International Association of Prosecutors annual conference, Copenhagen 28 August-1 September 2005

PENTIT WITNESSES IN THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)

1 Draft

Overview:

The International Criminal Tribunal for Rwanda "Tribunal" was established by the United Nations Security Council by its resolution 955 of 8 November 1994.1 After having reviewed various official United Nations reports2 which indicated that acts of genocide and other systematic, widespread and flagrant violations of international humanitarian law had been committed in Rwanda, the Security Council concluded that the situation in Rwanda in 1994 constituted a threat to international peace and security within the meaning of Chapter VII of the United Nations Charter. Determined to put an end to such crimes and "…convinced that...the prosecution of persons responsible for such acts and violations ... would contribute to the process of national reconciliation and to the restoration and maintenance of peace", the Security Council, acting under the said Chapter VII established the Tribunal.3 Resolution 955 charges all States with a duty to cooperate fully with the Tribunal and its organs in accordance with the Statute of the Tribunal (the "Statute"), and to take any measures necessary under their domestic law to implement the provisions of the Statute, including compliance with requests for assistance or orders issued by the Tribunal . Subsequently, by its resolution 978 of 27 February 1995, the Security Council "urge[d] the States to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda".4

The 1994 Massacres and Violence in Rwanda

In the period between 1 April and 31 July 1994, and particularly following the death of President Habyarimana in a plane crash on 6 April 1994, widespread and systematic killings targeting Tutsis occurred throughout Rwanda. In addition, many Tutsis in different parts of Rwanda were raped and subjected to other acts of sexual violence during wholesale attacks targeting Tutsis.

In the period between April and 31 July 1994, the Interim Government, including the President (Theodore Sindikubwabo), the Prime Minister (Jean Kambanda), Ministers,

military and police officials including civil servant and political party leaders, through out Rwanda, espoused, planned, constituted, pursued and/or executed a common criminal enterprise, plan, scheme and/or strategy of destruction of the civilian Tutsi population. They made statements during public meetings and over the radio, mainly Radio Rwanda and RLTM, inciting the Hutu population to hunt down Tutsis and eliminate them. They accused Tutsis for being responsible for the death of President Habyarimana and for being the "enemies" of Rwanda, and called upon the Army (FAR), members of the Presidential Guard, *Gendarmerie Nationale, prefets*, *bourgmestres*, communal police, *conseillers de secteur*, administrative personnel, *Interahamwe*, militias, and the entire Hutu population to eliminate Tutsis.

Moreover, the Government, ordered, and aided and abetted massacres and other acts of violence targeting Tutsis.Furthermore, the Interim Government, participated in the training of *Interahamwe* and other militiamen to eliminate Tutsis. In addition to training them, they armed them with machetes, bayonets, and axes, in order to kill Tutsis. Some of the criminal activities began prior to April 1994 and continued during the carnage. All four accused were active participants.As a result of this, between April and 31 July 1994, massive and widespread killings and acts of violence against innocent civilians took place throughout Rwanda. These killings and acts of violence were carried out mainly by the Army (FAR), members of the Presidential Guard, *Gendarmerie Nationale, prefets*, *bourgmestres*, communal police, *conseillers de secteur*, administrative personnel, *Interahamwe*, militias, and the Hutu population on the orders, directives, incitement, instigation and/or with the assistance and support of the Interim Government, including all four accused persons.The total number of the dead is estimated at approximately one million. In addition to deaths, many Tutsis in different parts of Rwanda were raped and subjected to other acts of sexual violence during wholesale attacks targeting Tutsis.

It is now not difficult to imagine that there are numerous accomplice witnesses who participated at various levels in these horrendous crimes. Two of these were convicted by the Tribunal after pleading guilty. The balance of accomplices is convicts in the Rwandan jails. Some of these, having faced the Gachacha traditional courts, are serving sentences or having appealed their sentences, are waiting the outcome of their appeals.

