ICTR-98-44-AR72.4
22 October 2004
(917/H-898/H)

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UNITED NATIONS
NATIONS UNIES

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding Judge
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 22 October 2004

ICTR Appeals Chamber
Date: 22 October 04
Action: PG
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Parties, Judicial Ar
LOs, LSS

André RWAMAKUBA

v.

THE PROSECUTOR

Case No. ICTR-98-44-AR72.4

DECISION ON INTERLOCUTORY APPEAL REGARDING APPLICATION OF JOINT CRIMINAL ENTERPRISE TO THE CRIME OF GENOCIDE

Counsel for the Prosecution

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Ms. Dior Fall
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Counsel for the Defence

Mr. David Hooper
Mr. Andreas O'Shea

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1. The Appeals Chamber of the International Criminal Tribunal for Rwanda ("International Tribunal") is seised of the "Appeal on Behalf of Dr. André Rwamakuba Against Decision on Preliminary Motion Re Application of Joint Criminal Enterprise to the Crime of Genocide," filed by counsel for André Rwamakuba ("Appeal" and "Appellant" respectively). The Appeals Chamber hereby decides the Appeal on the basis of the written submissions of the parties.

Procedural History

2. The current indictment in this case ("Indictment") was filed on 18 February 2004 pursuant to an order of Trial Chamber III.[1] On 24 March 2004, the Appellant filed a preliminary motion challenging the Indictment on the ground that the International Tribunal lacked jurisdiction to try the Appellant for genocide on a theory of participation in a joint criminal enterprise.[2] The Trial Chamber dismissed this motion in a decision rendered on 11 May 2004 ("Impugned Decision"),[3] to which Judge Flavia Lattanzi appended a separate individual opinion.[4]

3. The Appellant filed the Appeal on 1 June 2004, seeking to appeal as of right under Rule 72(B)(i) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). The case was assigned to a Bench of the Appeals Chamber pursuant to Rule 72(E) of the Rules.[5] The Prosecution filed a response on 14 June 2004, which argued *inter alia* that the Appeal was not

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[1] *Prosecutor v. Karemera et al.*, No. ICTR-98-44-I, Amended Indictment of 18 February 2004 filed pursuant to Trial Chamber III Order of 13 February 2004.
[2] *Prosecutor v. Karemera et al.*, No. ICTR-98-44-I, Preliminary Motion on Behalf of Dr. André Rwamakuba – Re Lack of Jurisdiction: The Applicability of the Doctrine of Joint Criminal Enterprise to the Crime of Genocide, 24 March 2004.
[3] *Prosecutor v. Karemera et al.*, No. ICTR-98-44-I, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004.
[4] *Prosecutor v. Karemera et al.*, No. ICTR-98-44-I, Opinion individuelle de la juge Flavia Lattanzi relative à la "Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise," 11 May 2004.
[5] Order of the Presiding Judge Assigning a Bench of Three Judges Pursuant to Rule 72(E) of the Rules of Procedure and Evidence, 3 June 2004.

timely filed and could not proceed as of right under Rule 72(E) of the Rules ("Prosecution Response").[6] The Appellant filed a reply on 18 June 2004 ("Reply").[7]

4. In a decision rendered on 23 July 2004, the Appeals Chamber declared that the Appeal was timely filed and validly filed for purposes of Rule 72(E) of the Rules.[8] The Appeals Chamber also established a schedule for the submission of supplemental briefing.[9]

5. The Appellant filed a timely supplementary brief on 2 August 2004 ("Supplementary Appeal Brief").[10] The Prosecution filed a timely supplementary response on 9 August 2004 ("Supplementary Response").[11]

Submissions of the Parties

6. The Appellant contends in this Appeal that the International Tribunal does not have subject-matter jurisdiction to try an accused for genocide on a theory of joint criminal enterprise because, he asserts, such a mode of liability for genocide was not recognized by customary international law in 1994, the year in which the events charged in the Indictment allegedly occurred. In this regard, it is important to recognize what the Appellant does not dispute. He does not contend that conviction for genocide on a theory of joint criminal enterprise would result in a genocide conviction on an improper *mens rea* standard, an argument recently rejected by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY).[12] Nor does he contend that the doctrine of joint criminal enterprise is completely alien to customary international law or to the

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[6] Prosecutor's Response to Appeal on Behalf of Dr. André Rwamakuba Against Decision on Preliminary Motion Re: Application of Joint Criminal Enterprise to the Crime of Genocide, 14 June 2004.
[7] Reply to Prosecutor's Response to Appeal on Behalf of Dr André Rwamakuba Against Decision on Preliminary Motion Re: Application of Joint Criminal Enterprise to the Crime of Genocide, 18 June 2004.
[8] Decision on Validity of Appeal of André Rwamakuba Against Decision Regarding Application of Joint Criminal Enterprise to the Crime of Genocide Pursuant to Rule 72(E) of the Rules of Procedure and Evidence, 23 July 2004, p. 5.
[9] *Ibid.*
[10] Supplementary Brief on Behalf of Dr. André Rwamakuba Re: Application of Joint Criminal Enterprise to the Crime of Genocide, 2 August 2004.
[11] Prosecutor's Response to Supplementary Brief on Behalf of Dr. André Rwamakuba Re: Application of Joint Criminal Enterprise to the Crime of Genocide, 9 August 2004.
[12] See *Prosecutor v. Brđanin*, No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004 ("*Brđanin*"), paras. 5-10.

