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ANNEX A

AUTHORITY 11



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Before:

Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal Hossain Khan

Registrar:

Mr. Agwu U. Okali

Decision of: 21 May 1999

THE PROSECUTOR
versus
CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-T

JUDGEMENT

The Office of the Prosecutor:

Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton
Ms. Holo Makwaia

Counsel for Clément Kayishema:

Mr. André Ferran
Mr. Philippe Moriceau

Counsel for Obed Ruzindana:

Mr. Pascal Besnier
Mr. Willem Van der Griend

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The Mental Element

133. The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. The Defence for Ruzindana submitted that to be guilty of crimes against humanity the perpetrator must know that there is an attack on a civilian population and that his act is part of the attack.^[34] This issue has been addressed by the ICTY where it was stated that the accused must have acted with knowledge of the broader context of the attack;^[35] a view which conforms to the wording of the Statute of the International Criminal Court (ICC) Article 7.

134. The Trial Chamber agrees with the Defence. Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused. This requirement further compliments the exclusion from crimes against humanity of isolated acts carried out for purely personal reasons.

4.2.2 The Crimes

135. Article 3 entitles the International Criminal Tribunal for Rwanda to prosecute persons responsible for crimes enumerated within the Statute. The crimes must be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The crimes themselves need not contain the three elements of the attack (i.e. widespread or systematic, against any civilian population, on discriminatory grounds), but must form *part of* such an attack. Indeed, the individual crimes contain their own specific elements. For an accused to be found guilty under crimes against humanity the Prosecution must prove that the accused is responsible for one of the crimes charged pursuant to Article 6(1) and/or 6(3) of the Statute. The following crimes are charged in the Indictment: murder, extermination and other inhumane acts.

Nexus Requirement Between the Armed Conflict and the Crime

185. It is important to establish whether all the crimes committed during the non-international armed conflict should be considered as crimes connected with serious violations of Common Article 3 and Protocol II. The Chamber is of the opinion that only offences, which have a nexus with the armed conflict, fall within this category. If there is not a direct link between the offences and the armed conflict there is no ground for the conclusion that Common Article 3 and Protocol II are violated.

186. The jurisprudence in this area of the law requires such a link between the armed conflict and the offence. The ICTY Trial Chamber in the Judgement of *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo (Celebici* Judgement) stated that "there must be an obvious link between the criminal act and the armed conflict."^[68] The same point of view is reflected in the *Tadic* Judgement. In *Tadic*, the Trial Chamber remarked that "the only question to be determined in the circumstances of each individual case was whether the offences were closely related to the armed conflict as a whole."^[69] In the *Akayesu* Judgement, the Trial Chamber found that ". . . it has not been proved beyond reasonable doubt that the acts perpetrated by Akayesu . . . were committed in conjunction with the armed conflict." Such a conclusion means that, in the opinion of that Chamber, such a connection is necessary.

187. This issue was discussed recently at the first session of the Preparatory Commission for the International Criminal Court (16 to 26 February 1999). From the point of view of the participants, war crimes would occur if the criminal conduct took place in the context of and was associated with the armed conflict.^[70]

188. Thus the term "nexus" should not be understood as something vague and indefinite. A direct connection between the alleged crimes, referred to in the Indictment, and the armed conflict should be established *factually*. No test, therefore, can be defined *in abstracto*. It is for the Trial Chamber, on a case-by-case basis, to adjudge on the facts submitted as to whether a nexus existed. It is incumbent upon the Prosecution to present those facts and to prove, beyond a reasonable doubt, that such a nexus exists.

189. The nexus requirement between the offence and the armed conflict is of crucial significance, taking into account that Common Article 3 and Protocol II are designed to protect the victims of the armed conflict. War crimes are inevitably connected with violations of Common Article 3 and Protocol II. Whether there is a nexus between the alleged crimes and the armed conflict in the instant case is an issue of legal findings which will be addressed in Part VI of the Judgement. At this stage it should be highlighted that the consideration of the applicability of the provisions of Common Article 3 and Protocol II would be proper if such a nexus is established.

Conclusion

190. It remains for the Chamber to make a finding in the context of the events alleged in the Indictment with regard to the culpability of the accused under Article 4 of the ICTR Statute. This will be addressed in the Legal Findings Part of the Judgement

- Count 19: Guilty of Genocide
Count 22: Not Guilty of Crimes Against Humanity/Other Inhumane Acts
Count 23: Not Guilty of a violation of Article 3 Common to the Geneva Conventions
Count 24: Not Guilty of a violation of Additional Protocol II

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

William H. Sekule
Presiding

Yakov A. Ostrovsky

Tafazzal Hossain Khan

Judge Khan appends a Separate and Dissenting Opinion to this Judgement.

Dated this twenty-first day of May 1999
Arusha
Tanzania