Approach to a definition of an accomplice **(re-draft)**

The Prosecutor's submission in Akayesu Trial Chamber[1] was that the term "aiding and

[1] In this respect, the Prosecution submited that the Krstić Trial Chamber was correct in stating that "By incorporating Article 4(3) in the Statute, the drafters of the Statute ensured that the Tribunal has jurisdiction over all forms of participation in genocide prohibited under customary international law. The consequence of this approach, however, is that certain heads of individual criminal responsibility in Article 4(3) overlap with those in Article 7(1). *Krstić Trial Judgement*, para. 640. *See* also *Bagilishema Trial Judgement*, paras. 67-70. (??check passages) ??cite also to Stakić Rule 98 bis decision. (the distinction [between Article 7(1) aiding and abetting and Article 4 (3) (e) complicity in genocide] is not sustainable, but unfortunately for

abetting" is subsumed within the term "complicity in genocide". Indeed, in subsequent paragraphs of its Judgement, the Akayesu Trial Chamber expressly accepted this. In particular, the Akayesu Trial Chamber recognised that the term "complicity" in genocide, as set out in Article 2(3)(e) of the ICTR Statute, is an umbrella term covering three types of accomplice liability, namely, instigation, aiding and abetting and procuring means.[2] It is, therefore, inconsistent to suggest that aiding and abetting under Article 6(1) requires a higher *mens rea* standard than aiding and abetting as a form of complicity under Article 2(3)(e).

The Rules of Evidence and Procedure of the ICTR, "the Rules" do not specifically state who an accomplice witness is or how such testimony once admitted should be assessed by the trial Chamber. This may surprise colleagues who work in national jurisdictions. In most commonwealth jurisdictions there are well laid down "cautionary" rules of assessing such evidence. In those jurisdictions, the rules of evidence do state what the court must caution itself before accepting such evidence or if accepted should be corroborated in certain instances.

Rule 89 of the Rule of evidence state in part as follows:

"(A) The rules of evidence set forth in this section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence."

"(B) In cases not otherwise provided for in this section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

All accused arraigned before the tribunal have been charged with the following Crimes under the Rules:

(a): Conspiracy to Commit Genocide (a crime stipulated under Article 2(3)(b)): for agreeing among themselves and/or with other persons, including but not limited to other members of the Interim Government of 9 April 1994, to kill or cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group as such.

(b): Genocide (a crime stipulated under Article 2(1)(a) of the Statute): for killing or causing serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group as such.

(C) Complicity in Genocide (in alternative to genocide), (a crime stipulated under Article 2(3)(e) of the Statute): for instigating, procuring the means, for aiding and abetting or otherwise for facilitating the killing or causing serious bodily or mental harm to members of the Tutsi population.

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us he turned the analysis on its head: despite the jurisprudence of *Akayesu* and *Musema*, Schomburg strongly suggested that he believes that special intent is required for all forms of genocide including complicity (para. 47-48, 60, 63-67).

[2] *Akayesu Trial Judgement*, para. 533.

(d) Direct and Public Incitement to Commit Genocide (a crime stipulated under Art. 2(3)(b) of the Statute). for direct and public incitement to kill or cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group as such.

(e) Crimes against Humanity: for Murder, Extermination and Rape as Crimes Against Humanity (crimes stipulated under Article 3 of the Statute). The crimes were all committed as a part of widespread and systematic attacks against civilian populations.

(f) War crimes: Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II (crimes stipulated under Article 4 of the Statute): for causing violence to life, health and physical or mental well-being of persons; for outrages upon personal dignity, in particular humiliating and degrading treatment, rape, and indecent assault. All crimes were committed as part of an armed conflict in Rwanda.

Prosecutor's Case Strategy and Theory of the genocide in Government II Case:

1. Individual Criminal Responsibility under Article 6(1)

The persons most responsible for the genocide are charged with individual criminal responsibility under Article 6(1) of the Statute in relation to all counts in the Indictment. Article 6(1) of the Statute provides that a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the Statute shall be individually responsible for the crime. This provision is similar to Article 7(1) of the ICTY Statute.

Prosecutor's Theories of the Case under Article 6(1): a Purposive Construction of Criminal Responsibility

The highlights of the Prosecution case theory facilitates for construction and interpretation of the different modes of participation embodied in Article 6(1) of the Statute. The Prosecutor theory of liability in his cases is that the Trial Chamber as a trier of fact and law, is entitled to apply any theory it finds applicable on the basis of the facts of the case. The Prosecutor view is that notwithstanding his theory of liability, the Trial Chamber is entitled to find an accused guilty if it determines that he participated in a crime through any form of *participation* enumerated in Article 6(1), or encompassed in the intent, object and purpose of the Statute, namely to bring to justice all persons responsible for genocide and other serious transgressions of international humanitarian law. The Prosecutor hereby puts the Defence on further notice through the pleading of Article 6(1) that any one or more of the theories of direct responsibility may apply. The Prosecutor theory that the provisions of Article 6(1) should be construed purposively and not narrowly with a view to

achieving and implementing the objects and purposes of this article.[3] The Appeals Chamber has underscored the purposes underlying the provisions of Article 7(1) of the ICTY Statute which is similar to Article 6(1) of the Statute of this Tribunal, holding that a narrow construction of the particular actions contained in Article 7(1) is inconsistent with the intent of the Statute to "extend the jurisdiction of the International Tribunal to all those *responsible* for serious violations of international humanitarian law." [4]

