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SCSL-04-15-T
(25429 - 25442)

25429

CASE No.SCSL-2004-15-T

SPECIAL COURT FOR SIERRA LEONE

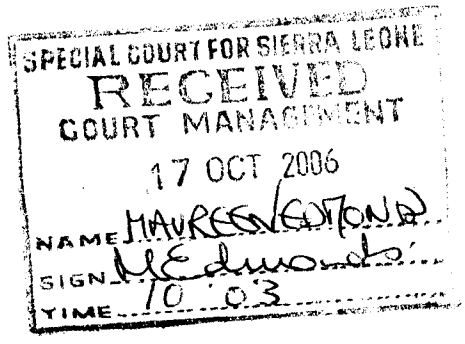
TRIAL CHAMBER 1

Before:

Hon Justice Bankole Thompson, Presiding Judge

Hon Justice Pierre Boutet

Hon Justice Benjamin Mutanga Itoe



Registrar:

Mr. Lovemore G. Munlo SC

Date: 17 October 2006

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

AUTHORITIES REFERRED TO DURING RULE 98 ORAL MOTION FOR ACQUITTAL, 16 OCTOBER 2006

Office of the Prosecutor

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Court Appointed Counsel for Augustine Gbao: Andreas O'Shea and John Cammegh

AUTHORITIES REFERRED TO DURING RULE 98 ORAL MOTION FOR ACQUITTAL, 16 OCTOBER 2006

The Prosecutor v. Bagilishema, ICTR, No. ICTR-95-1A-T, Judgment, 7 June 2001, para 44 – 49

The Prosecutor v. Blaskic, ICTY, No. IT-95-14-A, Judgment, 29 July 2004, para 62 - 63

The Prosecutor v. Kamuhanda, ICTR, No. ICTR-95-54A-T, Judgment, 22 January 2004, para 605 – 607

The Prosecutor v. Mpambara, ICTR, No. ICTR-01-65-T, Judgment, 11 September 2006, para 14

NB: The relevant sections of text have been filed in accordance with Article 7 Practice Direction on Filing Documents before the Special Court for Sierra Leone (Amended 10 June 2005) as the authorities are readily available on the internet and exceed 30 pages in length.

Shekou Touray
Lead Counsel 1

25431

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

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

2001 JUN -7 A 9:52

07/06/2001

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

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIEE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: AMINATTA L.R. N'GUM
SIGNATURE: N'gum DATE: 18/06/01

Counsel for the accused:

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

1.2.2 Knowing or Having Reason to Know

44. As to the *mens rea*, the standard that the doctrine of command responsibility establishes for superiors who fail to prevent or punish crimes committed by their subordinates is not one of strict liability. The U.S. Military Tribunal in the "High Command case" held:

> "Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part."[46]

45. It follows that the essential element is not whether a superior had authority over a certain geographical area, but whether he or she had effective control over the individuals who committed the crimes, and whether he or she knew or had reason to know that the subordinates were committing or had committed a crime under the Statutes. Although an individual's command position may be a significant indicator that he or she knew about the crimes, such knowledge may not be presumed on the basis of his or her position alone.

46. It is the Chamber's view that a superior possesses or will be imputed the *mens rea* required to incur criminal liability where:

> he or she had actual knowledge, established through direct or circumstantial evidence, that his or her subordinates were about to commit, were committing, or had committed, a crime under the Statutes;[47] or,
>
> he or she had information which put him or her on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such

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[45] Ibid. para. 646.

[46] *U.S.A. v. Wilhelm von Leeb et al.*, in Trials of War Criminals, Vol. XI, pp. 543-544, [henceforth the *High Command* case].

[47] See *Celebici* (TC) paras. 384-386.

offences were about to be committed, were being committed, or had been committed, by subordinates;[48] or,

the absence of knowledge is the result of negligence in the discharge of the superior's duties; that is, where the superior failed to exercise the means available to him or her to learn of the offences, and under the circumstances he or she *should* have known.[49]

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]

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[48] Ibid. para. 390-393.
[49] See *Blaskic* paras. 314-332; cf. *Aleksovski* (TC) para. 80.
[50] See *Blaskic* para. 333.
[51] See *Celebici* (TC) para. 395.
[52] See *Blaskic* para. 336.