Statute of the International Tribunal; rather, he acknowledges that the ICTY Appeals Chamber's judgement in *Tadić* ("*Tadić* Appeals Judgement") recognized the doctrine of "common purpose" or joint criminal enterprise as established in customary international law and that it was an applicable mode of liability under Article 7(1) of the Statute of the ICTY.[13] Furthermore, the Appellant does not dispute that Article 6(1) of the Statute of the International Tribunal – identical in all relevant respects to Article 7(1) of the Statute of the ICTY – incorporates the doctrine of joint criminal enterprise and that that article applies to all crimes within the jurisdiction of the International Tribunal.[14]

7. Rather, the Appellant argues that the application of the doctrine of joint criminal enterprise to genocide, as mentioned in Article 2 of the Statute, would extend the crime to situations not covered by customary international law; the extension would therefore be outside of the jurisdiction of the International Tribunal. For this reason, he argues, Article 6(1) of the Statute cannot be read as applying that doctrine to genocide. He contends that, as of 1994, when the acts charged in the Indictment allegedly took place, customary international law did not recognize the possibility that a conviction for genocide could flow from participation in a joint criminal enterprise. In support of this position, the Appellant asserts that there is insufficient state practice and *opinio juris* to justify the conclusion that a conviction on a charge of genocide through participation in a joint criminal enterprise was contemplated at customary international law as of 1994.[15] The Appellant also seeks support from the enumeration of punishable acts in Article 2(3) of the Statute of the International Tribunal, which mirrors article III of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ("Genocide Convention") and which the Appellant

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[13] *Prosecutor v. Tadić*, No. IT-94-1-A, Appeal Judgment, 15 July 1999 ("*Tadić* Appeal Judgment"), paras. 188, 190-91, 193, and 220. In paragraph 220, the Appeals Chamber stated: "In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal."

[14] Appeal, para. 4 ("The Defence accepts the finding in paragraph 46 [of the Impugned Decision] that 'it is well established that joint criminal enterprise liability is one of the forms of liability under article 6(1) of the Statute and that this provision is applicable to all crimes under the jurisdiction of the Tribunal.'"). *See also Prosecutor v. Kayishema and Ruzindana*, No. ICTR-95-1-A, Judgment (Reasons), 1 June 2001, para. 193 (citing *Tadić* Appeals Judgment).

[15] Appeal, paras. 17, 23-30; Supplementary Appeal Brief, paras. 9-14, 16-17, 23.

contends "supports a possible distinction between forms of responsibility for genocide and forms of responsibility for other crimes otherwise falling under the jurisdiction of the court."[16] The Appellant additionally submits that concerns of public policy support his interpretation of the Statute, in that genocide is a "special crime" and that allowing a genocide conviction based on a joint criminal enterprise would "water down the intended stigma of the crime of genocide" and result in "collective criminal responsibility."[17]

8. The Prosecution responds that the ICTY Appeals Chamber has recognized the doctrine of joint criminal enterprise in *Tadić* and reaffirmed it in *Ojdanić*[18] and that there is "no legal basis" for the Appellant's distinction between the applicability of joint criminal enterprise to crimes other than genocide in those cases and the applicability of joint criminal enterprise to genocide in this case.[19] The Prosecution also contends that the ICTY Appeals Chamber implicitly decided that customary international law permitted a charge of genocide on a theory of joint criminal enterprise by reinstating just such a charge in its decision in *Brđanin*.[20] The Prosecution also submits that the Appellant's reliance on the enumeration of punishable acts in Article 2(3) of the Statute of the International Tribunal is misplaced and that his "policy arguments" are unsupported and meritless.[21]

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[16] Appeal, paras. 19-22; Supplementary Appeal Brief, paras. 3-6, 15.
[17] Appeal, paras. 7, 8-16, 18; Supplementary Appeal Brief, paras. 2, 18.
[18] *Prosecutor v. Milutinović et al.*, No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 ("*Ojdanić* Jurisdiction Appeal").
[19] Prosecution Response, para. 15; Supplemental Response, paras. 8, 11.
[20] Prosecution Response, para. 17; Supplemental Response, paras. 9, 12.
[21] Prosecution Response, paras. 18-20; Supplemental Response, paras. 14-16.

