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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER II

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

Registry: Mr. Adama Dieng

Judgement of: 1 December 2003

THE PROSECUTOR
v.
JUVÉNAL KAJELIJELI
Case No. ICTR-98-44A-T

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**DISSENTING OPINION OF
JUDGE ARLETTE RAMAROSON**

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Translation certified by LSS, ICTR

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DISSENTING OPINION OF JUDGE ARLETTE RAMAROSON

1. The present Judgement was rendered unanimously, except that I wish to enter this dissenting opinion, being satisfied beyond a reasonable doubt that Kajelijeli is, pursuant to Article 3(g) of the Statute and as charged, “responsible for the rape of Tutsi women as part of a systematic or widespread attack against a civilian population on political, ethnic or racial grounds, and thereby committed a CRIME AGAINST HUMANITY, pursuant to Article 3(g) of the Statute, and punishable in reference to Articles 22 and 23 of the Statute of the International Criminal Tribunal for Rwanda” and pursuant to Articles 6(1) and 6(3) of the Statute.
2. I do not agree with the Majority’s rationale for dismissing the charge of rape, and its decision strikes me as lacking a basis both in fact and in law, especially as it relates to the evidence in support of the allegations preferred in paragraphs 5.3 and 5.5 of the Indictment on Kajelijeli’s responsibility for the rape of Tutsi women.

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I. BACKGROUND

(1) *The counts*

3. Paragraphs 5.3 and 5.5 of the Indictment read, respectively, as follows:

The events in Ruhengeri *préfecture*:

5.1(sic) *"From April to July 1994, many Tutsi men, women and children were attacked, abducted, raped and massacred in their residences or at their places of shelter within the Mukingo commune or arrested, detained and later murdered. The Accused commanded, organized, supervised and participated in these attacks."*

5.3(sic) *"The Accused ordered and witnessed the raping and other sexual assaults on the Tutsi females. At all the times material to this indictment, the Accused, as a person in authority over the attackers failed to take any measure to stop these nefarious acts on the Tutsi females."*

(2) *The majority decision and ratio decidendi*

4. While the Majority found that rapes were perpetrated by the *Interahamwe* as part of a widespread attack directed against a civilian population on ethnic grounds, it *dismissed the charge of rape against Kajelijeli* on the grounds that the Prosecution failed to show:

- that Kajelijeli planned, incited to commit, ordered, committed, or otherwise aided and abetted the planning, preparation or execution of the rapes which the Chamber found to have been committed under Article 6(1) of the Statute;
- that Kajelijeli ordered the *Interahamwe* to rape, as such orders as the Accused issued were, generally, to kill and exterminate, or that Accused in any way knew or had reason to know that such rapes were about to be committed by members of the *Interahamwe*, pursuant to Article 6(3) of the Statute.

5. The Chamber unanimously found credible the evidence of rapes that were committed on 7 April by the *Interahamwe* on Joyce in Rwankeri *cellule*, on Witness ACM in Kabyaza *cellule*, at a roadblock near Busogo Parish, on Witness GDO's daughter in Rukoma *cellule*, Shiringo

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secteur, and on Witness GDT in Susa *secteur*, Kinigi *commune*. The Chamber also found that members of the *Interahamwe* raped Witness GDF on 10 April 1994 in Susa *secteur*, Kinigi *commune*.

6. However, the Majority found that Kajelijeli was not present when members of the *Interahamwe* committed rapes on Joyce, on Witness GDO's daughter, or on Witnesses ACM, GDT and GDF. Moreover, the Majority was not satisfied that the Accused ordered that rapes be committed or that he ordered the rape or sexual assault of Tutsi women.

7. As a result, the Majority found that the Prosecution had failed to prove beyond a reasonable doubt that the Accused was present during the rape or that he knew or had reason to know that rapes were being committed by the *Interahamwe* in Mukingo and Kinigi *communes*, Ruhengeri *préfecture*, between 7 and 10 April 1994.

8. *However, I respectfully disagree with this finding, as I am satisfied beyond a reasonable doubt that Kajelijeli is personally responsible for the rapes of the Tutsi women committed between 7 and 10 April 1994, including the ones discussed above.*

9. Before discussing my reasoning and underlying arguments, I wish to review the applicable law and the findings of the Chamber, especially with regard to the applicability of Articles 6(1) and 6(3) to the counts of genocide and crimes against humanity.

