Declassified to Public
06 September 2012

ANNEX A

AUTHORITY 10

00206699

ICTR-95-1A-A
16 June 2003
(3100/bis/h - 3031/bis/h)

3100/bis/h
RMM

D96

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

ENGLISH
Original: French

APPEALS CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Fausto Pocar
Judge Theodor Meron

Registry: **Adama Dieng**

Judgement of: **3 July 2002**

ICTR Appeals Chamber
Date: 16 June 2003
Action: PG
Copied To: All Judges, Parties, Judicial Archives, LDs, LSS

THE PROSECUTOR
(Appellant)

v.

IGNACE BAGILISHEMA
(Respondent)

Case No. ICTR-95-1A-A

2003 JUN 18 P 4:05

JUDGEMENT
(REASONS)

Office of the Prosecutor:
Carla Del Ponte
Norman Farrell
Sonja Boelaert-Suominen
Mathias Marcussen

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: Rosette Muzigo-Morrison
SIGNATURE: DATE: 16 June 2003

Counsel for the Defence:
François Roux
Maroufa Diabira

1. Whether the Trial Chamber considered the "had reason to know" test

26. The Appeals Chamber emphasizes, first of all, that the Prosecution does not contest the analysis which the Trial Chamber made of the applicable law,[25] but only contests the application by the said Chamber of the criteria set out in Article 6(3) of the Statute. The Prosecution submits that the Trial Chamber committed an error of law in not seeking to know whether the Accused "had reason to know" in terms of Article 6(3) of the Statute, or, in other words, whether he possessed information which put him on notice of the risk of crimes being committed or crimes which have been committed and requiring him to carry out an additional investigation or punish his subordinates guilty of such crimes.[26]

27. For a proper interpretation of the "had reason to know" standard, the Prosecution relies on the manner in which this issue was addressed in the *Čelebići* Appeal Judgement[27] and proposes an interpretation of the concept of "inquiry notice" (i.e., a superior's affirmative duty to inquire further when put on notice). The Prosecution dwells at length on the question of applying the above standard to civilian superiors in support of its argument that the said obligation applies to all superiors.[28] Referring to paragraphs 966 to 989 of the Trial Judgement, the Appellant submits that the Trial Chamber only tried to establish, on the basis of direct or circumstantial evidence, that the Respondent had actual knowledge of the facts.[29] According to the Prosecution, the Trial Chamber's findings in paragraphs 988 and 989 of the Judgement reveal that the "had reason to know" standard was not examined.[30] It further submits that insofar as the standard of criminal negligence as applied by the Trial Chamber[31] differs from that used in the *Čelebići* Appeal Judgement, it is necessary to determine whether the legal ingredients required for criminal negligence[32] could amount to the "had reason to know" standard,[33] in accordance with the *Čelebići* jurisprudence.[34]

28. After considering the Appellant's arguments, the Appeals Chamber holds, for the reasons set out below, that the Trial Chamber actually examined the "had reason to know" standard. However, the distinction between the "knowledge" and "had reason to know" standards could have been expressed more clearly by the Trial Chamber. The "had reason to know" standard does not require that actual knowledge, either explicit or circumstantial, be established. Nor does it require that the Chamber be satisfied that the accused actually knew that crimes had been committed or were about to be committed. It merely requires that the Chamber be satisfied that the accused had "some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates."[35]

29. In paragraph 896 of the Judgement, the Trial Chamber set forth the standard for establishing the Accused's *mens rea* under Article 6(3) of the Statute:

> [...] *the knowledge element of superior responsibility* will be fulfilled if the Accused actually knew of one or more crimes committed or about to be committed in connection with a roadblock, or alternatively was put on notice and failed to inquire further.[36]

The Trial Chamber further considered "'knowledge' [as] an indispensable element of [...] the liability of a superior [...]", by holding that "the mental element of knowledge [must be] demonstrated beyond reasonable doubt."[37] On the basis of this definition, the Trial Chamber found, after examining the direct evidence, that it was not in a position to establish that the Accused *had knowledge* of the murders of Judith and Bigirimana.[38] It therefore proceeded to examine the concept of "knowledge", or the Accused's *mens rea* under Article 6(3) of the Statute, on the basis of the available circumstantial evidence, guided by the indicia set down by the Commission of Experts in its Final Report.[39]