Discussion

9. At the outset, the Appeals Chamber notes that the issue raised in this Appeal was not decided, explicitly or implicitly, in the ICTY Appeals Chamber's *Brđanin* decision. In *Brđanin*, the Trial Chamber had dismissed a count of the indictment on the ground that "the specific intent required for a conviction of genocide was incompatible with the lower *mens rea* standards of a third category joint criminal enterprise."[22] The ICTY Appeals Chamber held that the Trial Chamber "erred by conflating the *mens rea* requirement of the crime of genocide with the mental element requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused" and therefore reversed the Trial Chamber's decision to acquit the accused of that charge.[23] The Prosecution maintains that this decision to reverse the acquittal and reinstate the corresponding count of the indictment reflected an implicit finding that a conviction under that count would be permitted under customary international law. The Appeals Chamber does not accept this submission; it did not appear to consider the precise point now raised. Although the Trial Chambers and the Appeals Chambers of both International Tribunals may raise jurisdictional issues *proprio motu*, the reasoning in *Brđanin* does not indicate that the Appeals Chamber dealt with the problem whether international customary law supports the application of joint criminal enterprise to the crime of genocide.

10. The more relevant statement of law by the ICTY is the *Tadić* Appeal Judgement, which clearly states that criminal liability through participation in a joint criminal enterprise can arise in relation to all crimes within the jurisdiction of the Tribunal. At the outset of its discussion of "the notion of common purpose,"[24] the Appeals Chamber stated that "the commission of one of the crimes *envisaged in Articles 2, 3, 4 or 5 of the Statute* might also occur through participation in the

[22] *Brđanin* Decision, *supra* note 12, at para. 2.
[23] *Ibid.*, at para. 10.
[24] *Tadić* Appeal Judgment, *supra* note 13, Section V(B)(2)(a).

realisation of a common design or purpose."[25] Article 5 of the ICTY Statute deals with genocide. The ensuing discussion of the doctrine of common purpose refers to "serious violations of international humanitarian law" and "the commission of crimes" without suggesting that any crime within the jurisdiction of the ICTY might be exempt from the discussion.[26]

11. The Appellant points out, however, that any discussion in *Tadić* with regard to the applicability of the doctrine of joint criminal enterprise to crimes other than the crimes charged against Tadić must be treated as *obiter dictum*. The *Tadić* Appeals Judgement relied on the doctrine of joint criminal enterprise to find Tadić guilty of a grave breach of the Geneva Conventions of 1949, a war crime, and a crime against humanity.[27] The ICTY Appeals Chamber had no reason to consider the doctrine's application to the crime of genocide because Tadić was not charged with that crime.

12. However, even if the discussion in *Tadić* is *obiter dictum*, the *Tadić* Appeal Judgement would still be dispositive of this Appeal if the Prosecution is correct in its assertion that there is "no legal basis" for distinguishing between the recognition, at customary international law, of a mode of liability as to one crime and the recognition of the same mode of liability as to other crimes. The Prosecution essentially argues that a mode of liability, once recognized at customary international law, applies to all crimes; because *Tadić* concluded that the doctrine of common purpose was recognized as of 1992, all persons accused of criminal acts committed after that year were subject to prosecution through that mode of liability, regardless of which crime was charged. The Prosecution does not cite any authority specifically advancing this proposition.

13. The Appeals Chamber considers that it is not necessary to decide whether the *Tadić* Appeal Judgement's statement that customary international law recognized the applicability of joint

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[25] *Ibid.*, at para. 188 (emphasis added); see also *Ojdanić* Jurisdiction Appeal, Separate Opinion of Judge David Hunt, 21 May 2003, para. 2.
[26] *Tadić* Appeal Judgment, para. 190.
[27] *Ibid.*, para. 327(5).

criminal enterprise to all crimes within the Tribunal's jurisdiction was *obiter dictum* or not. This is because, even assuming *arguendo* that the statement was *obiter*, the Appeals Chamber considers that criminal responsibility for genocidal acts through participation in a common purpose or joint criminal enterprise was recognized at customary international law at the time of *Tadić*.

14. Norms of customary international law are characterized by the two familiar components of state practice and *opinio juris*. In concluding that customary international law permitted a conviction for, *inter alia*, a crime against humanity through participation in a joint criminal enterprise, the *Tadić* Appeals Judgement held that the recognition of that mode of liability in prosecutions for crimes against humanity and war crimes following World War II constituted evidence of these components.[28] The ICTY Appeals Chamber has placed similar reliance in other cases on proceedings held following World War II, including the proceedings before the International Military Tribunal and before tribunals operating under Allied Control Council Law No. 10 ("Control Council Law No. 10"), as indicative of principles of customary international law at that time.[29] For the reasons that follow, the Appeals Chamber concludes that these proceedings, as well as the text and drafting history of the Genocide Convention of 1948, lead to the conclusion that customary international law criminalized intentional participation in a common plan to commit genocide prior to 1992.

15. The application of the doctrine of joint criminal enterprise to crimes against humanity, recognized as customary international law by *Tadić* and not disputed by the Appellant, has significant bearing on this case because, during the criminal prosecutions arising out of World War II, genocide was viewed as a subcategory of crimes against humanity. Although the post-World War II criminal proceedings did not include formal genocide charges as such, it is clear that the

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[28] *Tadić* Appeal Judgement, paras. 195-220.

