Prosecution to remove count 1 from the Indictment to the extent that the accusations contained therein are based on liability through joint criminal enterprise.<sup>6</sup>

4. On 19 March 2019, the Prosecution filed the present Appeal contending that the Single Judge erred in law in finding that the Mechanism does not have jurisdiction over contempt committed through participation in a joint criminal enterprise and requesting the Appeals Chamber to overturn the Impugned Decision to this extent.<sup>7</sup> On 1 April 2019, the Accused filed a joint response.<sup>8</sup>

## II. STANDARD OF REVIEW

5. To succeed on appeal, the Prosecution would have to demonstrate that the Single Judge committed a specific error of law that invalidates the decision or weighed relevant considerations or irrelevant considerations in an unreasonable manner.<sup>9</sup>

## III. DISCUSSION

6. In arguing that the Single Judge erred by finding that the Mechanism does not have jurisdiction over contempt committed through participation in a joint criminal enterprise, the Prosecution contends that Article 1(4) of the Statute and Rule 90 of the Rules should be interpreted so that they encompass liability under a joint criminal enterprise.<sup>10</sup> The Prosecution relies in support on: (i) the language of the Statute and the Rules; (ii) jurisprudence from the *ad hoc* Tribunals; (iii) the object and purpose of the Mechanism's jurisdiction over contempt; and (iv) the application of a general

<sup>6</sup> Impugned Decision, paras. 4, 31-33.

<sup>7</sup> Appeal, paras. 1-20. The Prosecution also requests that the Impugned Decision be stayed pending the outcome of the Appeal. *See* Appeal, para. 21. On 26 March 2019, the Prosecution filed, without prejudice to its Appeal, a confidential amended indictment, in which the parts of the Indictment alleging the participation of the Accused in a joint criminal enterprise are struck. *See* Prosecution Notice of Compliance with the Decisions Concerning the Indictment, 26 March 2019 (confidential with confidential Annex), Annex, paras. 17-26.

<sup>8</sup> Joint Defence Response to "Prosecution Appeal of Decision on Challenges to Jurisdiction", 1 April 2019 ("Response"), paras. 1-35. Given that the Appeal was distributed by the Registry on 20 March 2019, the Appeals Chamber considers the Response to be validly filed pursuant to Rule 154(A)(ii) of the Rules. *See* Rule 132(A) of the Rules.

<sup>9</sup> *Prosecutor v. Radovan Karadžić*, Case Nos. IT-95-5/18-AR72.1, IT-95-5/18-AR72.2, IT-95-5/18-AR72.3, Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE III-Special Intent Crimes, Superior Responsibility), 25 June 2009, para. 10; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, 6 June 2007, para. 7; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR72.1, Decision on Petković's Interlocutory Appeal Against the Trial Chamber's Decision on Jurisdiction, 16 November 2005, para. 11. *See also* *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Judgement (public redacted version), 20 March 2019 ("Karadžić Appeal Judgement"), para. 14.

<sup>10</sup> Appeal, paras. 1-21.

principle of law supporting group criminality for contempt.<sup>11</sup> The Appeals Chamber will consider each of these submissions in turn.

#### A. The Language of the Statute and the Rules

7. The Prosecution submits that the broad definition of interference with the administration of justice in the Statute encompasses all modes of responsibility, including commission through participation in a joint criminal enterprise.<sup>12</sup> The Prosecution maintains that the language of Rule 90 of the Rules similarly supports a broad reading of the Mechanism's jurisdiction.<sup>13</sup> In its submission, the inclusion of the inchoate offences of "attempt" and "incitement" in relation to contempt under Rule 90(B) of the Rules reinforces the conclusion that the Mechanism's jurisdiction for contempt should be understood as covering all conduct that interferes with the administration of justice.<sup>14</sup>

8. The Accused respond that the Single Judge correctly found that joint criminal enterprise liability cannot be applied to offences against the administration of justice under the statutory framework of the Mechanism.<sup>15</sup> The Accused submit that the inclusion of inchoate offences in the scope of Rule 90 of the Rules does not make the Mechanism's jurisdiction limitless but rather suggests that jurisdiction is limited to that expressly provided for under Rule 90 of the Rules, which excludes commission through joint criminal enterprise.<sup>16</sup>

