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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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APPEALS CHAMBER

Before: Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun, presiding
Judge Andréia Vaz
Judge Carmel Agius

Registrar: Adama Dieng

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THE PROSECUTOR

V.

JEAN-BAPTISTE GATETE

Case No. ICTR-00-61-A

PROSECUTION'S BRIEF IN REPLY

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PART I – OVERVIEW

1. At issue in this appeal is the Trial Chamber’s failure to convict Gatete of conspiracy to commit genocide, although it found him responsible for the crimes of genocide, conspiracy to commit genocide, extermination and murder.¹ These findings were based on the same criminal conduct, namely Gatete’s prior planning of and his leading role in the killings of hundreds, and possibly thousands, of Tutsis at three different crime scenes over a small period of 6 days in April 1994.² The Trial Chamber held that convictions for genocide and conspiracy to commit genocide were impermissible, and only convicted him of genocide and extermination as a crime against humanity.³ In doing so, it sentenced Gatete to life imprisonment, emphasising that his conduct “led to a loss of life on a massive scale, and caused immense suffering” and that each of the crimes of which he is convicted “are deserving of the maximum sentence.”⁴

2. The Prosecution appealed the finding of the Trial Chamber not to enter a conviction for conspiracy to commit genocide, and requested the Appeals Chamber to correct this error of law by entering an additional conviction for conspiracy.⁵ On 4 November 2011, Gatete filed his Respondent’s Brief, opposing the Prosecution’s appeal.⁶ Pursuant to Rule 113 of the Rules of Procedure and Evidence, the Prosecution now files its Brief in Reply.

3. In short, the Appeals Chamber should reject all of Gatete’s submissions advanced in his Respondent’s Brief. Gatete fails to respond in any direct manner to the content of the Prosecution’s appeal. He merely claims that the landmark

¹ See Judgement, paras. 581–651, 662.

² Gatete was found responsible for the killings of Tutsis at Rwankuba sector on 7 April 1994, Kiziguro parish on 11 April 1994, and Mukarange parish on 12 April 1994. See Judgement, paras. 151–153; 341–342; 417; 581–651. See also Prosecution’s Appellant’s Brief, paras. 6–12 (“Facts Relevant to the Appeal”).

³ Judgement, para. 668 (Verdict); paras. 654–662. The Trial Chamber held, pursuant to settled Appeals Chamber’s jurisprudence, that it is not permissible to convict Gatete of both extermination and murder as a crime against humanity, and only entered a conviction for extermination. See Judgement, paras. 665–667.

⁴ Judgement, paras. 675, 682, 683.

⁵ Prosecution’s Notice of Appeal; Prosecution’s Appellant’s Brief. Because Gatete has already been sentenced to life imprisonment, the Prosecution does not request an increase in Gatete’s sentence (Judgement paras. 669–686). See Prosecution’s Notice of Appeal, para. 3; Prosecution’s Appellant’s Brief, paras. 38, 41.

⁶ Gatete’s Respondent’s Brief, para. 5.

test laid down by the Appeals Chamber in *Čelebići*, as endorsed by the ICTR Appeals Chamber in *Musema*,⁷ was not binding in the case,⁸ and that the Trial Chamber correctly relied on the *Musema* and *Popović* Trial Chamber findings.⁹ He thus ignores all binding and consistent Appeals Chamber jurisprudence since the year 2001, and confines his entire argument to these two non-binding Trial Chamber Judgements, of which one is dated (*Musema* at the ICTR) and one is flawed (*Popović* at the ICTY).¹⁰ Apart from his repetition of incorrect Trial Chamber findings, Gatete does not advance any considered legal or factual submission that may assist in deciding this appeal.

PART II – SUBMISSIONS

4. Gatete fails to raise any new arguments on the central issue of this appeal – the issue of cumulative convictions for conspiracy to commit genocide and genocide. Therefore, the Prosecution will only respond to Gatete’s submission on entering an additional conviction for conspiracy, and to his submissions based on incorrect statements of facts and law, including his understanding of appellate jurisprudence. For the rest, the Prosecution relies on all its submissions made in its Appellant’s Brief.

(i) The Appeals Chamber can enter an additional conviction following a proper application of the *Čelebići* test

5. Gatete claims that a “new” conviction on appeal would deny his right to review by a higher Tribunal because he did not appeal the findings on conspiracy to commit genocide.¹¹ He submits that he “refrained from lodging such an Appeal as none of the errors committed by the Trial Chamber in relation to conspiracy would have invalidated the verdict, no conviction having been pronounced.”¹²

⁷ *Musema* Appeal Judgement, paras. 358–369.

