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06 September 2012**

ANNEX A

AUTHORITY 9

1783



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: English

TRIAL CHAMBER I

Before: Judge Erik Møse, Presiding
Judge Asoka de Z. Gunawardana
Judge Mehmet Güney

Registry: Mr Adama Dieng

Decision of: 7 June 2001

JUDICIAL RECORDS/ROHINES
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THE PROSECUTOR
VERSUS
IGNACE BAGILISHEMA

Case No. ICTR-95-1A-T

JUDGEMENT

The Office of the Prosecutor:

Ms Anywar Adong
Mr Charles Adeogun-Phillips
Mr Wallace Kapaya
Ms Boi-Tia Stevens

Counsel for the accused:

Mr François Roux
Mr Maroufa Diabira
Ms Héleyn Uñac
Mr Wayne Jordash

E. Lu

CHAPTER III. APPLICABLE LAW

1. Individual Criminal Responsibility

26. Article 6 of the Statute reads as follows:

“1. 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.

2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. 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.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.”

27. Article 6 defines the modalities of participation that give rise to individual responsibility for crimes under the Statute.[18]

28. In the present case, each count of the Indictment alleges that the Accused is criminally responsible pursuant to paragraphs (1) and (3) of Article 6 of the Statute. The heads of responsibility applicable to the present case are briefly examined below.

1.1 Responsibility under Article 6(1) of the Statute

Committing

29. The actual perpetrator may incur responsibility for committing a crime under the Statute by means of an unlawful act or omission.[19]

Planning, instigating, ordering

30. An individual who participates directly in planning to commit a crime under the Statute incurs responsibility for that crime even when it is actually committed by another person. The level of participation must be substantial, such as formulating a criminal plan or endorsing a plan proposed by another.[20] An individual who instigates another person to commit a crime incurs responsibility for that crime. By urging or encouraging another person to commit a crime, the instigator may contribute substantially to the commission of the crime. Proof is required of a causal connection between the instigation and the *actus reus* of the crime. The principle of criminal responsibility applies also to an individual who is in a position of authority, and who uses his or her authority to order, and thus compel a person subject to that authority, to commit a crime.[21]

31. Proof is required that whoever planned, instigated, or ordered the commission of a crime possessed criminal intent, that is, that he or she intended that the crime be committed.

Aiding and Abetting in the Planning, Preparation, or Execution

32. An accomplice must *knowingly* provide assistance to the perpetrator of the crime, that is, he or she must know that it will contribute to the criminal act of the principal.[22] Additionally, the accomplice must have intended to provide the assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.[23]

33. For an accomplice to be found responsible for a crime under the Statute, he or she must assist the commission of the crime; the assistance must have a *substantial effect* on the commission of the crime. [24] The Chamber, however, agrees with the view expressed in *Furundzija*, that the assistance given by the accomplice need not constitute an indispensable element, i.e. a *conditio sine qua non*, of the acts of the perpetrator.[25] Further, the participation in the commission of a crime does not require actual physical presence or physical assistance.[26] Mere encouragement or moral support by an aider and abettor may amount to “assistance”. [27] The accomplice need only be “concerned with the killing”. [28] The assistance need not be provided at the same time that the offence is committed.

34. The Chamber agrees with the conclusions in *Furundzija* and *Akayesu* that presence, when combined with authority, may constitute assistance (the *actus reus* of the offence) in the form of moral support. In *Furundzija*, the Chamber inferred from the *Synagogue* case that an “approving spectator who is held in such respect by other perpetrators that his presence encourages them in their conduct, may be guilty in a crime against humanity”. [29] Insignificant status may, however, put the “silent approval” below the threshold necessary for the *actus reus*. [30]

35. In *Akayesu*, the Chamber found that the Accused aided and abetted in the commission of acts “by allowing them to take place on or near the premises of the bureau communal, while he was present on the premises... and in his presence... , and by facilitating the commission of these acts through his words of encouragement in other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place.” [31]

36. The approving spectator must therefore not have an insignificant status if his or her presence is to have the required effect on the perpetrators, such as encouragement, moral support or tacit approval. As long as the accomplice has the requisite *mens rea*, which includes knowing that his presence would be seen by the perpetrator of the crime as encouragement or support, all acts of assistance that lend encouragement or support will constitute aiding and abetting, even where the “act” is mere presence. However, liability for aiding and abetting as an “approving spectator” presupposes actual presence at the scene of the crime, or at least presence in the immediate vicinity of the scene of the crime. The *mens rea* of the approving spectator may be deduced from the circumstances, and may include prior concomitant behaviour, for instance allowing crimes to go unpunished or providing verbal encouragement.

