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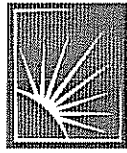
What types of evidence are used to prove a joint criminal enterprise under International Criminal Law?

Katlyn Kraus

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CASE WESTERN RESERVE
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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR EXTRAORDINARY CHAMBERS IN THE
COURTS OF CAMBODIA

ISSUE: WHAT TYPES OF EVIDENCE ARE USED TO PROVE A JOINT CRIMINAL ENTERPRISE UNDER
INTERNATIONAL CRIMINAL LAW?

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BIBLIOGRAPHY OF SOURCES

Bibliography of Sources

Statutes and Rules

1. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704, adopted by Security Council on 25 May 1993, U.N. Doc/S/Res/827 (1993)
2. Statute of the International Tribunal For Rwanda, adopted by Security Council on 8 November 1994, U.N. Doc. S/Res/955 (1994)
3. Statute of the Special Court for Sierra Leone, adopted by Security Council on 14 August 2000, U.N. Doc. S/Res1315 (2000).
4. Laws on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006, promulgated on 27 October 2004 (2004).

Cases

ICTY

5. The Prosecutor v. Krstic, Case No: IT-98-33-A, Judgment, ICTY Appeals Chamber, 19 April 2004.
6. The Prosecutor v. Simic, Tadic, Zaric, Case No: IT-95-9, ICTY Trial Chamber Judgment, ICTY Trial Chamber, 17 October 2003.
7. Prosecutor v. Tadic, Case Number IT-94-1-A, Appeals Chamber Judgment, 15 July 1999.
8. 1999.
9. The Prosecutor v. Tadic, Case No: IT-94-1-A, Sentencing Judgment, ICTY Appeals Chamber, 26 January 2000.
10. Prosecutor v. Krajisnik, Case No. IT-00-39-T, ICTY Trial Chamber Judgment, 27 September 2006.
11. Prosecutor v. Krajisnik, Case No. IT-00-39-T, ICTY Appeal Chamber Judgment, 17 March 2009.
12. Prosecutor v. Kvočka, Case No. IT-98-30/1-T, ICTY Trial Chamber Judgment, 2 November 2001.

ICTR

13. Prosecutor v. Karamara, Case no. ICTR-98-44-T, ICTR Trial Chamber Judgment, 2 February 2012.
14. Prosecutor v. Bikindi, Case No. ICTR-01-72-T, ICTR Trial Chamber Judgment, 2 December 2008.
15. Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, ICTR Trial Chamber Judgment, 17 June 2004.
16. Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, ICTR Appeals Chamber Judgment, 7 July 2006.
17. Prosecutor v. Imanishimwe, Case No. ICTR-99-46-A, ICTR Trial Chamber Judgment, 25 February 2004.
18. Prosecutor v. Imanishimwe, Case No. ICTR-99-46-A, ICTR Appeal Chamber Judgment, 7 July 2006.
19. Prosecutor v. Mugenzi. Case No. ICTR-99-50-T, ICTR Trial Chamber Judgment, 30 September 2011.
20. Prosecutor v. Munyakazi, Case No. ICTR-97-36A-A, ICTR Appeals Chamber Judgment, 28 September 2011.
21. Prosecutor v. Nchamihigo, Case No. ICTR-2001-63-A, ICTR Trial Chamber Judgment, 12 November 2008.
22. Prosecutor v. Nchamihigo, Case No. ICTR-2001-63-A, ICTR Appeals Chamber Judgment, 18 March 2010.
23. Prosecutor v. Renzaho, Case No. ICTR-97-31-T, ICTR Trial Chamber Judgment, 14 July 2009.
24. Prosecutor v. Rukundo, Case No. ICTR 2001-70-A, ICTR Appeals Chamber Judgment, 20 October 2010.
25. Prosecutor v. Simba, Case Nbo. ICTR-01-76-A, ICTR Trial Chamber Judgment, 13 December 2005.
26. Prosecutor v. Simba, Case No. ICTR-01-76-A, ICTR Appeals Chamber Judgment, 27 November 2007.
27. Prosecutor v. Gatete, Case No. ICTR2000-61-T, ICTR Trial Chamber Judgment, 31 March 2011.

28. Prosecutor v. Ndahimana, Case No. ICTR-01-68-T, ICTR Trial Chamber Judgment, 30 December 2011.

SCSL

29. Prosecutor v. Sesay, Kallon, Gbao, Case No. SCSL-04-15-T, SCSL Trial Chamber Judgment, 2 March 2009.
30. Prosecutor v. Sesay, Kallon, Gbao, Case No. SCSL-04-15-T, SCSL Appeals Chamber Judgment, 26 October 2009.
31. Prosecutor v. Fofana, Konduew, CaseNo. SCSL-04-14-T, SCSL Trial Chamber Judgment, 2 August 2007
32. Prosecutor v. Brima, Kamara, Kanu, Case no. SCSL-04-16-T, SCSL Trial Chamber Judgment, 20 June 2007.
33. Prosecutor v. Brima, Kamara, Kanu, Case no. SCSL-04-16-T, SCSL Appeal Chamber Judgment, 22 February 2008.