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UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-95-14-A
		Date:	29 July 2004
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Judgement of: **29 July 2004**

PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Sonja Boelaert-Suominen
Ms. Michelle Jarvis
Ms. Marie-Ursula Kind
Ms. Kelly Howick

Counsel for the Appellant:

Mr. Anto Nobilo
Mr. Russell Hayman

purpose.'"[113] One of the duties of a commander is therefore to be informed of the behaviour of his subordinates.

62. The Appeals Chamber considers that the *Čelebići* Appeal Judgement has settled the issue of the interpretation of the standard of "had reason to know." In that judgement, the Appeals Chamber stated that "a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offences committed by subordinates."[114] Further, the Appeals Chamber stated that "[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish."[115] There is no reason for the Appeals Chamber to depart from that position.[116] The Trial Judgement's interpretation of the standard is not consistent with the jurisprudence of the Appeals Chamber in this regard and must be corrected accordingly.

63. As to the argument of the Appellant that the Trial Chamber based command responsibility on a theory of negligence, the Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis of liability in the context of command responsibility, and that it stated that "it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law."[117] It expressed that "[r]eferences to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought...."[118] The Appeals Chamber expressly endorses this view.

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[112] Trial Judgement, para. 332.
[113] Trial Judgement, para. 329 (quoting the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Y. Sandoz et al. (eds.), ICRC, 1986), para. 3545).
[114] *Čelebići* Appeal Judgement, para. 241 (emphasis added) (footnote omitted). The standard as interpreted in the *Čelebići* Appeal Judgement has been applied in the *Bagilishema* Appeal Judgement, para. 42, and in the *Krnojelac* Appeal Judgement, para. 151.
[115] *Čelebići* Appeal Judgement, para. 226.
[116] *Aleksovski* Appeal Judgement, para. 107. The Appeals Chamber has previously stated in the *Aleksovski* Appeal Judgement that "a previous decision of the Chamber should be followed unless there are cogent reasons in the interests of justice for departing from it." *Aleksovski* Appeal Judgement, para. 128. Elaborating on this principle, the Appeals Chamber stated that: "[i]nstances of situations where cogent reasons in the interest of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law." *Aleksovski* Appeal Judgement, para. 108.
[117] *Bagilishema* Appeal Judgement, para. 34.
[118] *Bagilishema* Appeal Judgement, para. 35.

TRIAL CHAMBER II

25436

Before:
Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 22 January 2004

The PROSECUTOR
v.
Jean de Dieu KAMUHANDA

Case No. ICTR-95-54A-T

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PART IV - LEGAL FINDINGS

574. In the present Part, the Chamber will present its legal findings based on the factual findings made above in Part II and III.

575. The Indictment states that:

The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to the authority stipulated in Article 17 of the Statute of the International Criminal Tribunal for Rwanda ('the Statute of the Tribunal') charges:

JEAN DE DIEU KAMUHANDA

With CONSPIRACY TO COMMIT GENOCIDE; GENOCIDE, or alternatively COMPLICITY IN GENOCIDE; CRIMES AGAINST HUMANITY, and VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL II, offences stipulated in Articles 2, 3 and 4 of the Statute of the Tribunal.

A. Admitted Facts

576. The Accused has admitted that:

Between 1 January 1994 and 17 July 1994, Rwanda was a state party to the Genocide Convention (1948) having acceded to it on 16 April 1975.

The victims referred to in this document were protected persons, according to the provisions of Articles 3 common to Geneva conventions and additional protocol.

B. Cumulative Convictions

577. In almost every case tried before this Tribunal, the issue has arisen as to whether or not the accused may be convicted of multiple offences based on the same facts. In Musema, this Tribunal's Appeals Chamber finally had an opportunity to pronounce itself on the matter. This issue as it arose in that case was whether it was permissible to convict the prisoner of both genocide and extermination (as a Crime against Humanity) based on the same facts. Approving and adopting the applicable test as it was enunciated in the ICTY Appeals Chamber's case of Delalic et al. (the "Celebici Case"), the ICTR Appeals Chamber in Musema held that it was permissible so to convict the prisoner.