[29] See, e.g., *Prosecutor v. Furundžija*, No. IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998, paras. 195, 211, 217; *Tadić* Appeal Judgment, paras. 200, 202; see also *Ojdanić* Jurisdiction Appeal, Separate Opinion of Judge David Hunt, para. 12 ("It is clear that, notwithstanding the domestic origin of the laws applied in many trials of persons charged with war crimes at that time, the law which was applied must now be regarded as having been accepted as part of customary international law.").

charges of war crimes and crimes against humanity in several of those cases encompassed acts of genocide.[30] The indictment before the International Military Tribunal at Nuremberg charged, as part of the war crimes count, that the defendants "conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others."[31] The indictment in *United States v. Greifelt et al.*, commonly known as the "*RuSHA Case*,"[32] heard before a United States military tribunal under Control Council Law No. 10, charged the defendants with crimes against humanity "carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of national characteristics."[33] Although the judgements of the International Military Tribunal and in the *RuSHA Case* did not discuss the term "genocide" or the legal elements of the offence, it is beyond question that the tribunal found the defendants criminally liable for genocidal acts and that it did so on a basis equivalent to that of joint criminal enterprise.[34]

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[30] See, e.g., Antonio Cassese, *International Criminal Law*, p. 96 (Oxford University Press, 2003); Antonio Cassese, "Genocide," in *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, pp. 335, 339 (Antonio Cassese et al., eds., 2002); Matthew Lippman, "Genocide," in *International Criminal Law*, vol. 1, (M. Cherif Bassiouni ed., 2d ed. 1999) pp. 591 ("The Nuremberg defendants were indicted for genocide under both the war crimes and crimes against humanity counts.").

[31] *United States of America, et al. v. Göring, et al.*, International Military Tribunal, Indictment dated 6 October 1945, Count Three, Part VIII(A), in *Trial of the Major War Criminals Before the International Military Tribunal*, Vol. 1 (1947), pp. 43-44 ("IMT Indictment"). The Indictment also charged that the facts pleaded under the war crimes count also "constitut[ed] Crimes against Humanity." *Ibid.*, Count Four, Part X, in *Trial of the Major War Criminals Before the International Military Tribunal*, Vol. 1, p. 65.

[32] *United States v. Greifelt et al.* (1948), United States Military Tribunal I, Opinion and Judgment, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol. V (U.S. Government Printing Office 1949), p. 88 ("*RuSHA Case*").

[33] *RuSHA Case*, Indictment dated 1 July 1947, para. 2, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol. IV (U.S. Government Printing Office 1949), p. 609.

[34] See, e.g., *RuSHA Case*, pp. 121 ("As a part of the gigantic program of strengthening Germany while weakening, and ultimately destroying, enemy nations, measures were taken to hamper and impede the reproduction of enemy nationals."); 140 ("Both defendants are responsible for a systematic and organized expulsion and evacuation of masses of the population throughout the invaded countries of Europe."); see also Lippmann, *supra* note 30, at 592 ("The Nuremberg [International Military Tribunal] judgment dealt with the crime of genocide in great detail, but failed to discuss the legal elements of the crime.").

16. The judgement of a United States military tribunal under Control Council Law No. 10 in *United States v. Altstoetter et al.*,[35] commonly known as the "*Justice Case*," explicitly stated that genocide was one of the crimes against humanity that it was adjudicating. The *Justice Case* cited genocide "[a]s the prime illustration of a crime against humanity under [Control Council] Law [No.] 10, which by reason of its magnitude and its international repercussions has been recognized as a violation of common international law."[36] After quoting a resolution of the United Nations General Assembly that affirmed that "genocide is a crime under international law which the civilized world condemns,"[37] the tribunal stated as follows:

> The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime is persuasive evidence of the fact. We approve and adopt its conclusions. Whether the crime against humanity is the product of statute or of common international law, or, as we believe, of both, we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed.[38]

17. The fact that at least one court applying Control Council Law No. 10 found genocide to be "the prime illustration of a crime against humanity"[39] supports the conclusion that we should not distinguish between the modes of liability applicable to genocide and the modes of liability applicable to crimes against humanity. The Appellant does not challenge the conclusion in *Tadić* that the doctrine of joint criminal responsibility applies to crimes against humanity. On this basis, the statement in *Tadić* that customary international law permitted application of the "notion of common purpose" to all crimes within the jurisdiction of the Tribunal, including genocide, appears to be logically and legally correct, regardless of whether it is considered to be *obiter dictum*.

18. This conclusion is reinforced by the use made of the doctrine of common plan or enterprise in the instruments of the post-World War II tribunals and in the *Justice Case* itself. Article II(2) of Control Council Law No. 10, which set out the various modes of criminal responsibility recognized

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[35] *United States. v. Altstoetter et al.* (1947), United States Military Tribunal III, Opinion and Judgment, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol. III (U.S. Government Printing Office 1951), p. 954 ("*Justice Case*").
[36] *Ibid.*, p. 983.
[37] *Ibid.* (quoting United Nations General Assembly Resolution 96(I), adopted 11 December 1946).
[38] *Ibid.*, p. 983.

in proceedings under that Law, provided that a person "is deemed to have committed a crime" if he was:

> (*a*) a principal or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans or enterprises involving its commission ....[40]

The structure of this section makes clear that the criminal responsibility of an accused who is "connected with plans or enterprises involving" commission of a crime differs conceptually from that of an accessory, one who ordered or abetted the commission of a crime, or one who took a consenting part in it, even though all are punished as having "committed a crime."