30. The Appeals Chamber recalls that the murders of Judith and Bigirimana are the only criminal acts acknowledged by the Trial Chamber as having been perpetrated by subordinates of the Respondent. With regard to the murder of Bigirimana, the Trial Chamber held in paragraph 974 of the Judgement that

it was not convinced that the Accused *had been notified* of the imminent offence by Bigirimana's wife. [40] It also underscored the fact that "it [was] not possible [...] to look to other known facts in an effort to determine whether the Accused was at his office or at the *bureau communal,* or at any rate close by, when the offence was committed." The Trial Chamber further held that "[a]s the Accused's location is unknown for the date on which Bigirimana was killed, the corresponding indicium of knowledge does not enter into the Chamber's calculations."[41] With respect to the murder of Judith, the Trial Chamber, in considering the Accused's responsibility as superior,[42] took into account its earlier findings, and in particular, the fact that the Respondent denied *having had knowledge* of the murder of Judith.[43] Besides, it appears from paragraphs 986 *et seq.* of the Trial Judgement that the Trial Chamber considered the Prosecution's theory that the Accused "*would have found out about*" the murder of Judith later and "upon being informed of the crime should have initiated an investigation to identify and punish the perpetrators" of the crime. The Trial Chamber also held the view that "the claim that Judith's murder was *public knowledge* in Mabanza *commune* [lacked] *sufficient foundation.*"[44] Following an examination of the indicia relating to the Accused's presence, the geographical location, the time, and *modus operandi*, the Trial Chamber came to the conclusion that there was no evidence to show that the killings of Judith and Bigirimana were not just isolated or exceptional incidents, rather than illustrations of a routine of which the Accused *could not plausibly have remained unaware.*[45] In other words, the Trial Chamber decided that the evidence put forward by the Prosecution did not prove beyond reasonable doubt that the Accused had reason to know that murders had been committed at the Trafipro roadblock.

31. The Appeals Chamber considers that the Prosecution's submissions are based on a partial analysis of the Trial Judgement. The Appeals Chamber concedes that the Trial Chamber did not explicitly refer to the "had reason to know" standard. The Appeals Chamber believes, however, that simply because the Trial Chamber did not explicitly declare that the Accused did not "have reason to know" does not mean that the Chamber did not refer to the standard. An analysis of the Judgement shows that the Trial Chamber indeed sought to know whether the Accused had sufficient information enabling the Chamber to find beyond a reasonable doubt that the Accused "had reason to know."

32. Moreover, with regard to the concept of "criminal negligence" challenged by the Prosecution, [46] the Appeals Chamber observes that the Trial Chamber identified criminal negligence as a "third basis of liability."[47] This form was qualified as a liability by omission, which takes the form of "criminal dereliction of a public duty."[48]

33. The Appeals Chamber wishes to recall and to concur with the *Čelebići* jurisprudence,[49] whereby a superior's responsibility will be an issue only if the superior, whilst some general information was available to him which would put him on notice of possible unlawful acts by his subordinates, did not take the necessary and reasonable measures to prevent the acts or to punish the perpetrators thereof.

34. The Statute does not provide for criminal liability other than for those forms of participation stated therein, expressly or implicitly. In particular, it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law.

35. References to "negligence" in the context of superior responsibility are likely to lead to confusion of thought, as the Judgement of the Trial Chamber in the present case illustrates. The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed, and to punish crimes which he knows or has reason to know had been committed, by subordinates over whom he has effective control. A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wilfully disregarding them.[50]

36. Depending on the nature of the breach of duty (which must be a gross breach), and the gravity of the consequences thereof, breaches of duties imposed by the laws of war may entail a disciplinary rather than a criminal liability of a superior who is subject to military discipline. The line between those forms of responsibility which may engage the criminal responsibility of the superior under international law and those which may not can be drawn in the abstract only with difficulty, and the Appeals Chamber does not need to attempt to do so in the present Judgement. It is better, however, that Trial Chambers do not describe superior responsibility in terms of negligence at all.

