
ANNEX A

AUTHORITY 15

ICTR-97-20-T
15-5-2003
(7494 - 726)

7494
#171



UNITED NATIONS

NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER III

Original: English

Before Judges: Yakov Ostrovsky, Presiding
Lloyd G. Williams, QC
Pavel Dolenc

Registrar: Adama Dieng

Judgement of: 15 May 2003

2003 MAY 15 11:19
ORIGINAL RECORDS BRANCH/INVESTIGATIVE
ICTR
RECEIVED

THE PROSECUTOR

v.

LAURENT SEMANZA

Case No. ICTR-97-20-T

JUDGEMENT AND SENTENCE

Counsel for the Prosecution:

Chile Eboe-Osuji

Counsel for the Defence:

Charles Acheleke Taku
Sadikou Ayo Alao

373. Murder under Article 4 refers to the intentional killing of another which need not be accompanied by a showing of premeditation. The Chamber reaches this conclusion having considered the use of the term “*meurtre*” as opposed to “*assassinat*” in the French version of the Statute. [622]

374. Torture under Article 4 has the same essential elements as those set forth for torture as a crime against humanity. [623]

D. Individual Criminal Responsibility

375. The Indictment charges the Accused with criminal responsibility under Article 6(1) and Article 6(3) of the Statute for genocide, crimes against humanity, and serious violations of Common Article 3 and Additional Protocol II. In addition, the Indictment charges the Accused with criminal responsibility for the crime of genocide under Article 2(3) of the Statute.

1. Responsibility Under Article 6(1) of the Statute

376. Article 6(1) addresses criminal responsibility for unlawful conduct of an accused and is applicable to all three crimes. [624] Article 6(1) provides as follows:

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.

377. Article 6(1) reflects the principle that criminal liability is not incurred solely by individuals who physically commit a crime, but also extends to those who participate in and contribute to a crime in other ways, following principles of accomplice liability. [625]

378. Pursuant to Article 6(1), a crime within the Tribunal’s jurisdiction must have been completed before an individual’s participation in that crime will give rise to criminal responsibility. [626] Article 6 (1) does not criminalize *inchoate* offences, which are punishable only for the crime of genocide pursuant to Article 2(3)(b), (c), and (d). [627]

379. To satisfy Article 6(1), an individual’s participation must have *substantially* contributed to, or have had a *substantial* effect on, the completion of a crime. [628]

a. Forms of Participation

(i) Planning

380. “Planning” envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime. [629] The level of participation in the planning must be substantial such as actually formulating the criminal plan or endorsing a plan proposed by another. [630]

(ii) Instigating

381. “Instigating” refers to urging, encouraging, or prompting another person to commit a crime. [631] Instigation need not be direct and public. [632] Proof is required of a causal connection between the instigation and the commission of the crime. [633]

(iii) Ordering

382. "Ordering" refers to a situation where an individual has a position of authority and uses that authority to order – and thus compel – another individual, who is subject to that authority, to commit a crime. [634] Criminal responsibility for ordering the commission of a crime under the Statute implies the existence of a superior-subordinate relationship between the individual who gives the order and the one who executes it. [635]

(iv) Committing

383. "Committing" refers to the direct personal or physical participation of an accused in the actual acts which constitute the material elements of a crime under the Statute. [636]

(v) Aiding and Abetting in the Planning, Preparation, or Execution

384. The terms "aiding" and "abetting" refer to distinct legal concepts. [637] The term "aiding" means assisting or helping another to commit a crime, and the term "abetting" means encouraging, advising, or instigating the commission of a crime. [638] However, the terms "aiding" and "abetting" are frequently employed together as a single broad legal concept, [639] as is the case in this Tribunal.

