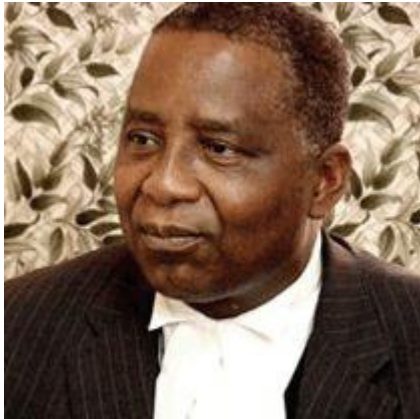




Voices from the Rwanda Tribunal

Official Transcript: Charles Taku (Part 7 of 10)



Role:	Defense Counsel
Country of Origin:	Cameroon
Interview Date:	3 November 2008
Location:	Arusha, Tanzania
Interviewers:	Batya Friedman Ronald Slye
Videographer:	Max Andrews
Interpreter:	None

Interview Summary

Charles Taku discusses the failure of the ICTR to prosecute RPF members. He refers to a form of 'judicial genocide' through which Hutu victims are denied justice and the Tribunal perpetuates violence through impunity. He notes that the Office of the Prosecutor (OTP) should investigate crimes based on the acts committed rather than on ethnicity or political affiliation. Taku also discusses the controversial principle of joint criminal enterprise which he claims has been abused by the OTP to indict individuals without sufficient evidence.

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Part 7

- 00:00** **Ronald Slye: You mentioned a number of criticisms of the tribunal. On balance, do you think that it was a positive or a negative institution with respect to justice and reconciliation?**
- 00:17 Let me say the mere fact that the institution was created and existed and has operated on the continent is very, very positive, because for once in our own century, our own times, dictators on the continent now know that they can be (____), held accountable for crimes perpetrated, perpetrated by them.
- 00:45 More important, people to whom, people have, who have been elected or people who have held up themselves as commanders, army officers, others whose major role was to protect the people, to rule the different countries, now know that if they turn around and kill their own people or they fail to protect their own people when they had the capacity to do so, they will be held accountable.
- 01:21 On that, I can say that it's positive. And I can say that the mere existence of the tribunal per se outweighs any other criticism as far as the African continent is concerned. As far as international justice is concerned, it came too late in the day because there was a possibility of pre-empting the crisis. So was the Security Council with this (_____) did this just in order to hide its face and therefore – but better late than never and today it stands as positive.
- 02:05 On the development of international law, yes the jurisprudence on rape as a war crime is a major development. I think it is one of the greatest legacies that this tribunal will leave, because personally, women and v-, people, vulnerable groups ought to be protected from warfare. And for them to use women and the vulnerable groups as instruments of war, it is wrong.
- 02:35 Whether as the facts evolve the law applies to particular factors is another issue but the mere principle itself is good. With the, the, the precedents that were laid out in Nuremberg and Tokyo, this tribunal has followed those precedent to the extent that the, the, the "victor's justice" concept has been followed to the letter.
- 03:02 And that's a bad precedent that happened so many years ago from 1945, '46, '47, so many years ago. And it has set, it set a bad precedent for the world and this tribunal has just walked along those lines and it's unfortunate.
- 03:18 Now, may, do, do we have another tribunal or wait for another tribunal to come and put an end to, to, to this, to, to this conduct, to these principles? I do not know. But again, just as we were saying, in Nuremberg the world was saying, "never again," you now know why. That, that "never again" was an empty slogan to the extent that we have victor's justice and to the extent that it has been repeated in this particular court, it remains an empty slogan.
- 03:53 And in anything, it leaves us with a perception that whenever victor's justice is applied, it enhances impunity for the, the party that feels aggrieved. That they can always take

up arms and repeat the same crimes. To that extent, I think this court, this tribunal has failed woefully on that.

04:16 And as you say, in order for them and I see this development – unfortunately development that was developed in the Tadić case, I see that unfortunate development of joint criminal enterprise as was just another means by the court in order to enhance the victor’s justice principle was extended further.

04:36 If you can’t get them in any form of accomplice liability, then why not extend this notion of joint criminal enterprise? Know that it is a web that once you throw it wide open, the person will be caught somehow – jailed by association.