37. The Trial Chamber must be satisfied that, pursuant to Article 6(3) of the Statute, the accused either "knew" or "had reason to know", whether such a state of knowledge is proved directly or circumstantially. The Appeals Chamber is of the opinion that the test for criminal negligence as advanced by the Trial Chamber cannot be the same as the "had reason to know" test in terms of Article 6 (3) of the Statute. In the Appeals Chamber's view, the Trial Chamber should not have considered this third form of responsibility, and, in this sense, it committed an error of law. The Appeals Chamber considers, however, that the error does not invalidate the Judgement, since, as pointed out before, the Trial Chamber established that Bagilishema neither knew nor possessed information which would have enabled him to conclude, in the circumstances at that time, that the murders had been committed or were about to be committed by his subordinates.

38. Accordingly, the Appeals Chamber dismisses the Prosecution's first part of this ground of appeal.

2. Whether the Trial Chamber committed an error in finding that it was not established beyond a reasonable doubt that the Accused "had reason to know" in terms of Article 6(3) of the Statute

39. The Prosecution submits that, were the Appeals Chamber to consider that the Trial Chamber examined the "had reason to know" standard within the meaning of Article 6(3) of the Statute, the Trial Chamber committed an error of fact in finding that the Respondent "did not have reason to know" crimes had been committed at the Trafipro roadblock.[51] For the Prosecution, this error occasioned a miscarriage of justice within the meaning of Article 24 of the Statute.[52]

40. The Prosecution puts forward the following argument:

- The factual findings in the Trial Judgement allow for the conclusion that the Respondent possessed enough information to put him on notice of possible unlawful acts by his subordinates. The Trial Chamber did not take into consideration the context in which the two murders occurred, namely, the background of widespread attacks on Tutsi civilians throughout Rwanda in general, and in the Kibuye *préfecture* and the *commune* of Mabanza in particular;[53]

- The Respondent was thus aware, in other words "had reason to know", that his subordinates had committed serious crimes. By its very nature, this information triggered the duty for the Accused to inquire further[54] and, following the inquiries, to prevent crimes from being committed or to punish the perpetrators thereof.[55] The Prosecution also bases its argument on its earlier submissions relating to "a superior's affirmative duty to inquire further when put on notice"[56] to demonstrate that the same standard applied to the Respondent in this case.[57]

41. The Appeals Chamber notes that the Appellant relies on *certain* general findings by the Trial Chamber relating to the background against which the killings of Judith and Bigirimana took place in

order to propose, on the basis of this selection, various findings of fact that the Trial Chamber could, according to the Prosecution, have reached. In the Appeals Chamber's view, these findings should be placed back in their proper context and the allegations relating thereto should be considered in the light of the overall findings of fact made by the Trial Chamber.

42. The *Čelebići* Appeal Judgement makes it clear that "a showing that a superior *had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates* would be sufficient to prove that he 'had reason to know'."[58] The Appeals Chamber endorses the finding of the ICTY Appeals Chamber in the *Čelebići* Appeal Judgement that the information does not need to provide specific details about unlawful acts committed or about to be committed by his subordinates.[59] With regard to the arguments advanced by the Prosecution, the Appeals Chamber, however, deems it necessary to make a distinction between the fact that the Accused had information about the general situation that prevailed in Rwanda at the time, and the fact that he had in his possession general information which put him on notice that his subordinates might commit crimes. With this distinction in mind, the Appeals Chamber identifies below the main arguments advanced by the Appellant to support the contention that the Respondent "had reason to know" that crimes had been committed or were about to be committed at the Trafipro roadblock.