19. Indeed, the *Justice Case* itself proceeded as a prosecution on a theory of participation in a common plan that resulted in the commission, by persons other than the defendants, of war crimes and crimes against humanity, including genocide. The tribunal noted that the defendants were accused of "participat[ing] in carrying out a governmental plan and program for the persecution and extermination of Jews and Poles" and stated:

> The overt acts of the several defendants must be seen and understood as deliberate contributions toward the effectuation of the policy of the Party and the State. The discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants are charged. The material facts which must be proved in any case are (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law.[41]

The tribunal further explained the case as follows:

> No defendant is specifically charged in the indictment with the murder or abuse of any particular person. If he were, the indictment would, no doubt, name the alleged victim. Simple murder and isolated instances of atrocities do not constitute the gravamen of the charge. Defendants are charged with crimes of such immensity that mere specific instances of criminality appear insignificant by comparison. *The charge, in brief, is that of conscious participation in a nation wide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts.* The dagger of the assassin was concealed beneath the robe of the jurist. The record is replete with evidence of specific criminal acts, but they are not the crimes charged in the indictment. They constitute evidence of the intentional participation of the

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[39] *Justice Case*, p. 983.
[40] Control Council Law No. 10, 20 December 1945, art. II(2), in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol. 1 (U.S. Government Printing Office 1949), p. xvii.
[41] *Justice Case*, *supra* note 29, at 1063.

> defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment.[42]

After setting out the evidence of a plan to commit war crimes and crimes against humanity, the *Justice* tribunal summarized its task as follows:

> The pattern and plan of racial persecution has been made clear. General knowledge of the broad outlines thereof in all its immensity has been brought home to the defendants. The remaining question is whether or not the evidence proves beyond a reasonable doubt in the case of the individual defendants that they each consciously participated in the plan or took a consenting part therein.[43]

The tribunal later stated that "the essential elements to prove a defendant guilty under the indictment in this case are that a defendant had knowledge of an offense charged in the indictment and established by the evidence, and that he was connected with the commission of that offense."[44] These statements show that liability for the commission of a genocide extended not only to those who physically committed or aided and abetted killings or other genocidal acts, but also to those who intentionally participated in a common plan that yielded such acts.[45]

20. The factual discussions supporting the conviction of defendants in the *Justice Case* further make plain that they were convicted, not for participating in discrete episodes of murder, but for participation in a plan of genocide through the perversion of the administration of justice, which in turn enabled and encouraged others to commit genocide. For instance, in discussing the criminal responsibility of Ernst Lautz, Chief Public Prosecutor of the People's Court, the tribunal discussed in some detail the fact that Lautz's deputies filed, on Lautz's authority, indictments against Polish defendants "for leaving their places of work and attempting to escape Germany by crossing the border into Switzerland."[46] The Polish defendants were charged with high treason and sentenced to death. The *Justice* tribunal concluded that "[t]he defendant Lautz is guilty of participating in the national program of racial extermination of Poles by means of the perversion of the law of high

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[42] *Justice Case*, p. 985 (emphasis added).
[43] *Ibid.*, p. 1081.
[44] *Ibid.*, p. 1093; see also *ibid.*, p. 1143.
[45] This differs from so-called "organizational liability," whereby mere membership in an organization declared to be criminal was grounds for conviction. The *Justice Case* was concerned with responsibility for intentional participation in plans that led to the commission of offenses, not responsibility based solely on an accused's office or position.

treason."[47] In concluding its discussion of Lautz's criminal responsibility, the *Justice* tribunal stated:

> We have cited a few cases which are typical of the activities of the prosecution before the People's Court in innumerable cases. The captured documents which are in evidence establish that the defendant Lautz was criminally implicated in enforcing the law against Poles and Jews which we deem to be a part of the established governmental plan for the extermination of those races. He was an accessory to, and took a consenting part in, the crime of genocide.[48]

Lautz's liability was based, not on a finding of participation in physical killings or presence at the scene of such killings, but on participation in a plan to pervert and manipulate the laws and judicial procedure for unlawful ends, the consequence of which was the unlawful extermination of Poles and Jews.

21. Similarly, the tribunal convicted Oswald Rothaug, Senior Public Prosecutor of the People's Court, following a discussion of three cases against Poles and Jews that Rothaug tried as presiding judge.[49] The Tribunal concluded:

> The individual cases in which Rothaug applied the cruel and discriminatory law against Poles and Jews cannot be considered in isolation. It is of the essence of the charges against him that he participated in the national program of racial persecution. It is of the essence of the proof that he identified himself with this national program and gave himself utterly to its accomplishment. He participated in the crime of genocide.[50]

22. The *Justice Case*, therefore, shows not only that genocide was treated as a crime under customary international law at the time, but also that defendants could be held criminally responsible for genocide on the basis that they participated in a common criminal design that resulted in the destruction of racial or religious groups.