In the same context, the Prosecutor theory that in construing the various modes of participation in Article 6(1), the Trial Chamber should be guided by the principle of law that all those who contribute to the commission of crimes stipulated in the Statute incur criminal liability, and this is not limited only to those persons who *directly* or *physically* commit the crimes,[5] but must extend to all those persons, especially those in authority as the accused in our case, who by virtue of their actions or inactions (omissions), allowed, enabled, assisted, or facilitated the commission of those crimes.

It is in this same spirit articulated in the preceding paragraphs that the Appeals Chamber has emphasized that the modalities of participation not explicitly referred to, such as common or joint criminal enterprise/purpose, are included within the meaning of Article 6(1) or 7(1).[6] The Appeals Chamber has concluded as follows:

"[The] Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common criminal purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons."[7]

It is submitted that to establish criminal culpability of each of the accused under Article 6(1), the Prosecutor has to demonstrate that (a) the accused participated in the commission of the crime(s), i.e. that his or her conduct contributed to the commission of the crime(s); and (b) that the accused participated or contributed to the commission of the crime(s) with

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[3] In construing the Statutes of the Tribunals, the Appeals Chamber has on a number of occasions pursued a purposive approach, wherein it has sought to establish the object and purpose of the provisions of the Statute as opposed to narrow construction. See e.g. *Tadic* Appeals Chamber Judgement, para. 189.

[4] *Tadic* Appeals Chamber Judgement, para. 189, italicization added.

[5] In this context, the Judges in the *Celebici* Judgement have held that Article 7(1) of the ICTY Statute, which is similar to Article 6(1), reflects the "basic understanding that individual criminal responsibility under the jurisdiction of the International Tribunal *is not limited* to persons who directly commit the crimes in question." *Celebici* Trial Chamber Judgement, para. 319; italicization added.

[6] *Tadic* Appeals Chamber Judgement, para. 190; *Bagilishema* Trial Chamber Judgement, para. 27 and the accompanying footnote; *Kayishema and Ruzindana* Trial Chamber Judgement, para. 203-204; *Celebici* Trial Chamber Judgement, para. 328.

[7] *Tadic* Appeals Chamber Judgement, para. 190.

the requisite knowledge or intent.[8]The Prosecutor theory that each of the accused's participation need not cover cumulatively all the five different forms and/stages of participation in the commission of crimes stipulated in Article 6(1), but that any one or more of them will suffice.[9]

Contents of the Different Modes of Participation under Art. 6(1)

The Prosecutor construes the nature and content of the *actus reus* and *mens rea* required for holding an accused individually criminally responsible under Article 6(1) for having "planned", "instigated" "ordered" "committed" or otherwise "aided and abetted" the offences alleged in the Indictment as follows:

a. "Planning"

This form of participation means that the accused either alone or jointly designed or organized the commission of a crime.[10] The *actus reus* of the crime may be executed by persons other than the accused who planned it, although it has to be established that the crime was executed in furtherance of the plan.[11] Besides direct evidence, the existence of a plan may be established from circumstantial evidence.[12]

With respect to the criminal intent, the accused must have intended directly or indirectly that the crime in question be committed,[13] or he or she must have been aware of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.[14]

b. "Instigating"

This form of participation involves prompting, provoking or otherwise inducing another to commit an offence.[15] The *actus reus* of the crime may be committed by one or more persons other than the accused. Instigation may be executed by both express and implied conduct, and the notion is "sufficiently broad to allow for the inference that both acts and omissions may constitute instigation."[16]

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[8] See *Ruzindana and Kayishema* Trial Chamber Judgement, para. 198.

[9] This is the position followed in various judgements of the two Tribunals, including, *Akayesu* Trial Chamber Judgement, para. 473; *Kayishema and Ruzindana* Trial Chamber Judgement, para. 194-7; and *Celebici* Judgement, para. 321.