ECCC

34. Case 001 (Prosecutor v. Duch), Case No. 001/18-07-2007/ECCC/TC, Trial Chamber Judgment, 26 July 2010.

Books

35. HECTOR OLASOLO, THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES, Volume 4 Studies in International Comparative Criminal Law, (2009).
36. ESSAYS ON ICTY PROCEDURE AND EVIDENCE, INTERNATIONAL HUMANITARIAN LAW SERIES. Eds Richard May, David Tolbert, John Hocking, Ken Roberts, Bing Bing, Daryl Mundis and Gabriel Oosthuizen (2001).
37. PRINCIPALS OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE (Eds Karim A. A. Khan, Caroline Buisman, Christopher Gosnell) (2010).
38. CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT. Eds John Jackson, Mazimo Langer and Peter Tillers (2008).
39. NANCY ARMOUNRY COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

Articles

40. William Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, *New England Law Review*, 1032 (Summer 2003).
41. Allison Danner and Jenny Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of the International Criminal Law*, 99 *Cal. L. Rev.* 75, 107-137 (Jan. 2005).
42. Beth Lyons, *Tortured Law/Tortured "Justice" – Joint Criminal Enterprise in the Case of Aloys Simba* (Oct. 2009).

MEMORANDUM

I. INTRODUCTION

A. SCOPE

This memorandum discusses what types of evidence are used to prove a Joint Criminal Enterprise under international criminal law. Both evidence used to establish the *actus reus* and *mens rea* elements of Joint Criminal Enterprise will be examined. Additionally, this memorandum will discuss the difficulties experienced by international tribunals in the admission of evidence used to prove criminal liability under the Joint Criminal Enterprise.

B. SUMMARY OF CONCLUSIONS

i. Absent specific rules, the general tendency of the Court is the liberal admission of evidence. This is mitigated by the trial chambers evaluation of the weight and credibility of the evidence.

In all the *ad hoc* Tribunals the admission of evidence at trial was very broad. The judges then made a determination on credibility of each witness and the weight given to their testimony. If there was corroborating evidence in the form of additional testimony or documents greater weight was given to the piece of evidence.

ii. Evidence from other related trials is often relied upon is showing the existence of Joint Criminal Enterprise.

In many cases the judges and parties would stipulate to facts already proven in prior related cases. Stipulations would not be made to the existence of a Joint Criminal Enterprise found in a prior case. Therefore, there is no presumption that if the Accused had contact with another Accused found guilty under a theory of Joint Criminal Enterprise in a prior case; that they were involved in the Joint Criminal Enterprise. However, the evidence used in other cases based upon Joint Criminal Enterprise was often put forth again by the Prosecution.

iii. Specificity to all elements of Joint Criminal Enterprise is important in the Court's findings that the Accused were members and furthered the goals of the common plan.

In many cases the failure to find the Accused criminally liable under a theory of Joint Criminal Enterprise was not due to a lack of evidence. Many times the court refused to determine liability under Joint Criminal Enterprise for lack of notice and specificity in the indictment. Often in later related cases the existence of a common plan was found using the same evidence the prosecution put forth in a case where the pleading of Joint Criminal Enterprise was deemed ineffective.

iv. Multiple types of evidence were necessary to prove the elements necessary to find criminal liability under Joint Criminal Enterprise.

In every case involving criminal liability under a theory of Joint Criminal Enterprise no singular type of evidence was used to prove an element. Specifically, testimony from the accused, insider witnesses and experts all combined allowed the Court to make findings under a theory of Joint Criminal Enterprise. Moreover, the existence of documents that collaborated with the oral testimony was important in allowing the judges to find criminal liability under Joint Criminal Enterprise.

II. BACKGROUND

The foundation for Joint Criminal Enterprise as a mode of individual criminal liability can be found in Article 29 (new) ECCC Law Outline.¹ Article 29 specifically allows:

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.²

Article 29 is modeled after forms of responsibility found in the statutes of the *ad hoc* international tribunals.³ The co-prosecutors relied upon the jurisprudence of the ICTY's Appeals

* The issue presented in this memorandum is what types of evidence are used to prove a Joint Criminal Enterprise under international criminal law. This memorandum will evaluate the evidence presented at the International Criminal Tribunal for Rwanda, International Criminal Tribunal for the Former Yugoslavia and the Special Court for Sierra Leone to establish criminal liability under a theory of Joint Criminal Enterprise.

¹ Laws on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006, Art. 29, promulgated on 27 October 2004 (2004).

² *Id.*

³ See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Art. 7(1), U.N. Doc. S/25704, adopted by Security Council on 25 May 1993, U.N. Doc/S/Res/827 (1993); Statute of the Special Court for Sierra Leone, adopted by

Chamber⁴ in pleading responsibility through Joint Criminal Enterprise in their Amended Closing Order.⁵ The Accused in Case 001 contested the applicability of Joint Criminal Enterprise,⁶ and the Co-Investigating Judges did not incorporate Joint Criminal Enterprise as a mode of criminal responsibility in their Closing Order. The Co-Prosecutors appealed the decision in the Closing Order in a request to the Chamber to apply Joint Criminal Enterprise.⁷