385. In the Tribunal's jurisprudence, "aiding and abetting" refers to all acts of assistance that lend encouragement or support to the commission of a crime. [640] This encouragement or support may consist of physical acts, verbal statements, or, in some cases, mere presence as an "approving spectator". [641] Except in the case of the "approving spectator," the assistance may be provided before or during the commission of the crime, and an accused need not necessarily be present at the time of the criminal act. [642]

386. Criminal responsibility as an "approving spectator" does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct. [643] The authority of an individual is frequently a strong indication that the principal perpetrators will perceive his presence as an act of encouragement. [644] Responsibility, however, is not automatic, and the nature of the accused's presence must be considered against the background of the factual circumstances. [645]

b. *Mens Rea*

387. An individual who "commits" a crime as a principal perpetrator must possess the requisite *mens rea* for the underlying crime. [646]

388. In cases involving a form of accomplice liability, the *mens rea* requirement will be satisfied where an individual acts intentionally and with the awareness that he is influencing or assisting the principal perpetrator to commit the crime. [647] The accused need not necessarily share the *mens rea* of the principal perpetrator; the accused must be aware, however, of the essential elements of the principal's crime including the *mens rea*. [648]

389. In the case of the "approving spectator", the individual must know that his presence would be seen by the perpetrator of the crime as encouragement or support. [649] The requisite *mens rea* may be established from the circumstances including prior like behaviour, failure to punish, or verbal encouragement. [650]

2. *Responsibility Under Article 2(3) of the Statute*

390. Article 2(3) lists the forms of criminal responsibility that are applicable to the crime of

genocide under the Statute, namely genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.

391. The Chamber notes that an overlap exists between “genocide” in Article 2(3)(a) and “committing” in Article 6(1), and between “complicity” in Article 2(3)(e) and forms of accomplice liability in Article 6(1). [651] This redundancy can be explained by the drafters’ *verbatim* incorporation into the Statute of Article III of the Genocide Convention. [652]

392. The Prosecutor charged the Accused with committing genocide, as discussed in section V.A. hereof, as well as with direct and public incitement to commit genocide and with complicity in genocide. The Chamber will limit its present discussion to complicity in light of its decision to disregard for vagueness the paragraphs supporting the direct and public incitement count. [653]

393. Having taken into consideration the general meaning of complicity in the common and civil law, as well as the domestic law of Rwanda, prior jurisprudence has defined the term complicity as aiding and abetting, instigating, and procuring. [654]

394. In the view of the Chamber, there is no material distinction between complicity in Article 2(3)(e) of the Statute and the broad definition accorded to aiding and abetting in Article 6(1). [655] The Chamber further notes that the *mens rea* requirement for complicity to commit genocide in Article 2(3)(e) [656] mirrors that for aiding and abetting and the other forms of accomplice liability in Article 6(1). [657]

395. Therefore, complicity to commit genocide in Article 2(3)(e) refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide. The accused must have acted intentionally and with the awareness that he was contributing to the crime of genocide, including all its material elements.

396. In this case, Count 1 charges the Accused with criminal responsibility for committing genocide on the basis of Articles 6(1) and 6(3) of the Statute. This count seeks to hold the Accused responsible as a principal perpetrator, an accomplice, and a superior. If Count 1 is understood to encompass a charge of accomplice liability, Count 3 of the Indictment would be superfluous, as it charges the identical underlying criminal conduct as complicity to commit genocide under Article 2(3)(e).

397. Where a count does not specify a particular form of criminal participation under Article 6(1), the Chamber may consider the charge under the appropriate form within the limits of the Indictment and fair notice. [658] The Chamber is mindful that the commission of a crime and complicity in that crime are alternative charges. [659] Where a count seemingly charges both direct and accomplice liability under Article 6(1) and another count specifically alleges complicity for the identical criminal acts, the Chamber will narrow the scope of the broader count so as to eliminate any overlap.

398. Therefore, the Chamber finds that the reference to Article 6(1) in Count 1 of the Indictment refers only to direct criminal participation by “committing” and that all other forms of accomplice liability should be properly considered under Count 3, which charges complicity to commit genocide for the identical underlying criminal conduct.

3. *Responsibility Under Article 6(3) of the Statute*

399. Article 6(3) of the Statute concerns the criminal responsibility of a superior for failure to prevent or punish the criminal acts of his subordinates and is broadly applicable to all three crimes. Article 6(3) provides as follows:

Kayishema and Ruzindana, Judgement, TC, para. 185; *Akayesu*, Judgement, TC, para. 643. This is also the position taken by the ICTY. See, e.g., *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, AC, para. 70.

[618] See *Kayishema and Ruzindana*, Judgement, TC, para. 189.

[619] See *Bagilishema*, Judgement, TC, para. 105; *Musema*, Judgement, TC, para. 260; *Rutaganda*, Judgement, TC, para. 104; *Kayishema and Ruzindana*, Judgement, TC, para. 186; *Akayesu*, Judgement, TC, para. 643 (...[I]t has not been proved beyond reasonable doubt that the acts ... were committed in conjunction with the armed conflict."). This is also the position taken by the ICTY. See, e.g., *Kunarac*, Judgement, AC, para. 58; *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, AC, para. 70 ("It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.").