9. The Appeals Chamber observes that a plain reading of the statutory framework confirms that the Single Judge correctly considered that neither Article 1(4) of the Statute nor Rule 90 of the Rules incorporates the modes of liability that apply to the core crimes that are encompassed in the jurisdiction of the Mechanism pursuant to Article 1(1) of its Statute.<sup>17</sup> Specifically, Article 1(4) of the Statute provides for the Mechanism's power to prosecute any person who knowingly and wilfully interferes or has interfered with the administration of justice by the Mechanism or the *ad hoc* Tribunals and to hold such person in contempt. Rule 90 of the Rules provides that the

<sup>11</sup> Appeal, para. 1. *See also* Appeal, paras. 1-21.

<sup>12</sup> Appeal, paras. 1, 4, *referring to* Article 1(4) of the Statute. In addition, the Prosecution maintains that the lack of an explicit reference in the Statute to the modes of liability set out in Article 6(1) of the Statute of the International Criminal Tribunal for Rwanda ("ICTR") and Article 7(1) of the Statute of the International Tribunal for the former Yugoslavia ("ICTY") does not lead to the conclusion drawn by the Single Judge. *See* Appeal, para. 4.

<sup>13</sup> Appeal, para. 5.

<sup>14</sup> Appeal, para. 5. The Prosecution also maintains that the Single Judge made contradictory findings when he confirmed that the Mechanism has jurisdiction over incitement to commit contempt by relying on the "court's broad and inherent powers to punish any 'conduct which tends to obstruct, prejudice or abuse the administration of justice'" and excluding joint criminal enterprise as a mode of liability for contempt. *See* Appeal, para. 6.

<sup>15</sup> Response, paras. 1, 2, 3, 12, 13, 33, 34.

<sup>16</sup> Response, paras. 4-6.

<sup>17</sup> Impugned Decision, para. 27.

Mechanism may hold in contempt those who knowingly and wilfully interfere with the administration of justice and enumerates what conduct can amount to such interference. Neither of these provisions refers to any mode of liability.

10. The Appeals Chamber understands the Prosecution's submission to be that the Single Judge should have interpreted the phrase "interferes with the administration of justice" to include interference committed through a joint criminal enterprise. The Appeals Chamber does not find this interpretation to be persuasive. As the Single Judge noted, while the doctrine of joint criminal enterprise is not referred to in the Statute or the Rules of the Mechanism and the *ad hoc* Tribunals, it has been specifically applied to the core crimes of genocide, crimes against humanity, and war crimes as a form of commission under Article 6(1) of the ICTR Statute and Article 7(1) of the ICTY Statute after a detailed review of customary international law.<sup>18</sup> The Prosecution does not argue that customary international law supports its present contention on appeal.<sup>19</sup> In addition, the Single Judge found that jurisdiction over joint criminal enterprise liability was limited to the core crimes as, *inter alia*: (i) Articles 6(1) and 7(1) of the ICTR and the ICTY Statutes, respectively, only apply to the core crimes by their plain language; and (ii) Article 1(4) of the Statute, Rule 90 of the Rules, or Rule 77 of the ICTR and the ICTY Rules of Procedure and Evidence do not cross reference Articles 6(1) and 7(1), respectively, of the ICTR and the ICTY Statutes.<sup>20</sup> The Prosecution fails to show error in the Single Judge's reasoning or conclusion.

11. Similarly, the Prosecution's argument concerning the inclusion of "attempt" and "incitement" in Rule 90(B) of the Rules is not convincing. The references to "attempt" and "incitement" in the language of Rule 90(B) of the Rules indicate that these specific offences expressly fall within the Mechanism's jurisdiction and they cannot be construed as incorporating other offences or modes of liability in the scope of this provision.