In making its ruling on the admissibility of Joint Criminal Enterprise the Chamber recognized the difficulty in relying on the ICTY Appeals Chamber judgment as it was adjudicated post-1975-1979.⁸ However, the Court none the less that recognized that Joint Criminal Enterprise was not “a novel creation of the ICTY.”⁹ The Chamber recognized that the

Security Council on 14 August 2000, Art. 6(1). U.N. Doc. S/Res1315 (2000). Case 001 (Prosecutor v. Duch), Case No. 001/18-07-2007/ECCC/TC, ¶511, Trial Chamber Judgment, 26 July 2010. [*hereinafter* Case 001]

⁴ Prosecutor v. Tadic, Case Number IT-94-1-A, Appeals Chamber Judgment, 15 July 1999. *see generally* ESSAYS ON ICTY PROCEDURE AND EVIDENCE, INTERNATIONAL HUMANITARIAN LAW SERIES. Eds Richard May, David Tolbert, John Hocking, Ken Roberts, Bing Bing, Daryl Mundis and Gabriel Oosthuizen (2001).

⁵ Amended Closing Order, “Co-prosecutors Request for Application of the Joint Criminal Enterprise (ECCC).

⁶ “Defense Response to the Co-Prosecutors’ Request for the Application of the Joint Criminal Enterprise Theory in the Present Case” (ECCC).

⁷ ECCC, Decision on Appeal against the Closing Order, ¶¶123, 136, 141-14.

⁸ Case 001, Trial Chamber Judgment, *supra* note 3 at ¶504. *see generally* HECTOR OLASOLO, THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES, Volume 4 Studies in International Comparative Criminal Law, (2009).

⁹ *Id.*

concept of criminal responsibility through Joint Criminal Enterprise found its foundations in the Nuremburg-era documents and the principles of national legal systems.¹⁰

Following the *Tadic* Appeals judgment the jurisprudence of the *Ad Hoc Tribunals* has developed three categories of Joint Criminal Enterprise.¹¹

The first category is a “basic” form of Joint Criminal Enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention. An example is a plan formulated by the participants in the Joint Criminal Enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.

The second category is a “systemic” form of Joint Criminal Enterprise. It is a variant of the basic form, characterised by the existence of an organised system of ill- treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the Joint Criminal Enterprise.

The third category is an “extended” form of Joint Criminal Enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect “ethnic cleansing”) with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.¹² (RUF, TC, ¶ 254).

The *actus reus* of any category of Joint Criminal Enterprise has three requirements.

First, a plurality of persons is required. “They need not be organised in a military, political or administrative structure.” However, it needs to be shown that this plurality of persons acted in concert with each other. A common objective in itself is not enough to demonstrate that the plurality of persons acted in concert with each other as different and independent groups may happen to share the same objectives.

¹⁰ *Id.*

¹¹ *Id.* at ¶507.

¹² Prosecutor v. Sesay, Kallon, Gbao, Case No. SCSL-04-15-T, SCSL Trial Chamber Judgment, ¶254, 2 March 2009. [*hereinafter* RUF Trial Chamber Judgment].

Second, the existence “of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute is required. There is no need for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts.”

The common objective can be conceptualised as “fluid in its criminal means.”

The Chamber considers that it will be proven that the members of a Joint Criminal Enterprise have accepted an expansion of the criminal means of the common objective when leading members of the Joint Criminal Enterprise are made aware of the new types of crimes committed, take no measures to prevent these crimes and persist in the implementation of the common objective.¹³

In the *Ndahimana* case at the ICTR the Trial Court held that Joint Criminal Enterprise could be proven by evidence showing an omission.¹⁴ However, the failure of and Accused to prevent or punish cannot be the omission the prosecution relies.¹⁵

However, the *mens rea* requirements for the three categories of Joint Criminal Enterprise are different. Within the basic and systematic forms of Joint Criminal Enterprise the Accused must intent to participate in the common plan. Further the objective of the common plan must be the commission of a crime or commission through criminal means.¹⁶

The *mens rea* for the third category of Joint Criminal Enterprise is two-fold: in the first place, the Accused must have had the intention to take part in and contribute to the common purpose. In the second place, responsibility under the third category of Joint Criminal Enterprise for a crime that was committed beyond the common purpose of the

¹³ RUF Trial Chamber Judgment *supra* note 12 at ¶ 257-259; *see also* Case 001 Trial Chamber Judgment, *supra* note 5 at ¶508.

¹⁴ Prosecutor v. Ndahimana, Case No. ICTR-01-68-T, ¶810, ICTR Trial Chamber Judgment, 30 December 2011. [*hereinafter* Ndahimana Judgment].

¹⁵ *Id.* *see generally* PRINCIPALS OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE (Eds Karim A. A. Khan, Caroline Buisman, Christopher Gosnell) (2010); CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT. Eds John Jackson, Mazimo Langer and Peter Tillers (2008).

¹⁶ RUF Trial Chamber Judgment *supra* note 12 at ¶266; *see also* Case 001 Trial Chamber Judgment, *supra* note 5 at ¶ 509.

