Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

1346/H

ICTR-98-44-AR72.5
ICTR-98-44-AR72.6
12 April 2006
(1346/H - 1337/H)

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Decision of: 12 April 2006

ICTR Appeals Chamber
Date: 12 April 2006
Action:
Copied To: Concerned Judges, Ds, ALDs & LSS

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

v.

THE PROSECUTOR

Case Nos. ICTR-98-44-AR72.5, ICTR-98-44-AR72.6

DECISION ON JURISDICTIONAL APPEALS: JOINT CRIMINAL ENTERPRISE

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: CHARLES ZAMA
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I. INTRODUCTION

1. **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 Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994 ("Tribunal")[1] in this decision resolves appeals filed by Joseph Nzirorera ("Appellant") against two decisions of Trial Chamber III ("Trial Chamber") of the Tribunal. Both decisions by the Trial Chamber address issues raised in "Joseph Nzirorera's Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise" ("Jurisdictional Motion"), which was filed on 4 May 2005.

2. In the Jurisdictional Motion, the Appellant asserted that the Tribunal lacks jurisdiction over "the charges relating to the extended form of joint criminal enterprise liability in the Amended Indictment".[2] In support of this assertion, the Appellant first argued that the Tribunal lacks jurisdiction to convict an accused pursuant to the third category of joint criminal enterprise ("JCE") for crimes committed by fellow participants in a JCE of "vast scope".[3] Second, he argued that the Tribunal lacks jurisdiction to consider third category JCE liability when there is no "direct relationship" alleged between the accused and the physical perpetrators of the crime.[4] Third, he argued that the Tribunal lacks jurisdiction to impose liability for rape as a foreseeable consequence of a joint criminal enterprise to commit genocide.[5] Fourth, he argued that that the Tribunal lacks jurisdiction to impose liability for complicity in genocide as a foreseeable consequence of a JCE.[6]

3. On 5 August 2005, the Trial Chamber issued the "Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – *Joint Criminal Enterprise* Rules 72 and 73 of the Rules of Procedure and Evidence" ("First Impugned Decision"). That decision found no jurisdictional impediment to the imposition of third category JCE liability for crimes committed by participants in a vast JCE in which an accused has taken part.[7] The Trial Chamber did not explicitly address the Appellant's second assertion: that the Tribunal lacks jurisdiction to impose third category JCE liability when the Prosecution does not allege a "direct relationship" between the accused and the

[1] In this decision, the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 will be referred to as the "ICTY".
[2] Jurisdictional Motion, para. 66.
[3] *Ibid.*, paras 15-32.
[4] *Ibid.*, paras 33-39.
[5] *Ibid.*, paras 40-56.
[6] *Ibid.*, paras 57-65.
[7] First Impugned Decision, para. 7.

physical perpetrators of the crime. Rejecting the Appellant's argument about JCEs of "vast scope", however, the Trial Chamber characterized it as an argument that third category JCE liability can be imposed only when the JCE is "limited to a specific operation and a restricted geographical area, and where the Accused was not structurally remote from the actual perpetrators of the crimes."[8]

4. In the First Impugned Decision, the Trial Chamber deferred consideration of the final two arguments put forward in the Jurisdictional Motion.[9] On 14 September 2005, after hearing oral argument on these two issues, the Trial Chamber issued the "Decision on Defence Motions Challenging the Indictment as Regards the Joint Criminal Enterprise Liability" ("Second Impugned Decision").

5. In the Second Impugned Decision, the Trial Chamber held that there is no jurisdictional impediment to the imposition of liability for rape if it is a foreseeable consequence of a joint criminal enterprise.[10] The Trial Chamber, however, again declined to decide whether the Tribunal has jurisdiction to impose third category joint criminal enterprise liability for complicity in genocide.[11] As the indictment's charge of complicity in genocide is simply an alternative to its genocide charge, the Trial Chamber explained, there might, in the end, be no need to resolve that question in this case.[12]

6. After the Trial Chamber issued the First Impugned Decision, the Appellant filed a document asking the Appeals Chamber to determine that the question resolved by that decision – whether the Tribunal can impose third category JCE liability on an accused for crimes committed by fellow participants in a JCE of "vast scope" – was jurisdictional, and that therefore the Appellant could bring an interlocutory appeal against the Trial Chamber's resolution of the question.[13] In the same document, the Appellant also argued on the merits that the Trial Chamber had resolved the question incorrectly.[14]