12. The Prosecution seeks to derive support for its contention that the language of the Statute and the Rules includes interference committed through a joint criminal enterprise from the Single Judge's interpretation of the terms "interferes" or "has interfered with the administration of justice".<sup>21</sup> The Single Judge noted that this language does not limit the jurisdiction of the Mechanism to actual commission of contempt, but instead includes "all conduct" that interferes

<sup>18</sup> Impugned Decision, para. 28.

<sup>19</sup> In particular, the Prosecution submits that demonstrating state practice and *opinio juris* specifically in relation to liability under joint criminal enterprise for contempt is not required. See Appeal, para. 13.

<sup>20</sup> Impugned Decision, para. 29.

<sup>21</sup> Appeal, paras. 1, 4, 6, referring to Impugned Decision, para. 9.

with the Mechanism's administration of justice.<sup>22</sup> However, the Prosecution takes the words of the Single Judge out of context. The Single Judge made these observations in the course of his enquiry into whether the Mechanism's jurisdiction extends to the separate offence of incitement to commit contempt, not in relation to any mode of liability for offences against the administration of justice. The Single Judge found that the Mechanism's subject matter jurisdiction encompassed incitement to commit contempt as this offence was specifically recognised in the Rules of Procedure and Evidence of both *ad hoc* Tribunals and Article 1(4)(a) of the Statute codifies jurisdiction over offences that interfere with the administration of justice.<sup>23</sup> The Prosecution fails to show that the Single Judge erred in distinguishing the *offence* of incitement and the *mode of liability* of committing under the doctrine of joint criminal enterprise in interpreting the relevant provisions.

#### **B. The Jurisprudence of the *ad hoc* Tribunals**

13. The Prosecution submits that the jurisprudence of the ICTY and the ICTR supports an interpretation of the Mechanism's jurisdiction that is broader than direct and physical commission of contempt.<sup>24</sup> It relies in this respect on the following: (i) the *Haraqija and Morina* Trial Judgement that observed that the ICTY had jurisdiction over contempt committed in ways other than direct and physical commission;<sup>25</sup> (ii) the *Beqaj* Trial Judgement that held that ICTY Rule 77(A), the equivalent of Rule 90(A) of the Rules, contains a non-exhaustive list of modes of commission of contempt and the phrase "otherwise interfering with witnesses" encompasses any conduct that is intended to disturb the administration of justice;<sup>26</sup> and (iii) the *Nshogoza* Trial Judgement that adopted the *Beqaj* Trial Judgement's analysis of this phrase.<sup>27</sup> The Prosecution argues that, had the drafters of the Statute intended to make the Mechanism's jurisdiction more restrictive than that of its predecessors, they would have done so explicitly.<sup>28</sup>

14. The Accused respond that, contrary to the Prosecution's position, the relevant jurisprudence reflects that nearly all contempt-related proceedings before the *ad hoc* Tribunals and the Mechanism relied exclusively on direct perpetration, incitement, or attempt as set out in Rule 90 of the Rules and that the impugned attempt to charge joint criminal enterprise liability in relation to

<sup>22</sup> Impugned Decision, para. 9.

<sup>23</sup> Impugned Decision, para. 9.

<sup>24</sup> Appeal, para. 7.

<sup>25</sup> Appeal, para. 8, referring to *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, Judgement on Allegations of Contempt, 17 December 2008 ("*Haraqija and Morina* Trial Judgement"), paras. 20, 101;

<sup>26</sup> Appeal, para. 8, referring to *Prosecutor v. Beqa Beqaj*, Case No. IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005 ("*Beqaj* Trial Judgement"), para. 21.

<sup>27</sup> Appeal para. 8, referring to *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-T, Judgement, 7 July 2009 ("*Nshogoza* Trial Judgement"), paras. 190-193.

offences against the administration of justice is the first in the history of all international tribunals.<sup>29</sup> The Accused also argue that the Prosecution's submission as to the intent of the drafters of the Statute is unfounded and that had the drafters intended to extend commission beyond what is provided for in Rule 90 of the Rules, this would have been reflected in the statutory framework in accordance with the principle of legality.<sup>30</sup>