Joint Criminal Enterprise, but which was “a natural and foreseeable consequence thereof”, arises only if the Prosecution proves that the Accused had sufficient knowledge that the additional crime was a natural and foreseeable consequence to him in particular. The Accused must also know that the crime which was not part of the common purpose, but which was nevertheless a natural and foreseeable consequence of it, might be perpetrated by a member of the group (or by a person used by the Accused or another member of the group). The Accused must “willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.” The Chamber can only find that the Accused has the requisite intent “if this is the only reasonable inference on the evidence.”¹⁷

Having found Joint Criminal Enterprise was implicitly recognized in Article 29 of the ECCC Laws and that the concept of Joint Criminal Enterprise was found in customary international law at the time of the crimes, the Court ruled that the Accused in Case 001 was found guilty under a theory of Joint Criminal Enterprise.¹⁸ However the Chamber conducted only Joint Criminal Enterprise in its basic and systematic form was applicable and found in customary international law during 1975 and 1979. Therefore the Chamber held that the extended version of Joint Criminal Enterprise would not be applicable in the ECCC pursuant to Article 29.¹⁹

Trial Chamber’s in the *ad hoc* Tribunals “may admit all relevant evidence.”²⁰ Trial judges have wide discretion to determine credibility of evidence. Mere inconsistencies in testimony will not undermine a witnesses’ credibility.²¹ Notably, the Trial Chamber’s tend to prefer oral testimony.²² Hearsay evidence is admissible. However, the Chamber is aware of the

¹⁷ RUF Trial Chamber Judgment *supra* note 12 at ¶266; *see also* Case 001, Trial Chamber Judgment, *supra* note 5 at ¶509.

¹⁸ Case 001, Trial Chamber Judgment, *supra* note 5 at ¶¶514-516.

¹⁹ *Id.* at ¶¶512-513

²⁰ RUF Trial Chamber Judgment, *supra* at ¶474.

²¹ *Id.* at ¶489.

²² *Id.* at ¶491.

deficiencies of hearsay evidence because it cannot be cross-examined.²³ For that reason the weight attached to hearsay evidence is usually less than direct testimony subject to cross examination.²⁴ Additionally, accomplice evidence is regarded with caution – specifically, if the accomplice could have an ulterior motive – especially if there is a promise not to be charged.²⁵

²³ *Id.* at ¶495.

²⁴ *Id.* at ¶496.

²⁵ *Id.* at ¶499.

III. TYPES OF EVIDENCE USED TO PROVE JOINT CRIMINAL ENTERPRISE

A. ACCUSED TESTIMONY

Accused testimony was important evidence in proving all elements of the Joint Criminal Enterprise. All *Ad Hoc* Tribunals used the Accused testimony in its determinations of the existence and participation in the Joint Criminal Enterprise by the Accused. Often evidence went to the Accused position within the common plan. However, certain Accused testified directly to their participation in the criminal activity.

i. Extraordinary Chambers in the Courts of Cambodia

In Case-001 at the ECCC the testimony from the Accused Duch, was instrumental in proving his criminal liability. Dutch testimony, both written and oral, established his liability under the systematic form of Joint Criminal Enterprise. In Case-001 the Accused agreed to the statements that he held a meeting to plan and establish S-21.²⁶ In the written records of interviews with Duch, he clearly establishes his role as Deputy of S-21, and the purpose of its establishment.²⁷ The nature and activities at S-21 were unquestionably a systematic form of Joint Criminal Enterprise.²⁸ The Accused testified he was responsible for training the interrogation techniques at S-21 and then reporting the information learned through interrogation.²⁹ This evidence fulfilled the element of the existence of a criminal plan. Specifically, “[a] concerted system of ill-treatment and torture was purposefully implemented in

²⁶ Case 001, Trial Chamber Judgment, *supra* note 5.

²⁷ *Id.*

²⁸ *Id.* at ¶514.

²⁹ *Id.*

order to subjugate detainees and obtain their confessions during interrogations.”³⁰ Duch further testified that he oversaw interrogation of important prisoners and that he was “ultimately responsible for S21.”³¹

ii. Special Court For Sierra Leone

In the RUF Case at the SCSL Accused testimony was used as evidence to demonstrate the element of a plurality of persons.³² For example it was testimony from Issa Sesay and Morris Kallon that contributed to the Trial Court’s finding that they were both high-ranking members of the RUF and participated in the Joint Criminal Enterprise.³³

iii. International Criminal Tribunal for Rwanda

Accused testimony combined with conflicting witness statements can establish liability under a Joint Criminal Enterprise. For example, the Accused Edouard Karemera testified about the drafting of documents and his presence at meetings. Although the Accused denied the findings of the Court of what took place at those meetings his testimony was seen as evidence demonstrating his participation in the planning of the common plan.³⁴

iv. International Criminal Tribunal for the Former Yugoslavia

The Accused testimony bolstered the courts foundation in determining the existence of Joint Criminal Enterprise and the Accused’s participation in the plan. For example in the *Simic*

³⁰ Case 001, Trial Chamber Judgment, *supra* note 5 at ¶514.

³¹ *Id.* at ¶128.

³² Transcript of 22 June 2007, Issa Sesay, pp. 30, 40-41 (SCSL); Transcript of 11 April 2008, Morris Kallon, p. 102 (SCSL).

³³ RUF Trial Chamber Judgment, *supra* note 12 at ¶¶1986-87.