⁸ Gatete’s Respondent’s Brief, paras. 9–11.

⁹ Gatete’s Respondent’s Brief, paras. 12–19.

¹⁰ See also Prosecution’s Appellant’s Brief, paras. 32–36.

¹¹ Gatete’s Respondent’s Brief, paras. 6–7.

¹² Gatete’s Respondent’s Brief, para. 6.

6. Because Gatete's guilt for the crime of conspiracy to commit genocide was already established at trial,¹³ there is no question of entering a "new" conviction on appeal, in the sense advanced by Gatete. His claim ignores that he was, in fact, found guilty of the crime of conspiracy to commit genocide for three separate crime-sites – Rwankuba sector on 7 April 1994, Kiziguro parish on 11 April 1994 and Mukarange parish on 12 April 1994.¹⁴ It was only after Gatete's guilt for that crime was established beyond reasonable doubt that the Trial Chamber failed to follow this finding to its logical conclusion, i.e., to enter a separate additional conviction for conspiracy.¹⁵ The Prosecution's appeal seeks only to enter the additional conviction for conspiracy, for which the Trial Chamber has already adjudicated Gatete's guilt. The Chamber declined to enter such a conviction based on its erroneous application of the *Čelebići* test.¹⁶

7. In similar cases, the Appeals Chamber has corrected the Trial Chambers' application of the *Čelebići* test on cumulative convictions, and entered additional convictions on appeal for separate crimes.¹⁷ Gatete's case is no different.

8. Further, Gatete cannot realistically assert any prejudice to him from entering an additional conviction for conspiracy to commit genocide on appeal.

¹³ Judgement, paras. 616–629.

¹⁴ Judgement, paras. 616–629.

¹⁵ Judgement, para. 662.

¹⁶ Prosecution's Appellant's Brief, paras. 23-38.

¹⁷ In *Krstić*, the Appeals Chamber found that the Trial Chamber erred in finding that extermination and persecution as crimes against humanity were impermissibly cumulative with the crime of genocide, and entered additional convictions for both extermination and persecution. (*Krstić* Appeal Judgement, paras. 219–229, 269, Disposition). Likewise, in *Stakić*, the Appeals Chamber found that cumulative convictions for the crimes of murder, deportation, other inhumane acts (forcible transfer) and extermination as crimes against humanity and persecutions as a crime against humanity were permissible. Subsequently, it entered additional convictions on appeal for deportation and other inhumane acts (forcible transfer), and confirmed the conviction for extermination. However, it did not enter an additional conviction for the crime of murder, as this crime is impermissibly cumulative with the crime of extermination (*Stakić* Appeal Judgement, paras. 359–367, Disposition). Again, in *Strugar*, based on an application of the *Čelebići* test on cumulative convictions, the Appeals Chamber entered additional convictions for the crimes of military devastation not justified by military necessity and of unlawful attacks on civilian objects as violations of laws or customs of war (*Strugar* Appeal Judgement, paras. 326–332, Disposition). At the ICTR, the Appeals Chamber has, on several occasions, not been required to enter additional convictions on appeal because the respective Trial Chambers had properly applied the *Čelebići* test on cumulative convictions to enter separate convictions. Nevertheless, the Appeals Chamber has endorsed the entering of separate convictions for separate crimes. See e.g., *Ntagerura et al.* Appeal Judgement, paras. 425–427; *Nahimana et al.* Appeal Judgement, paras. 1019–1020, 1024–1036.

He had ample opportunity to challenge the Trial Chamber's adjudication of his guilt for conspiracy but failed to do so.¹⁸ Gatete had five months after the filing of the Prosecution's own Notice of Appeal and three months after the filing of the Prosecution's Appellant's Brief to consider the issue of cumulative convictions and decide to appeal the finding of guilt for conspiracy, if need be, by seeking leave from the Appeals Chamber. If Gatete wished, he could have included this issue in his appeal at any stage prior to filing his Respondent's Brief, but he chose not to do so. His failure to do so belies his present claim that he allegedly is unable to challenge on appeal the Trial Chamber's subsidiary factual findings.

9. In fact, as even Gatete notes,¹⁹ his appeal does contest the sufficiency of evidence grounding the Trial Chamber's adjudication of his guilt for conspiracy. Thus, the Prosecution's appeal from the Trial Chamber's failure to enter an additional conviction on this basis does not result in any prejudice to him.