15. The Appeals Chamber notes that in none of the cases relied upon by the Prosecution was the accused charged for offences against the administration of justice pursuant to participation in a joint criminal enterprise. In this respect, the Single Judge rightly concluded that "the doctrine of joint criminal enterprise has never been applied in any contempt case before the Tribunals."<sup>31</sup> In addition, the Single Judge correctly considered the context in which liability under the doctrine of joint criminal enterprise was applied by the *ad hoc* Tribunals and that this was specifically done in relation to the core crimes of genocide, crimes against humanity, and war crimes.<sup>32</sup> The Appeals Chamber reiterates that the Mechanism is bound to interpret its Statute and Rules in a manner consistent with the jurisprudence of the *ad hoc* Tribunals<sup>33</sup> and finds that the Prosecution merely repeats on appeal the submissions it made at first instance<sup>34</sup> without showing error.

### C. The Object and Purpose of the Mechanism's Jurisdiction over Contempt

16. The Prosecution contends that the statutory framework should be interpreted broadly to give effect to the object and purpose of the Mechanism's jurisdiction over contempt, namely to protect

<sup>28</sup> Appeal, para. 9.

<sup>29</sup> Response, para. 10. The Accused also submit that the jurisprudence referred to by the Prosecution is inapposite. Specifically, the Accused argue that, while the *Haraqija and Morina* Trial Judgement states that "commission requires that the person's acts form part of the *actus reus* element of the offence, without however being limited to direct and physical perpetration", it does so with specific association to the offence of incitement which it found "relates to actions that encourage or persuade another to commit the offence" and was therefore rooted in the offence of incitement as expressly provided for in the relevant rules. See Response, para. 8. The Accused also submit that the finding in the *Beqaj* Trial Judgement, which held that Rule 77(A) of the ICTY Rules contained a non-exhaustive list of modes of commission of contempt, was limited to the expression "otherwise interfering with a witness or potential witness" as provided for specifically in Rule 77(A)(iv) of the ICTY Rules. See Response, para. 9. The Accused also add that the allegations in this case concerning multiple accused seeking to jointly interfere with the administration of justice are not unique to this case. See Response, para. 11.

<sup>30</sup> Response, paras. 7, 12. The Accused also submit that expressly extending the forms of commission would have been consistent with the contemporaneous drafting of the relevant legislative framework of the Rome Statute and, in particular, Rule 163 of the Rules of Procedure and Evidence of the International Criminal Court ("ICC"), which expressly provides that all modes of liability foreseen in Article 25 of the ICC Statute apply *mutatis mutandis* to the punishment of offences against the administration of justice under Article 70 of the ICC Statute. See Response, para. 12.

<sup>31</sup> Impugned Decision, para. 30.

<sup>32</sup> Impugned Decision, paras. 28, 29.

<sup>33</sup> *Karadžić* Appeal Judgement, para. 12 and references therein.

<sup>34</sup> See Prosecution Response to Joint Defence Motion Challenging Jurisdiction Pursuant to Rules 79(A)(I) and 79(D) – Joint Criminal Enterprise, 7 January 2019, paras. 1-9.

the integrity of the proceedings concerning the core crimes.<sup>35</sup> It argues that the integrity of the proceedings is particularly threatened when a group of persons act together with the purpose of interfering with the administration of justice and that, therefore, joint criminal enterprise should be accepted as a form of commission of such offence.<sup>36</sup> In its submission, any other mode of liability would fail to capture the Accused's criminal responsibility given that they worked together as a group and enlisted others over an extended period of time to achieve the common objective of overturning Ngirabatware's conviction through witness interference.<sup>37</sup> In addition, the Prosecution argues that, by limiting jurisdiction over contempt to direct and physical commission, those who plan, organise, and otherwise aid and abet in the commission of contempt cannot be held responsible.<sup>38</sup>

17. The Accused respond that the Prosecution's teleological argument is unsubstantiated and in breach of the principle of legality.<sup>39</sup> They also argue that excluding liability under a joint criminal enterprise does not create an impunity gap,<sup>40</sup> the Prosecution fails to provide any example of alleged conduct in the interference with the administration of justice which could not be charged under the express sub-provisions of Rule 90 of the Rules,<sup>41</sup> and no statutory lacuna exists with respect to the present proceedings.<sup>42</sup>

18. The Appeals Chamber does not find the Prosecution's submissions convincing. While the public interest of protecting the integrity of proceedings through the effective prosecution of offences against the administration of justice cannot be underestimated, it cannot be allowed to undermine the Accused's rights guaranteed by the principle of legality, which requires sufficient

<sup>35</sup> Appeal, paras. 2, 3, 10, 11-13, 15, 20.