³⁴ Prosecutor v. Karamara, Case No. ICTR-98-44-T, ¶¶7691-93, ICTR Trial Chamber Judgment, 2 February 2012. [*hereinafter* Karamara Judgment].

case, it was the testimony of the Accused that demonstrated a command of tactical groups. Moreover it helped demonstrate troop movements so that the court could develop the timeframe in which the Joint Criminal Enterprise came into existence.³⁵ As in the ECCC it was the Accused own testimony that was the evidence of his position of “strong influence and control.”³⁶ Thus demonstrating his participation in the Joint Criminal Enterprise.

B. INSIDER WITNESS TESTIMONY

For the purposes of the section insider witness testimony will refer to testimony by witnesses involved in the military structure, the Joint Criminal Enterprise or accomplices to the crimes. Often insider witness testimony came from subordinates. Evidence by insiders was used to prove the existence of a Joint Criminal Enterprise and the Accused’s participation. Often insider witnesses provided the evidence necessary for the court to find the existence of a common plan for two reasons. First, insiders were present at meetings discussing the common plan. Second, insiders were able to testify to the intent of the parties involved in the Joint Criminal Enterprise and the means in which their goals would be achieved.

i. Extraordinary Chambers in the Courts of Cambodia

Testimony from those classified as insider witnesses was used during Case 001.³⁷ For example in Case 001 insider witness testimony went to both the actus reus and mens rea of the

³⁵ The Prosecutor v. Simic, Tadic, Zaric, Case No: IT-95-9, ¶988, ICTY Trial Chamber Judgment, ICTY Trial Chamber, 17 October 2003. [*hereinafter* Simic Judgment].

³⁶ Simic Judgment, *supra* note 35 at ¶994. See also Prosecutor v. Krajisnik, Case No. IT-00-39-T, ¶914-916, 940, ICTY Trial Chamber Judgment, 27 September 2006 (discussing his position within the organization). [*hereinafter* Krajisnik Judgment].

³⁷ Case 001, Trial Chamber Judgment, *supra* note 5 at ¶132.

accused.³⁸ Insider witnesses produced evidence not only of the accused participation in the Joint Criminal Enterprise but his role.³⁹ For example, one witness stated specifically “[f]or the prisoners to be taken out or in there had to be an authorization from Duch who was the Chairman of S-21. Everything had to be done through him and with his authorization.”⁴⁰ Other insider witness testified “[a]t S-21, nobody ordered [the Accused]. It was only him who ordered other people [...] He could do all these things because at that location he was the top-most leader.”⁴¹

ii. Special Court for Sierra Leone

Insider witness testimony was used to describe the Accused’s participation in the mission to recapture and control Districts of Sierra Leone; this evidence was corroborated in part with defense witnesses’ recollection of events.⁴² Insider testimony was further used to demonstrate the AFRC/RUF’s use of the diamond mining within Sierra Leone as a source of income.⁴³

Witness testimony was used to identify the Accused as high ranking members of the RUF who were involved in the Joint Criminal Enterprise.⁴⁴ Moreover, insider witnesses described the relationships between the high ranking officials of the RUF,⁴⁵ involvement at meetings of the governing body of the junta, which proved participation.⁴⁶

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at ¶224.

⁴¹ *Id.* at ¶132.

⁴² RUF Trial Chamber Judgment *supra* note 12 at ¶1139.

⁴³ *Id.* at ¶1088.

⁴⁴ *Id.* at ¶1993.

⁴⁵ *Id.* at ¶¶1048-1053.

iii. International Criminal Tribunal for Rwanda

At the ICTR insider witness testimony was often referred to as accomplice witnesses.⁴⁷ Evidence from accomplices established both the position of the Accused in the alleged Joint Criminal Enterprise and their participation.⁴⁸ For example, in the *Ndahimana* case an accomplice testified that the Accused lead attack groups against the Tutsi refugees.⁴⁹ Moreover, in the *Karamara* case, witness testimony demonstrated the presence of the Accused at the meeting where the court found the formation of the joint plan.⁵⁰ The accomplice witnesses' testimonies were important evidence of the Accused position and participation.⁵¹

iv. International Criminal Tribunal for the Former Yugoslavia

Insider witnesses' testimonies, within the organized military structure, were important sources of evidence to the Courts findings of the Accused participation in the Joint Criminal Enterprise. For example, it was testimony from other members of the Crisis Staff that allowed for the Trial Chamber to find the Accused was present for the crimes charged.⁵² From the testimony of military leaders within the Joint Criminal Enterprise, the court was able to infer the Accused participation in the Joint Criminal Enterprise. Specifically, an insider witness testified

⁴⁶ *Id.* at ¶2004.

⁴⁷ *Ndahimana* Judgment *supra* note 14 at pg. 198.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Karamara* *supra* note 34 at ¶¶681-686.

⁵¹ *Id.* at ¶734.