10. Additionally, accepting Gatete's argument would imply a loss of the Prosecution's right to appeal as guaranteed by Article 24 of the Statute. The Statute allows the Prosecution to challenge errors of fact and errors of law on appeal, including those made in relation to cumulative convictions. A consequence of that right is the possibility of entering additional convictions, as the Appeals Chamber has done on many occasions, including, as shown above, where the Prosecution challenges the Trial Chamber's failure to enter an additional conviction based on the erroneous application of the *Čelebići* test.²⁰

(ii) Gatete misunderstands the law on cumulative convictions and its application to the facts of this case

11. Gatete's arguments are based on several incorrect interpretations of the law and facts in this case.

12. Firstly, when claiming that the *Čelebići* test does not apply to the case, he misunderstands and misapplies this test, especially the two-step analysis

¹⁸ Gatete's Notice of Appeal and Gatete's Amended Notice of Appeal.

¹⁹ Gatete's Respondent's Brief, para. 6.

²⁰ See *supra*, footnote nr. 17.

enshrined in the test.²¹ In particular, Gatete confuses the underlying conduct (acts or omissions) with the legal elements of the crimes. In this regard, as the Appeals Chamber has found, the first step is to determine whether the two crimes are based on the same underlying conduct (acts or omissions). If the crimes are based on the same underlying conduct, the second step is whether that same conduct violates two distinct statutory provisions in terms of their legal elements.²² This two-step analysis cannot be collapsed into one, contrary to Gatete's submission when he follows the holding of the *Popović* Trial Chamber. Both the *Popović* Trial Chamber and this Trial Chamber erred in the same way, by applying a circular and erroneous reasoning.²³

13. In conflating the underlying conduct and the legal elements of the crimes in question, Gatete is also inconsistent in his understanding of the facts of this case. While he sometimes concedes that conspiracy and genocide are based *in casu* on the same acts and are part of the "same set of facts",²⁴ he also claims that "[t]he underlying act of conspiracy is the inferred agreement and is necessarily distinct, by essence, of the subsequent acts of participation to the genocide".²⁵ This confusion is based – once again – on an incorrect application of and a departure from the *Čelebići* test. Apart from professing that conspiracy is "unique in nature",²⁶ Gatete fails to support his attempted departure from settled appellate jurisprudence and practice with any legal authority.

14. As argued in the Prosecution's Appellant's Brief, the Trial Chamber's findings clearly confirm that the crimes of conspiracy and genocide are based on the same underlying conduct and that the first-step of the *Čelebići* test had been duly satisfied.²⁷ Additionally, the second step of the *Čelebići* test is satisfied.

²¹ Gatete's Respondent's Brief, paras. 9–11.

²² *Delalić et al.* Appeal Judgement, para. 412; *Kordić and Čerkez* Appeal Judgement, para. 1033; *Musema* Appeal Judgement, para. 363; *Nahimana et al.* Appeal Judgement, para. 1020. See also Prosecution's Appellant's Brief, paras. 16–22.

²³ Judgement, para. 654; *Popović* Trial Judgement, para. 2118. See Prosecution's Appellant's Brief, paras. 27–28.

²⁴ Gatete's Respondent's Brief, paras. 10, 14.

²⁵ Gatete's Respondent's Brief, para. 10.

²⁶ Gatete's Respondent's Brief, para. 11.

²⁷ Prosecution's Appellant's Brief, paras. 6–12; 23–29. See also Judgement, paras. 585–608; 617–629, 652, 654.

The Trial Chamber rightly stated that “[w]hile the crime of genocide requires one of the enumerated acts in Article 2 (2) to have been committed, the crime of conspiracy to commit genocide merely requires the act of entering into an agreement to commit genocide.”²⁸ Based upon a proper application of the *Čelebići* test, separate convictions should have been entered for these two “materially distinct” crimes.

15. This approach has also been endorsed by the ICTR Trial Chambers post-*Čelebići* when called upon to tackle the issue of whether to enter separate convictions for genocide and conspiracy as distinct crimes. These Chambers found in practice that convictions for both conspiracy and genocide could be entered.²⁹ Such a finding is the correct application of the Appeals Chamber’s jurisprudence.

16. Secondly, Gatete incorrectly states that the Trial Chamber had the discretion to rely on the *Musema* and *Popović* Trial Judgements, when the underlying conduct for genocide and conspiracy is the same.³⁰ However, as the Appeals Chamber has stated, when the underlying conduct is the same, trial chambers must strictly apply the *Čelebići* test, and are not permitted any discretion in this regard.³¹ Once again, Gatete ignores well-settled Appeals Chamber jurisprudence.