<sup>36</sup> Appeal, paras. 12, 13.

<sup>37</sup> Appeal, para. 14.

<sup>38</sup> Appeal, para. 16. The Prosecution also argues that, in effect, if an accused used innocent agents to carry out the actual interference, nobody would be criminally responsible and such loophole would seriously undermine the deterrent effect of punishing contemptuous conduct. *See* Appeal, para. 16.

<sup>39</sup> Response, paras. 19-21, 26-28, 33, 34, *referring to, inter alia, Vasiliauskas v. Lithuania*, ECtHR, No. 35343/05, 20 October 2015, para. 154.

<sup>40</sup> Response, paras. 26-30.

<sup>41</sup> Response, para. 28. In particular, the Accused submit that the Prosecution's argument that those who "plan, organize and otherwise aid and abet in the commission of contempt could also not be held responsible" is undermined by the Prosecution's acknowledgment that such individuals could be held responsible for incitement pursuant to Rule 90(B) of the Rules. *See* Response, para. 28, *referring to* Appeal, para. 16.

<sup>42</sup> Response, para. 29, *referring to* Impugned Decision, para. 32. The Accused add that, in any event, the existence of any lacuna in impunity is irrelevant when determining the Mechanism's jurisdiction pursuant to its sources of law. *See* Response, para. 27. The Accused also contend that the Prosecution has previously accepted that the application of joint criminal enterprise was not a conclusive factor on Rwanda's ability to try the *Turinabo et al.* case and the Prosecution cannot legitimately argue on the one hand that this case can be referred to Rwanda in the absence of the doctrine of joint criminal enterprise, yet at the same time warn of the dire risk of impunity before the Mechanism if joint criminal enterprise for contempt is excluded from the Mechanism's jurisdiction. *See* Response, para. 30.



precision and clarity in prescribing modes of criminal liability.<sup>43</sup> The Prosecution fails to demonstrate that it would have been sufficiently clear and foreseeable to the Accused that they could be held liable for contempt before the Mechanism on the basis of joint criminal enterprise liability. Therefore, the Appeals Chamber cannot accept the broad interpretation of the statutory framework which the Prosecution advocates in its Appeal. Moreover, the Prosecution fails to show error in the Single Judge's finding that his decision on joint criminal enterprise liability does not prevent the Prosecution from holding the Accused responsible for their alleged individual actions of commission.<sup>44</sup>

#### **D. The Application of a General Principle of Law to Contempt**

19. The Prosecution contends that domestic law supports the application to contempt of the general principle of law providing that "individual criminal responsibility for acts of others can result from contributions to crimes which are carried out together with others".<sup>45</sup> Specifically, the Prosecution submits that domestic law supports the position that individual criminal liability for group criminality also applies to interference with the administration of justice.<sup>46</sup> It relies in this respect on the Federal Criminal Code of the United States of America, the Canadian Criminal Code, the Penal Code of Tanzania and the civil law systems of Bosnia and Herzegovina, Slovakia, France, and Rwanda.<sup>47</sup>

20. The Accused respond that the Prosecution fails to establish that the doctrine of joint criminal enterprise can be applied to contempt by virtue of a general principle under customary international law.<sup>48</sup> They argue that joint criminal enterprise has been applied by the *ad hoc* Tribunals as a form of commission only after a detailed review of customary international law and only with regard to

<sup>43</sup> *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 55; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, paras. 37, 38; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR77, Judgement on Appeal by Anton Nobile Against Finding of Contempt, 30 May 2001, para. 38.

<sup>44</sup> Impugned Decision, para. 32.