⁵² *Simic* Judgment, *supra* note 35 at ¶989.

to the group's superiority in the region.⁵³ From the groups senior position and the crimes being committed by the group the Court found the only possible inference was the Accused intent to participate in common plan of persecution and cruel and inhumane treatment.⁵⁴

Testimony by fellow contributors to the Joint Criminal Enterprise, and insider witnesses was the evidence used to demonstrate the existence of meetings and the discussions that lead the court to find the existence of a common plan.⁵⁵ Many times the evidence was the testimony for co-Accused.⁵⁶

C. VICTIM TESTIMONY

Victim testimony was mainly used only in the Special Court for Sierra Leone as evidence of a Joint Criminal Enterprise. This was most likely due to the fact that only the SCSL specifically introduced witnesses as "Victim Testimony." Unlike the SCSL the ICTR did not specifically designate non-insider witness testimony as victim evidence. However, the witness evidence used in the ICTR to show the existence of a Joint Criminal Enterprise and the Accused participation often came from those that could be classified as victims. Many were present at the time of the crimes and were able to directly testimony to their observations.

i. Special Court for Sierra Leone

Victim evidence was important in establishing the Joint Criminal Enterprise in Sierra Leone because the objective was non-criminal, i.e., to pillage the natural resources of Sierra

⁵³ *Id.* at ¶1004.

⁵⁴ *Id.* See also Krajisnik *supra* note 36 at ¶950 (testifying to the Accused presence at the meeting and contribution of a way to bring the Muslim and Corat terrorist under the control of the Serbs.

⁵⁵ Simic *supra* note 35 at ¶¶166-189.

⁵⁶ See for example, *id.* at ¶¶314-17.

Leone. However, victim testimony demonstrated that the means of achieving this objective was criminal, thus imposing criminal liability on the Accused.

Direct evidence was given by victim witnesses that saw the attacks by the AFRC/RUF on town in Sierra Leone and the burning and pillaging of houses.⁵⁷ Victim witness who were forced to mine were used to show the RUF's diamond mining policies and use of Child Soldiers as laborers in the process.⁵⁸ Hearsay evidence from witnesses who collaborated in what they heard but were not present at the actual massacres was sufficient.⁵⁹

ii. International Criminal Tribunal for Rwanda

Trial Court found the evidence of witness testimony describing defendant as distributing guns and grenades and the encouragement of killings proved guilt under Joint Criminal Enterprise.⁶⁰ Further, the Trial Court was able to infer from witness testimony that because an Accused participated in a meeting with other members Joint Criminal Enterprise and then shortly after an attack took place, that the Accused was a member and had participated in the Joint Criminal Enterprise.⁶¹ Often hearsay evidence provided by the witnesses of the accused participation was deemed credible and helped prove the Accused's participation.⁶²

⁵⁷ RUF Trial Chamber Judgment *supra* note 12 at ¶¶993-1005.

⁵⁸ Transcript of 5 July 2005, TF1-035 p. 91-97. (SCSL); RUF Trial Chamber Judgment *supra* note 12 at ¶¶1664-1666; *see also* Transcript of 18 November 2005, TF1-045, pp. 59, 77-78 (SCSL).

⁵⁹ RUF Trial Chamber Judgment *supra* note 12 at ¶409.

⁶⁰ Simba Trial Judgment at ¶403. *See Generally* Beth Lyons, Tortured Law/Tortured "Justice" – Joint Criminal Enterprise in the Case of Aloys Simba (Oct. 2009).

⁶¹ Ndahimana Judgment, *supra* note 14 at pg. 199, ¶106.

⁶² *Id.* at pg. 20.

Moreover, witness testimony at the ICTR was evidence of the Accused shared intent in the Joint Criminal Enterprise. For example in the *Gatete* case a witness testified he heard the accused say “start working, and by working I mean kill the Tutsis.”⁶³ This testimony was corroborated by another witness.⁶⁴ The Trial Court specifically noted the consistency of the prosecution witnesses was significant.⁶⁵ In addition to collaborating evidence, the court drew inferences from the witness testimony. For example, finding from evidence in witness statements that the large-scale killings could only be part of a common plan because it would have required large-scale coordination and planning.⁶⁶

D. EXPERT TESTIMONY

Expert testimony and documents prepared by experts were used to find the existence of Joint Criminal Enterprise in the *ad hoc* Tribunals. Experts were able to testify to the organization of the Joint Criminal Enterprise and the motivations behind the organizations.

i. Extraordinary Chambers in the Courts of Cambodia

In Case 001 at the ECCC books written by experts,⁶⁷ expert testimony⁶⁸ were used to prove criminal liability under a systematic form of Joint Criminal Enterprise.

⁶³ Prosecutor v. Gatete, Case No. ICTR2000-61-T, ¶590, ICTR Trial Chamber Judgment, 31 March 2011. [*hereinafter* Gatete Judgment].

⁶⁴ *Id.* at ¶¶110-112.

⁶⁵ *Id.* at ¶¶127-129.

⁶⁶ *Id.* at ¶¶621, 624.

⁶⁷ Case 001, Trial Chamber Judgment, *supra* note 5 (referencing “Voices from S-21 – Terror and History in Pol Pot’s Secret Prison” (book) by David Chandler, at pp. 35-36).