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[8] *Ibid.*, para. 4 (internal footnotes omitted).
[9] *Ibid.*, paras 9-12.
[10] Second Impugned Decision, paras 4-7.
[11] *Ibid.*, para. 10.
[12] *Ibid.*
[13] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.5, Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise, 19 August 2005 ("First Defence Appeal"), paras 9-19. Rule 72(B)(i) of the Rules of Procedure and Evidence ("Rules") provides the right to file an interlocutory appeal against decisions on jurisdictional motions. Decisions on many other types of motions are not subject to interlocutory appeal.
[14] First Defence Appeal, paras 20-87. Inferring that the Trial Chamber had decided to defer, until the end of the case, a decision on the whether a direct relationship between the accused and the physical perpetrator is necessary for third category joint criminal enterprise liability, the Appellant "decided not to take an interlocutory appeal on the second issue raised in the" Jurisdictional Motion. *Ibid.*, fn. 7.

7. The Prosecution filed a response[15] and the Appellant filed a reply.[16] Then, a three-judge Bench of the Appeals Chamber decided that the appeal was validly filed.[17] The three-judge Bench of the Appeals Chamber, however, decided that the Appellant would not be allowed to submit a new appellant's brief – as would normally be allowed when three judges of the Appeals Chamber determine that an issue satisfies the requirements for immediate appeal – because the First Defence Appeal argued the merits and greatly exceeded the permissible length for motions merely seeking a determination that an issue satisfies the requirements for immediate appeal.[18]

8. After the Trial Chamber issued the Second Impugned Decision, the Appellant filed a document asking the Appeals Chamber to determine that the question deferred by that decision – whether the extended form of joint criminal enterprise liability can attach to complicity in genocide – was jurisdictional, and that therefore the Appellant could bring an interlocutory appeal against the Trial Chamber's failure to resolve the question.[19] In the same document, the Appellant also argued that the Trial Chamber was obliged to resolve the question.[20] The Appellant added that, should it choose to address the question itself, the Appeals Chamber should determine that the Tribunal cannot impose liability for complicity in genocide as a foreseeable consequence of an extended JCE.[21] The Appellant decided not to appeal the Second Impugned Decision's conclusion about third category joint criminal enterprise liability for rape.[22]

9. Again, the Prosecution filed a response,[23] and the Appellant filed a reply.[24] Then, a three-judge Bench of the Appeals Chamber decided that the Appellant could appeal the Trial Chamber's failure to determine whether the Prosecution could charge him with third category JCE liability for

[15] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.5, Prosecutor's Response to Joseph Nzirorera's "Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise" ("First Prosecution Response"), 29 August 2005.
[16] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.5, Reply Brief: Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise, 1 September 2005.
[17] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.5, Decision on the Validity of Joseph Nzirorera's Appeal of the Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal Enterprise, 14 October 2005, paras 8-9.
[18] *Ibid.*, para. 7. The Prosecution subsequently filed the "Prosecutor's Brief Addressing the *Merits* in Relation to Joseph Nzirorera's 'Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise'", 24 October 2005, in which it stated that it would rely on the First Prosecution Response's submissions on the merits of the Appellant's arguments about JCEs of vast scope. On 26 October 2005, the Appellant notified the Appeals Chamber that he would not file a reply brief. *See* "Statement in Lieu of Reply Brief: Appeal of Decision Denying Preliminary Motion on Joint Criminal Enterprise".
[19] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.6, Joseph Nzirorera's Interlocutory Appeal of Decision 'Reserving' Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity, 19 September 2005 ("Second Defence Appeal"), paras 13-22.
[20] *Ibid.*, paras 23-30.
[21] *Ibid.*, paras 31-40.
[22] *Ibid.*, para. 11.
[23] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.6, Prosecutor's Response to Interlocutory Appeal of Decision "Reserving" Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise Complicity, 29 September 2005 ("Second Prosecution Response").

complicity in genocide.[25] This appeal was assigned to the same five-judge Bench of the Appeals Chamber assigned to hear the merits of the First Defence Appeal.[26]

10. The present decision therefore addresses two issues: (a) Whether the Tribunal has jurisdiction to impose third category JCE liability on an accused for crimes committed by fellow participants in a JCE of "vast scope"; and (b) Whether the Trial Chamber needed to decide if third category JCE liability can be imposed for complicity in genocide.