(1) The Accused knew of the dangerous nature of the Trafipro roadblock. According to the Prosecution, the roadblock operated like any other roadblock in Rwanda.[60] On the basis of the general factual findings by the Trial Chamber relating to roadblocks, the Prosecution asserts that the Trafipro roadblock was used to identify and kill Tutsis.[61]

(2) The Prosecution challenges the Trial Chamber's finding in paragraph 937 of the Judgement that Witness Y gave an account of the purpose and functioning of the roadblock that was different from the account of Witness Z. According to the Prosecution, "Witness Y never gave this apparently crucial explanation in his oral testimony in court." The Prosecution submits that the Trial Chamber's point of departure should have been the oral testimony given by Witness Y in court, and that the portion of the written statement relied upon by the Trial Chamber in paragraph 937 of the Judgement should have been put to the Witness in court.[62]

(3) The Respondent knew that Witness Z was an ex-soldier with a criminal record.[63] With particular reference to the Kahan Commission Report,[64] the Prosecution submits that this fact is most important. It argued that, "the undisputed evidence on record shows that the Respondent knew about Witness Z's past."[65] Leaving aside this evidence, the Trial Chamber used "euphemistic language" in concluding that the Accused had not given a complete picture of all those staffing the roadblock.[66]

43. With regard to the killings of Judith and Bigirimana, the Appeals Chamber recalls the need to place the Respondent's *mens rea* in relation to the "had reason to know" standard within the context of the evidence available to the Trial Chamber, and to make a general appraisal of the Chamber's factual findings in this regard in order to establish whether the alleged errors exist.

44. As regards the Prosecution's allegations relating to the erroneous assessment of the purpose of the Trafipro roadblock, the Appeals Chamber holds that the Prosecution has obviously not demonstrated that the Trial Chamber made an unreasonable finding about the legitimate purpose of the roadblock in question.[67] Indeed, the Prosecution merely refers to some of the Trial Chamber's findings with a view to asserting that the Chamber's assessment of the purpose of the roadblock was erroneous. With regard to the Prosecution's argument concerning Witness Y, the Appeals Chamber observes that the Trial

Chamber correctly reproduced the transcript of Witness Y's written statement as well as his testimony during the trial.[68] The reference made to Witness Y's "statement" in paragraph 937 of the Trial Judgement[69] is also accurate since the Trial Chamber is implicitly alluding to Witness Y's written statement. As to the more specific allegation that the Trial Chamber erred in referring to and relying upon the prior statement of Witness Y, the Appeals Chamber indicates that this allegation is dealt with under the third ground of appeal, and refers therefore to its findings relating thereto.[70] Lastly, with regard to the Respondent's knowledge of Witness Z's criminal record, the Trial Chamber did not indeed take explicitly into consideration all of the relevant evidence. It must be recalled, however, that a Trial Chamber is not obliged to give a detailed answer to every argument raised during a trial,[71] and that it is for the Trial Chamber to assess, *in concreto*, whether a superior has in his possession sufficient information.

45. The Appeals Chamber observes that the Trial Chamber relied on certain facts which were not disputed by the Appellant, for example, that there were personal motives behind the killings,[72] and that there was no evidence as to whether the Accused was present at the communal office, so as to determine whether it was established beyond reasonable doubt that the Respondent "had reason to know" within the meaning of Article 6(3) of the Statute. The Appeals Chamber is of the opinion that the Prosecution has not demonstrated the unreasonableness of the Trial Chamber's finding that the Respondent had no reason to know that his subordinates were committing or had committed crimes on the persons of Judith and Bigirimana, or the miscarriage of justice resulting therefrom. In the light of the foregoing, the Appeals Chamber finds that it is unnecessary to address the issue of whether customary international law imposes a duty on a civilian superior to inquire further.

46. In conformity with the above-mentioned case-law relating to the standard for examining errors of fact on appeal,[73] the Appeals Chamber dismisses this part of the first ground of appeal.