04:55 So, so, I mean look at Article 6(1) of the statute on individual criminal responsibility. Because there is no joint criminal enterprise in the statute, how do you fit it, how do you fit joint criminal enterprise under 6(1)?

05:14 When 6(1) enumerates the conduct, that the enumerated conduct is there. How do you fit it? Of course they say they fall back on customary international law. But if it (_____) customary international law and they move back to Nuremberg again and to the Tokyo trials, where the principle was first admitted but not as in the concept in which you find it.

05:39 And the manner in which it was discussed in Tadić you find out that even there, it is victor’s justice looking for a means of criminalising and convicting the particular individual when it pleases them to do so.

05:58 So on that score, the tribunal has failed because it has set a bad precedent for the rest of the world or it has developed further a bad precedent that has its origin from Nuremberg then Tadić, and continues.

06:13 RS: Those who defend joint criminal enterprise, sort of raise the problem of dealing with atrocities that a lot of people are involved in, and that, that you only have genocides or crimes against humanity if there’s a very large organizational structure with both very high level people and mid-level people and low level people involved.

06:40 RS: Do you think that, leaving aside the legal issue you raised about the origins or the, the legitimacy of joint criminal enterprise in the ICTR statute, do you think as a general principle it is a good principle or a bad prin-, principle in terms of individual liability?

07:00 If it were, if it were applied very restrictively it could be good. Because you know, especially criminal genocide, the specific intent, specific intent has, it has a higher threshold. So if we were to, to, to apply it as, in that concept, how do you – especially with the system, the systemic form of joint criminal enterprise – how, how, how do, how do you, how do you, how do you get the (_____) on specific intent?

- 07:34 So, you know, it is has been abused, it has been abused. In fact, I think it might have been conceived in order to, to, to, in order to remedy a mischief, the way you put it, but the fact that it has been abused in rare cases.
- 07:52 And in that, in that, in that particular situation, you find that the judges are so divided, some of the judges (_____) say that, "We can never apply it," in the same, in the same court. Different appeal chambers have come to different conclusions.
- 08:08 (_____) appeals chamber (_____) followed by the idea (_____) – and the danger for us is this: In this concept, if these courts must be modelled and these concepts, these principles were applied to a national jurisdiction, in the African context in the hands of the dictators in power, believe me, you would do substantial injustice. It would lead to war. It would target just about any person who is perceived to have taken part in an alleged joint criminal enterprise in any of the three forms. And that is our worry.
- 08:48 And that's why in, in Sierra Leone I pointed out that the judges of the Special Court should take note that joint criminal enterprise is not part of the statute of the Special Court for Sierra Leone. They cannot create another form of criminal liability, which is neither in the statute nor flows from the statute. They were out of their mandate.
- 09:13 I, I'm waiting for, for what, whatever decision they'll say about that but I'll raise it. In other words, what you're saying is correct. It was, it was perceived to redress a perceptible mischief but the fact is that from Tadić it has been abused. It was poorly applied in Tadić and in many other cases that here these couple of people were acquitted of all other forms of liability except the joint criminal enterprise. How can that be?
- 09:42 **RS: Well, in Tadić there were three different categories, right, of joint criminal enterprise, and the third is the most controversial.**
- 09:47 Yes.
- 09:48 **RS: Let me ask you if you were advising somebody setting up a new tribunal, now, so you could write the statute, would you include any form of joint criminal enterprise in that statute whether the first, the second or the third?**
- 10:03 Well, ordinarily there, there's a problem here. You see like in the case of Mpambara here, the judges in that case expressed the fear that there's some form of confusion between joint criminal enterprise, especially the first and second forms, with other forms of accomplice liability, in aiding and abetting.
- 10:26 And as long as we have on the statute books all forms of aiding and abetting and of course, and that's why they derived the notion of criminal enterprise – aiding and abetting. There's a lot of confusion there, the law is not certain there and the courts are not certain there.

10:43 At this time, at this point in time no, at this point in time for me, no. But if they could really reconcile themselves, maybe and say okay the first form of cr-, of joint criminal enterprise, maybe even the second, we can incorporate into the laws, there will be no problem. But the third form is the most controversial, I mean the most controversial of all.