II. THE FIRST DEFENCE APPEAL

11. The Appellant submits that, in concluding that third category JCE liability can be imposed on an accused for crimes committed by fellow participants in a vast JCE, the Trial Chamber committed "three errors of law".[27] According to the Appellant, the Trial Chamber "erred when it relied upon the *Milošević* case as authority for a vast 'extended' joint criminal enterprise".[28] The Appellant also asserts that the Trial Chamber "erred in concluding that 'the scale of a joint criminal enterprise has [no] impact on such form of liability'".[29] Moreover, the Appellant submits, the Trial Chamber "erred by failing to consider whether the 'extended' form of joint criminal enterprise liability applied to vast enterprises in customary international law".[30] The Appeals Chamber reviews *de novo* whether the Trial Chamber applied the correct law.[31]

12. The Tribunal has jurisdiction to consider only offences and modes of liability which both a) are contemplated by its Statute, and b) existed in customary international law at the time of the alleged actions under consideration or were proscribed by treaties forming part of the law to which

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[24] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.6, Reply Brief: Joseph Nzirorera's Interlocutory Appeal of Decision "Reserving" Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity, 3 October 2005.

[25] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.6, Decision on Validity of Joseph Nzirorera's Appeal of Decision "Reserving" Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity, 14 November 2005 ("Second Rule 72 Decision"), paras 8-9. Following the Second Rule 72 Decision, on 15 November 2005, the Appellant filed "Joseph Nzirorera's Statement in Lieu of Brief: Appeal of Decision 'Reserving' Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity", in which he informed the Appeals Chamber that he would stand on the Second Defence Appeal's discussion of the merits, *see ibid.*, para. 2. The Prosecution did not file a response to "Joseph Nzirorera's Statement in Lieu of Brief: Appeal of Decision 'Reserving' Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity".

[26] *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.6, Order replacing a Judge in a Case Before the Appeals Chamber, 18 November 2005; *see also Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.5, Order replacing a Judge in a Case Before the Appeals Chamber, 18 November 2005.

[27] First Defence Appeal, para. 21.

[28] *Ibid.* (quoting First Impugned Decision, para. 7). The Appellant refers to the discussion of *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, in paragraph 7 of the First Impugned Decision.

[29] *Ibid.*

[30] *Ibid.*

[31] *Prosecutor v. Krnolejac*, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnolejac* Appeal Judgement"), para. 10.

the accused was subject at the time of the alleged actions under consideration.[32] Because the Appellant offers no cogent explanation for how the language of the Tribunal's Statute limits consideration of third category JCE liability to cases in which the JCE at issue is small, because the Appeals Chamber itself sees no such limitation in the Statute, and because the JCE mode of liability is grounded in customary international law rather than in any treaty, the crucial question raised by the First Defence Appeal is whether customary international law permits imposition of third category JCE liability on an accused for crimes committed by fellow participants in a JCE of "vast scope". On this question, the Appeals Chamber sees no merit in the Appellant's position.

13. In *Prosecutor v. Tadić*, the ICTY's Appeals Chamber concluded that customary international law recognizes the joint criminal enterprise mode of liability.[33] In so doing, the Appeals Chamber recognized three categories of JCE liability.[34] Under the first – or "basic"[35] – category, the accused can be held responsible for crimes that are intended consequences of the JCE, but which are physically committed by persons besides the accused.[36] The second category of JCE liability, which is not at issue in this appeal, is sometimes called "systemic" JCE liability, and is a variant of the first category.[37] Crucially, under the third – or "extended"[38] – category of JCE liability, the accused can be held responsible for crimes physically committed by other participants in the JCE when these crimes are foreseeable consequences of the JCE, even if the accused did not agree with other participants that these crimes would be committed.[39] In light of *Tadić*, then, there can be no question that third-category JCE liability is firmly accepted in customary international law.

14. Here, the Appellant does not suggest a lack of support in customary international law for imposition of first-category JCE liability for (agreed-upon) crimes committed by any participant in a vast JCE. Indeed, he concedes that the *Justice* and *RuSHA* cases, two major Nuremberg cases, involved vast criminal enterprises.[40] Nonetheless, the Appellant suggests that the Tribunal lacks jurisdiction to impose third category JCE liability for crimes committed by participants in a vast JCE – particularly those structurally or geographically remote from the accused – because the

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[32] *See Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 209; *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999; para. 40; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 158; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, paras. 604-60, 611; Secretary General's Report on Practical Arrangements for the Effective Functioning of the International Tribunal for Rwanda, Recommending Arusha as the Seat of the Tribunal, UN Doc. S/1995/134, 13 February 1995, paras 11-12.

[33] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Judgement"), para. 220.

[34] *See ibid.*, paras 195-220.

[35] *See Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Judgement"), para. 97.

[36] *Tadić* Judgement, para. 220.

[37] *See Vasiljević* Judgement, para. 98.

