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**ANNEX A**

**AUTHORITY 8**

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UNITED NATIONS  
NATIONS UNIES

ICTR-96-4-A  
23<sup>RD</sup> NOVEMBER 2001  
(G052/ABJ-5883/ABJ)  
**International Criminal Tribunal for Rwanda**  
**Tribunal pénal international pour le Rwanda**

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ENGLISH  
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Before Judges: Claude Jorda, presiding  
Lal Chand Vohrah  
Mohamed Shahabuddeen  
Rafael Nieto-Navia  
Fausto Pocar

Registry: Adama Dieng

Judgment of: 1 June 2001

**THE PROSECUTOR**

v.

**JEAN-PAUL AKAYESU**

JUDICIAL RECORDS/ARCHIVES  
RECEIVED  
ICTR

23/11/2001  
2001 NOV 23 A 11:06  
[Signature]

**JUDGMENT**

Office of the Prosecutor:

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Translation certified by LCSS, ICTR

HAG(A)01-001 (E)

458. The Appeals Chamber finds there appears to be *prima facie* a contradiction in the reasoning and the findings of the Trial Chamber. Indeed, although it appears to have found, on the one hand, that for murder and rape to constitute crimes against humanity their perpetrators must have the discriminatory *intent to commit such crimes against the victim*, and, on the other hand, that where extermination and torture are concerned, the *attack* must be on discriminatory grounds.

459. The issue before the Appeals Chamber is to determine whether this ingredient of crimes against humanity within the jurisdiction of the Tribunal, as referred to in the chapeau of Article 3 of the Statute, requires the perpetrator to have knowledge that his act is part of a widespread or systematic attack against a civilian population on discriminatory grounds, or is in furtherance of the attack, or whether this ingredient requires that the perpetrator of each crime enumerated in the article must have the discriminatory intent to commit the said crime against his victim in particular, on one of the enumerated grounds.

### 3. Discussion

460. The Appeals Chamber will first recall the provisions of Article 3 of the Statute.

#### Article 3: Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape;
- (h) Persecution on political, racial and religious grounds;
- (i) Other inhumane acts.

461. ICTY Appeals Chamber has had occasion to consider the issue of discriminatory intent within the context of crimes against humanity, as defined in Article 5 of the Statute of ICTY. In the *Tadic* Appeal Judgment, the Appeals Chamber found that:

[...]the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.[840]

462. This Appeals Chamber is, however, of the view that this jurisprudence as well as the interpretation of Article 5 of ICTY Statute are of limited relevance in the instant case and to the Appeals

Chamber's consideration of Article 3 of the Statute especially as both provisions are substantially different. Indeed, Article 5 of ICTY Statute does not include the same requirement in its chapeau namely that crimes against humanity may be prosecuted "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds"[841]. However, it does not follow automatically that the "addition" to Article 3 of ICTR Statute allows a reading contrary to that contained in *Tadic* and that, consequently, Article 3 required that the perpetrator (s) of any crimes against humanity must have a discriminatory intent.

463. Therefore, the Appeals Chamber must pass on how the lawmaker (to wit, the Security Council) intended Article 3 of the Statute to be understood and, in particular, it must determine whether there exists a difference between Article 3 and Article 5 of ICTY Statute such that the Appeals Chamber must depart from the interpretation of crimes against humanity contained in *Tadic*.

464. In the opinion of the Appeals Chamber, except in the case of persecution, a discriminatory intent is not required by international humanitarian law as a legal ingredient for all crimes against humanity [842]. To that extent, the Appeals Chamber endorses the general conclusion and review contained in *Tadic*, as discussed above.[843] However, though such is not a requirement for the crime *per se*, all crimes against humanity, may, in actuality, be committed in the context of a discriminatory attack against a civilian population. As held in *Tadic*: "[i]t is true that in most cases, crimes against humanity are waged against civilian populations which have been specifically targeted for national, political, ethnic, racial or religious reasons".[844] It is within this context, and in light of the nature of the events in Rwanda (where a civilian population was actually the target of a discriminatory attack), that the Security Council decided to limit the jurisdiction of the Tribunal over crimes against humanity solely to cases where they were committed on discriminatory grounds. This is to say that the Security Council intended thereby that the Tribunal should not prosecute perpetrators of other possible crimes against humanity.