II. APPLICABLE LAW ON RAPE UNDER THE STATUTE

10. Part IV of the Judgement "Legal Findings" includes the following:

- On the one hand, according to Count 7 "Crimes against humanity-Rape, pursuant to Article 3(g) of the Statute", Juvénal Kajelijeli:

"[I]s responsible for the rape of Tutsi(s) as part of a widespread and systematic attack against a civilian population on political, ethnic and racial grounds, and thereby committed a crime against humanity, pursuant to Articles 22 and 23 of the Statute of the International Criminal Tribunal for Rwanda."

- On the other hand, the Indictment also alleges that Kajelijeli is responsible for the crime of rape, pursuant to both Articles 6(1) and 6(3) of the Statute, but as the Majority found that Kajelijeli was not responsible for the rapes committed by the *Interahamwe*, it did not consider the said Articles applicable. Nonetheless, Articles 6(1) and 6(3) are dealt with under Section C "Criminal responsibility"¹, to which I respectfully wish to refer.

¹ *Kajelijeli* Judgement, 1 December 2003, paras. 754 to 779.

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11. I agree with the case law cited and discussed by the Trial Chamber on the ingredients of the crime of rape under sub-section 4: "*Crimes against humanity*"² to which I respectfully refer.

12. As I stated above, the Indictment charges Articles 6(1) and 6(3) responsibility under several counts of genocide and crimes against humanity, including rape. Indeed, in Section 6, "The Charges", the Indictment reads:

13. *For all of the acts described in the paragraphs specified in each of the counts below, the Accused either planned, incited to commit, ordered, committed, or in some other way aided and abetted the planning, preparation or execution of the said acts,*

And

The Accused knew, or had reason to know, that his subordinates were preparing to commit or had committed one or more of the acts referred to in Articles 2 to 4 of the Statute of the Tribunal and failed to take the necessary measures to prevent the said acts from being committed or to punish those who were responsible."

14. I agree with the Chamber's discussion on Article 6 under Section C: "*Criminal responsibility*"³ and, since it covers the subject exhaustively, I find it unnecessary to revisit the issue, especially as concerns:

- responsibility under Article 6(1) of Statute with the forms of participation: the Accused planned, instigated, ordered, committed, encouraged and abetted the planning, preparation or execution of the crime, and the Accused's *mens rea*;
- responsibility under Article 6(3) of the Statute (superior-subordinate relationship), the *mens rea* requiring that the superior knew or had reason to know, the superior's effective control over the subordinates which enables him to prevent or punish their criminal acts.

III. THE EVIDENCE

15. With respect to the rape of Tutsi women, the Trial Chamber was presented with evidence of seven known cases of rape committed by the *Interahamwe* in Ruhengeri *préfecture*: on 7 April 1994, Kizungu was raped, and another woman named Joyce was raped and killed at Rudatinya's house, in Rwankeri *cellule*; on 7 April 1994, Witness ACM was raped at a roadblock in Kabyaza *cellule*, near Busogo Parish, in Rwankeri; on 7 April 1994, the disabled daughter of Witness GDO was raped and killed in Shiringo *secteur*, Mukingo *commune*; on 7 April 1994, Witness GDF and her sister, who were residents of Shingiro, were raped; and on 10 April 1994, Witness GDT was raped at Kinigi.

² *Kajelijeli* Judgement, 1 December 2003, paras. 908 to 916.

³ *Ibid.*, paras. 754 to 779.

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16. I shall highlight the events that I consider relevant and which, in my opinion, support my reasoning, in reference, *inter alia*, to Part III, Section L of the Judgement.

(1) The testimonies of Prosecution Witnesses GAO, GBV and GDD⁴

17. Witnesses GBV and GAO both testified that Kajelijeli was at Byangabo Market in the morning of 7 April 1994. Witness GAO testified that the Accused gathered members of the *Interahamwe* at Byangabo market and ordered them to kill and exterminate the Tutsis; GBV also testified that Kajelijeli ordered the *Interahamwe* at Byangabo market to “dress up and start to work”. Witness GAO testified that Kajelijeli led them from Byangabo Market to Rwankeri *cellule*; thus, it was immediately after his incitement and at the same site that Joyce and a woman named Kizungu were raped and killed by two *Interahamwe*. Regarding Joyce, GAO testified that “they used a spear to pierce her side, and they also pierced her sexual organs. She was killed and her skirt was used to cover her”. Witness GBV testified that although many people were killed, he witnessed the killing of only one person⁵, but added that **Kajelijeli was present** when the killings began,⁶ including at the house of Rudatinya.⁷ Witness GAO further testified that Joyce was raped near Rudatinya’s house.⁸ Indeed, the Chamber found that Tutsis were attacked and killed in their residences or at their places of shelter in Mukingo *commune*, notably at the home of Rudatinya and that the Accused ordered and supervised the attack and **participated in it**.⁹ Kajelijeli was informed of all the acts perpetrated by his *Interahamwe*. On 7 April, he asked them for a report on what they had done: “I am leaving for Mukingo to monitor the situation, and we could get together again in the afternoon and then you would report to me on what you have done.”¹⁰ Later that day, Kajelijeli met to drink and celebrate with his *Interahamwe* in a bar.