[620] See *Bagilishema*, Judgement, TC, para. 102; *Musema*, Judgement, TC, para. 286; *Rutaganda*, Judgement, TC, para. 106; *Kayishema and Ruzindana*, Judgement, TC, para. 184; *Akayesu*, Judgement, TC, para. 616. This position is based on a decision of the ICTY Appeals Chamber where the Tribunal stated that "the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim." *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, AC, para. 94.

[621] See *Musema*, Judgement, TC, para. 288; *Rutaganda*, Judgement, TC, para. 106; *Kayishema and Ruzindana*, Judgement, TC, para. 184; *Akayesu*, Judgement, TC, para. 616.

[622] See *supra* paras. 334-339.

[623] *Kunarac*, Judgement, TC; paras. 465, 497, *aff'd Kunarac*, Judgement, AC, paras. 144, 156. For the elements of torture see *supra* paras. 342-343.

[624] The Chamber finds that all forms of criminal participation and responsibility under Article 6 are applicable to violations of Article 4 of the Statute even though that provision states that the Tribunal shall have the power to prosecute persons "committing or ordering to be committed" serious violations of Common Article 3 and Additional Protocol II. This language in Article 4 can be explained by its *verbatim* incorporation from Common Article 3 of the four Geneva Conventions. Article 6 (1) and Article 6(3) both expressly apply to Articles 2 through 4 and reflect that an individual is criminally responsible if he plans, instigates, orders, commits, aids and abets, or as a superior fails to prevent or punish the violations of international criminal law codified in the Statute. Article 1 also states that the Tribunal has the power to prosecute persons criminally responsible for the violations in accordance with the provisions of the Statute. Thus, in light of Articles 1 and 6, the Tribunal has the authority to prosecute all forms of criminal responsibility for violations of Article 4.

[625] *Kayishema and Ruzindana*, Judgement, AC, para. 185. See also *Musema*, Judgement, TC, para. 114; *Rutaganda*, Judgement, TC, para. 33; *Kayishema and Ruzindana*, Judgement, TC, paras. 196-197; *Akayesu*, Judgement, TC, para. 473.

[626] *Kayishema and Ruzindana*, Judgement, AC, paras. 186, 187; *Musema*, Judgement, TC, paras. 115-116; *Rutaganda*, Judgement, TC, paras. 34, 35, 43; *Akayesu*, Judgement, TC, paras. 473, 482.

[627] *Musema*, Judgement, TC, para. 115; *Rutaganda*, Judgement, TC, para. 34; *Akayesu*, Judgement, TC, para. 473.

[628] *Kayishema and Ruzindana*, Judgement, AC, paras. 186, 198; *Ntakirutimana*, Judgement, TC, para. 787; *Bagilishema*, Judgement, TC, paras. 30, 33; *Musema*, Judgement, TC, para. 126; *Rutaganda*, Judgement, TC, para. 43; *Kayishema and Ruzindana*, Judgement, TC, paras. 199, 207; *Akayesu*, Judgement, TC, para. 477.

[629] Black's Law Dictionary p. 1150 (6th ed. 1990) (defining "plan"); *Rutaganda*, Judgement, TC, para. 37.

[630] *Bagilishema*, Judgement, TC, para. 30.

[631] *Bagilishema*, Judgement, TC, para. 30; *Akayesu*, Judgement, TC, para. 482.

[632] *Akayesu*, Judgement, AC, paras. 478-482.

[633] *Bagilishema*, Judgement, TC, para. 30.

[634] *Bagilishema*, Judgement, TC, para. 30; *Rutaganda*, Judgement, TC, para. 39; *Akayesu*, Judgement, TC, para. 483.

[635] *Bagilishema*, Judgement, TC, para. 30; *Rutaganda*, Judgement, TC, para. 39; *Akayesu*, Judgement, TC, para. 483.

[636] *Kayishema and Ruzindana*, Judgement, AC, para. 187; *Tadic*, Judgement, AC, para. 188.