17. In any event, contrary to Gatete’s submissions,³² both *Musema* and *Popović* Trial Judgements were incorrectly decided and are not relevant to this analysis.³³ Gatete selectively claims that the *Musema* Trial Judgement was undisturbed on appeal. He fails to mention, however, that there was ultimately

²⁸ Judgement, paras. 654, 655. See also Prosecution’s Appellant’s Brief, para. 26.

²⁹ See *Niyitegeka* Trial Judgement, para. 480; *Niyitegeka* Appeal Judgement, para. 270; *Nahimana et al.* Trial Judgement, paras. 1043, citing *Musema* Appeal Judgement, paras. 361–363. Additionally, although *Kambanda* was decided prior to *Čelebići*, convictions were entered for both crimes in that case (*Kambanda* Trial Judgement, paras. 40 (1) and (2); p. 27 (Verdict); *Kambanda* Appeal Judgement, Disposition). The issue was rendered moot before the *Kajelijeli* Trial Chamber because the conspiracy count was not established (*Kajelijeli* Trial Judgement, paras. 789–793, 798; see generally *Kajelijeli* Appeal Judgement).

³⁰ Gatete’s Respondent’s Brief, paras. 13–14.

³¹ *Stakić* Appeal Judgement, para. 358; *Strugar* Appeal Judgement, para. 324. See also Prosecution’s Appellant’s Brief, paras. 30–32.

³² Gatete’s Respondent’s Brief, paras. 12–19.

³³ See also Prosecution’s Appellant’s Brief, paras. 33–35.

no finding of conspiracy at trial because the Trial Chamber had principally found that “the Prosecutor has neither clearly alleged, nor, above all, adduced evidence that Musema, indeed, conspired with other persons to commit genocide and that he and such persons reached an agreement to act to that end.”³⁴ It was this finding, along with the absence of a Prosecution appeal in the case challenging it, which led to the incorrect law remaining unchallenged on appeal. The *Musema* Appeals Chamber thus did not have the opportunity to apply the *Čelebići* test to the crimes of conspiracy and genocide. Moreover, the *Musema* Trial Judgement cannot be good law when the *Musema* Appeals Chamber itself endorsed the general application of the *Čelebići* test to cumulative convictions for crimes with the same underlying conduct.³⁵

18. The *Musema* Trial Judgement was also internally inconsistent in its analysis of cumulative convictions for conspiracy and genocide. While, on the one hand, it noted that, according to the *Travaux Préparatoires* of the Genocide Convention, the concept of conspiracy relied upon the Anglo-Saxon doctrine of conspiracy or common law,³⁶ on the other hand, it ignored that very drafting intent and origin of the Convention. It instead considered the different concept of conspiracy in civil law and then wrongly concluded that cumulative convictions for genocide and conspiracy were not possible.³⁷ Because the *Popović* Trial Judgement relied on the pre-*Čelebići* approach advanced in the *Musema* Trial Judgement, it is equally irrelevant to the analysis for the same reasons as *Musema*.

19. Thirdly, Gatete misrepresents the principle in *Pinkerton* by stating that it “show[ed] that whether or not the offences may accumulate is a legislative decision.”³⁸ However, *Pinkerton* does not stand for this principle. Instead,

³⁴ *Musema* Trial Judgement, paras. 940–941.

³⁵ *Musema* Appeal Judgement, paras. 358–369. See also Roman Boed, Current Developments in the Jurisprudence of the International Criminal Tribunal for Rwanda, *International Criminal Law Review* 3, 2003, p. 172–174, stating that the ICTR Appeals Chamber in *Musema* confirmed the applicability of the *Čelebići* test to cumulative convictions in ICTR cases, to the exclusion of all other possible tests identified in the earlier jurisprudence of the Tribunal.

³⁶ *Musema* Trial Judgement, para. 187.

³⁷ *Musema* Trial Judgement, paras. 189, 191, 196, 198.

³⁸ Gatete’s Respondent’s Brief, para. 16; *a contrario Pinkerton et al. v. U.S.*, 328 U.S. 640, 643 (1946) (U.S. Supreme Court). It is noteworthy that Gatete does not challenge the other case cited

according to the *Pinkerton* principle, the common law rule is that substantive offences may not be merged with conspiracy. In the same breath, it held that the commission of the substantive offence and a conspiracy to commit it are separate and distinct offences. *Pinkerton* did not rule on the power of the legislature, contrary to Gatete's submission. That is clear from a plain reading of the decision. Gatete misdirects the Appeals Chamber, by selectively quoting a non-holding in the case.