[10] *Akayesu* Trial Chamber Judgement, para. 480; *Blaskic* Trial Chamber Judgement, para. 278.

[11] *Blaskic* Trial Chamber Judgement, para. 279.

[12] *Blaskic* Trial Chamber Judgement, para. 279.

[13] *Blaskic* Trial Chamber Judgement, para. 278;

[14] *Kvocka* Trial Chamber Judgement, para. 251.

[15] *Kvocka* Trial Chamber Judgement, para. 243; *Blaskic* Trial Chamber Judgement, para. 280; *Kristic* Trial Chamber Judgement, para. 601.

[16] *Blaskic* Trial Chamber Judgement, para. 279.

The Prosecutor has to prove a casual relationship between the instigation and the fulfilment of the *actus reus* of the crime or the physical perpetration of the crime.[17] To establish the "casual" link, the Prosecutor need not demonstrate that the crime would not have occurred without the accused's involvement; it is sufficient if it is shown that the accused's conduct was a clear contributing factor to the conduct of other persons.[18] The accused must have possessed the criminal intent, that is he or she must have directly or indirectly intended to provoke or induce the commission of the crime in question,[19] or he or she must have been aware of the substantial likelihood that that a criminal act or omission would occur as a consequence of his conduct.[20]

d. "Ordering"

Under Article 6(1), "ordering" involves the accused giving orders to others under his authority to commit crimes with or without the participation of the accused in the physical execution of those crimes.[21] It is not necessary that the order be given in writing or any particular form. Therefore the order may be explicit or implicit.[22] The fact that the order was given can be proved through circumstantial evidence.[23] In addition, an order need not be given by the superior (accused) directly to the persons physically executing the *actus reus* of the offence, but may be transmitted by others in the chain of command.[24] It must be proved that the accused possessed the *mens rea* of the crime ordered or must have acted in awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his order.[25]

e. "Aiding and Abetting"[26]

"Aiding and Abetting" which are forms of accomplice liability,[27] involve the provision of practical assistance, encouragement or moral support that has a substantial effect on the

[17] *Blaskic* Trial Chamber Judgement, para. 278.
[18] *Tadic* Trial Chamber Judgement, para. 688; *Kvocka* Trial Chamber Judgement, para. 252; *Celebici* Trial Chamber Judgement, para. 327.
[19] *Blaskic* Trial Chamber Judgement, para. 278.
[20] *Kvocka* Trial Chamber Judgement, para. 251.
[21] Akayesu Trial Chamber Judgement, para. 483 (noting that ordering implies a superior-subordinate relationship between the person giving the order and the one executing it); *Blaskic* Trial Chamber Judgement, para. 281; *Krstic* Trial Chamber Judgement, para. 601
[22] *Akayesu* Trial Chamber Judgement, para. 483); *Blaskic* Trial Chamber Judgement, para. 281; *Krstic* Trial Chamber Judgement, para. 601.
[23] *Blaskic* Trial Chamber Judgement, para. 281.
[24] *Blaskic* Trial Chamber Judgement, para. 281.
[25] *Kvocka* Trial Chamber Judgement, para. 251;
[26] This form of participation is further elaborated under the Prosecutor's discussion of the elements of the crime of complicity in genocide, (*infra*).
[27] *Bagalishema* Trial Chamber Judgement, paras. 32-33; *Kvocka* Trial Chamber Judgement, para. 253.

perpetration of the crime.[28] The assistance given, however, need not constitute an indispensable element, i.e. a *conditio sine qua non*, of the acts of the perpetrator.[29] In addition, the *actus reus* of aiding and abetting may be perpetuated through an omission.[30] Further, participation in crimes by way of aiding and abetting does not require actual physical presence of the accused at the scene of the crime, nor physical assistance, and the assistance need not be provided at the same time that the crime is committed.[31] Mere encouragement or moral support by the accused aider or abettor, or merely being "concerned with" the crimes, may amount to assistance.[32] With respect to the criminal intent, the accused must have acted with knowledge that his or her acts or omission would assist or facilitate the commission of the crime by the principal.[33] It is not necessary, however, that the aider and abettor "should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[34]

f. "Committing"

"Committing" covers not only situations where the accused either alone or jointly with others physically performs all the requisite elements of the *actus reus* of the crime, but where the accused engenders a culpable omission in violation of criminal law.[35] The accused must have possessed the *mens rea* of the relevant crime, or he or she must have been aware of the substantial likelihood that a crime would occur as a consequence of his/her act or omission.[36]

g. "Joint Criminal Enterprise" or "Common Criminal Plan or Purpose"

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[28] *Furundzija* Trial Chamber Judgement, para. 249; *Kvocka* Trial Chamber Judgement, para.253; *Kunaraca* Trial Chamber Judgement, para. 391. Either aiding or abetting alone (and not both) is sufficient for one to be criminally culpable. See *Akayesu* Trial Chamber Judgement, para. 484.