578. In the Celebici Case, the relevant test was set out as follows:

Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.

579. In the Musema Case, the ICTR Appeals Chamber also noted:

In the Jelisic Appeal Judgment, ICTY Appeals Chamber adopted the reasoning it had followed in the Celebici case, and held that the multiple convictions entered under Article 3 and Article 5 of ICTY Statute are permissible because each Article contained a distinct element requiring proof of a fact not required by the other Article.

580. Having reviewed these ICTY cases, the Appeals Chamber in Musema approved the test therein as one that "reflects general, objective criteria enabling a Chamber to determine when it may enter or affirm multiple convictions based on the same acts" and then confirmed the test as "the test to be applied with respect to multiple convictions arising under ICTR Statute."

581. Concerning the elements of the offences to be considered in the application of this test, the ICTR Appeals Chamber said:

The Appeals Chamber further endorses the approach of the Celebici Appeal Judgment, with regard to the elements of the offences to be taken into consideration in the application of this test. In applying this test, all the legal elements of the offences, including those contained in the provisions' introductory paragraphs, must be taken into account.

582. Applying the foregoing analysis to the issue in the Musema Case, the Appeals Chamber held as follows:

Applying the provisions of the test articulated above, the first issue is whether a given statutory provision has a materially distinct element not contained in the other provision, an element being regarded as materially distinct from another if it requires proof of a fact not required by the other.

Genocide requires proof of an intent to destroy, in whole or in part, a national, ethnical, racial or religious group; this is not required by extermination as a Crime against Humanity. Extermination as a Crime against Humanity requires proof that the crime was committed as a part of a widespread or systematic attack against a civilian population, which proof is not required in the case of genocide.

As a result, the applicable test with respect to double convictions for genocide and extermination as a Crime against Humanity is satisfied; these convictions are permissible. Accordingly, Musema's ground of appeal on this point is dismissed.

583. In deciding the issue as it did on that occasion, however, the Appeals Chamber declined to pronounce itself on the question of whether multiple convictions under different Articles of the Statute are always permitted.

584. The Chamber considers that in the present case there is no need to pronounce on the same question, especially as the Chamber has not been invited to do so by the Parties.

C. Criminal Responsibility

1. Indictment

585. The Indictment alleges that the Accused is criminally responsible on the basis of Article 6 of the Statute for the crimes described in the Counts below.

2. The Statute

586. The Article 6 of the Statute on Individual Criminal Responsibility reads:

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.
3. Jurisprudence
a. Responsibility under Article 6.1 of the Statute

587. Article 6(1) addresses criminal responsibility for unlawful conduct of an accused and is applicable to all three categories of crimes: genocide and derivative crimes; Crimes against Humanity; and violations of Article 3 Common to the Geneva Conventions and Additional Protocol II.
588. Article 6(1) reflects the principle that criminal responsibility for any crime in the Statute is incurred not only by individuals who physically commit that crime, but also by individuals who participate in and contribute to the commission of a crime in other ways, ranging from its initial planning to its execution, as specified in the five categories of acts in this Article: planning, instigating, ordering, committing, or aiding and abetting.
589. Pursuant to Article 6(1), an individual's participation in the planning or preparation of an offence within the Tribunal's jurisdiction will give rise to criminal responsibility only if the criminal act is actually committed. Accordingly, crimes which are attempted but not consummated are not punishable, except for the crime of genocide, pursuant to Article 2(3)(b),(c) and (d) of the Statute.
590. Jurisprudence has established that for an accused to incur criminal responsibility, pursuant to Article 6(1), it must be shown that his or her participation has substantially contributed to, or has had a substantial effect on, the completion of a crime under the Statute.
591. The elements of the crimes of genocide, Crimes against Humanity, and violations of Article 3 common to the Geneva Conventions and Additional Protocol II, articulated in Articles 2 to 4 of the Statute, are inherent in the five forms of criminal participation enumerated in Article 6(1), for which an individual may incur criminal responsibility. These five forms of participation are discussed below.
o Forms of Participation
(i) Planning
592. "Planning", implies that one or more persons contemplate a design for the commission of a crime at both the preparatory and execution phases. The existence of a plan may be demonstrated through circumstantial evidence. In Bagilishema, it was held that the level of participation in planning to commit a crime must be substantial, such as the actual formulation of a plan or the endorsement of a plan proposed by another individual.
(ii) Instigating
593. "Instigating", involves prompting another person to commit an offence, and needs not be direct or public. Both positive acts and omissions may constitute instigation. Instigation is punishable on proof of a causal connection between the instigation and the commission of the crime.
(iii) Ordering
594. "Ordering", implies a situation in which an individual with a position of authority uses such authority to impel another, who is subject to that authority, to commit an offence. No formal superior-subordinate relationship is required for a finding of "ordering" so long as it is demonstrated that the accused possessed the authority to order. The position of authority of the person who gave an order may be inferred from the fact that the order was obeyed.
(iv) Committing
595. To "commit" a crime usually means to perpetrate or execute the crime by oneself or to omit to fulfil a legal obligation in a manner punishable by penal law. In this sense, there may be one or more perpetrators in relation to the same crime where the conduct of each perpetrator satisfies the requisite elements of the substantive offence.
(v) Aiding and Abetting in the Planning, Preparation, or Execution of an Offence
596. "Aiding and abetting" relate to discrete legal concepts. "Aiding" signifies providing assistance to another in the