20. Moreover, the United States Supreme Court's holding in *Pinkerton* on simultaneous convictions for both conspiracy and the substantive offence was subsequently endorsed by other courts, including by the Supreme Court itself in *Iannelli et al. v. United States*.³⁹ In that case, the Supreme Court even found that the *Blockburger* test on cumulative convictions – which provided the framework for the *Čelebići* test before this Tribunal⁴⁰ – would be satisfied in the case of conspiracy and the substantive offence, because “[t]he essence of the crime of conspiracy is agreement, an element not contained in the [substantive] offence”.⁴¹ A similar reasoning should apply to convictions for conspiracy and genocide before this Tribunal.⁴²

21. Fourthly, Gatete suggests that the “*travaux préparatoires* of the Genocide Convention are clear that the legislators did not intend for the offenses (*sic*) to be cumulative.”⁴³ This is wrong. In fact, as acknowledged in *Popović*, the *Travaux Préparatoires* did not directly discuss or endorse the possibility of alternate

in footnote 92 of the Prosecution's Appellant's Brief, which stands for the same principle as *Pinkerton*.

³⁹ *Iannelli et al. v. U.S.*, 420 U.S. 770, 777 (1975) (U.S. Supreme Court). See also *United States v. Coulter*, 953 F.2d 1388 (U.S. Court of Appeals, 9th Cir. 1992); *United States v. McCullah*, 76 F.3d 1087, sections 38–39 (U.S. Court of Appeals, 10th Cir. 1996); *United States v. Ambers*, 85 F.3d 173, sections 6–7 (U.S. Court of Appeals, 4th Cir. 1996); *United States v. Mothersill*, 87 F.3d 1214, sections 4–5 (U.S. Court of Appeals, 11th Cir. 1996).

⁴⁰ *Delalić et al.* Appeal Judgement, paras. 409, 412, 413.

⁴¹ *Iannelli et al. v. U.S.*, 420 U.S. 770, 785, footnote 17 (1975) (U.S. Supreme Court) (addition added) See also *United States v. Rivera-Ramirez*, 911 F.2d 739, section I.2. and II (U.S. Court of Appeals, 9th Cir. 1990), endorsing *United States v. Wylie*, stating that “a substantive charge and a conspiracy charge based on the substantive charge are separate offenses under the *Blockburger* test because each requires proof of facts the other does not—conspiracy requires proof of an agreement while conviction of the substantive charge requires consummation of the crime”. See *United States v. Wylie*, 625 F.2d 1371, 1381 (U.S. Court of Appeals 9th Cir. 1980).

⁴² Prosecution's Appellant's Brief, para. 26.

⁴³ Gatete's Respondent's Brief, para. 16.

convictions for the two crimes.⁴⁴ On the other hand, the *Travaux Préparatoires* clearly recognised the common law origins of the crime of conspiracy, where convictions are entered for both crimes⁴⁵ Even Gatete's only two sources of authority, the *Musema* and *Popović* Trial Judgements, endorsed conspiracy's common law origins.⁴⁶

22. Moreover, taking the objective and drafting intent of the Genocide Convention into consideration, cumulative convictions for conspiracy and genocide are justified. A close reading of the *Travaux Préparatoires* suggests that the crime of conspiracy to commit genocide was established as an independent and separate crime from that of the substantive crime of genocide.⁴⁷ It does not support Gatete's statement that "no purpose would be served in convicting an accused for conspiracy if he has already been found guilty of the substantive offence of genocide for the same set of facts."⁴⁸

23. As a matter of fact, when adopting the definition of the crimes, the *Travaux Préparatoires* underscored that "conspiracy to commit genocide must be punished in view of the gravity of the crime of genocide and of the fact that in practice genocide is a collective crime, presupposing the collaboration of a greater

⁴⁴ *Popović* Trial Judgement, para. 2121. Gatete also misrepresents the holding in *Popović* (Gatete's Respondent's Brief, para. 15). Contrary to Gatete's claim, *Popović* acknowledged that the issue of convictions for conspiracy and genocide was not discussed directly in the *Travaux Préparatoires*.