[637] See *Akayesu*, Judgement, TC, para. 484. See generally Mewett & Manning on Criminal Law p.272 (3rd ed. 1994); Black's Law Dictionary p. 69 (7th ed. 1999) (defining "aid and abet"), quoting Wharton's Criminal Law § 29 (15th ed. 1993). See, e.g., The Criminal Code, R.S.C. 1985, ch. C-46, § 21(b),(c) (Canada) (treating aiding and abetting separately).

[638] See *Ntakirutimana*, Judgement, TC, para. 787; *Akayesu*, Judgement, TC, para. 484; Smith & Hogan, Criminal Law p. 144 (10th ed. 2002) (quoting Oxford English Dictionary); Mewett & Manning on Criminal Law p.272 (3rd ed. 1994); Black's Law Dictionary p. 69 (7th ed. 1999) (defining "aid and abet"), quoting Wharton's Criminal Law § 29 (15th ed. 1993).

[639] Mewett & Manning on Criminal Law p.272 (3rd ed. 1994) (noting that aiding and abetting are "almost universally used conjunctively").

[640] *Kayishema and Ruzindana*, Judgement, AC, para. 186; *Ntakirutimana*, Judgement, TC, para. 787; *Bagilishema*, Judgement, TC, paras. 33, 36; *Musema*, Judgement, TC, paras. 125-126; *Kayishema and Ruzindana*, Judgement, TC, paras. 200-202; cf. *Akayesu*, Judgement, TC, para. 484.

[641] *Kayishema and Ruzindana*, Judgement, AC, paras. 201-202; *Kayishema and Ruzindana*, Judgement, TC, para. 198; *Aleksovski*, Judgement, TC, para. 63.

[642] *Bagilishema*, Judgement, TC, para. 33; *Rutaganda*, Judgement, TC, para. 43; *Kayishema and Ruzindana*, Judgement, TC, para. 200; *Akayesu*, Judgement, TC, para. 484. Physical presence during the commission of the crime was traditionally the distinguishing factor between aiding and abetting, which required presence, and other forms of complicity such as counselling and procuring. See generally Andrew Ashworth, Principles of Criminal Law p. 429 (3rd ed. 1999).

[643] *Bagilishema*, Judgement, TC, para. 36; *Aleksovski*, Judgement, TC paras. 64-65.

[644] *Aleksovski*, Judgement, TC, para. 65.

[645] *Kvocka*, Judgement, TC, para. 257; *Aleksovski*, Judgement, TC, paras. 64-65. See, e.g., *Akayesu*, Judgement, TC, para. 693 (authority and prior words of encouragement); *Tadic*, Judgement, TC, para. 690 (presence and previous active role in similar acts by the same group).

[646] *Kayishema and Ruzindana*, Judgement, AC, para. 187.

[647] *Kayishema and Ruzindana*, Judgement, AC, para. 186; *Bagilishema*, Judgement, TC, para. 32; *Kayishema and Ruzindana*, Judgement, TC, para. 201.

[648] *Kayishema and Ruzindana*, Judgement, TC, para. 205. See also *Aleksovski*, Judgement, AC, para. 162; *Vasiljevic*, Judgement, TC, para. 71; *Krnojelac*, Judgement, TC, paras. 75, 90; *Kvocka*, Judgement, TC, paras. 255, 262; *Kunarac*, Judgement, TC, para. 392; *Furundzija*, Judgement, TC, para. 249. But see *Ntakirutimana*, Judgement, TC, para. 787 (stating that aiding and abetting under Article 6(1) required proof that an accused possessed the *mens rea* of the underlying crime, for example, the specific intent of genocide); *Akayesu*, TC, paras. 485, 547. The Chamber notes that these cases do not provide any justification for treating the *mens rea* requirement for aiding and abetting under Article 6(1) differently than that for complicity in genocide, which does not require proof of the *mens rea* of the underlying crime.

[649] *Bagilishema*, Judgement, TC, para. 36.

[650] *Bagilishema*, Judgement, TC, para. 36.

[651] *Krstic*, Judgement, TC, para. 640.

[652] *Krstic*, Judgement, TC, para. 640. This overlap was notably eliminated in the ICC Statute where all forms of criminal responsibility, even those uniquely applicable to genocide, are listed in Article 25. See ICC Statute, art. 25.

[653] See *supra* para. 61.