1.2 Responsibility under Article 6(3) of the Statute

37. Article 6(3) incorporates the customary law doctrine of command responsibility. This doctrine is predicated upon the power of the superior to control or influence the acts of subordinates. Failure by the superior to prevent, suppress, or punish crimes committed by subordinates is a dereliction of duty that may invoke individual criminal responsibility. [32]

38. The Chamber will now consider, in turn, the three essential elements of command responsibility, namely:

- (i) the existence of a superior-subordinate relationship of effective control between the accused and the perpetrator of the crime; and,

(ii) the knowledge, or constructive knowledge, of the accused that the crime was about to be, was being, or had been committed; and,

(iii) the failure of the accused to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator.[33]

1.2.3 Failing to Prevent or Punish

47. Article 6(3) states that a superior is expected to take “necessary and reasonable measures” to prevent or punish crimes under the Statutes. The Chamber understands “necessary” to be those measures required to discharge the obligation to prevent or punish in the circumstances prevailing at the time; and, “reasonable” to be those measures which the commander was in a position to take in the circumstances.[50]

48. A superior may be held responsible for failing to take only such measures that were within his or her powers.[51] Indeed, it is the commander’s degree of effective control – his or her material ability to control subordinates – which will guide the Chamber in determining whether he or she took reasonable measures to prevent, stop, or punish the subordinates’ crimes. Such a material ability must not be considered abstractly, but must be evaluated on a case-by-case basis, considering all the circumstances.

49. In this connection, the Chamber notes that the obligation to prevent or punish does not provide the Accused with alternative options. For example, where the Accused knew or had reason to know that his or her subordinates were about to commit crimes and failed to prevent them, the Accused cannot make up for the failure to act by punishing the subordinates afterwards.[52]

50. The Chamber is of the view that, in the case of failure to punish, a superior’s responsibility may arise from his or her failure to create or sustain among the persons under his or her control, an environment of discipline and respect for the law. For example, in *Celebici*, the Trial Chamber cited evidence that Mucic, the accused prison warden, never punished guards, was frequently absent from the camp at night, and failed to enforce any instructions he did happen to give out.[53] In *Blaskic*, the accused had led his subordinates to understand that certain types of illegal conduct were acceptable and would not result in punishment.[54] Both Mucic and Blaskic tolerated indiscipline among their subordinates, causing them to believe that acts in disregard of the dictates of humanitarian law would go unpunished. It follows that command responsibility for failure to punish may be triggered by a broadly based pattern of conduct by a superior, which in effect encourages the commission of atrocities by his or her subordinates.[55]

3.1.3 On Discriminatory Grounds

81. The Statute contains a requirement that, the broader attack must be conducted on national, political, ethnic, racial, or religious grounds.[78] The Chamber is of the view that the qualifier “on national, political, ethnic, racial or religious grounds”, which is peculiar to the ICTR Statute should, as a matter of construction, be read as a characterisation of the nature of the “attack” rather than of the *mens rea* of the perpetrator.[79] The perpetrator may well have committed an underlying offence on discriminatory grounds identical to those of the broader attack; but neither this, nor for that matter any discriminatory intent whatsoever, are prerequisites of the crime, so long as it was committed as part of the broader attack.[80]



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Pursuant to Rule 99 (A) of the Rules of Procedure and Evidence, the Trial Chamber orders the immediate release of Ignace Bagilishema from the Tribunal's Detention Facilities and directs the Registrar to make the necessary arrangements.

This order is without prejudice to any such further order that may be made by the Trial Chamber pursuant to Rule 99 (B) of the Rules of Procedure and Evidence.

Judge Asoka de Z. Gunawardana appends a Separate Opinion to this Judgement.

Judge Mehmet Güney appends a Separate and Dissenting Opinion to this Judgement pertaining to Counts 2, 3, 4 and 5.

Arusha 7 June 2001

A handwritten signature in black ink, appearing to read 'Erik Møse'.

Erik Møse
Presiding Judge

A handwritten signature in black ink, appearing to read 'Asoka de Z. Gunawardana'.

Asoka de Z. Gunawardana
Judge

A handwritten signature in black ink, appearing to read 'Mehmet Güney'.

Mehmet Güney
Judge

(Seal of the Tribunal)