3. Whether the Trial Chamber committed errors of law in its analysis of the superior-subordinate relationship

47. The Prosecution submits that the Trial Chamber's analysis of the conditions under which a person can be considered to be a superior in terms of Article 6(3) of the Statute is flawed in two instances:

- The Trial Chamber erred in law in stating that civilians can only be found liable on condition that they exercise a military-style command authority over alleged subordinates;[74] and

- The Trial Chamber erred in law in construing superior responsibility exclusively by virtue of a person's *de jure* authority. According to the Prosecution, the Trial Chamber made little or no allowance for the possibility that a person can be considered a superior on the basis of a *de facto* exercise of powers of command and control.[75]

48. The Prosecution considers that the Trial Chamber misapprehended the overriding factor (namely the "effective control" standard), which is used to determine whether a person can be considered a superior under Article 6(3) of the Statute.[76] The Prosecution requests the Appeals Chamber, in the interests of justice, to take note of the errors committed by the Trial Chamber and to provide the appropriate remedy.

(a) Issue as to the nature of a civilian superior's authority

49. The Prosecution takes issue with the Trial Chamber for over-emphasizing the "military features" of the superior-subordinate relationship.[77] The Trial Chamber, according to the Prosecution, took the view that a civilian superior's responsibility requires proof that the powers exercised by such superior over his subordinates are similar to the "command" powers of a military superior.[78] It further submits that the Trial Chamber misconstrued the principle in the *Čelebići* Appeal Judgement by subjecting a superior's responsibility when exercising his authority to a military-style chain of command.[79] The Prosecution submits that there is no indication that the Trial Chamber focused on the test of effective control.[80]

50. Under Article 6(3), a commander or superior is the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the commission of a crime by a subordinate after the crime is committed".[81] The power or authority to prevent or to punish does not arise solely from a *de jure* authority conferred through official appointment.[82] Hence, "as long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control." [83] The *effective control* test applies to all superiors, whether *de jure* or *de facto,* military or civilian.[84]

51. Indeed, it emerges from international case-law that the doctrine of superior responsibility is not limited to military superiors, but also extends to civilian superiors. In the *Čelebići* case, it was held that:

> [...] the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise *a degree of control over their subordinates which is similar to that of military commanders.*[85]

In this respect, the Appeals Chamber notes that the *Musema* Trial Judgement, which took into consideration the Rwandan situation, pointed out that "it is appropriate to assess on a case-by-case basis the power of authority actually devolved on an accused to determine whether or not he possessed the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish their perpetration."[86]

52. Hence, the establishment of civilian superior responsibility requires proof beyond reasonable doubt that the accused exercised effective control over his subordinates, in the sense that he exercised a degree of control over them which is similar to the degree of control of military commanders. It is not suggested that "effective control" will necessarily be exercised by a civilian superior and by a military commander in the same way, or that it may necessarily be established in the same way in relation to both a civilian superior and a military commander.

53. In the instant case, the Trial Chamber relied on the *Čelebići* Trial Judgement, which was affirmed by the ICTY Appeals Chamber, in holding that:

> [...] for a civilian superior's degree of control to be "similar to" that of a military commander, the control over subordinates must be "effective", and the superior must have the "material ability" to prevent and punish any offences. Furthermore, the exercise of *de facto* authority must be accompanied by the "the trappings of the exercise of *de jure* authority". The present Chamber concurs. The Chamber is of the view that these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. It is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other persons of influence.[87]

54. The Trial Chamber also reiterated that a civilian superior will have exercised effective control over his or her subordinates in the concrete circumstances if both *de facto* control and the trappings of *de jure* authority are present and similar to those found in a military context.[88] The Trial Chamber went further to point out that its approach was to consider the character of the *de jure* or *de jure-like*

relationships (in French, "quasi-*de jure*") between the Accused and his supposed subordinates, and then to determine if the Accused's authority (whether real or contrived) was comparable to that exercised in a military context.[89]

55. The Appeals Chamber holds the view that the Trial Chamber's approach to the notion of "effective control" in relation to civilian superior was erroneous in law, to the extent that it suggested that the control exercised by a civilian superior must be of the same nature as that exercised by a military commander.[90] As the Appeals Chamber has already stated, this is not the case. It is sufficient that, for one reason or another, the accused exercises the required "degree" of control over his subordinates, namely, that of effective control. However, as conceded by the Prosecution,[91] this error did not affect the verdict as the Appeals Chamber is satisfied that the Accused did not possess the required *mens rea*. The Appeals Chamber therefore concludes that this error does not render the decision invalid.