[654] *Bagilishema*, Judgement, TC, paras. 69-70; *Musema*, Judgement, TC, paras. 177, 179; *Akayesu*, Judgement, TC, paras. 533, 535, 537. Reference to the Rwandan Penal Code is relevant in determining whether the principle of *nullum crimen sine lege* has been violated. However, the Chamber finds no compelling reason for explicitly defining a legal term in its Statute, which is drawn *verbatim* from an international instrument, by reference to a particular national code.

[655] *Akayesu*, Judgement, TC, para. 546 (noting that “aiding and abetting” in Article 6(1) “are similar to the material elements of complicity”). See also *Krstic*, Judgement, TC, para. 640; *Report of the Ad Hoc Committee on Genocide 5 April to 10 May 1948*, UN GAOR, Economic and Social Council, 7th Sess., Supp. No. 6, Doc. E 794 (26 May 1948), p. 8 (“The United States representative stated that, in agreeing to the inclusion of ‘complicity’ in this Article, he understood it to refer to accessoryship before and after the fact and to aiding and abetting in the commission of crimes enumerated in this Article”).

[656] See *Bagilishema*, Judgement, TC, para. 71; *Musema*, Judgement, TC, paras. 180-181; *Akayesu*, Judgement, TC, para. 545.

[657] *Kayishema and Ruzindana*, Judgement, AC, para. 186; *Bagilishema*, Judgement, TC, para. 32; *Kayishema and Ruzindana*, Judgement, TC, paras. 201, 205. See also *Aleksovski*, Judgement, AC, para. 162; *Vasiljevic*, Judgement, TC, para. 71; *Krnjelac*, Judgement, TC, paras. 75, 90; *Kvočka*, Judgement, TC, paras. 255, 262; *Kunarac*, Judgement, TC, para. 392; *Furundzija*, Judgement, TC, para. 249.

[658] *Kunarac*, Judgement, TC, para. 388.

[659] *Bagilishema*, Judgement, TC, para. 67; *Musema* Judgement, TC, para. 175; *Akayesu*, Judgement, TC, para. 532.

[660] *Bagilishema*, Motifs de l'Arrêt, AC, paras. 50, 51; *Kayishema and Ruzindana*, Judgement, AC, para. 294; *Musema*, Judgement, TC, para. 148. See also *Celebici*, Judgement, AC, paras. 192-196.

[661] *Bagilishema*, Judgement, TC, para. 38; *Celebici*, Judgement, AC, paras. 189-198, 225-226, 238-239, 256, 263. See also *Kunarac*, Judgement, TC, para. 395.

[662] *Celebici*, Judgement, AC, para. 303 (“The Appeals Chamber understands the necessity to prove that the perpetrator was the ‘subordinate’ of the accused, not to import a requirement of *direct* or *formal* subordination but to mean the relevant accused is, by virtue of his or her position, senior in some sort of formal or informal hierarchy to the perpetrator.”).

[663] *Bagilishema*, Motifs de l'Arrêt, AC, para. 56 (rejecting the notion that there must be a “*de jure*-like” relationship).

[664] *Bagilishema*, Motifs de l'Arrêt, AC, para. 50; *Kayishema and Ruzindana*, Judgement, AC, para. 294; *Celebici*, Judgement, AC, para. 192.

[665] *Bagilishema*, Motifs de l'Arrêt, AC, para. 50; *Kayishema and Ruzindana*, Judgement, AC, para. 294; *Celebici*, Judgement, AC, para. 266.

[666] *Bagilishema*, Motifs de l'Arrêt, AC, para. 50; *Celebici*, Judgement, AC, para. 266.

[667] *Celebici*, Judgement, AC, paras. 266, 303.

[668] *Bagilishema*, Judgement, TC, para. 45; *Kayishema and Ruzindana*, Judgement, TC, para. 225.

[669] *Bagilishema*, Judgement, TC, paras. 44-45; *Akayesu*, Judgement, TC, para. 489 (“[I]t is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent.”).

[670] *Bagilishema*, Judgement, TC, para. 45.

7307


The Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T


180

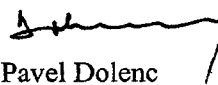
593. Judge Ostrovsky and Judge Dolenc append their separate opinions to this Judgement.

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

Arusha, 15 May 2003.


Yakov Ostrovsky
Presiding Judge


Lloyd G. Williams, QC
Judge


Pavel Dolenc
Judge

(Seal of the Tribunal)