465. The Appeals Chamber found that in doing so, the Security Council did not depart from international humanitarian law[845] nor did it change the legal ingredients required under international humanitarian law with respect to crimes against humanity. It *limited* at the very most the jurisdiction of the Tribunal to a sub-group of such crimes, which in actuality may be committed in a particular situation. By the same token, the Appeals Chamber notes that ICTY Statute contains in its Article 5 explicitly an express requirement for a nexus with an armed conflict. As held in *Tadic*, this "creates a narrower sphere of operation than that provided for crimes against humanity under customary international law".[846] Here again, by limiting the scope of the article, the Security Council did not, however, intend that the definition contained in ICTY Statute should constitute a departure from customary international law. In the case at bench, the Tribunal was conferred jurisdiction over crimes against humanity (as they are known in customary international law), but solely "when committed as part of a widespread or systematic attack against any civilian population" on certain discriminatory grounds; the crime in question is the one that falls within such a scope. Indeed, this narrows the scope of the jurisdiction, which introduces no additional element in the legal ingredients of the crime as these are known in customary international law.

466. Consequently, apart from this restriction of jurisdiction, such crimes continue to be governed in the usual manner by customary international law, namely that discrimination is not a requirement for the various crimes against humanity, except where persecution is concerned.

467. The meaning to be collected from Article 3 of the Statute is that even if the accused did not have a discriminatory intent when he committed the act charged against a particular victim, he nevertheless knew that his act could further a discriminatory attack against a civilian population; the attack could even be perpetrated by other persons and the accused could even object to it. As a result, where it is

shown that the accused had knowledge of such objective nexus, the Prosecutor is under no obligation to go forward with a showing that the crime charged was committed against a particular victim with a discriminatory intent. In this connection, the only known exception in customary international law relates to cases of persecutions.

468. In light of this interpretation and the finding that persecution is the only crime which requires a discriminatory intent, the Appeals Chamber is of the view that any interpretation of the chapeau of Article 3 of the Statute such as would add a requirement for a showing of a discriminatory intent with respect to all crimes against humanity would likely render redundant the express if more succinct reference to discrimination – contained in Article 3 of the Statute (Persecutions), which reference is understood as a requirement of a discriminatory intent.<sup>[847]</sup> As is known, one of the basic rules of interpretation requires that a provision or part thereof should not be interpreted in a manner to render it redundant or bereft of any object, unless such a conclusion is inevitable. One must proceed from the assumption that the lawmakers intended to give some effect to *each* of the words used.

469. For the foregoing reasons, the Appeals Chamber considers the present ground of appeal and finds that:

- (1) Article 3 of the Statute does not require that all crimes against humanity enumerated therein be committed with a discriminatory intent.
- (2) Article 3 restricts the jurisdiction of the Tribunal to crimes against humanity committed in a specific situation, that is, “as part of a widespread or systematic attack against any civilian population” on discriminatory grounds.

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is immaterial whether the act of instigation is committed in a bus or public park, or in a private motor vehicle or a private garden, the moral responsibility of the instigator is the same. In both cases, individual criminal responsibility attaches under Article 6(1) of the Statute.<sup>852</sup> The Prosecutor further submits that to hold that incitement always has to be public and direct may render otiose the specific reference to "direct and public incitement to commit genocide" as stipulated under Article 2(3)(c) of the Statute.<sup>853</sup>

472. As a remedy, the Prosecution moves the Appeals Chamber to set aside the holding of the Trial Chamber.<sup>854</sup>

473. Akayesu submits that if the Appeals Chamber were to entertain this ground of appeal, that will not alter the verdict rendered by the Trial Chamber in any way and that, for that reason the Appeals Chamber need not even consider this ground of appeal.<sup>855</sup> Consequently, Akayesu submits that should the Chamber decide to hear this ground of appeal, it would also have to authorize Counsel for the other accused concerned to be joined to the proceedings.<sup>856</sup> Furthermore, Akayesu poses the question as to whether the issue raised warrants an intervention by the Appeals Chamber, and cites, in this respect, the Prosecution's reference to ILC Commentary on the Draft Code of Crimes.<sup>857</sup> Akayesu therefore submits that it is not necessary to entertain the Prosecution's appeal in order to make this cosmetic clarification.<sup>858</sup>

## 2. Discussion

474. The Trial Chamber reviewed Article 6 of the Statute (individual criminal responsibility) and found, *inter alia*, as follows:

The second form of liability is 'incitation' (in the French version of the Statute) to commit a crime, reflected in the English version of Article 6(1) by the word *instigated*. In English, it seems the words incitement and instigation are synonymous. Furthermore, the word "instigated" or "instigation" is used to refer to incitation in several other instruments. However, in certain legal systems and, under Civil Law, in particular, the two concepts are very different. Furthermore, and even assuming that the two words were synonymous, the question would be to know whether instigation under Article 6(1) must include the direct and public elements, required for incitement, particularly, incitement to commit genocide (Article 2(3)(c) of the Statute) which, in this instance, translates *incitation* into English as "incitement" and no longer "instigation". Some people are of that opinion. The Chamber also accepts this interpretation.<sup>859</sup>

475. The Prosecution submits that this interpretation of Article 6(1) is erroneous, leading the Trial Chamber to require that "instigation" must be direct and public. Relying on a comparison of

<sup>852</sup> Prosecution's Brief, para. 5.21. The Prosecution submits that the "public and direct" requirement would be "unwarranted and would frustrate the intention of the drafters of the Statute by restricting those who could be held criminally responsible and [...] deserving of penal sanction". Prosecution's Brief, para. 5.26.

<sup>853</sup> Prosecution's Brief, para. 5.27. Lastly, the Prosecutor submits that "[a]s long as a person knowingly instigates the commission of an offence (wishing it to be carried out or foreseeing that this is a likely consequence of his actions) and his participation directly and substantially affected the commission of that offence, he will be liable under Article 6(1)." Prosecution's Brief, para. 5.31.

<sup>854</sup> Prosecution's Brief, para. 5.32.

<sup>855</sup> Akayesu's Response, para. 44.

<sup>856</sup> Akayesu's Response, para. 45.

<sup>857</sup> Akayesu's Response, para. 46. Akayesu submits that if the Prosecution wanted to institute proceedings against inciters or instigators who acted privately, it could prepare their indictment taking into account the above remark.

<sup>858</sup> Akayesu's Response, para. 47.

<sup>859</sup> Trial Judgment, para. 481 (footnotes omitted).

Article 6(1) of the Statute (instigated) with Article 2(3)(c) of the Statute ([...] incitement to commit genocide), the Trial Chamber found that "some people" contend [instigation must include direct and public elements] adding that "it also accepts this interpretation".<sup>860</sup> In this holding, the Trial Chamber refers to the opinion of certain experts ("some people"), by citing Morris and Scharf in a footnote.

476. First and foremost, the Appeals Chamber considered the analysis made by Morris and Scharf in their book. In the opinion of the Appeals Chamber, it could be said that in fact Morris and Scharf only provided a general comparison of the approach followed by the Draft Code of Crimes (and commentaries included therein) with the approach contained in the Statute, with respect to individual criminal responsibility regarding incitement to commit crimes.<sup>861</sup> It is not clear that these authors reached specifically the alleged finding.<sup>862</sup> Regarding the Trial Chamber's review, its finding is based on a broad comparison of provisions of international instruments, which use the "public character" test and refer to it in the same context.<sup>863</sup> The issue here is whether the Trial Chamber erred in its review and, in particular, whether it erred in finding that the term "instigated" in Article 6(1) of the Statute is necessarily to be construed as direct and public incitement.

477. Article 6(1) of the Statute both texts of which are authoritative, provides that:

A person who planned, *instigated*, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.<sup>864</sup>

478. There is a glaring disparity between the English text and the French text: indeed, the English word "instigated" is translated into French as "*incité*". That said, the Appeals Chamber is of the opinion that linguistically the two terms are synonymous. The Appeals Chamber points out in particular that neither text contains any suggestion or recommendation that incitement must be direct and public. Consequently, by interpreting this provision "in accordance with [its] ordinary meaning",<sup>865</sup> the Appeals Chamber holds that, although instigation may, in certain circumstances, be direct and public, this does not, however, constitute a requirement. Nothing in Article 6 (1) suggests that there is such a requirement. The Appeals Chamber concurs with the Prosecution's argument that "[...] i]f the drafters of the Statute had wished to similarly confine 'instigation' to situations where it was 'public and direct', it would be reasonable to expect that they would have specifically required it".<sup>866</sup> It goes without saying that "[a] special meaning shall be given to a term if it is established that the parties so intended".<sup>867</sup> Such an intent has not been established.