56. The Appeals Chamber notes the ambiguity of the expression *a contrived de jure-like authority* (in French, "*autorité quasi-de jure factice*")[92] and acknowledges that it is difficult to grasp the meaning thereof. In the context of paragraph 152 of the Judgement, the concept seems to form part of the reasoning used by the Trial Chamber in examining the *de jure* authority exercised by the Accused, but it can be interpreted in different ways. The Appeals Chamber reiterates that the case law of the International Tribunals makes it mandatory to use the effective control test for both *de jure* and *de facto* superiors. Creating intermediate levels of authority is unnecessary and it would impair the legal analysis of the criminal liability of a superior under Article 6(3) of the Statute, as well as heighten the confusion in identifying the various forms of authority and instituting effective control. Although this wording is inappropriate, the Appeals Chamber considers that it is of no consequence to the Judgement, given that it was not unreasonable to conclude from the evidence presented that the Accused was not liable under Article 6(3) of the Statute for the killings at the Trafipro roadblock.

57. With regard to the Prosecution's argument that the Trial Chamber misapprehended the *Čelebići* jurisprudence by requiring a civilian superior to exercise his control through a military-style command, the Appeals Chamber draws attention to its previous decisions[93] and to those of the ICTY Appeals Chamber.[94] It emphasizes that the line of reasoning adopted by the Trial Chamber with regard to *gendarmes*[95] and reservists[96] can actually lead one to think that the Chamber sought to determine the Accused's position as part of the "*gendarmerie* command" or the "strict hierarchical structure of military personnel." Considering that the Accused, as a civilian administrative officer would not have been able to operate in this structure, the Trial Chamber deduced that he could not have exercised any *de jure* authority whatsoever over *gendarmes*.[97] However, these findings do not in themselves constitute an error, considering that the Trial Chamber merely sought to establish whether the Accused wielded *de jure* authority. It therefore tried to determine whether Rwandan law conferred powers on a *bourgmestre* that were comparable to those of military commanders in terms of control over subordinates, thus placing him in a position similar to that of a military commander, for the purpose of evaluating the *de jure* responsibility of the *bourgmestre*, a civilian administrative officer, over military personnel.

58. Consequently, the Trial Chamber did not intend to require proof of the Accused's position in the military command structure to establish the existence of *effective control*, but sought to know whether, *in this case*, in light of the evidence provided by the Prosecutor, it was possible to conclude that the Accused exercised *de jure* powers.[98]

VI. DISPOSITION

For the foregoing reasons, the **Appeals Chamber**, on 3 July 2002, at Arusha, ruled as follows:

"The **Appeals Chamber**,

Pursuant to Article 24 of the Statute of the Tribunal and Rule 118 of the Rules of Procedure and Evidence,

Considering the written submissions of the Parties and their oral arguments at the hearing of 2 July 2002,

Sitting in open court,

Unanimously **Dismisses** the arguments of Ignace Bagilishema regarding the inadmissibility of the Prosecution's Appeal,

Unanimously **Dismisses** the appeal lodged by the Prosecution against the Judgement delivered on 7 June 2001, and will give the Reasons for the Judgement in due course,

Affirms the acquittal by the Trial Chamber on all the counts in the Indictment,

Rules that it is not necessary therefore to consider all the motions filed by Ignace Bagilishema pursuant to Rule 115 of the Rules of Procedure and Evidence, and the Motion for Protective Measures for Defence Witnesses,

Orders the immediate release of Ignace Bagilishema,

Rules that it is therefore not necessary to consider the *"Requête urgente de l'Intimé en demande de main levée de contrôle judiciaire"* [Respondent's Urgent Motion for the Lifting of Judicial Control Measures] filed on 2 July 2002,

Rules that this Judgement shall be enforced immediately pursuant to Rule 119 of the Rules of Procedure and Evidence.

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

Claude Jorda Presiding Judge	Mohamed Shahabuddeen Judge	David Hunt Judge
Fausto Pocar Judge	Theodor Meron Judge	

Dated this third day of July 2002
At Arusha, Tanzania."