18. Witness GAO also testified that Kajelijeli met with his *Interahamwe* at a bar for their report on the events of 7 April. Kajelijeli was therefore informed of what had happened that day.

(2) Testimony of Prosecution Witness ACM¹¹

19. Witness ACM first saw Kajelijeli on 7 April during the daytime, when he came to Munyemvano’s compound in Kinyababa *cellule*, Gitwa *cellule* [*sic*], Nkuli *commune*, which borders Mukingo *commune*; Kajelijeli was in a vehicle with his *Interahamwe*. *Kajelijeli left the Interahamwe at the compound and returned during the attack. He was there* when the surviving residents were taken from Munyemvano’s compound to Busogo Parish and told to line up. The *Interahamwe*, who were on both sides of the line, told them: “**Now we are going to rape you, and we are going to**

⁴ *Ibid.*, paras. 632 to 634.

⁵ T., 4 July 2001, p. 116 (GBV).

⁶ *Ibid.*, p. 108 (GBV).

⁷ *Ibid.*, p.115 (GBV).

⁸ T., 27 November 2001, p. 17 (GAO).

⁹ *Kajelijeli* Judgement, 1 December 2003, para. 555.

¹⁰ T., 3 October 2001, p. 37 (GDD).

¹¹ *Kajelijeli* Judgement, 1 December 2003, para. 636.

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introduce our feet and bottles in your vaginas.”¹² On the way to the Parish, some of the people who tried to flee, including his paternal uncle, were shot. ACM testified that Kajelijeli was present: “As a matter of fact, he was just behind us”¹³, she said; she further testified that: “he was there and he saw everything that happened.”¹⁴ Although Kajelijeli may or may not have heard the comments made by his *Interahamwe*, such comments point to the prevailing tension at the time, including the *Interahamwe*’s intent not only to kill the Tutsi women, but also to rape them, as Kajelijeli had ordered and incited them to do (see testimony of GDO *supra*).

20. When she reached Busogo Parish, Witness ACM once again saw Kajelijeli inspecting the location. She then fled and was raped by two *Interahamwe* who were manning a roadblock near the Parish. They were the same *Interahamwe* who had gone with Kajelijeli to the compound and told him that “they had not seen him for a while and had now found him”.

(3) *Testimony of Prosecution Witness GDO*¹⁵

21. As regards the testimony of Prosecution Witness GDO, the Majority dismissed the charge of rape against Kajelijeli. The Majority based its finding on the inconsistencies it noted between Witness GDO’s statement to investigators on 8 March 2000, to the effect that she had seen the Accused at a distance of 50 meters and recalled the time of Kajelijeli’s arrival to be 4 a.m., and her testimony at trial during which she insisted that she did not know how to estimate the distance in metres and that she had not mentioned 4 a.m.

22. The Majority also noted that the events took place in a forest, which made visibility and hearing difficult. For these reasons, the Majority found that there is reasonable doubt as to whether the Accused was present at the scene when GDO’s daughter was raped.

23. While the Defence does not contest that the crimes of rape occurred, it disputes that Kajelijeli was involved in the perpetration of such crimes in Rwankeri *cellule*.

24. *However, I disagree with the finding of the Majority and the Defence’s contention, and opine as follows:*

- *Inconsistencies noted by the Majority between Witness GDO’s statement to investigators and her testimony at trial*

25. A review of Witness GDO’s statement to the investigators, taken on 8 March 2000, shows obvious inconsistencies; in her statement GDO stated *inter alia* that her husband and son were discovered “the same morning”¹⁶ by *Interahamwe*, among whom she recognised Semahane

¹² T., 11 December 2001, p. 49 (ACM).

¹³ *Ibid.*, p. 59 (ACM).

¹⁴ T., 12 December 2001, p. 67 (ACM).

¹⁵ *Kajelijeli* Judgement, 1 December 2003, para. 680.

¹⁶ Statement of Witness GDO of 8 March 2000 to the ICTR investigators.

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and Bizimana. When she “regained consciousness”¹⁷, [she saw] the attackers taking her husband and son with them.