[29] *Bagilishema* Trial Chamber Judgement, para. 33; *Furundzija* Trial Chamber Judgement, para. 209. In the *Blaskic* Trial Chamber Judgement, (para. 285), the Trial Chamber held that proof of that the conduct of the aider and abettor had a casual effect on the act of the principal perpetrator is no required. *See also Aleksovski* Trial Chamber Judgement, para. 61; *Furundzija* Trial Chamber Judgement, para. 233.

[30] *Blaskic* Trial Chamber Judgement, para. 284.

[31] *Tadic* Trial Chamber Judgement, para. 687; *Bagilishema* Trial Chamber Judgement, para. 33; *Akeyesu* Tria; Chamber Judgement, para. 484.

[32] *Bagilishema* Trial Chamber Judgement, para. 33; *Furundzija* Trial Chamber Judgement, para. 199; *Tadic* Trial Chamber Judgement, para. 691.

[33] *Tadic* Appeals Chamber Judgement, para. 229; *Kvocka* Trial Chamber Judgement, para. 253; *Furundzija* Trial Chamber Judgement, para. 249.

[34] *Furundzija* Trial Chamber Judgement, para. 246.

[35] *Alesksovski* Appeals Chamber Judgement, paras. 162-164; *Tadic* Appeals Chamber Judgement, para. 188; *Musema* Trial Chamber Judgement, para. 123; *Bagilishema* Trial Chamber Judgement, para. 29; *Krstic* Trial Chamber Judgement, para. 601; *Kvocka* Trial Chamber Judgement, para. 243; *Kordic* Trial Chamber Judgement, para. 364.

[36] *Tadic* Appeal Chamber Judgement, paras. 185-186; Kordic Trial Chamber Judgement, paras. 364 & 373.

As noted above, in addition to the above modalities of participation, the jurisprudence of the ICTR (and the ICTY) recognizes that participation in Article 6(1) includes modes of participating in commission of crimes which occur where a plurality of persons having a common criminal purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons.[37]Under this form of participation, all those who contribute to the commission of crimes in execution of a common criminal purpose are criminally liable as co-perpetrators. The jurisprudence of the ICTR and ICTY recognizes *collective criminality* through participation in a joint criminal enterprise. The Appeals Chamber in the *Tadic* case recognized that for crimes committed by groups of individuals, individual liability for each co-perpetrator could be established on the grounds that collectivity is a recurrent characteristic of crimes commonly committed during wartime.[38]

The Appeals Chamber in the *Tadic* case has explained the rationale for its finding that participation in Article 7(1) of the Statute of the ICTY (similar to Article 6(1) of the ICTR Statute) encompasses participation in a joint criminal enterprise. It also has explained the rationale for the position that in general all participants in a common criminal enterprise, including those who do not physically perpetrate the criminal act (e.g. murder or rape), are criminally liable as co-perpetrators. The Appeals Chamber has stressed that this interpretation,

[…] is not only dictated by the object and purpose of the Statute, but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time, these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities…), the participation and contribution of the other members of the group is often vital in facilitation of the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from those actually carrying out the acts in question. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role of 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 circumstances, to hold the latter only as aiders and abettors might understate the degree of their criminal responsibility.[39]There are three basic objective requirements of this form of participation that must be proved. First, it must be proved that two or more individuals were, in one way

[37] *Tadic* Appeals Chamber Judgement, para. 190; *Kayishema and Ruzindana* Trial Chamber Judgement, para. 203-204; *Celebic* Trial Chamber Judgement, para. 328.
[38] *Tadic* Appeal Chamber Judgement, paras. 190-191.
[39] *Tadic* Appeal Chamber Judgement, paras. 191-192.

or the other, involved together in the commission of a crime within the jurisdiction of the Tribunal. These persons need not be organized in military, political or administrative structures.[40] Second, it must be proved that there existed a common design or plan constituting or including the commission of a crime within the jurisdiction of the Tribunal. The plan, design or purpose need not have been previously arranged or formulated. The common plan or purpose "may materialize extemporaneously and be inferred from that fact that a plurality of persons acts in unison to put in effect a joint criminal enterprise."[41] Finally, it must be proved that the accused participated in the common design or plan and was thereby linked and related to the commission of the crimes within the jurisdiction of the Tribunal. The accused's participation need not involve the physical perpetration of the crime, such as murder, but may take the form of assistance in or contribution to, the execution of the common plan or purpose.[42]Concerning *mens rea*, the jurisprudence of the Appeals Chamber in the *Tadic* case has found that it differs according to three categories of collective criminality that fall within the doctrine of common criminal purpose.

Categories of Joint Criminal Enterprise

During the course of the trial, the Prosecutor will adduce evidence that speaks to mainly the first and third categories of joint criminal enterprise. As submitted above, despite the Prosecutor's theory of the case under this category of criminal participation, the Trial Chamber as a trier of fact and law is entitled to adopt a theory it deems applicable on the basis of the evidence adduced. Following is an overview of each category of joint/common criminal enterprise.

i. Same Criminal Intention

The first category includes those cases where all perpetrators, acting pursuant to a common design, possess the same criminal intention, for instance, the formulation of a plan to kill, although their methods of participation may differ. Under this category, it has to be proved that the accused intended to commit a crime, this intent being shared by all other individuals involved in the crime being perpetrated.[43]

In elaborating this category of joint criminal enterprise, the *Tadic* Appeal Judgement, for instance, cited the *Einsatzgruppen* Judgement where the Nuremberg Tribunal held that guilt for murder is not restricted to the person who pulls the trigger or buries the corpse. It found:

Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its

[40] *Tadic* Appeal Chamber Judgement, para. 227(i).
[41] *Tadic* Appeal Chamber Judgement, para. 227(ii).
[42] *Tadic* Appeal Chamber Judgement, para. 227(iii).
[43] *Tadic* Appeal Chamber Judgement, para. 228.

commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime.[44]

In cases where a participants did not, or cannot be proved to have physically carried out the *actus reus* of the common plan (e.g. the killing), there are two objective and subjective prerequisites for imputing criminal responsibility to such participant: (a) the accused must voluntarily participate in one aspect of the common design (e.g., by inflicting a non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators; and (b) the accused, even if not personally carrying out the killing, must nevertheless intend the result.[45]

(ii) Acting Pursuant to a Concerted Plan

The second category, essentially a variant of the first one above, involves accused participating in a concerted plan or system, such as a system of ill-treatment or repression. The Appeals Chamber has described this category as embracing so-called "concentration camp" cases.[46]

Invoking decisions of the World War II military courts, the Appeals Chamber has held that the notion of common criminal purpose was applied to instances where the offences charged were alleged to have been committed by members of military and administrative units, such as those running concentration camps, i.e. by groups of persons acting pursuant to a concerted plan. The Appeals Chamber has held that in these cases:

[…] the required *actus reus* was the active participation in the enforcement of a *system of repression,* as it could be inferred from the position of authority and the specific functions held by each accused.[47]

The notion "active participation" above has been defined to include encouraging, aiding and abetting or in any case participating in the realization of the common criminal design.[48]The Appeal Chamber noted that the *mens rea* element comprised (a) knowledge or awareness of the system, and (b) the intent to further the common concerted design of ill-treatment.[49] The Appeals emphasized that in these cases the requisite intent could also be inferred from the position of authority held by the camp personnel.

iii. Foreseeable Conduct outside the Common Design

[44] *Tadic* Appeals Chamber Judgement, para. 200.
[45] *Tadic* Appeal Chamber Judgement, para. 196.
[46] *Tadic* Appeal Chamber Judgement, para. 202.
[47] *Tadic* Appeal Chamber Judgement, para. 203.
[48] *Tadic* Appeal Chamber Judgement, para. 202.
[49] *Tadic* Appeal Chamber Judgement, para. 203.

This category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.[50]The Appeals Chamber has provided the example of a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town (that is to effect "ethnic cleansing") in the course of which one of the victims is shot and killed. The Appeals Chamber has explained that in such a scenario, although perhaps murder was not an explicit part of the common design, it was certainly foreseeable that forcible removal of civilians at gunpoint from their homes might well result in the death or more of those civilians.[51] Criminal responsibility, noted by the Appeals Chamber, "may be imputed to all participants within a common criminal enterprise where the risk of death occurring was both a predictable consequence of the execution of the criminal design and the accused was either reckless or indifferent to that risk."[52]

In conclusion, to establish criminal responsibility under this category, it needs to be proved that (a) that the accused intended to participate in a common criminal design, and (b) the foreseeability that criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants in the common design.[53]

THE CONCEPT OF ACCOMPLICE WITNESSES:

The, term "accomplice" must be interpreted in its broadest sense to mean that "the participants in a joint criminal enterprise were themselves accomplices – accomplices of each other – and therefore engage "a form of accomplice liability". The term "accomplice" can, however, include both aiders and abettors and principals in the commission of a crime.[54]

Approach to the assessment of accomplice evidence

In the **Ntagerura** trial[55] the Trial Chamber rejected as unreliable the testimonies of accomplice witnesses Lal, lai, laj, lah,lab lak and LAM. The Prosecutor has appealed this decision and pointed out that the Trial Chamber was wrong in presuming that that accomplice testimony necessarily had to be viewed with caution without undertaking the necessary analysis of circumstances, such as any reason for the witness to be untruthful, or to have a bias, or to make self- serving statements, which might affect the witness's

[50] *Tadic* Appeal Chamber Judgement, para. 204.
[51] *Tadic* Appeal Chamber Judgement, para. 204.
[52] *Tadic* Appeal Chamber Judgement, para. 204.
[53] *Tadic* Appeal Chamber Judgement, para. 206.
[54] *Ojdanić JCE Appeal Decision*, Separate Opinion of Judge Shahabuddeen, paras. 7 and 10. See also Separate Opinion of Judge David Hunt, para. 29 (stating that the term "accomplice" "means one who is associated with another in the commission of a crime, but his association may be either as principal or as one who aids and abets the principal."
[55] Prosecutor verses Andre Ntegerura,emmanuel Bagambiki,Samuel Imanishimwe,ictr-99-46-A

credibility. The Trial Chamber has the discretion to weigh the evidence and assess the credibility of each witness. In this case, the Trial Chamber's entire analysis rests on an assumption that as accomplices, the integrity and credibility of these witnesses were necessarily suspect, such that the analysis of the credibility of these witnesses started from a point of disbelief, from which these witnesses had to recover in the estimation of the Trial Chamber. In the Prosecutor's view, this had the effect of tainting the Trial Chamber's analysis and led to the erroneous conclusions made regarding the credibility of these witnesses.

On the other hand Respondent Ntagerura argued that, these witnesses were all motivated to lie in order to lighten or soften their sentences in Rwanda. Ntagerura stated repeatedly that "les témoins avaient un intérêt évident" without support for this contention. On Appeal, The Respondent Ntagerura, in essence, argued that the Trial Chamber should not be faulted for assuming that such an interest existed. However, it is this very assumption that is the Prosecutor found to be unacceptable.The Respondent Ntagerura that, given that these witnesses admitted to having participated in the events of 1994, the Trial Chamber was well advised to use caution with respect to their testimony as their admissions impacted on their morality as persons for whom a lie would not weigh heavily in comparison to the crimes they had already admitted to committing. This type of reasoning, however, has been rejected by the Appeals Chamber in its recent decision in *Kordic.*[56]

The Appeals Chamber in *Kordic* upheld the Trial Chamber's reasoning in that case, finding that the Trial Chamber did not err in accepting the evidence of Witness AT as credible. On appeal, the Defence argued that the credibility of Witness AT must be assessed in light of the fact that he was a convicted criminal. The Defence also suggested that Witness AT, in cooperating with the Prosecution, was attempting to "buy a discount from his sentence."[57] The Prosecution, however, refuted this contention, stating that there was no "deal" made with Witness AT, no immunity was ever offered, and there was no agreement with AT at the time he testified.[58] The Appeals Chamber upheld the Trial Chamber's assessment of the credibility of Witness AT.[59] Implicit in doing so, the Appeals Chamber endorsed the principle that the mere fact of being a convicted criminal does not necessarily signify that the witness will lie. Furthermore, the Appeals Chamber accepted that an automatic assumption cannot be made that an accomplice is testifying for self-serving motives.