[38] *See, e.g., Vasiljević* Judgement, para. 99.

[39] *Tadić* Judgement, para. 220.

Appellant sees no evidence specifically showing that customary international law permits imposition of third category JCE liability for their crimes.[41]

15. The Appellant's argument reflects a misunderstanding of customary international law and its role in determining the jurisdiction of the Tribunal. For the Tribunal to convict an accused based on a particular mode of liability, there must be clear evidence that the mode of liability exists in customary international law[42] – in addition to being contemplated by the Statute, as discussed above.[43] Yet, "where a principle can be shown to be ... established" in customary international law, "it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle."[44] Hence, once the Tribunal has found that a mode of liability exists in customary international law, and once the Tribunal has identified the elements that need to be proven to establish that mode of liability under customary international law, the Tribunal can, consistently with customary international law, convict someone pursuant to the mode of liability whenever the facts demonstrate that its elements have been met.[45]

16. Here, as already mentioned, it is clear that there is a basis in customary international law for both JCE liability in general, and for the third category of JCE liability in particular. Moreover, though the Tribunal's Appeals Chamber and that of the ICTY have, in several cases dealing with different factual situations, explained the requirements for establishing different types of JCE liability,[46] not once has either Appeals Chamber suggested that JCE liability can arise only from participation in enterprises of limited size or geographical scope. Confirming that there is no geographical limitation on third-category JCE liability, the *Tadić* Judgement cited, as an example of when this type of liability may be imposed, a situation in which murders are committed as a

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[40] First Defence Appeal, paras 81-86.

[41] *Ibid.*, paras 58, 60, 75, 77. The Appellant's position rests in part on his belief that post-WWII cases provide no support for the application of third category JCE liability to the crimes of structurally remote JCE participants. In *Rwamakuba v. Prosecutor*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004 ("*Rwamakuba* Decision"), para. 24, the Appeals Chamber observed that it would be a mistake to find with certainty that post-WWII cases, including the *Justice* and *RuSHA* cases, dealt only with the basic, and not the extended, form of joint criminal enterprise liability. Hence, the Appellant's assertion that post-WWII cases provide no support for the application of third category JCE liability to the crimes of structurally remote JCE participants is not necessarily consistent with the caselaw of the Tribunal.

[42] *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—*Joint Criminal Enterprise*, 21 May 2003, paras 10-11.

[43] *See* para. 12, *supra*.

[44] *See Prosecutor v. Hadzihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 12.

[45] *See ibid.*

[46] *See, e.g., Prosecutor v. Ntakirutimana and Ntakirutimana*, Case Nos ICTR-96-10-A & ICTR-96-17-A, Judgement, paras 463-468; *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, paras 5-8; *Vasiljević* Judgement, paras 94-111; *Krnolejac* Appeal Judgement, paras 28-32, 67-98; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, paras 343, 365-366; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, paras 118-119.

foreseeable but unintended consequence of a JCE that seeks "to forcibly remove members of one ethnicity from their [...] *region*".[47] Thus, the ICTY's Appeals Chamber has explicitly contemplated third category JCE liability for crimes stemming from region-wide JCEs.

17. The import of the section of the First Defence Appeal addressing the "impact" of the enterprise's "scale" is far from clear – in particular, it is unclear whether this section seeks to advance an argument based on the Tribunal's Statute or customary international law. In any event, this section appears to argue that it would be bad policy to permit third category JCE liability for crimes committed by participants in vast JCEs; according to the Appellant, permitting third category JCE liability for these crimes would turn JCE into a form of strict liability and produce unfair convictions.[48] The Appeals Chamber, however, considers fears about establishing strict liability to be unfounded. Third category JCE liability can be imposed only for crimes that were foreseeable to an accused.[49] In certain circumstances, crimes committed by other participants in a large-scale enterprise will not be foreseeable to an accused. Thus, to the extent that structural or geographic distance affects foreseeability, scale will matter, as the Appellant suggests it should.

18. Finally, the Appeals Chamber notes that, for purposes of this decision, it is irrelevant whether the Trial Chamber properly cited the *Milošević* case, or whether doing so was improper, as the Appellant alleges.[50] For the reasons explained in this decision, the Trial Chamber gave the correct answer to the question of law raised by the Appellant. The Appeals Chamber therefore dismisses the First Defence Appeal.

