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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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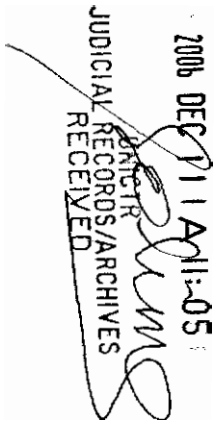
THE PROSECUTOR

v.

JEAN MPAMBARA

Case No. ICTR-01-65-T



SEPARATE OPINION OF JUDGE LATTANZI

CI06-0070 (E)

Translation certified by LSS, ICTR

SEPARATE OPINION OF JUDGE LATTANZI

1. I regret that I cannot concur with some of the arguments set out by the majority of the Judges in paragraphs 21 to 35 of the Judgement, in connection with the various ways in which omissions may give rise to responsibility under the Statutes of the two International Criminal Tribunals. Here, I will limit myself to emphasizing only a few significant arguments that I cannot share.

2. Omissions give rise to responsibility, above all, under Articles 6(3) and 7(3) of the said *Statutes, where they are explicitly considered as regards superior responsibility* for *acts* committed by subordinates. There is no such form of liability in the present case, as the Chamber rightly emphasizes.[1]

3. As is clearly apparent from the case-law of the Trial[2] and Appeals[3] Chambers, responsibility by omission may also be contemplated under Articles 6(1) and 7(1), in particular as a form of aiding and abetting (indeed instigation of)[4] the commission of the crime by the main perpetrator. Omissions may also give rise to individual responsibility within the scope of a joint criminal enterprise (JCE).[5] In this case, the individual would be responsible for the commission of a crime.[6]

These are, in the present instance, the two forms of liability by omission that the Prosecutor is pleading.

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[1] *Mpambara* Judgement (TC) 12 September 2006, p. 2, footnote 4.

[2] See *Bagilishema*, TC Judgement, 7 June 2001, para. 675; *Rutaganira,* TC Judgement, 14 March 2005, p. 17, para. 68. The Trial Chamber in asserted that the *actus reus* of aiding and abetting may well be realized by omission "provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*" (quoted in *Blaškić* Judgement (AC), 29 July 2004, para. 47). See also *Kvočka,* TC Judgement, 2 November 2001, para. 251. A recent very interesting decision on omission as a mode of commission of a crime under the ICTY Statute, is that rendered by the Trial Chamber in *Blagojević*, where there is a detailed illustration of the applicable law in this respect: *Blagojević* Judgement, TC, 17 January 2005, p. 261, para. 726.

[3] The case-law of the Appeals Chamber either essentially confirms the approach taken in the judgements rendered by the Trial Chambers, admitting responsibility by omission in the context of the aiding and abetting provided for in Articles 6(1) and 7(1) of the two Statutes, or contemplates responsibility by omission directly on appeal. Thus the Appeals Chamber in *Blaškić* considered specifically the Trial Chamber's assertion regarding aiding and abetting by omission, leaving open only the aspect of the source of the obligation (Judgement, 29 July 2004, para. 47). In *Ntagerura* also there was an opportunity, on appeal, to address responsibility under Article 6(1), but this was limited to noting the agreement of the parties that "*un accusé /peut/ être tenu pénalement responsable d'une omission sur la base de l'art. 6(1) du Statut*" [an Accused may be held criminally responsible for an omission under Article 6(1) of the Statute] (para. 334). Still in *Blaškić*, the Appeals Chamber found the Accused liable for inhuman treatments by reason of breaches of an obligation to act, ruling out his responsibility for positive acts relating to the same charge, which the Trial Chamber had upheld. For the sake of brevity, I will not refer to other decisions and judgements, rendered at trial and on appeal, in which omissions were considered as a form of responsibility under Articles 6(1) and 7(1) of the Statutes. Thus, I do not share the opinion of the majority of the Chamber that in addition to the omissions committed in the presence of the Accused or strictly related to positive acts, "other examples of aiding and abetting through failure to act are not to be easily found in the annals of the *ad hoc* Tribunals" (*Mpambara* Judgement, para. 23).

[4] "Instigation can take many different forms; it can be expressed or implied, and entail both acts and omissions". *Blaškić* Judgement, TC, 3 March 2000, para. 270.

[5] The Appeals Chamber in *Kvočka* went deeper into the distinctions to be made in relation to *mens rea* and the substantial effect between omission as a simple form of aiding and abetting and omission in the context of a JCE (Judgement, AC, 28 February 2005, para. 90).

[6] I do not see that "it is hard to imagine that total passivity could demonstrate the requisite intent for co-perpetratorship" (para. 24 of the Judgement): this depends only on the actual circumstances. Culpable "passivity" represents the *actus reus* (breach of a duty to act), while the *mens rea* is another element to be proven: and it is possible to share in the *mens rea* of other participants in the JCE even by simply failing to discharge an obligation to act.