⁴⁵ See Ad Hoc Committee on Genocide, *Report of the Committee and Draft Convention Drawn Up by the Committee*, ECOSOC, 5 April – 10 May 1948, UN Doc E/794 (24 May 1948), p. 20; Sixth Committee of the General Assembly, "84th Meeting: Continuation of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633]," GAOR, 3rd Session, UN Doc A/C.6/SR.84 (26 October 1948), p. 212; William A. Schabas, *Genocide in International Law*, Cambridge University Press, Cambridge, 2000, p. 260–261: "The Secretariat's conception was obviously drawn from the common law. [...] The common law approach was surprisingly uncontroversial, even if it constituted an innovation for many delegates." See also Prosecution's Appellant's Brief, para. 35.

⁴⁶ *Musema* Trial Judgement, para. 187; *Popović* Trial Judgement, para. 2122.

⁴⁷ See *supra*, footnote nr. 45. This has also been acknowledged by the *Popović* Trial Judgement: "[t]he Trial Chamber is aware that the framers of the Genocide Convention considered conspiracy to commit genocide to be sufficiently serious as to warrant criminalising the mere agreement without preparatory acts, and as a distinct offence from genocide itself" (*Popović* Judgement, para. 2126).

⁴⁸ Gatete's Respondent's Brief, para. 15, basing itself on the *Musema* and *Popović* Trial Judgements.

or smaller number of persons.”⁴⁹ Because conspiracy criminalises this collaboration of persons with criminal intent, its relevance is not diminished when there is a conviction for genocide which does not feature this aspect of criminal collaboration.⁵⁰ It is only by entering convictions for both offences that the primary purpose of the Convention to prevent genocide through punishing acts of planning and preparation can be realised.⁵¹ Conspiracy and genocide are thus two different substantive offences, with independent objectives, deserving simultaneous convictions.⁵² This has also been recognized, as noted above, when ICTR Trial Chambers post-*Čelebići* entered convictions for both conspiracy and genocide.⁵³

24. As a final point, Gatete fails to directly address many more of the Prosecution’s submissions, and simply parrots the findings of the Trial Chamber. For example, when repeating the Trial Chamber’s findings, he alleges a novel substantive offence of “participation to a joint criminal enterprise of genocide”,⁵⁴ but does not provide any support for this. There is in fact no such substantive offence recognized by the law or practice of the Tribunal.⁵⁵ Indeed, as argued before, the Trial Chamber’s comparison of a crime and mode of liability does not

⁴⁹ Ad Hoc Committee on Genocide, *Report of the Committee and Draft Convention Drawn Up by the Committee*, ECOSOC, 5 April – 10 May 1948, UN Doc E/794 (24 May 1948), p. 20.

⁵⁰ The gravity of the conspiracy offence also underlies the *Pinkerton* holding, where the Supreme Court found that conspiracy “involves deliberate plotting to subvert the laws, educating and preparing conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered” (*Pinkerton et al. v. U.S.*, 328 U.S. 640, 644 (1946)). See also Kathy Diener and Teisha C. Johnson, *Federal Criminal Conspiracy*, 42 *American Criminal Law Review*, 2005, p. 464.

⁵¹ Alex Obote-Odora, *Conspiracy to Commit Genocide: Prosecutor v. Jean Kambanda and Prosecutor v. Alfred Musema*, *Murdoch University Electronic Journal of Law*, Volume 8, Number 1, 2001, paras. 39, 51 (“*Obote-Odora*”), at <http://www.austlii.edu.au/au/journals/MurUEJL/2001/3.html> (last visited on 17 November 2011).

⁵² See Antonio Cassese, *International Criminal Law (Second Edition)*, Oxford University Press, Oxford, 2008, p. 227, stating that the offence of conspiracy “is punished even if the crime is never perpetrated. In addition, if the crime is carried out, the perpetrators are held liable both for conspiracy and the substantive crime they commit.” See also *Obote-Odora*, paras. 39, 49, 52.

⁵³ See *supra*, footnote nr. 29.

⁵⁴ Gatete’s Respondent’s Brief, para. 17.