23. Article 6 of the Charter of the International Military Tribunal makes a similar point by providing that persons "participating in the formulation or execution of a Common Plan or Conspiracy to commit [crimes against peace, war crimes, or crimes against humanity] *are*

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[46] *Ibid.*, pp. 1120-1121.
[47] *Ibid.*, p. 1123.
[48] *Ibid.*, p. 1128.
[49] *Ibid.*, pp. 1146-1155.
[50] *Ibid.*, at 1156.

responsible for all acts performed by any persons in execution of such plan."[51] Accordingly, Count Three of the indictment submitted to the International Military Tribunal alleged that "[t]he said War Crimes were committed by the defendants *and by other persons for whose acts the defendants are responsible* (under Article 6 of the Charter [of the International Military Tribunal]) *as such other persons when committing the said War Crimes performed their acts in execution of a common plan* and conspiracy to commit the said War Crimes, in the formulation and execution of which plan and conspiracy all the defendants participated as leaders, organizers, instigators, and accomplices."[52] Similar language appeared in Count Four of the indictment, which charged crimes against humanity.[53] Although the Judgment of the International Military Tribunal does not specifically address this issue, except to note that Article 6 of the Charter did not create a "new and separate crime" of conspiracy to commit such crimes,[54] the factual discussion in that case makes plain that several defendants were convicted for participation in a vast plan to commit atrocities which amounted to genocide.[55]

24. The language used in the Charter of the International Military Tribunal, the indictment submitted to that tribunal, Control Council Law No. 10, and the indictment and judgement in the *Justice Case* have much in common with the language used in the *Tadić* Appeals Judgement to describe the elements of a joint criminal enterprise. The post-World War II materials do not always

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[51] Charter of the International Military Tribunal, art. 6, in *Trial of the Major War Criminals Before the International Military Tribunal*, Vol. 1, p. 11 (emphasis added).

[52] IMT Indictment, Count Three, Part VIII, in *Trial of the Major War Criminals Before the International Military Tribunal*, Vol. 1, p. 43 (emphasis added).

[53] IMT Indictment, Count Four, Part X, in *Trial of the Major War Criminals Before the International Military Tribunal*, Vol. 1, p. 65.

[54] *United States of America, et al. v. Göring, et al.*, International Military Tribunal, Judgment dated 1 October 1946 ("IMT Judgment"), in *Trial of the Major War Criminals Before the International Military Tribunal*, Vol. 1, p. 226. On this point, the Tribunal held that the Charter "does not define as a separate crime any conspiracy except the one to commit acts of aggressive war," *ibid.*, and therefore disregarded the portion of Count One of the indictment that alleged crime. See IMT Indictment, Part Count One, Part IV.(G), in *Trial of the Major War Criminals Before the International Military Tribunal*, Vol. 1, p. 41; see also *Ojdanić* Jurisdiction Appeal, paras. 21-23. The Tribunal did not comment on the allegations in Counts Three and Four that the accused were responsible, not just for their own physical commission of war crimes or crimes against humanity, but for "other persons" who "performed their acts in execution of a common plan ... to commit the said War Crimes." *Ibid.*, Counts Three and Four, Parts VIII & X, in *Trial of the Major War Criminals Before the International Military Tribunal*, Vol. 1, pp. 43, 65.

[55] See, e.g., IMT Judgment, in *Trial of the Major War Criminals Before the International Military Tribunal*, Vol. 1, pp. 226-228.

fit neatly into the so-called "three categories" of joint criminal enterprise discussed in *Tadić*, in part because the tribunals' judgements did not always dwell on the legal concepts of criminal responsibility, but simply concluded that, based on the evidence, the accused were "connected with," "concerned in," "inculpated in," or "implicated in" war crimes and crimes against humanity.[56] Nonetheless, it is clear that the post-World War II judgements discussed above find criminal responsibility for genocidal acts that are physically committed by other persons with whom the accused are engaged in a common criminal purpose.

25. The foregoing discussion disposes of the Appellant's contention that the doctrine of common purpose, as applied in post-World War II cases, "was confined to crimes with great specificity in relation to the identity and the relationship as between co-perpetrators and victims to the extent that the cases dealt with specific incidents or situations."[57] On the contrary, the *Justice Case* shows that liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a "nation wide government-organized system of cruelty and injustice."[58] The *Justice* tribunal's statement in connection with the defendant Rothaug is pertinent in this regard:

> In these cases the defendant's court, in spite of the legal sophistries which he employed, was merely an instrument in the program of the leaders of the Nazi State of persecution and extermination. That the number the defendant could wipe out within his competency was smaller than the number involved in the mass persecutions and exterminations by the leaders whom he served, does not mitigate his contribution to the program of those leaders.[59]

The cases cited by the Appellant do not contradict this point. Rather, they reinforce the point that an accused's liability under a "common purpose" mode of commission may be as narrow or as broad as the plan in which he willingly participated. The fact that certain prosecutions charged

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[56] See, e.g., *Justice Case*, pp. 1093 ("connected with the commission" of an offense), 1094 ("connected to some extent" with persecution), 1099 ("knowingly was connected" with an offense), 1120 (concluding that the evidence established "Ftghe connection of the defendant" to an illegal procedure); 1128 (stating that the defendant Lautz was "criminally implicated" in enforcing the law against Poles and Jews); *RuSHA Case*, p. 108 (stating that two defendants "are inculpated in crimes connected with the kidnaping of foreign children"). Cf. also *The Essen Lynching Case* (1945), British Military Court for the Trial of War Criminals, summarized in *Law Reports of Trials of War Criminals*, vol. 1 (United Nations War Crimes Commission, 1947) ("*Essen Lynching Case*), p. 89 (stating that the prosecutor argued that the accused were "concerned in" the killing of three British airmen);
[57] Appeal, para. 25.
[58] *Justice Case*, p. 985.
[59] *Ibid.*, pp. 1155-1156.

participation in small-scale plans involving few victims[60] or in the operation of specific concentration camps[61] does not suggest that customary international law forbade punishment for genocide committed through plans formulated and executed on a nationwide scale. As is discussed above, the *Justice Case* involved precisely such a mode of commission.

26. Given this well-known post-World War II framework of criminal responsibility for persons who participated in a common plan to commit genocide, we find telling Appellant's failure to present convincing evidence that the drafters of the Genocide Convention meant to retreat from that jurisprudence by excluding from criminal responsibility those persons, such as the defendants in the *Justice Case*, whose conduct had been found to trigger criminal liability through participation in a vast nationwide system to exterminate racial and religious groups. To the contrary, there is much in the drafters' discussion to support the view that the drafters of the Genocide Convention actually meant to include within its prohibitions all persons who intentionally formulated or participated in a plan to commit genocide, even if they were removed from the final physical acts of killing, bodily or mental harm, or other acts enumerated in article II of the Convention.

27. Although the doctrine of common purpose was not mentioned by name, the *travaux préparatoires* make clear that the Contracting Parties sought to ensure that all persons involved in a campaign to commit genocide, at whatever stage, were subject to criminal responsibility. Early in the discussions, Belgium suggested an amendment to article II of the Convention to the effect that certain acts, including murder, constituted the crime of genocide "[w]here such acts are committed with intent to co-operate in destroying a national, racial or religious group on grounds of national or

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[60] See, e.g., *Essen Lynching Case*, p. 91; *The Almelo Trial (Trial of Otto Sandrock and Three Others)* (1945), British Military Court for the Trial of War Criminals, summarized in *Law Reports of Trials of War Criminals*, vol. 1 (United Nations War Crimes Commission, 1947), pp. 40, 43; *Trial of Franz Schonfeld and Nine Others* (1946), British Military Court, summarized in *Law Reports of Trials of War Criminals*, vol. 11 (United Nations War Crimes Commission, 1949), pp. 68-71; *Trial of Robert Hölzer et al.* (1946), Canadian Military Court, RCAF Binder 181.009 (D2474), vol. 1, p. 341 (on file with Library of ICTY).

[61] See, e.g., *The Dachau Concentration Camp Trial (Trial of Martin Gottfried Weiss et al.)* (1945), General Military Government Court of the United States Zone, Case No. 60, summarized in Law Reports of Trials of War Criminals, vol. XI (United Nations War Crimes Commission 1949), p. 14; *The Belsen Trial (Trial of Josef Kramer and 44 Others)*

racial origin or religious belief."[62] The representative of Mexico noted that the Belgian amendment's reference to "co-operation" entailed "the idea of complicity and responsibility of those who took part, directly or indirectly, in the crime of genocide."[63] The Mexican representative suggested that this idea "would appear more appropriately in article IV [article III in the final version] of the Convention,"[64] and the Belgian delegate withdrew the amendment, stating that its purpose "was to emphasize the collective character of genocide, but as that characteristic could undoubtedly be emphasized in another article of the convention, his delegation would not insist on its amendment to article II."[65] During the discussion of the text of article III of the Convention, which criminalizes genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide, there were frequent unchallenged statements to the effect that the drafters intended these provisions to include all persons who could be held responsible for genocidal acts under general principles of criminal law. The representative of the United States, speaking in opposition to the provision outlawing incitement to genocide, argued that the Nazi war criminals could have all been convicted of conspiracy to commit genocide.[66] In a later discussion of a proposed Soviet amendment to insert a prohibition on acts in preparation for the commission of genocide, several representatives commented that such activities, at least in serious cases, were already prohibited by existing provisions of the Convention, including most notably complicity and conspiracy.[67] The representative of the United States observed in this connection that, while the Soviet amendment

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(1945), British Military Court, summarized in *Law Reports of Trials of War Criminals*, vol. 2 (United Nations War Crimes Commission 1947), pp. 120-121, 139.

[62] U.N. Doc. A/C.6/217, 5 October 1948.

[63] Official Records of the Third Session of the General Assembly, Part I, Summary Records of Meetings of the Sixth Committee (21 September—10 December 1948) ("Sixth Committee Summary Records"), 73rd Meeting, p. 93 (statement of Mr. Noriega, Mexico).