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commission of a crime. "Abetting" signifies facilitating, encouraging, advising or instigating the commission of a crime. Legal usage, including that in the Statute and case law of the ICTR and the ICTY, often inter-links the two terms and treats them as a broad singular legal concept.
597. "Aiding and abetting", pursuant to the jurisprudence of the ad hoc Tribunals, relates to acts of assistance that intentionally provide encouragement or support to the commission of a crime. The act of assistance may consist of an act or an omission, and it may occur before, during or after the act of the actual perpetrator. The contribution of an aider and abetter before or during the fact may take the form of practical assistance, encouragement or moral support, which has a substantial effect on the accomplishment of the substantive offence. Such acts of assistance before or during the fact need not have actually caused the consummation of the crime by the actual perpetrator, but must have had a substantial effect on the commission of the crime by the actual perpetrator.
o Mens Rea

598. To be held criminally culpable of a crime, the perpetrator must possess the requisite mens rea for that underlying crime.
599. For purposes of accomplice liability, the mens rea requirement will be fulfilled where an individual acts with the knowledge that his or her act(s) assist in the commission of the crime by the actual perpetrator(s). While the accused need not know the precise offence being committed by the actual perpetrator(s), the accused must be aware of the essential elements of the crime, and must be seen to have acted with awareness that he or she thereby supported the commission of the crime.
600. An accused's position of superior authority, in and of itself, does not suffice to conclude that the accused, by his or her mere presence at the scene of the crime, encouraged or supported the offence. The presence of the accused at the crime site, however, may be perceived as a significant indicium of his or her encouragement or support. The requisite mens rea may be established from an assessment of the circumstances, including the accused's prior and similar behaviour, failure to punish or verbal encouragement.
b. Responsibility Under Article 6(3) of the Statute

601. Article 6(3) of the ICTR Statute addresses the criminal responsibility of a superior by virtue of his or her knowledge of the acts and omissions of subordinates and for failure to prevent, discipline, or punish the criminal acts of his or her subordinates in the preparation and execution of the crimes charged. The principle of superior responsibility, which derives from the principle of individual criminal responsibility as applied in the Nuremberg and Tokyo trials, was subsequently codified in Article 86 of the Additional Protocol I to the Geneva Conventions in 1977. Article 6(3) of the Statute, which is applicable to genocide, Crimes against Humanity, and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II, provides as follows:
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.
602. The jurisprudence of both the ICTR and the ICTY has recognised that a civilian or a military superior, with or without official status, may be held criminally responsible for offences committed by subordinates who are under his or her effective control. The chain of command between a superior and subordinates may be either direct or indirect.
603. The following three concurrent conditions must be satisfied before a superior may be held criminally responsible for the acts of his or her subordinates:
(i) There existed a superior-subordinate relationship between the person against whom the charge is directed and the perpetrators of the offence;
(ii) The superior knew or had reason to know that the criminal act was about to be or had been committed; and
(iii) The superior failed to exercise effective control to prevent the criminal act or to punish the perpetrators thereof.
o Existence of a Superior-Subordinate Relationship