⁵⁵ For ICTR, see Articles 2, 3 and 4 of the Statute of the Tribunal.

withstand legal scrutiny because the *Čelebići* test on cumulative convictions operates between crimes, and not modes of liability.⁵⁶

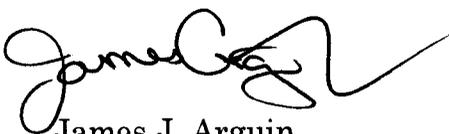
25. Similarly, Gatete repeats the Trial Chamber's holding, based on *Popović*, that "the concern regarding multiple convictions should be one of fairness to the accused."⁵⁷ In that context, he fails to address directly the Prosecution's submissions on the policy objectives of the *Čelebići* test, which already takes into account the factor of fairness to the accused together with the factor of fully describing the criminal culpability for distinct crimes.⁵⁸ By focusing only on the factor he perceives as being most helpful to him (fairness to the accused) and ignoring the other factor identified by the Appeals Chamber (fully describing the accused's criminal culpability), Gatete once again ignores settled precedent. For these reasons, Gatete's arguments have no merit and should be dismissed.

PART III — RELIEF SOUGHT

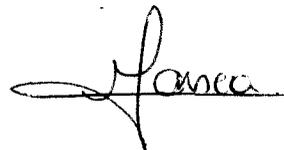
26. The Prosecution respectfully requests the Appeals Chamber to grant its appeal in its entirety and to reject Gatete's submissions.

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Dated 21 November 2011, at Arusha, Tanzania



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⁵⁶ Prosecution's Appellant's Brief, paras. 36–37. As argued in the Appellant's Brief, even if the Chamber's consideration of conspiracy and joint criminal enterprise for genocide was permitted in law, it still failed to properly assess their materially distinct legal elements.

⁵⁷ Gatete's Respondent's Brief, para. 18.

⁵⁸ Prosecution's Appellant's Brief, paras. 19, 32, 38. He also does not respond to the Prosecutor's submissions on the requirement to enter separate convictions for separate crimes, assuming that the underlying criminal conduct is different. See Prosecution's Appellant's Brief, paras. 39–40.

ANNEX – CITED MATERIALS AND DEFINED TERMS

A – Jurisprudence

1. ICTR

Kajelijeli

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003 (“*Kajelijeli* Trial Judgement”)

Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 (“*Kajelijeli* Appeal Judgement”)

Kambanda

The Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998 (“*Kambanda* Trial Judgement”)

Jean Kambanda v. The Prosecutor, Case No. ICTR-97-23-A, Judgement, 19 October 2000 (“*Kambanda* Appeal Judgement”)

Musema

The Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgement and Sentence, 27 January 2000 (“*Musema* Trial Judgement”)

Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A, Judgement, 16 November 2001 (“*Musema* Appeal Judgement”)

Nahimana et al.

The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 (“*Nahimana et al.* Trial Judgement”)

Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (“*Nahimana et al.* Appeal Judgement”)

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The Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003 (“*Niyitegeka* Trial Judgement”)

Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Judgement, 9 July 2004 (“*Niyitegeka* Appeal Judgement”)

Ntagerura et al.

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551/A

2. ICTY

Delalić et al.

Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Delalić et al.* Appeal Judgement”)

Kordić and Čerkez

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”)

Krstić

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 (“*Krstić* Appeal Judgement”)

Popović

Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević, Case No. IT-05-88-T, Judgement, 10 June 2010 (“*Popović* Trial Judgement”)

Stakić

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 (“*Stakić* Appeal Judgement”)

Strugar

Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgement, 17 July 2008 (“*Strugar* Appeal Judgement”)

3. National Jurisprudence

Pinkerton et al. v. U.S., 328 U.S. 640 (1946) (U.S. Supreme Court)

Iannelli et al. v. U.S., 420 U.S. 770 (1975) (U.S. Supreme Court)

United States v. Wylie, 625 F.2d 1371 (U.S. Court of Appeals 9th Cir. 1980)

United States v. Rivera-Ramirez, 911 F.2d 739 (U.S. Court of Appeals, 9th Cir. 1990)

United States v. Coulter, 953 F.2d 1388 (U.S. Court of Appeals, 9th Cir. 1992)

United States v. McCullah, 76 F.3d 1087 (U.S. Court of Appeals, 10th Cir. 1996)

United States v. Ambers, 85 F.3d 173 (U.S. Court of Appeals, 4th Cir. 1996)

United States v. Mothersill, 87 F.3d 1214 (U.S. Court of Appeals, 11th Cir. 1996)