[64] *Ibid.*

[65] *Ibid.*, p. 94.

[66] Sixth Committee Summary Records, 85th Meeting, pp. 224-225 (statement of Mr. Maktos, United States).

[67] Sixth Committee Summary Records, 86th Meeting, pp. 237 (statements of Mr. Raafat, Egypt) ("Most of the acts enumerated in the amendment of the Soviet Union constituted, in the most serious cases, acts of conspiracy and complicity."), 238 (statement of Mr. Fitzmaurice, United Kingdom) ("[A] preparatory act could not be condemned on vague presumptions; if, however, such presumptions were substantiated, there would be conspiracy or attempt, which crimes were already provided for in the convention."), 240 (statement of Mr. Abdoh, Iran) ("[T]he rejection of the

went too far, genocide should be punished "at all stages preceding the commission of the material act, not only at the stage of perpetration of the act itself but at the successive stages of incitement, conspiracy and attempt."[68] In discussing the provision outlawing complicity, the representative of Luxembourg drew a distinction between a person who, on the one hand, rendered "accessory or secondary aid, or simply ... facilities, to the perpetrator of an offence," who was called an "accomplice" and was punished "only if the crime were actually committed," and a person who, on the other hand, "rendered essential, principal, or indispensable aid," and was therefore "termed a co-perpetrator and was placed on the same footing, in regard to punishment, as the perpetrator."[69] The Swedish representative noted, during a discussion of the text of article IV of the Convention, that "[i]ndividuals who had personally planned or executed the crime would obviously be punished in accordance with the penalties provided by the criminal law."[70]

28. It is not clear whether the drafters viewed criminal responsibility through intentional participation in a common plan as a form of commission of genocide, complicity in genocide, or conspiracy to commit genocide, but it is not necessary to answer this question in order to dispose of the Appeal. The *travaux préparatoires* provide strong evidence supporting the presumption that drafting parties would have sought to criminalize participation in a common plan to commit genocide. This is not surprising in light of the fact that such a mode of liability formed the basis of criminal responsibility in the Charter of the International Military Tribunal, in Control Council Law No. 10, and in pre-Convention genocide cases such as the *Justice Case* and the *RuSHA Case*.[71]

29. The Appellant's remaining arguments advance the policy concern that punishing genocide through a joint criminal enterprise mode of liability risks "watering down" the seriousness of what

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USSR amendment would not prevent the punishment of preparatory acts in the most serious cases, under the headings of complicity, attempt, incitement and, above all, conspiracy.").

[68] Sixth Committee Summary Records, 86th Meeting, p. 237 (statement of Mr. Maktos, United States).

[69] Sixth Committee Summary Records, 87th Meeting, p. 245 (statement of Mr. Pescatore, Luxembourg).

[70] Sixth Committee Summary Records, 92nd Meeting, p. 304 (statement of Mr. Petren, Sweden).

[71] See, e.g., Control Council Law No. 10, art. II(2) (stating, *inter alia*, that any person who was an accessory to a crime, who ordered or abetted a crime, took a consenting part therein, or was connected with plans or enterprises involving its commission "is deemed to have committed a crime").

is called the "crime of crimes." The previous discussion has shown that that those who consciously participate in a common plan leading to genocidal acts have been and should be punished, that such persons were punished following World War II, and that the drafters of the Genocide Convention sought to preserve criminal responsibility for co-perpetrators and others who participated in formulating or carrying out genocidal plans. Although the defendants in the *Justice Case* were not "specifically charged in the indictment with the murder or abuse of any particular person,"[72] the Tribunal held:

> The charge, in brief, is that of conscious participation in a nation wide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist.[73]

The ICTY Appeals Chamber agreed with this position by recognizing that "to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility."[74] The Appellant has shown no reason why this reasoning does not continue to apply in the context of genocide prosecutions.

30. The Appeals Chamber wishes to make it clear that joint criminal enterprise does not create a separate crime of participating through the means identified in that doctrine. The doctrine is only concerned with the mode of liability of committing crimes within the jurisdiction of the Tribunal. It

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[72] *Justice Case, supra* note 29, at 984.

[73] *Ibid.*, at p. 985. *See also Ibid.*, at p. 1063 ("The overt acts of the several defendants must be seen and understood as deliberate contributions toward the effectuation of the policy of the Party and the State. The discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants are charged. The material facts which must be proved in any case are (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime.")

[74] *Tadić* Appeal Judgment, *supra* note 29, at para. 192.

is only for this purpose that recourse has been made to the preparatory works of the Genocide Convention.

Conclusion

31. The present decision is a narrow one. The Appeals Chamber holds that customary international law recognized the application of the mode of liability of joint criminal enterprise to the crime of genocide before 1992, and that in consequence the statement to that effect in the *Tadić* Appeal Judgement was legally correct. Consequently, the International Tribunal has jurisdiction to try the Appellant on a charge of genocide through the mode of liability of joint criminal enterprise.

32. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal.

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

Theodor Meron
Presiding Judge

Dated this 22nd day of October 2004,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]