<sup>45</sup> Appeal, paras. 17, 18. The Prosecution relies in this respect on a comparative analysis by the Max Planck Institute. See Appeal, para. 18; Book of Authorities, Registry Pagination 3829-3827, referring to Max Planck Study, Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks (Expert Opinion, Commissioned by the United Nations-ICTY-OTP), Project Coordination: Prof. Dr. Ulrich Sieber, Part 1, pp. 15, 16. The Prosecution also clarifies that it is not arguing that joint criminal enterprise liability itself is based on a general principle of law, a notion that was rejected in the *Tadić* Appeal Judgement. See Appeal, para. 18, n. 20, referring to *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), para. 225.

<sup>46</sup> Appeal, para. 19.

<sup>47</sup> Appeal, paras. 18, 19 and references made therein. See also Book of Authorities.

<sup>48</sup> Response, paras. 1, 25.

serious violations of international law.<sup>49</sup> In addition, they submit that the ICTY Appeals Chamber acknowledged that “[t]here is no specific customary international law directly applicable to [contempt]”<sup>50</sup> and that the Prosecution’s “handful of varied examples” of domestic laws are by no means sufficient to establish a customary norm.<sup>51</sup>

21. The Single Judge held that, in the absence of clear evidence that the doctrine of joint criminal enterprise applies to contempt in customary international law or as a general principle of international law, he was not satisfied that the Mechanism has jurisdiction over this form of liability for crimes committed in violation of Rule 90 of the Rules.<sup>52</sup> The Appeals Chamber finds that the Prosecution’s submissions, supported as they are by sporadic reference to domestic jurisdictions, fail to demonstrate the existence of a general principle of law common to all major legal systems or otherwise show error in the Single Judge’s finding.<sup>53</sup>

#### **E. Conclusion**

22. In view of the foregoing, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Single Judge made a specific error of law that invalidates the Impugned Decision or that he weighed considerations unreasonably.<sup>54</sup>

### **IV. DISPOSITION**

23. Based on the foregoing, the Appeals Chamber,

**DENIES** the Appeal in its entirety; and

**INSTRUCTS** the Registry to assign a new case number to the Appeal and all filings related to it, consistent with the Practice Direction on Filings Before the Mechanism, and to re-file all such filings under the corrected number.

<sup>49</sup> Response, paras. 13-16.

<sup>50</sup> Response, para. 2, referring to *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-R77, Judgment Against Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, paras. 13, 14, 24.

<sup>51</sup> Response, paras. 21, 23, 25. See also Response, paras. 21-24. The Accused submit that, even when applying the doctrine of joint criminal enterprise to serious violations of international law, the ICTY Appeals Chamber in *Tadić* noted the limitations of its reliance on state practice, recognizing the inconsistency of the notion of “common purpose” across states. See Response, para. 24.

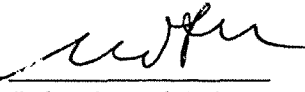
<sup>52</sup> Impugned Decision, para. 31.

<sup>53</sup> See *Tadić* Appeal Judgement, para. 225 (where the ICTY Appeals Chamber held that to rely upon domestic legislation and case law as a source of an international principle or rule under the doctrine of the general principles of law recognized by the nations of the world “it would be necessary to show that, in any case, the major legal systems of the world take the same approach to [a] notion”).

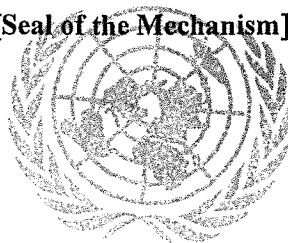
Done in English and French, the English version being authoritative.

Judge Alphons Orie appends a separate concurring opinion.

Done this 28th day of June 2019,  
At The Hague,  
The Netherlands

  
\_\_\_\_\_  
Judge Carmel Agius  
Presiding Judge

[Seal of the Mechanism]



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<sup>54</sup> In light of this finding, the Appeals Chamber also dismisses as moot the Prosecution's request to stay the Impugned Decision.



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Date Created/ Daté du :	28 June 2019	Date transmitted/ Transmis le :	28 June 2019	No. of Pages/ Nombre de pages : 11
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