4. I do not see that "[l]iability for an omission may arise in a third, fundamentally different context: where the accused is charged with a duty to prevent or punish others from committing a crime", nor that "the culpability arises not by participating in the commission of a crime, but by allowing another person to commit a crime which the Accused has a duty to prevent or punish"[7] (except in the context of superior responsibility, to which moreover the majority of the Chamber does not intend to refer.)[8]

5. In my view, the expression *Failure of Duty to Prevent or Punish*, in that it does not refer to the provision of Article 6(3), does not address a context different from those relating to the other omissions pleaded, but describes specific offences, since any culpable omission is only a breach of the duty to act, for if actions giving rise to criminal responsibility consist in the violation of a legal rule prohibiting action, omissions such are sources of liability always consist in the violation of a legal rule imposing an obligation to act.[9]

6. While it is true that the expression in question gives causes, especially as regards breach of the duty to punish, some ambiguity as to responsibility under Article 6(3), the charge pleaded sees the failure to punish the perpetrators of crimes as facilitation, instigation to commit subsequent crimes for which the responsibility of the Accused would again be incurred. And this could indeed be the case, especially in a situation, as in the instant case, of continued attacks with a close spatial and temporal and even personal connection between them (the same Commune, a very short period of time and, sometimes, the same attackers). Therefore, the context would still be that of aiding and abetting within the meaning of Article 6(1).[10]

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[7] *Mpambara* Judgement, TC, 12 September 2006, p.13, para. 25.

[8] See in this connection footnote 1 above. But the language used in the passage quoted seems precisely to evoke superior responsibility.

[9] The case-law of the two Tribunals does not agree on the source of the obligation. There are some Chambers which, in line with the *Tadić* Appeal Decision in which this issue was addressed for the first time, see this source only in criminal law, whereas other Chambers take into consideration "any legal obligation to act". The latter approach is in any event the one that is most often taken. Unfortunately, the issue has not been addressed other than indirectly by the Appeals Chamber, in *Ntagerura*. Here, faced with a Trial Chamber's decision which followed on this point the approach found in *Tadić* as to the criminal source of the obligation to act, the Appeals Chamber decided not to go deeper into this aspect and to confine itself to considering the issue of the ability to act, which had been the basis of the separate opinion of one trial Judge. The Chamber therefore concluded that *"le Procureur n'a pas indiqué les possibilités dont disposait Bagambiki pour s'acquitter de ses obligations dans le cadre de la législation nationale rwandaise"* [the Prosecutor has not indicated the possibilities upon to Bagambiki for discharging his obligations under Rwandan national legislation], adding that "*même si le fait de ne pas s'être acquitté de l'obligation incombant à un préfet rwandais d'assurer la protection de la population dans sa préfecture était susceptible d'engager sa responsabilité en droit pénal international, le Procureur n'a pas établi que l'erreur qu'aurait commise la Chambre de première instance a invalidé sa décision.*" [even if the fact of not having discharged the obligation on a Rwandan *Préfet* to protect the population in his *prefecture* was likely to give rise to his responsibility under international criminal law, the Prosecutor has failed to establish that the error allegedly committed by the Trial Chamber invalidated its decision]. In my opinion, criminal law, whether domestic or international, may provide for consequences in terms of individual liability for breach of obligations provided for by other branches of law, as is the case with the obligations imposed on State employees.

[10] In principle, breach of a duty to act as a basis for criminal responsibility under Articles 6(1) and 7(1) of the two Statutes takes the form of preceding action to the commission of the crime, not subsequent action such as breach of the duty to punish. In fact, this last offence is considered independently solely in the context of superior responsibility under Articles 6(3) and 7(3). However, this does not exclude the possibility of considering an Accused's breach of the duty to punish the perpetrator of a crime, according to the circumstances of the case, under aiding and abetting liability. Breach of this duty may well constitute a breach of the duty to prevent subsequent crimes and hence aiding and abetting their commission. This is also what the Trial Chamber contemplates in *Blaškić*, whose opinion was implicitly confirmed by the Appeals Chamber: "the failure to punish past crimes, which entails the commander's responsibility under Article 7(3), may, pursuant to Article 7(1) and subject to the fulfilment of the respective *mens rea* and *actus reus* requirements, also be the basis for his liability for

7. I regret once again that I cannot share the view of the majority of the Chamber that among the omissions pleaded in the instant case by the Prosecutor as a form of participation by the Accused in a first-Category JCE or as aiding and abetting the perpetrators of crimes, omissions which the Chamber considers in its conclusions, *Failure of Duty to Prevent or Punish,* could not be considered,[11] because the Defence had not been adequately informed in time of this «particular omission».[12]

8. In my view, if the Defence failed to exercise its rights because it had not received adequate information on the Accused's alleged breach of the *duty to prevent crimes and punish the perpetrators thereof,* it must be held that it did not even receive such information on the other omissions pleaded, in respect of which the majority of the Chamber finds no defect in the Indictment. Yet, any omission must be pleaded according to the evidence characterizing it, including the obligation whose violation would entail a culpable omission under the Statute.