⁶⁸ Case 001, Trial Chamber Judgment, *supra* note 5 at ¶149 (citing expert David Chandler who stated “that the archives of S-21 were likely the largest in the Santebal apparatus and were, under the leadership of the Accused, kept in a particularly professional way and in great detail. The

ii. International Criminal Tribunal for Rwanda

In the *Mugenzi* case at the ICTR the prosecution lead expert witness testimony to prove elements of a Joint Criminal Enterprise.⁶⁹ The expert in history and human rights violations testified to the motivations behind historical events.⁷⁰ Further she testified to the political system and atmosphere within Rwanda.⁷¹ Additionally, the expert testified to her personal opinions as to why actions were taken by the Accused.⁷²

E. HARD EVIDENCE

For the purpose of this section hard evidence will refer to exhibits produced in the forms of documents, articles, radio transcripts, media transcripts and other forms of non-testimonial evidence. Hard evidence was instrumental in finding criminal liability under a Joint Criminal Enterprise. Documents allowed the Courts to find the existence of a common plan, the Accused participation in the common plan and a plurality of persons. Admission of hard evidence was an

archives discovered at S-21 included over 4,000 confessions, hundreds of pages of administrative documents, rosters of detainees, lists of executions, study session documents and self-criticism materials. In CHANDLER's opinion, the efficiency with which documents were processed at S-21 reflected both a desire on the part of the Accused to demonstrate the quality of the work being carried out under his supervision, as well as an attempt to respond to the needs of the CPK leadership. He further added that "[a] prison of this dimensions had no precedent in Cambodian history that I am aware of, and an interrogation facility of this thoroughness [...] capable of producing such masses of documents, was unprecedented in [the] Cambodian past as well"").

⁶⁹ Prosecutor v. Mugenzi. Case No. ICTR-99-50-T, ¶1196, ICTR Trial Chamber Judgment, 30 September 2011.

⁷⁰ *Id.* at ¶1197.

⁷¹ *Id.*

⁷² *Id.* at ¶¶1198, 1199.

avenue to impeach the credibility of Accused testimony as to the criminal intent of the Joint Criminal Enterprise. Additionally, hard evidence was used to corroborate testimonial evidence.

i. Extraordinary Chambers in the Courts of Cambodia

In Case 001 Evidence of in the form of documents of prisoner list helped prove the systematic form of Joint Criminal Enterprise.⁷³ Documentary evidence in the form of written orders by the Accused while at S-21 was also used.⁷⁴

ii. Special Court for Sierra Leone

A No Peace without Justice report mapping the conflict was used to show the RUF's means to control were through massive human rights abuses and violence against the civilian population.⁷⁵ Further, reports written by the Accused were evidence of their position within the organization.⁷⁶

iii. International Criminal Tribunal for Rwanda

In the *Gatete* case personal identification sheets entered into evidence by the prosecution were used as evidence to show what groups of people were the subject of the Accused attacks.⁷⁷ In the *Karamara* case, evidence of a radio *communiqué* was used to demonstrate a meeting had taken place with senior officials, including the Accused.⁷⁸ The *communiqué* was signed by the

⁷³ See Case 001, Trial Chamber Judgment, *supra* note 5 at ¶147 (referring to the “Revised S-21 Prisoner List”)

⁷⁴ *Id.*

⁷⁵ RUF Trial Chamber Judgment *supra* note 12 at ¶1980.

⁷⁶ *Id.* at ¶1994 (citing footnote 3730, Exhibit 36).

⁷⁷ Gatete Judgment, *supra* note 63 at ¶¶244-245.

⁷⁸ Karamara Judgment, *supra* note 34 at ¶675.

Accused.⁷⁹ Multiple radio transcripts were entered into evidence upon which the court used to determine various elements of the Joint Criminal Enterprise⁸⁰.

iv. International Criminal Tribunal for the Former Yugoslavia

Document evidence demonstrating how the Accused and other members of the Joint Criminal Enterprise issued orders and decisions was used to prove the existence of a common plan in the *Simic* case.⁸¹ These documents extended to instructions on how their staff was to operate.⁸² Military documents issuing orders and setting up chains of command and organizations were evidence of a common plan and the participation of the Accused.⁸³ The Court specifically noted “the decisions and orders...provided for the legal, political and social framework in which the other participants of the Joint Criminal Enterprise worked and from which they profited.”⁸⁴

Reports to military command were evidence that the Accused was aware of crimes being carried out with the common plan. For example, the Court found a Command Report disclosing the Accused attendance at a meeting where crimes against Muslims were discussed. From this

⁷⁹ Karamara, *supra* note 34 at ¶675.

⁸⁰ *Id.* at ¶864.

⁸¹ *Simic supra* note 35 at ¶986.

⁸² *Id.*

⁸³ *Id.* at ¶991.

⁸⁴ *Id.* at ¶992. (describing orders and implementations of temporary housing, sale of alcohol, feeding of farmers and the assignment of residential spaces).

the court inferred the Accused “was in a position to express persuasive options at meetings with principal actors in the Joint Criminal Enterprise.”⁸⁵

Transcripts to television appearances and articles written by the Accused demonstrated to the Court the political views and strategic goals of the Accused. The court used this evidence in finding the Accused shared the intent of other members of the Joint Criminal Enterprise.⁸⁶ The Court in one instance found evidence of a letter written to the UN Secretary-General and others as intentional ploy to mislead the international community or crimes being committed within the Joint Criminal Enterprise.⁸⁷

