

**Declassified to Public  
06 September 2012**

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**ANNEX A**

**AUTHORITY 16**

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ICTR-96-13-T 2203<sup>D96</sup>  
27-01-2000  
(2203-1879)  
NATIONS UNIES

UNITED NATIONS



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
Trial Chamber I

OR: ENG.

Before: Judge Lennart Aspegren, Presiding  
Judge Laity Kama  
Judge Navanethem Pillay

Registry: Mr Agwu U. Okali

Judgement of: 27 January 2000.

THE PROSECUTOR  
VERSUS  
ALFRED MUSEMA

Case No. ICTR-96-13-T

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JUDGEMENT AND SENTENCE

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The Office of the Prosecutor:

Ms Carla Del Ponte  
Ms Jane Anywar Adong  
Mr Charles Adeogun-Philips  
Ms Holo Makwaia

Counsel for the Defence:

Mr Steven Kay QC  
Prof. Michail Wladimiroff

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME  
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NAME / NOM: JOHN M. KIYEYEU  
SIGNATURE: [Signature] DATE: 27.1.2000

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118. The Chamber defines five forms of criminal participation under Article 6(1) as follows:

119. The first form of participation, planning of a crime, implies that one or more persons contemplate the commission of a crime at both its preparatory and execution phases.

120. The second form of participation, incitement to commit a crime, involves instigating another, directly and publicly, to commit an offence. Instigation is punishable only where it leads to the actual commission of an offence intended by the instigator, except with genocide, where an accused may be held individually criminally liable for incitement to commit genocide under Article 2(3)(c) of the Statute, even where such incitement fails to produce a result.<sup>51</sup>

121. The third form of participation, ordering, implies a superior-subordinate relationship between the person giving the order and the one executing it, with the person in a position of authority using such position to persuade another to commit a crime.

122. The fourth form of participation in which an accused incurs criminal responsibility is where he actually commits one of the crimes within the jurisdiction *ratione materiae* of the Tribunal.

123. The Chamber holds that an accused may participate in the commission of a crime either through direct commission of an unlawful act or by omission, where he has a duty to act.

124. The fifth and last form of participation where individual criminal responsibility arises under Article 6(1) is "otherwise aid[ing] and abett[ing] in the planning, preparation, or execution of a crime referred to in Articles 2 to 4".

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<sup>51</sup> *Akayesu* Judgement, para. 562.

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125. The Chamber is of the view that aiding and abetting alone may be sufficient to render the accused criminally liable. In both instances, it is not necessary that the person aiding and abetting another to commit an offence be present during the commission of the crime. The relevant act of assistance may be geographically and temporally unconnected to the actual commission of the crime.

126. The Chamber holds that aiding and abetting include all acts of assistance in the form of either physical or moral support; nevertheless, it emphasizes that any act of participation must substantially contribute to the commission of the crime. The aider and abettor assists or facilitates another in the accomplishment of a substantive offence.

### 3.1.2 Responsibility of the Superior for Subordinates

127. Article 6(3) of the Statute 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.”

128. The principle enunciating the responsibility of command derives from the principle of individual criminal responsibility as applied by the Nuremberg and Tokyo Tribunals. It was subsequently codified in Article 86 of the Additional Protocol I of 8 June 1977 to the Geneva Conventions of 1949.

129. It is significant to note that there are varying views regarding the *mens rea* required for command responsibility. According to one view, *mens rea* derives from the legal concept of strict

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### 3.2.2 Complicity in Genocide

168. The Prosecutor has charged the Accused with this crime under Count 2 of the Indictment, as an alternative to Count 1 of genocide. The Statute indeed provides, under Article 2(3)(e), the Tribunal with the power to prosecute persons with complicity in genocide.

169. The Chamber notes that complicity is a form of criminal participation both under the Anglo-Saxon legal tradition (or Common Law) and the Roman-Continental legal tradition (or Civil Law).

170. According to the Chamber, the definition of complicity in genocide articulated in the *Akayesu* Judgement, states that an accomplice to an offence may be defined as someone who associates himself in an offence committed by another, complicity necessarily implying the existence of a principal offence.

171. The issue before the Chamber is whether genocide must be committed for a person to be found guilty of complicity in genocide. The Chamber notes that complicity can only exist when there is a punishable, principal act committed by someone, the commission of which the accomplice has associated himself with.

172. In this regard, the Chamber notes from the *Travaux Préparatoires* of the Genocide Convention that the crime of complicity in genocide was recognised only where genocide had actually been committed. The Genocide Convention did not provide the possibility for punishment of complicity in an attempt to commit genocide, complicity in incitement to commit genocide nor complicity in conspiracy to commit genocide, all of which were, in the view of some States, too vague to be punishable under the Convention.

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173. Consequently, the Chamber is of the opinion that in order for an accused to be found guilty of complicity in genocide, it must be proven beyond a reasonable doubt that the crime of genocide has been committed.

174. In regard to the issue of whether a person can be prosecuted for complicity, even where the perpetrator of the principal offence has himself not been tried, the Chamber notes that all criminal systems provide that a person may very well be tried as an accomplice, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, the latter's guilt can not be proven. The Rwandan Penal code is clear on this subject, and stipulates under Article 89 that accomplices:

“may be prosecuted even where the perpetrator may not face prosecution for personal reasons, such as double jeopardy, death, insanity or non-identification”.

175. The Chamber notes that the logical inference from the foregoing is that an individual cannot thus be both the principal perpetrator of a particular act and the accomplice thereto. An act with which an accused is charged cannot, therefore, be characterised as both an act of genocide and an act of complicity in genocide. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same act<sup>69</sup>.

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<sup>69</sup> In this regard, the Chamber notes that, in the *Akayesu* Judgement, the Trial Chamber, having made this observation on the applicable law and having found Jean-Paul Akayesu guilty of the crime of genocide for certain acts, therefore found him not guilty of the crime of complicity in genocide for the same acts.

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#### 5.4 Musema's Authority

863. Paragraph 5 of the Indictment states that Musema is individually criminally responsible pursuant to Articles 6(1) and 6(3) of the Statute for the crimes with which he is charged in the Indictment.

864. In Section 3.1 of the Judgement, the Chamber discussed the legal principles pertaining to individual criminal responsibility under Articles 6(1) and 6(3) of the Statute. As it determined there, the authority, whether *de facto* or *de jure*, or the effective control, exercised by Alfred Musema in the context of the events alleged, may provide the basis for such individual criminal responsibility.

865. In relation to Article 6(1), the nature of the authority wielded by an individual affects the assessment of that individual's role in planning, instigating, ordering, committing or otherwise aiding and abetting the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the Statute. In particular, the presence of an authority figure at an event could amount to acquiescence in the event or support thereof, and, in the perception of the perpetrators, legitimize the said event.

866. In relation to Article 6(3) of the Statute, the nature of the authority exercised by an individual is crucial to an assessment of whether that individual exercised a superior responsibility over perpetrators of acts detailed in Articles 2 to 4 of the Statute, and whether, as a result, that individual attracts individual criminal responsibility for those acts.

867. It is, therefore, necessary for the Chamber to assess the nature and extent of the authority, whether *de facto* or *de jure*, and the effective control exercised by Musema in the context of the events alleged in the Indictment. The Chamber will make that assessment of Musema's authority, firstly by examining the testimonies of witnesses before the Chamber and the documents tendered to it, and secondly by presenting its factual findings on the matter.

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The Chamber will then determine whether those acts are constituent elements of the crime of genocide and, if not, whether they constitute elements of the crime of complicity in genocide.

*With respect, firstly, to the facts alleged in the Indictment, the Chamber is satisfied beyond any reasonable doubt, on the basis of the factual findings, of the following:*

889. *Firstly*, regarding the allegations presented under paragraph 4.8 of the Indictment, according to which Musema, in concert with others, ordered and abetted in the rape of Annunciata, a Tutsi, and thereafter ordered that she and her son be killed, the Chamber holds that even if it is proven that Musema ordered that Annunciata be raped, such order, by and of itself, does not suffice for him to incur individual criminal responsibility, given that no evidence has been adduced to show that the order was executed to produce such result, namely the rape of Annunciata. Nor has it been proven that Musema ordered that she and her son be killed.

890. *Secondly*, the Chamber is satisfied that it has been established beyond a reasonable doubt that on 26 April 1994, Musema led and participated in an attack on Gitwa Hill. Musema arrived at the site of the attack in a Daihatsu vehicle belonging to the Gisovu Tea Factory. He carried a firearm and was accompanied by employees of the Gisovu Tea Factory wearing blue uniforms. Musema and other persons, some of whom wore banana leaves and *Imihurura* belts, attacked Tutsi refugees. It has also been established beyond a reasonable doubt that Musema shot into the crowd of refugees. The attackers killed resolutely, and few refugees survived the large-scale attack.

891. The Chamber finds that Musema incurs individual criminal responsibility for the above-mentioned acts, on the basis of the provisions of Article 6 (1) of the Statute, for having ordered and, by his presence and participation, having aided and abetted in the murder of members of the Tutsi ethnic group, and for the causing of serious bodily and mental harm to members of the said group.



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892. With respect to the Prosecutor's contention that Musema could additionally be held criminally responsible, under Article 6 (3) of the Statute, the Chamber finds that for an accused to be held criminally responsible under these statutory provisions, the Prosecutor must establish: (1) that one of the acts referred to under Articles 2 to 4 of the Statute was, indeed, committed by a subordinate of the Accused; (2) that the accused knew or had reason to know that the subordinate was about to commit such act or had done so; and (3) that the accused failed to take the necessary and reasonable measures to prevent the commission of said act by the subordinate or to punish him for the criminal conduct.

893. The Chamber notes that, in the instant case, it has been established that employees of the Gisovu Tea Factory were among the attackers. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, causing serious bodily and mental harm to members of the Tutsi group.

894. The Chamber finds that it has also been established that Musema was the superior of said employees and that he held not only *de jure* power over them, but also *de facto* power.<sup>189</sup> Considering that Musema was personally present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused nevertheless failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

895. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack of 26 April 1994 on Gitwa Hill, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6 (3) of the Statute.

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<sup>189</sup> See section 5.2 of the Judgement.

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RULES that the imprisonment shall be served in a State designated by the President of the Tribunal in consultation with the Trial Chamber; the Government of Rwanda and the designated State shall be notified of such designation by the Registrar;

RULES that this Judgement shall be enforced immediately, and that, however:

1. until his transfer to the designated place of imprisonment, Alfred Musema shall be kept in detention under the present conditions;
2. upon notice of appeal, if any, the enforcement of the sentence shall be stayed until a decision has been rendered on the appeal, with Musema nevertheless remaining in detention.

Judge Aspegren and Judge Pillay append their Separate Opinions to this Judgement.

Arusha, 27 January 2000.

*Lennart Aspegren*

Lennart Aspegren  
Presiding Judge

*Laity Kama*

Laity Kama  
Judge

*Navanethem Pillay*

Navanethem Pillay  
Judge

(Seal of the Tribunal)