9. While, in essence, I share the reconstruction by the majority of the Chamber of the defects in the Indictment against the Accused Mpambara, which subsequent documents failed to cure effectively (but this in relation to all the omissions pleaded, not only the breach of the duty to prevent or punish), I am however of the opinion that the Accused sustained no prejudice to his right to defend himself.

10. In fact, in the opinion of the Appeals Chamber, the obligation imposed on the Prosecutor to provide the Accused with clear and detailed information on the charges brought against him must be considered not in isolation, but in terms of the Accused's right to conduct his defence. Hence, there is a need to determine whether the Prosecutor provided adequate information on the charges based on how the Defence understood them. For while it is true that *"aucune déclaration de culpabilité ne peut être prononcée lorsque le manquement à l'obligation d'informer dûment la personne poursuivie des motifs de droit et de fait sur lesquels reposent les accusations dont elle est l'objet a porté atteinte à son droit à un procès équitable*" [no guilty verdict may be pronounced when breach of the obligation duly to inform the person being prosecuted of the legal and factual grounds on which the charges against him are based, has adversely affected his right to a fair trial], it is for that no less true that the Chamber must determine whether or not the Accused was in actual fact "in a reasonable position to understand the charges against him or her". Still in the opinion of the Appeals Chamber, if the Trial Chamber "*juge l'acte d'accusation vicié parce qu'il est vague ou ambigu, elle doit rechercher si l'accusé a néanmoins bénéficié d'un procès équitable ou, en d'autres termes, si le vice constaté a porté préjudice à la défense*" [finds the Indictment flawed because it is vague or ambiguous, it must ascertain whether the Accused nevertheless received a fair trial or, in other words, if the defect identified was prejudicial to the defence].[13]

11. A verification of this kind must thus be conducted in the light of the rights that the Defence actually exercised at trial. If, for one reason or another, these rights were indeed exercised despite the paucity of information provided by the Prosecutor on the charges brought against the accused, it would even be contrary to the interests of justice for the Chamber to decide not to consider them. These charges must naturally be considered within the confines of the Defence's effective exercise of its *rights in relation to each event* and each material fact alleged in the Indictment.

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either aiding and abetting or instigating the commission of future crimes" (Judgement TC, 29 July 2004, para. 337).

[11] *Mpambara* Judgement, TC, 12 September 2006, p.13, para. 35: "The Chamber will, however, consider the evidence of omissions adduced at trial to the extent that they may be probative of the accused's participation in a joint criminal enterprise or having aided and abetted another in the commission of a crime". But it will be seen that ultimately, the charge contested by the majority of the Chamber was also considered.

[12] "There is no mention of any duty to prevent or punish crimes. It bears repeating that the prosecution is permitted to bring potentially incompatible charges against the Accused. The defect here is not the incompatibility, but the failure to distinctly explain that the omissions alleged against the Accused constituted a breach of his duty to prevent or punish the crimes of others" (*Mpambara* Judgement, TC, para. 34).

[13] *Ntagerura* Judgement (AC), 7 July 2006, para. 28.

12. In the present case, and in the light of the evidence adduced by the Defence throughout the trial (including the testimony of the Accused), I am of the opinion that it did indeed exercise its rights in relation to all the omissions alleged by the Prosecutor, including the "*manquement de l'accusé au devoir tant d'empêcher que de punir*" [the Accused's breach of the duty to prevent or punish] raised within the context of responsibility by participation in a joint criminal enterprise or by aiding and abetting under Article 6(1) of the Statute.[14]

13. Furthermore, in order to ascertain whether the Accused could be held liable, the Chamber took care to consider all the omissions alleged at trial, including the one which the majority of the Chamber contested for lack of adequate information (*failure of duty to prevent and punish*).

14. The Chamber has therefore found, for each attack and each charge alleged against the Accused, that the omissions were not proven beyond all reasonable doubt, or that they demonstrated neither participation in a JCE nor aiding and abetting in the attacks, because certain aspects of these actions had not been proven beyond reasonable doubt. And I entirely agree with the findings.

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

Done at Arusha, Tanzania, on 20 September 2006

[Signed]

Judge Flavia Lattanzi

[Seal of the Tribunal]

[14] The Chamber has heard the Defence witnesses refer to the Accused's appeals for a return to peace, the meetings convened for that purpose and the assistance rendered to the refugees both by the Accused and by Father Santos. They also spoke of the investigations conducted by the Accused to find the perpetrators of the crimes and of the fact that he was not able to complete them successfully because he lacked resources. All the Defence spoke of the Accused's persistent and fruitless requests for assistance from the *sous-préfet* and hence of about the unavailability of sufficient resources to prevent the attacks or punish the perpetrators over the vast territory of the commune, where security was provided by only six or seven policemen. The Accused himself stated that had these policemen been used to arrest the criminals and guard their prison instead of being assigned by him to ensure the security (still so inadequate) of the refugees, all the refugees would have been killed, whereas he had succeeded in saving many lives. He was heard stating that to arrest the attackers would have been "suicide". These are some of the arguments advanced by the Defence to refute the charges. I refer, in this connection, to these testimonies as related in the Judgement.