604. The test for assessing a superior-subordinate relationship, pursuant to Article 6(3), is the existence of a de jure or de facto hierarchical chain of authority, where the accused exercised effective control over his or her subordinates as of the time of the commission of the offence. The cognisable relationship is not restricted to military hierarchies, but may apply to civilian authorities as well.
605. By effective control, it is meant that the superior, whether a military commander or a civilian leader, must have possessed the material ability, either de jure or de facto, to prevent or to punish offences committed by subordinates. The test to assess a superior-subordinate relationship, in the words of the Appeals Chamber in Bagilishema, is:
[...]whether the accused exercised effective control over his or her subordinates; this is not limited to asking whether he or she had de jure authority. The ICTY Appeals Chamber held in the Celebici Appeal Judgment that '[a]s 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.
o Mens Rea Requirement that the Superior Knew or Had Reason to Know

606. To hold a superior responsible for the criminal conduct of subordinates, the Chamber must be satisfied that the superior possessed the requisite mens rea, namely, that he or she knew or had reason to know of such conduct.
607. A superior in a chain of hierarchical command with authority over a given geographical area will not be held strictly liable for subordinates' crimes. While an individual's hierarchical position may be a significant indicium that he or she knew or had reason to know about subordinates' criminal acts, knowledge will not be presumed from status alone.
608. A superior is under a duty to act where he or she knew or had reason to know that subordinates had committed or were about to commit offences covered by Articles 2, 3, and 4 of the Statute.
609. In accordance with current jurisprudence related to Article 6(3), a superior will be has found to possess, or will be imputed with, the requisite mens rea sufficient to incur criminal liability, where, after weighing a number of indicia, the Chamber is satisfied that (1) the superior had actual knowledge, established through direct or circumstantial evidence, that his or her subordinates were committing or were about to commit, or had committed, an offence under the jurisdiction of the Statute, or, (2) information was available to the superior which would have put him or her on notice of offences committed by subordinates.
o Effective Control of Subordinates to Prevent or Punish Their Criminal Acts
610. Where it is demonstrated that an individual is a superior, pursuant to Article 6(3), with the requisite knowledge, then he or she will incur criminal responsibility only for failure to take "necessary and reasonable measures" to prevent or punish crimes subject to the Tribunal's jurisdiction committed by subordinates. Such measures have been described as those within the "material possibility" of the superior, even though the superior lacked the "formal legal competence" to take these measures. Thus a superior has a duty to act in those circumstances in which he or she has effective control over subordinates, and the extent of an individual's effective control, under the circumstances, will guide the assessment of whether he or she took reasonable measures to prevent, stop, or punish a subordinate's crimes.
4. Findings

611. The Chamber finds that no specific evidence has been brought to it as regards the nature of the relationship between the Accused and the attackers of the Gikomero Parish Compound. There has been no clear evidence presented by the Prosecution that the Accused had a superior-subordinate relationship with these attackers nor that he maintained effective control over them during the period relevant to the Indictment.
612. This finding is not inconsistent with the Chamber's earlier finding that the Accused was in a position of authority over the attackers, for purposes of his responsibility under Article 6(1) for ordering the attack at the Gikomero Parish Compound. The finding of a position of authority for purposes of "ordering" under Article 6(1) is not synonymous with the presence of "effective control" for purposes of responsibility under Article 6(3). It is settled that the two provisions are distinct: and, in our view, so are the considerations for responsibility under them.
613. Therefore the Chamber does not find that the Accused can bear criminal responsibility as a superior under article 6(3) of the Statute for the crimes that occurred in Kigali-Rural préfecture between 1 January 1994 and July 1994.
614. The Chamber will consider the elements of the individual criminal responsibility of the Accused under the Article 6(1) of the Statute in the relevant sections below in relation with each count of the Indictment.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ORIGINAL: ENGLISH

TRIAL CHAMBER I

Before: Judge Jai Ram Reddy, presiding
Judge Sergei Alekseevich Egorov
Judge Flavia Lattanzi

Registrar: Adama Dieng

Date: 11 September 2006

THE PROSECUTOR

v.