F. SPECIFICITY OF IN PLEADING JOINT CRIMINAL ENTERPRISE

The Prosecutors should be specific in its pleadings to which form of Joint Criminal Enterprise it is asking the court to find liability. Moreover, specificity will curtail the Accused’s ability to appeal for lack of proper notice or specificity. For example, In the Bikindi Case the prosecution alleged criminal liability through Joint Criminal Enterprise based on Article 6(1) of the Court’s Statute. However the court found the prosecution failed to specifically allege Joint Criminal Enterprise in its indictment. Further, the court found the failed to produce any evidence of the Accused participation in a Joint Criminal Enterprise.⁸⁸ Specifically no evidence was put forth demonstrating the Accused shared a common plan with other members of the Joint

⁸⁵ *Id.* at ¶995

⁸⁶ Krajisnik *supra* note 36 at ¶¶897-899, 904 (referencing a document entitled “Instructions for the Organisation and Activity of the Organs of the Serbian People in Bosnia and Herzegovina in Extraordinary Circumstance” demonstrating the Accused shared intent for the common plan).

⁸⁷ *Id.* at ¶958.

⁸⁸ Prosecutor v. Bikindi, Case No. ICTR-01-72-T, ¶400, ICTR Trial Chamber Judgment, 2 December 2008. *see generally* NANCY ARMOUR COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

Criminal Enterprise. The Court noted that despite some inferences from the evidence could be that the accused collaborated or agreed to “incite people to commit genocide – it [was] not the only inference that [could] be drawn from the circumstances.”⁸⁹ Therefore, court could not find the Accused participation in a Joint Criminal Enterprise. Further in the *Gacumbitsi*⁹⁰ and *Imanishimwe*⁹¹ cases the Trial Chamber would not consider evidence demonstrating criminal liability through Joint Criminal Enterprise because the Prosecution failed to adequately plead Joint Criminal Enterprise as a mode of liability.

Within the AFRC case in the SCSL the prosecution allege individual responsibility for all three defendants under a theory of joint criminal enterprise.⁹² However the Trial Chamber Decided that joint criminal enterprise was defectively pleaded in the indictment.⁹³ Therefore the prosecution could not rely on Joint Criminal Enterprise as mode of liability.⁹⁴ On appeal the

⁸⁹ *Id.* at ¶402.

⁹⁰ Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, ¶284, ICTR Trial Chamber Judgment, 17 June 2004. *see also* Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, ¶165, ICTR Appeals Chamber Judgment, 7 July 2006.

⁹¹ Prosecutor v. Imanishimwe, Case No. ICTR-99-46-A, ICTR Trial Chamber Judgment, 25 February 2004. *See also* Prosecutor v. Imanishimwe, Case No. ICTR-99-46-A, ¶¶39-45, ICTR Appeal Chamber Judgment, 7 July 2006.

⁹² Prosecutor v. Brima, Kamara, Kanu, Case no. SCSL-04-16-T, SCSL Trial Chamber Judgment, 20 June 2007. [*hereinafter* AFRC Trial Chamber Judgment]; Prosecutor v. Brima, Kamara, Kanu, Case no. SCSL-04-16-T, SCSL Appeal Chamber Judgment, 22 February 2008. [*hereinafter* AFRC Appeals Chamber Judgment].

⁹³ AFRC Trial Chamber Judgment, *supra* note 92 at ¶85.

⁹⁴ *Id.*

Appeals Chamber found that joint criminal enterprise was not defectively pleaded, but that the in the interest of justice no factual findings on Joint Criminal Enterprise need be made.⁹⁵

⁹⁵ AFRC Appeals Chamber Judgment, *supra* at ¶87.

IV. CONCLUSION

The Office of the Co-Prosecutors at the ECCC has a wide variety of types of evidence it can choose from, from what it has available, to demonstrate to the Trial Chamber that the Accused is criminally liability under a theory of Joint Criminal Enterprise. Two main types of evidence have been used to prove criminal liability through Joint Criminal Enterprise.

First, is testimonial evidence. Testimonial evidence has been used in the SCSL, ICTY, ICTR and Case 001 at the ECCC to prove all necessary elements of Joint Criminal Enterprise. Most important in proving the existence of a Joint Criminal Enterprise was testimony from insiders or co-Accused. Often the Accused own admissions in the form or written and oral testimony would allow the court to infer the Accused's participation in the Joint Criminal Enterprise.

Other forms of testimonial evidence used to prove Joint Criminal Enterprise was testimony from experts and victims. The expert testimony was used by the court mainly to establish the existence of a criminal plan and the motivations behind that plan. Victim evidence was used to demonstrate both, direct participation by the Accused, and criminal means of carrying out the Joint Criminal Enterprise.

The second category of evidence lead to prove liability through Joint Criminal Enterprise was hard evidence. Documents in the form of military orders, media articles and radio transcripts all were used to prove every element of Joint Criminal Enterprise. Hard evidence was important in establishing military command and the existence of a common plan. While media documents such as radio broadcast and news articles were used to prove the intent requirements of Joint Criminal Enterprise

In conclusion, it is necessary to provide a wide variety of evidence to prove criminal liability under a theory of Joint Criminal Enterprise. Further, collaboration among evidence is very important to judges in making determinations of the existence of all elements of Joint Criminal Enterprise. Therefore, multiple varieties of evidence for the same proposition are necessary for the Court to find criminal liability under either the basic or systematic forms of Joint Criminal Enterprise.