In the Ntegerura case, the trial record demonstrates that the issue of whether the Witnesses were motivated by self-serving interests, specifically whether they hoped to receive a lighter sentence in Rwanda in exchange for their testimony at the ICTR, was canvassed with some of the witnesses during cross-examination. In each situation, the Witness denied

[56] *Kordic* (AC), paras. 254-267.
[57] *Kordic* (AC), paras. 256 and 263.
[58] *Kordic* (AC), para. 264.
[59] It ought to be noted that the Appeals Chamber upheld the assessment of the credibility of Witness AT even with respect to hearsay evidence, which arguably is a bigger hurdle, than in the case of these accomplice witnesses who, for the most part, gave direct, eye-witness accounts.

being motivated by such a reason.[60] In other cases, the defence did not canvass this specific issue with the witness. In these latter cases, the Prosecutor submitted that it was the obligation of the Respondents to put such a question to the witness or to put such evidence on the record. The Respondents cannot decline to canvass this issue at trial and then attempt to rely on assumptions regarding these issues on appeal. There was no evidence that established that any of these witnesses were receiving a benefit through their testimony or were motivated to lie for such a benefit. All speculation to the contrary remains just that, unfounded conjecture.
Similarly, the Respondent Ntagerura, drew a parallel between his case and the *Nahimana et. al* (Media) case in which the Trial Chamber's rejection of Ruggiu's testimony in the. case. The important distinction to be drawn between Ruggiu and the accomplice testimony in this case is that, in this case, no deals or agreements were made between the Prosecution and these witnesses. In fact, as stated above, the Prosecution established at trial that these witnesses were not receiving benefits through their testimony at the ICTR

What is arguably most significant is that the Trial Chamber did not make any findings as to any self-serving motives on the part of these witnesses. The Trial Chamber simply concluded that being accomplices, *"as such"*, their testimony ought to be viewed with caution. It is in the categorization of the testimony "as such" that suggests that no further deliberation was made regarding whether these witnesses deserved to be treated with suspicion and caution from the outset, and therein lies the problem.

The Appellant has relied on the *Vetrovec* case for the contention that no automatic caution ought to apply to accomplice testimony. Of course, it is always within the ambit of the trier-of-fact to assess that witness's overall credibility. *Vetrovec* simply asserts that the mere fact of being an accomplice does not alone necessarily impute ill-intent to the motivations of the witness to testify. It would be ludicrous to suggest that, simply because an accomplice admits his or her participation, he or she is then beyond reproach. The thrust of the holding in *Vetrovec* pertains to how a trier-of-fact, whether it be a jury, a judge or this tribunal, ought to approach testimony given by an accomplice. The same principles apply to the methodology of assessing this type of evidence regardless of the nature of the trier-of-fact. The legal principle is as applicable to this tribunal-of-fact as to a jury.
The following illustrations shows that Trial Chamber's approach toThe testimony was tainted because of who the witness was. This is best illustrated in paragraph 440 of the Judgement where the Trial Chamber noted that Witnesses LAH and LAB:

[60] See for example, the cross-examination of Witness LAK, T 19 January 2001, p. 30, line 2 to p. 31, line 10 (closed session), where Witness LAK specifically stated that his coming to testify to the Tribunal had nothing to do with his sentence in Rwanda. See also the cross-examination of Witness LAJ, T 24 October 2000, p. 63, line 4 to p. 65, l. 14 where he also specifically denies testifying at the ICTR in hopes of a reduced sentence in Rwanda. See also the cross-examination of Witness LAH, 11 October 2000 (open session), p. 54, lines 3 to 25. And, see also the cross-examination of Witness LAM, 21 November 2000 (closed session), p. 43, l. 22 to p. 45, l1.

provided some measure of corroboration for their assertions that Bagambiki and Imanishimwe participated in the attack against the refugees. *However, the Chamber is reluctant to use the testimony of one suspect witness to corroborate another*, particularly where their own accounts of Bagambiki's and Imanishimwe's participation in the attack are not consistent.[61]

While the Trial Chamber indicates that it did not find the testimony of Witnesses LAH and LAB entirely consistent with each other, the fact that the Trial Chamber did not want to use "one suspect witness" to corroborate another demonstrates that the Trial Chamber simply categorized these witnesses as non-believable and treated them differently.

[61] J. para. 440 (emphasis added).