<sup>860</sup> *Ibid.*

<sup>861</sup> In pp. 238 and 239 of their book, Morris and Scharf write that "the Security Council condemned the breaches of international humanitarian law in Rwanda and recalled the principle of individual criminal responsibility for the instigation of such acts. This element of Article 6(1) corresponds to Article 2(3)(f) of the Draft Code which is explained in the commentary (by ILC) as follows" (footnote omitted).

<sup>862</sup> The Appeals Chamber holds in particular that nothing in the text suggests that Morris and Scharf considered in particular the fact that Article 6(1) of the Statute does not include the term "public".

<sup>863</sup> The Trial Chamber referred to Article 2(3)(f) of the Draft Code of Crimes (as cited by Morris and Scharf) and Article 2(3)(c) of the Statute, Trial Judgment para. 481.

<sup>864</sup> Emphasis added.

<sup>865</sup> Article 31(1) of the Vienna Convention on the Law of Treaties.

<sup>866</sup> Prosecution's Brief, para. 5.27.

<sup>867</sup> Article 31(4) of the Vienna Convention on the Law of Treaties.

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479. Furthermore, the Appeals Chamber is of the view that this interpretation is supported by Article 2(3)(c) of the Statute, where the Security Council specifically chose the same wording as that of the corresponding provision of the Convention on Genocide.<sup>868</sup> Article 2(3)(c) reads:

The following acts shall be punishable:

[...]

(c) Direct and public incitement to commit genocide.<sup>869</sup>

480. With respect specifically to incitement to commit the crime of genocide, the Statute makes clear that the act must be direct and public, which plainly excludes any other form of incitement to commit genocide, including private incitement to commit genocide. Such additional element is not included in the text of Article 6(1) of the Statute. The Appeals Chamber is of the opinion that if such a requirement were to be included also in Article 6(1) of the Statute, then the specification contained in Article 2(3)(c) of the Statute would be superfluous.<sup>870</sup>

481. In this connection, it would be erroneous to superimpose this wording on the (discrete) wording of Article 6(1) of the Statute, so as to import into the latter language to the effect that Article 2(3)(c) of the Statute provides explicitly that incitement to commit genocide must be public. As stated above, this would run counter to the well-established rules of interpretation under, which, in general, disparities in meaning are seen as tantamount to disparities in language.

482. Consequently, the Appeals Chamber finds that there is no cause to hold that the Security Council intended Article 6(1) of the Statute to include an additional element (absent from the explicit language of the provision), which would require an interpretation inconsistent with its plain and ordinary meaning.

483. For the foregoing reasons, having considered this ground of appeal the Appeals Chamber finds that "incitement", as set out in Article 6(1) of the Statute, need not be "direct and public".

<sup>868</sup> Article III of the Convention on the Prevention and Punishment of the Crime of Genocide: The Following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.

<sup>869</sup> Article 2(3)(c) of the Statute (emphasis added). One may also cite Article 2(3)(f) of ILC Report which provides that "[a]n individual shall be responsible for a crime set out in articles 17, 18, 19 or 20 if that individual: [...] (f) directly and publicly incites another individual to commit such a crime which in fact occurs" (p.18)

<sup>870</sup> *Tadic* Appeal Judgment para. 284.



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**V. DISPOSITION**

For these reasons, **The Appeals Chamber,**

**Considering** Article 24 of the Statute and Rule 118 of the Rules,

**Noting** the respective written submissions of the parties and their oral arguments at the hearings of 1 and 2 November 2000,

**Sitting** in open court,

**Unanimously dismisses** each of the grounds of appeal raised by Jean-Paul Akayesu,

**Affirms** the verdict of guilty entered against Jean-Paul Akayesu of all the counts on which he was convicted and the sentence of life imprisonment handed down,

**Rules** that this judgement shall be enforced immediately pursuant to Rule 119 of the Rules,

**Considers** the First, Third and Fourth Grounds of Appeal of the Prosecutor and **Finds** that, with respect to the points of law in issue in the Prosecution's appeal, this Judgement sets out the relevant legal findings thereon.

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

(Signed)

Claude Jorda

Lal Chand Vohrah

Mohamed Shahabuddeen

Rafael Nieto-Navia

Fausto Pocar

Judge Shahabuddeen appends a Declaration to this Judgment

Judge Nieto-Navia appends a Dissenting Opinion to this Judgment

Done on this first day of June 2001

At Arusha (United Republic of Tanzania)

[Seal of the Tribunal]