B – Defined Terms and Abbreviations

Čelebići	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo</i> , Case No. IT-96-21
Chamber	Trial Chamber III
Gatete	Jean-Baptiste Gatete
ICTY	International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Judgement	<i>The Prosecutor v. Jean-Baptiste Gatete</i> , Case No. ICTR-2000-61-T, Judgement and Sentence, 31 March 2011
p.	page
para. (paras.)	paragraph (paragraphs)
Popović	<i>The Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, Milan Gvero, Vinko Pandurević</i> , Case No. IT-05-88
Prosecution/Prosecutor	Office of the Prosecutor
Rules	Rules of Procedure and Evidence of the ICTR
Statute	Statute of the International Tribunal for Rwanda
Tribunal or ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994

C – Cited Filings and Decisions in the Gatete Case

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-T, Judgement and Sentence, 31 March 2011 (“Judgement”)

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-00-61-A, Prosecution’s Notice of Appeal, 3 May 2011 (“Prosecution’s Notice of Appeal”)

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-2000-61-A, Notice of Appeal, 3 May 2011 (“Gatete’s Notice of Appeal”)

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-2000-61-A, Prosecution’s Appellant’s Brief, 18 July 2011 (“Prosecution’s Appellant’s Brief”)

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-2000-61-A, Amended Notice of Appeal, 25 October 2011 (“Gatete’s Amended Notice of Appeal”)

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-2000-61-A, Gatete’s Respondent’s Brief, 4 November 2011 (“Gatete’s Respondent’s Brief”)

D – Other Authorities

UN Documents

Ad Hoc Committee on Genocide, *Report of the Committee and Draft Convention Drawn Up by the Committee*, ECOSOC, 5 April – 10 May 1948, UN Doc E/794 (24 May 1948)

Sixth Committee of the General Assembly, “84th Meeting: Continuation of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633],” GAOR, 3rd Session, UN Doc A/C.6/SR.84 (26 October 1948)

Doctrine

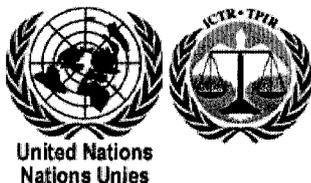
Alex Obote-Odora, Conspiracy to Commit Genocide: Prosecutor v. Jean Kambanda and Prosecutor v. Alfred Musema, *Murdoch University Electronic Journal of Law*, Volume 8, Number 1, 2001, at <http://www.austlii.edu.au/au/journals/MurUEJL/2001/3.html> (last visited on 17 November 2011)

Antonio Cassese, *International Criminal Law (Second Edition)*, Oxford University Press, Oxford, 2008, 455p.

Kathy Diener and Teisha C. Johnson, Federal Criminal Conspiracy, 42 *American Criminal Law Review*, 2005, p. 463-495.

Roman Boed, Current Developments in the Jurisprudence of the International Criminal Tribunal for Rwanda, *International Criminal Law Review* 3, 2003, p. 169–181.

William A. Schabas, *Genocide in International Law*, Cambridge University Press, Cambridge, 2000, 624p.



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input checked="" type="checkbox"/> Trial Chamber I N. M. Diallo		<input type="checkbox"/> Trial Chamber II R. N. Kouambo		<input type="checkbox"/> Trial Chamber III C. K. Hometowu	
	<input type="checkbox"/> OIC, JLSD P. Besnier		<input type="checkbox"/> OIC, JPU C. K. Hometowu		<input checked="" type="checkbox"/> F. A. Talon (Appeals/Team IV)	
From:	<input type="checkbox"/> Chamber (names)		<input type="checkbox"/> Defence (names)		<input checked="" type="checkbox"/> Prosecutor's Office Inneke Onsea (names)	
					<input type="checkbox"/> Other: (names)	
Case Name:	The Prosecutor vs. Jean-Baptiste Gatete				Case Number: ICTR-00-61-A	
Dates:	Transmitted: 21 November 2011			Document's date: 21 November 2011		
No. of Pages:	17		Original Language: <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda			
Title of Document:	PROSECUTION'S BRIEF IN REPLY					
Classification Level:			TRIM Document Type:			
<input type="checkbox"/> Ex Parte			<input type="checkbox"/> Indictment			
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<input checked="" type="checkbox"/> Public			<input type="checkbox"/> Affidavit			
			<input type="checkbox"/> Disclosure			
			<input type="checkbox"/> Order			
			<input type="checkbox"/> Judgement			
			<input type="checkbox"/> Motion			
			<input type="checkbox"/> Correspondence			
			<input type="checkbox"/> Notice of Appeal			
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			<input type="checkbox"/> Book of Authorities			
			<input type="checkbox"/> Submission from non-parties			
			<input checked="" type="checkbox"/> Submission from parties			
			<input type="checkbox"/> Accused particulars			

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<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: