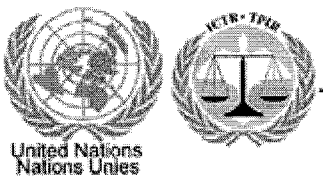
ANNEX A

AUTHORITY 12



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

APPEALS CHAMBER

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

Registry: Adama Dieng

Judgement of: 1 June 2001

THE PROSECUTOR
v.
CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-A

JUDGEMENT (REASONS)

Office of the Prosecutor:

Carla del Ponte
Salomon Loh
Wen-qi Zhu
Sonja Boelaert-Souminen
Morris Anyah

Counsel for Clément Kayishema:

André Ferran
Philippe Moriceau

Counsel for Obed Ruzindana:

(i) Error in finding Ruzindana individually responsible for committing killings within the meaning of Article 6 (1) by reason of the Prosecution's failure to establish a resulting death

185. Article 6(1) of the Statute provides that a person who "planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime ... shall be individually responsible for the crime." This provision reflects the criminal law principle that criminal liability is not incurred solely by individuals who physically commit a crime, but may also extend to those who participate in and contribute to a crime in various ways, when such participation is sufficiently connected to the crime, following principles of accomplice liability. Article 6 (1) may thus be regarded as intending to ensure that all those who either engage directly in the perpetration of a crime under the Statute, or otherwise contribute to its perpetration, are held accountable. [273]

186. The Appeals Chamber notes that the Trial Chamber did, earlier in the Judgement, discuss the general principles relating to criminal responsibility under Article 6 (1) of the Statute. The relevant paragraph of the Trial Judgement reads:

The Trial Chamber is of the opinion that, as was submitted by the Prosecution, there is a further two stage test which must be satisfied in order to establish individual criminal responsibility under Article 6 (1). This test required the demonstration of (i) participation, that is that the accused's conduct contributed to the commission of an illegal act, and (ii) knowledge or intent, that is awareness by the actor of his participation in a crime. [274]

The Appeals Chamber finds that this statement corresponds to the elements of individual criminal responsibility as set out, as follows, by the jurisprudence [275] of this Tribunal and that of ICTY:

1. The requisite *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have a direct and substantial effect on the commission of the illegal act; and

2. The corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act.

Ruzindana does not challenge the Trial Chamber's definition in relation to the elements that need to be satisfied in order to establish individual responsibility under Article 6 (1) of the Statute. However, he raises the specific issue of a material element required to establish responsibility for committing killings, namely "resulting death".

187. On the aspect of the legal element of "committing" referred to in Article 6 (1) of the Statute, the Appeals Chamber in the *Tadić* Appeal Judgement had occasion to consider an identical provision in Article 7 (1) of ICTY Statute and stated that:

> This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. [276]

The Appeals Chamber accepts this statement as accurate. Thus, any finding of direct commission requires the direct personal or physical participation of the accused in the actual acts which constitute a crime under the Statute, together with the requisite knowledge. For the present purposes, the Appeals Chamber sees no further necessity to attempt a detailed definition of what constitutes individual

responsibility for the element of "committing" under Article 6 (1) of the Statute. It suffices to observe that according to the jurisprudence discussed, the element of "resulting death" is not an indispensable factor or element to be established in proving individual responsibility under Article 6(1) of the Statute. The Trial Chamber found, beyond a reasonable doubt, that Ruzindana was individually responsible for committing killings with the intent to commit genocide. In making this finding, the material fact of the resulting death is determined by the Trial Chamber in its assessment and weighing of the evidence, including witness testimonies, presented at trial. As held by the Appeals Chamber in the *Tadić* Appeal Judgement, [277] the *Aleksovski* Appeal Judgement [278] and the *Čelebići* Appeal Judgement, [279] the Trial Chamber is best placed to hear, assess and weigh the evidence, including witness testimonies presented at trial. Whether a Trial Chamber will rely upon a single witness testimony as proof of a material fact, will depend on various factors that have to be assessed in light of the circumstances of each case. The Appeals Chamber therefore has to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial.

188. In this regard, the Appeals Chamber recalls the relevant factual conclusions vis-à-vis Ruzindana [280] in the Trial Judgement in respect of the massacres in the area of Bisesero:

(1) After reviewing the witness testimonies and Prosecution exhibits, the Trial Chamber was satisfied, beyond a reasonable doubt, that Ruzindana was properly identified by Prosecution Witnesses FF, PP, OO, II, JJ, NN, HH, UU, W, EE, Z, KK, RR and MM, as having participated in one or more of the assaults; [281]

(2) The Trial Chamber was satisfied beyond reasonable doubt that Ruzindana brought members of the *gendarmerie nationale,* communal police, members of the *Interahamwe* and armed civilians to the area of Bisesero and directed them to attack those Tutsis seeking refuge; [282]

(3) The Trial Chamber was satisfied beyond reasonable doubt that Ruzindana personally attacked Tutsis seeking refuge during the assaults described in Bisesero; [283]

(4) The Trial Chamber was left with no doubt that Ruzindana aided and abetted the killings, through orchestration and direction, and through his provision of transportation and weapons. The evidence proves that Ruzindana personally assisted in attacks that resulted in the killings of Tutsi civilians; [284]

(5) The Trial Chamber was satisfied, beyond a reasonable doubt, that Ruzindana mutilated and personally killed Beatrice; [285]

(6) All survivor witnesses attested to the fact that thousands were killed in the Bisesero area during April through June 1994. Witnesses, including Dr. Haglund and several journalists, confirmed this fact. Kayishema himself testified that massive burial efforts had taken place in this area. [286]

189. Ruzindana has relied on the finding of the Trial Chamber in paragraph 469 of the Trial Judgement wherein it was observed that ".... [c]ases of personal killing by [...] Ruzindana relating to specific individuals is less certain [...] in most instances where a witness testified to one or both of the accused shooting at a refugee, the Prosecution failed to establish a resulting death." Furthermore, during the hearing on appeal, Counsel for Ruzindana submitted that "the Trial Chamber is saying that the Prosecutor did not manage to prove that the death of men, women and children followed the acts of the Accused." [287] In making these submissions, Ruzindana limited his argument to the issue of his individual responsibility for "committing" the killings. The Appeals Chamber notes that in respect of personal killings relating to specific individuals, the Trial Chamber had found Ruzindana responsible,

beyond a reasonable doubt, for the death of one Beatrice. [288] More particularly, individual responsibility under Article 6 (1) of the Statute attaches not only to direct physical participation by the accused in the commission of the crime, but also to acts of participation which in fact contribute to, or have an effect on, the commission of the crime. Ruzindana has failed to challenge the findings of the Trial Chamber with regard to the other forms of participation under Article 6 (1) of the Statute for which he was found individually responsible.

190. The Appeals Chamber recalls that Ruzindana was found individually responsible under Article 6 (1) of the Statute, not only for committing killings with the intent to commit genocide but also for instigating, ordering, committing and otherwise aiding and abetting in the preparation and execution of the massacre that resulted in thousands of murders with the intent to destroy the Tutsi ethnic group in Bisesero area. [289] As discussed above, the issue of resulting death is not a legal element in the determination of criminal responsibility under Article 6(1) of the Statute; it can be an evidential factor in the proof of such a responsibility. Accordingly, the Appeals Chamber is satisfied that it was open to the Trial Chamber to assess the evidence before it in order to establish whether death resulted. In fact, such an assessment enabled it to find beyond a reasonable doubt that Ruzindana's acts and omissions constituted an adequate form of participation for the purpose of ascribing criminal responsibility under Article 6 (1) of the Statute.

(ii) Discussion

293. Kayishema alleges both legal and factual errors in the findings of the Trial Chamber with respect to his *de jure* authority over his subordinates. The Appeals Chamber understands his main argument to be that unless there is *de jure* authority there cannot be criminal responsibility under Article 6(3) of the Statute. [507] Kayishema appears to be contesting whether a *de facto* status can be determined without first establishing the *de jure* status.

294. Article 6(3) of the Statute on "Individual criminal responsibility", provides that:

> The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

With respect to the nature of the superior-subordinate relationship, the Appeals Chamber refers to the relevant principles expressed in the *Čelebići* Appeal Judgement in relation to the identical provision in Article 7(3) of ICTY Statute, as follows:

> (i) [A] superior is "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 perpetrators of the crime after the crime is committed". [508] Thus, "[t]he power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment." [509]
>
> (ii) "In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles. [...]. In general the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced. [T]he ability to exercise effective control is necessary for the establishment of *de facto* command or superior responsibility and [...] the absence of formal appointment is not fatal to a finding of criminal responsibility, provided certain conditions are met." [510]
>
> (iii) "The showing of effective control is required in cases involving both *de jure* and *de facto* superiors." [511]

This Appeals Chamber accepts these statements and notes that the Trial Chamber, in its Judgement, applied a similar approach when it found that:

> [E]ven where a clear hierarchy based upon *de jure* authority is not present, this does not prevent the finding of command responsibility. Equally, as we shall examine below, the mere existence of *de jure* power does not always necessitate the imposition of command responsibility. The culpability that this doctrine gives rise to must ultimately be predicated upon the power that the superior exercises over his subordinates in a given situation. [512]

Thus, "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". [513] Therefore, Kayishema's argument that without *de jure* authority, there can be no subordinate and hence, no *de facto* authority, is misconceived. This question turns on whether the superior had effective control over the persons committing the alleged crimes. The existence of effective control may be related to the question whether the accused had *de jure* authority. However, it need not be; such control or authority can have a *de facto* or a *de jure* character. [514]

295. As to the remainder of Kayishema's arguments, the Appeals Chamber is of the view that they

concern the allegation of an error on the part of the Trial Chamber in its evaluation of the evidence regarding the existence of *de jure* authority. This poses a question of fact and, in respect of a factual error, the Appeals Chamber recalls that the relevant "test" is that of reasonableness. Thus, "[i]t is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber." [515] In paragraphs 479 – 516 of the Trial Judgement, a thorough analysis of the evidence led the Trial Chamber to conclude that Kayishema exercised clear, definitive control, both *de jure* and *de facto,* over the assailants at every massacre site set out in the indictment. Kayishema, who now disputes this conclusion on appeal, must persuade the Appeals Chamber that the conclusion is one which could not have reasonably been made by a reasonable tribunal of fact, so that a miscarriage of justice has occurred.

296. The Appeals Chamber notes that during the closing arguments at trial, Counsel for Kayishema had argued to the effect that Kayishema did not enjoy *de jure* control over the appropriate administrative bodies and law enforcement agencies. [516] On appeal, he repeats these arguments both in the Kayishema Brief and during the hearing on appeal.

297. Kayishema argues that the Trial Chamber erred in its assessment of the testimony of Professor Guibal with respect to "crisis multi-partyism", the exceptional climate that reigned in 1994 and their effect on the existing legal texts on which the function and powers of the *préfet* were based. Having considered the testimony of Professor Guibal as confirming the *de jure* power of the *préfet, [517]* the Trial Chamber went on to consider the conclusion of Professor Guibal's testimony to the effect that such power was "emptied of any real meaning when the ministers, the ultimate hierarchical superiors to the police, *gendarmes* and army, were of a different political persuasion." [518] This conclusion led the Trial Chamber to find that:

> [S]uch assertions clearly highlight the need to consider the *de facto* powers of the Prefect between April and July 1994. Such an examination will be conducted below. However, the delineation of power on party political grounds, whilst perhaps theoretically sound, should only be considered in light of the Trial Chambers findings that the administrative bodies, law enforcement agencies, and even armed civilians were engaged together in a common genocidal plan. The focus in these months was upon a unified, common intention to destroy the ethnic Tutsi population. Therefore, the question of political rivalries must have been, if it was at all salient, a secondary consideration. [519]

The Appeals Chamber considers that it has not been shown that the Trial Chamber erred in its assessment of the testimony of Professor Guibal. The Trial Chamber adequately considered such testimony with respect to the events occurring at the material period and, hence, reasonably concluded that possession of *de jure* power would not suffice in the circumstances for the determination of effective control.

298. Kayishema submits that the *de jure* relationship between the *préfet* and *bourgmestre* (i.e. the hierarchical powers) under Rwandan law cannot be construed as one of a superior and a subordinate. Kayishema further relies on an analysis of the relevant legal text to claim, (i) that the *préfet* does not exercise an indirect *de jure* authority [520] over the communal police and (ii) that the *préfet*'s restricted powers of requisition over the *gendarmerie* refute a finding of *de jure* authority over the same. He submits that these arguments show that the Trial Chamber erred in ascribing criminal responsibility to Kayishema under Article 6(3) of the Statute. The Appeals Chamber notes that Kayishema's arguments are entirely premised on his main assertion that a finding of *de jure* authority is required for criminal responsibility under Article 6(3) of the Statute. As the Appeals Chamber has considered above that the argument is misplaced, it will not address Kayishema's arguments but, rather, it will briefly consider whether the Trial Chamber reasonably concluded that he exercised effective control over the assailants.

299. In the case of the *bourgmestre,* the Trial Chamber looked at the following factors (both *de jure* and *de facto*) to establish that Kayishema exercised effective authority: the legislative provisions of two Rwandan Statutes, [521] the actions of Kayishema himself showing the continued subordination of the *bourgmestres* to his *de jure* authority; [522] Kayishema's own evidence on his relationship with the *bourgmestre* of Gishyita *commune* indicating the importance of his presence at a scene and evidencing that the *préfet* was a "well-known, respected and esteemed figure within his community" [523]. Similarly, Kayishema was also found to have effective control over the communal police and the *gendarmerie*, as evidenced by legislative provisions, [524] and the actual control he wielded over all the assailants including the *gendarmes*, soldiers, prison wardens, armed civilians and members of the *Interahamwe* as demonstrated by the identification of Kayishema as leading, directing, ordering, instructing, rewarding and transporting them to carry out the attacks. [525] The Trial Chamber found that the facts of the case established that Kayishema exercised *de facto* control over all of the assailants. [526] At paragraph 504 of the Trial Judgement it was stated that:

> All of the factual findings need not be recounted here. These examples are indicative of the pivotal role that Kayishema played in leading the execution of the massacres. It is clear that for all crime sites denoted in the Indictment, Kayishema had *de jure* authority over most of the assailants, and *de facto* control of them all.

The Appeals Chamber is satisfied that it was open to the Trial Chamber to find that Kayishema exercised effective control through its consideration of the *de jure* and *de facto* status of the authority enjoyed by him. Kayishema has sought to challenge the findings of the Trial Chamber with respect to command responsibility under Article 6(3) of the Statute, exclusively through an allegation of error in its findings of his *de jure* authority. Consequently, the Appeals Chamber finds that Kayishema has not shown that the Trial Chamber's findings with regard to his effective control were unreasonable so as to result in a miscarriage of justice.

(b) The issue of the *préfet*'s power to punish and prevent crime

(i) Arguments of the parties

300. Kayishema maintains that, given the prevailing context at the time, it emerges clearly that he could neither prevent the crimes committed in Kibuye *préfecture* nor punish the perpetrators thereof. [527] To this effect, he recalls the findings of Professor Guibal, who holds the opinion that "the powers of administrative policing and of direct penalization of the *préfet* [...] were reduced and, in some cases, even disappeared". [528]

301. Kayishema recognizes that Article 10 of the legislative decree of 11 March 1975 provides that the *préfet*, in some cases, "could have a power which could be qualified as judicial since he may prosecute and punish". [529] But that provision cannot be relied upon as a ground for the responsibility of the accused under Article 6 (3). The Defence holds the view that Kayishema could neither control, contain, prevent nor even punish the assailants since he had neither the authority nor the necessary means to do so. [530]

(ii) Discussion

302. The Appeals Chamber notes that, in substance, Kayishema alleges a lack of means to prevent or punish, based on a similar argument of lack of *de jure* authority and, hence, an absence of *de facto* means, in the light of the circumstances of the material period. His submissions on this point are set out in general terms.

Article 6 (3) of the Statute establishes a duty to prevent a crime that a subordinate was about to commit

or to punish such a crime after it is committed, by taking "necessary and reasonable measures". The Appeals Chamber recalls that the interpretation of "necessary and reasonable measures" has been considered in previous cases before ICTY. The Čelebići Trial Judgement found that:

> [A] superior should be held responsible for failing to take such *measures that are within his material possibility*... [T]he lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior". [531]

The Appeals Chamber agrees with this interpretation and further notes that the Trial Chamber applied a similar approach when it found that:

> In order to establish responsibility of a superior under Article 6 (3), it must also be shown that the accused was in a position to prevent or, alternatively, punish the subordinate perpetrators of those crimes. Clearly, the Trial Chamber cannot demand the impossible. Thus, *any imposition of responsibility must be based upon a material ability of the accused to prevent or punish* the crimes in question. [532]

Thus, it is the effective capacity of the Accused to take measures which is relevant. Accordingly, in the assessment of whether a superior failed to act, it is necessary to look beyond formal competence to actual capacity to take measures. Kayishema's argument that he lacked the means to prevent or punish crime in the context of the material period through an absence of formal competence or *de jure* authority, is once again misplaced.

IV. DISPOSITION

372. For the foregoing reasons, **The Appeals Chamber**, on 1 June 2001, 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 hearings of 30 and 31 October 2000,

Sitting in open court,

Finds inadmissible by 4 votes (Judges Jorda, Vohrah, Nieto-Navia and Pocar) to 1 (Judge Shahabuddeen) the Prosecution appeal and the Prosecutor's Respondent's Brief;

Unanimously dismisses the grounds of appeal raised by Clément Kayishema and Obed Ruzindana against the Judgement and Sentence of the Trial Chamber delivered on 21 May 1999;

Affirms the verdict of guilty entered against Clément Kayishema for all the counts on which he was convicted and the sentence of life imprisonment imposed on him;

Affirms the verdict of guilty entered against Obed Ruzindana for the count on which he was convicted and the sentence of twenty-five years' imprisonment imposed on him;

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

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

Claude Jorda Presiding Judge	Lal Chand Vohrah Judge	Mohamed Shahabuddeen Judge
Rafael Nieto-Navia	Fausto Pocar	

Judge Judge

Judge Shahabuddeen appends a Separate Opinion to this Judgement.

Judge Nieto-Navia appends a Declaration to this Judgement.

Dated this first day of June 2001

At Arusha, Tanzania

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

Dated this nineteenth day of July 2001

At The Hague
The Netherlands

[Seal of the Tribunal]