III. THE SECOND DEFENCE APPEAL

19. In the Second Defence Appeal, the Appellant contends that the Trial Chamber erred in failing to reach a decision on whether the Tribunal has jurisdiction to convict an accused for complicity in genocide pursuant to an extended JCE theory. The Appellant observes that Rule 72(A) of the Rules provides that motions which challenge jurisdiction must be "disposed of not later than sixty days after they were filed, and before the commencement of the opening statements". Though the Trial Chamber found that the Appellant's motion challenged the Tribunal's jurisdiction, the Appellant points out, the Trial Chamber failed to "dispose of the motion before the commencement of the opening statements".[51] According to the Appellant, the Trial Chamber's

[47] *Tadić* Judgement, para. 204 (emphasis added).
[48] First Defence Appeal, paras 52-56.
[49] *See, e.g.*, *Tadić* Decision, para. 220.
[50] First Defence Appeal, paras 42-47.
[51] Second Defence Appeal, para. 25.

failure to decide on his motion "deprived [him] of his right not *to* be tried on a crime for which the Tribunal lacks jurisdiction".[52]

20. In response, the Prosecution first argues that the Trial Chamber, in ruling that extended JCE liability can be imposed for the crime of rape, and that JCE liability is not limited in "its application to any particular crime", implicitly rendered a decision on whether third category JCE liability can be imposed for complicity in genocide.[53] The Appeals Chamber disagrees. The Trial Chamber explicitly reserved its decision on complicity in genocide,[54] and the Trial Chamber cannot be held to have implicitly decided a question that it explicitly reserved.

21. The Prosecution's other arguments in response to the Second Defence Appeal are far from clear. In seeming contradiction to its argument that the Trial Chamber rejected the Defence's point about complicity in genocide, the Prosecution states that "unless the Trial Chamber can organise its work in such a way as to defer such a decision on a count" – like the complicity in genocide count – "that is only an alternative count, the Trial Chamber may have committed ... error in this instance".[55] The Prosecution also suggests that in light of Rule 72(A)'s text, "the question is whether the Appeals Chamber should return the matter to the Trial Chamber for a decision, or dispose of the issue itself".[56] Later, however, the Prosecution asserts that neither the Appeals Chamber nor the Trial Chamber has any reason to promptly decide the Appellant's challenge to the allegation of third category JCE liability for complicity in genocide; according to the Prosecution, a decision is unnecessary because the Appellant has been charged with complicity in genocide pursuant to other modes of liability as well, and because complicity in genocide is an alternative charge.[57]

22. To the extent that it suggests that the Trial Chamber can avoid deciding the Appellant's challenge now, the Prosecution is mistaken. Under Rule 72(A) all motions challenging jurisdiction must be "disposed of" within 60 days and before the commencement of opening statements. Here, both the Trial Chamber[58] and the Appeals Chamber[59] have ruled that the Appellant's motion was jurisdictional. And while it is certainly possible that a jurisdictional motion might raise within it certain non-jurisdictional questions that the Trial Chamber could legitimately defer, this is not such

[52] *Ibid.*, para. 29.
[53] Second Prosecution Response, para. 6 (quoting Second Impugned Decision, para. 4).
[54] *See* Second Impugned Decision, para. 10.
[55] Second Prosecution Response, para. 8.
[56] *Ibid.*, para. 9.
[57] *Ibid.*, paras 11, 14.
[58] First Impugned Decision, para. 2.
[59] Second Rule 72 Decision, para. 9.

a case: the question that the Appellant faults the Trial Chamber for deferring is a pure question of law concerning the limits of the Tribunal's jurisdiction to employ a mode of liability.

23. The Trial Chamber cannot avoid deciding the Appellant's motion simply because it pertains to an alternative charge, or because the count at issue alleges that the Appellant can be found guilty pursuant to several modes of liability. As already mentioned, the text of Rule 72(A) makes clear that its time limits apply to all jurisdictional motions – including those challenging alternative counts and those challenging one of many modes of liability alleged in connection with an offence. This reflects each accused's right not to be tried on, and not to have to defend against, an allegation that falls outside the Tribunal's jurisdiction.

24. The Second Defence Appeal is therefore upheld.

IV. DISPOSITION

25. For the foregoing reasons, the Appeals Chamber:

a. **DISMISSES** the First Defence Appeal;

b. **ALLOWS** the Second Defence Appeal; and

c. **ORDERS** the Trial Chamber to render a decision on whether the Appellant can be tried for complicity in genocide under an extended joint criminal enterprise theory.

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

Judge Theodor Meron,
Presiding

Dated this 12th day of April, 2006,
At The Hague,
The Netherlands

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To: / *A:*

OTP, Trial Attorney in charge of case ☐ In The Hague ☒ **In Arusha** ☐ In Kigali

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