Jean MPAMBARA

Case No. ICTR-01-65-T

JUDGEMENT

The Prosecution

Richard Karegyesa
Andra Mobberly
Didace Nyirinkwaya
Ousman Jammeh

The Defence

Arthur Vercken
Vincent Courcelle-Labrousse

14. A co-perpetrator (a term used to refer to a participant in a joint criminal enterprise) must intend by his acts to effect the common criminal purpose.[21] Mere knowledge of the criminal purpose of others is not enough: the accused must intend that his or her acts will lead to the criminal result. The *mens rea* is, in this sense, no different than if the accused committed the crime alone. As the Appeals Chamber has aptly remarked, a "joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself".[22] Determining whether a co-perpetrator possessed the necessary intent may be more difficult than in the case of a single perpetrator who, of necessity, must physically commit the crime. Although the *actus reus* may be satisfied by any participation, no matter how insignificant, "the significance and scope of the material participation of an individual in a joint criminal enterprise may be relevant in determining whether that individual had the requisite *mens rea*".[23]

15. There are three forms of joint criminal enterprise: "basic", described above; "systemic"; and "extended". Neither the systemic nor the extended forms of joint criminal enterprise are alleged in the present case, and need not be considered further.[24]

(ii) Aiding and Abetting

16. Aiding and abetting, though distinct concepts, are frequently combined to refer to any form of assistance or encouragement given to another person to commit a crime under the Statute.[25] The assistance or encouragement must have had a "substantial effect upon the

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nature of his contribution: it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose").

[21] *Stakic*, Judgement (AC), para. 65 ("it must be shown that the accused and the other participants in the joint criminal enterprise intended that the crime at issue be committed"); *Kvocka et al.*, Judgement (AC), para. 82 ("In the first form of joint criminal enterprise, all of the co-perpetrators possess the same intent to effect the common purpose"); *Vasiljevic*, Judgement (AC), para. 101 ("...what is required is the intent to perpetrate a certain crime (this being the shared intent of the part of all co-perpetrators)"); *Tadic*, Judgement (AC), para. 196 ("the accused, even if not personally effecting the killing, must nevertheless intend this result"); *Limaj*, Judgement (TC), para. 511 ("In the first type of joint criminal enterprise, the accused intends to perpetrate a crime and this intent is shared by all co-perpetrators").

[22] *Kvocka et al.*, Judgement (AC), para. 91.

[23] *Id.*, para. 97 ("In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common criminal purpose").

[24] Prosecution Closing Brief, para. 25 "The Prosecutor relies on the theory of JCE (JCE I) to establish the individual criminal responsibility of the accused...."). The Chamber notes that the intent required for the systemic form of liability, in which there is an organized criminal system such as a prison camp whose purpose is to persecute the inmates, is very similar to that of the basic form. It "requires personal knowledge of the organized system and intent to further the criminal purpose of that system". *Kvocka et al.*, Judgement (AC), para. 82. Although this formulation is slightly different from the intent required in the basic form of liability, the similarity is sufficient to permit this Chamber to rely on the pronouncements in the *Kvocka et al.* Appeal Judgement, which was concerned primarily with the systemic form of joint criminal enterprise liability.

[25] *Vasiljevic*, Judgement (AC), para. 102 (defining the *actus reus* of aiding and abetting as "acts specifically directed to assist, encourage or lend moral support to the perpetration of a specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect on the perpetration of the crime"); *Semanza*, Judgement (TC), paras. 384-385; *Limaj*, Judgement (TC), para. 516 ("'Aiding and abetting' has been defined as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime"); *Gacumbitsi*, Judgement (TC), para. 286 ("Aiding means assisting or helping another to commit a crime. Abetting means facilitating, advising or instigating the commission of a crime").