26. However, earlier in that very statement, she said that her daughter had been raped by *Interahamwe* who had been brought that morning by Kajelijeli, and that as a result of the beating she received during the rape of her daughter, she fainted and was unconscious “until nightfall”¹⁸. How could she have seen her husband being taken away “the same morning”¹⁹, as indicated in her statement, when she regained consciousness, whereas two paragraphs further down in her statement, it is stated that she regained consciousness only at nightfall? There is real inconsistency in the chronology of the events, and the error is so grotesque that it casts doubt on the sincerity and reliability of her statement as recorded. In view of the inconsistencies in the written statement, the investigator should have sought clarification as to the exact time that GDO’s husband and son were led away and when exactly GDO regained consciousness: was it in the morning or at nightfall? It follows from the said inconsistencies that the *Interahamwe* took GDO’s husband and son with them on a day other than that when her daughter was raped; and this is the more plausible account given by GDO at trial. For the foregoing reasons, I find that the statement made to ICTR investigators should be disregarded and that only the testimony at trial should be considered.

- *Finding that the events took place in a forest which, in the majority opinion, makes visibility and hearing difficult*

27. I would accord more credibility to GDO’s testimony at trial, in particular:

- Her testimony as to time and distance, notably the fact that she used the witness stand in the courtroom as her point of reference in estimating the distance, on the one hand, between the road and her hiding place, and, on the other hand, between her hiding place and the spot where Kajelijeli parked his car and dropped off the *Interahamwe*.
- Her testimony as to the time when Kajelijeli arrived, to wit, “It was early in the morning. It wasn’t the night or darkness.”²⁰

28. As a matter of fact, Witness GDO vehemently and consistently denied at trial that she estimated the distance in metres (50 metres) between her and Kajelijeli, considering that “she was incapable of estimating the distance in metres.”²¹ Also, she consistently denied at trial that

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ T., 19 July 2001, p. 36 (GDO).

²¹ *Ibid.* p. 37 (GDO). In her testimony before the Chamber, GDO stated: “I have already told you that I am not in a position to estimate, say, in terms of metres. I am talking about metres, but I don’t know exactly what that represents. I am prepared to provide explanations verbally, but I can’t talk about metres.” Witness GDO further testified: “If you want to teach me how to count in metres, you are welcome to do so, but let me assure that I never gave any estimates in metres because I don’t even know what those metres stand for.”

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she had stated that Kajelijeli arrived at 4 a.m. Considering that GDO's statement as taken by the investigators, lacks credibility with respect to these issues, *and considering further that GDO is illiterate*, the reference points she used to indicate the distance and time when Kajelijeli arrived with his *Interahamwe* are realistic, logical and sensible. Hence, her statement made to ICTR investigators on 8 March 2000 should be disregarded and credence given to her testimony at trial. Moreover, her account of the events is logical and consistent, and is given by someone who, though illiterate, spoke candidly and in simple terms.

29. The facts as per GDO's testimony at trial:

30. On 7 April 1994, GDO, who lived in Shingiro *secteur*, Mukingo *commune*, was hiding in a forest with her three children, including the victim, her 15-year-old disabled daughter. Even before President Habyarimana's death, she sometimes went into hiding, because the *Interahamwe* wanted to kill them, as they were Tutsi. In fact, before President Habyarimana's death, her son and husband were killed after being discovered in their hideout. The forest was close by, and was on the same property as her house, but below the house; her house was not on a steep hill. She was therefore hiding below her house, in the forest, and the road passed beside her hiding place.

31. In explaining the location and position of her hideout in relation to the road, Witness GDO compared it to the position of the witness stand where she was vis-à-vis the floor to the left of the stand, and testified that the road was below the place where she was hiding, using as a reference point the position of the table where she was with the interpreter vis-à-vis the floor. Her hiding place was therefore located above the road, but she could see people moving about or passing on the road. She could hear them if they spoke loudly. She also testified that the distance from her hideout to the road was equivalent to the distance from where she was to the entrance to the Tribunal (but I consider this vague, as the Tribunal has several entrances). It was a bamboo forest with scattered banana trees. There was also short grass, and from her location, she could observe what was going on by moving the bamboo branches aside.

32. On that day, Kajelijeli came aboard a red vehicle with the *Interahamwe* and stopped, after passing the Nyiragihima trading centre; the centre was near the place where she was hiding, but "not too close"; however, in my opinion, the mere fact that the vehicle went beyond the centre means that it passed by the location where she was. The vehicle stopped a little farther down, in relation to her hiding place; she saw people coming; "*It was early in the morning. It was already a clear sky, it wasn't the night or darkness.*"²² The *Interahamwe*, whom she recognised because of their uniforms, came out and said that Habyarimana had died and they were going to avenge his death.

²² T., 19 July, pp. 35 to 36 (GDO). Witness GDO testified at trial: "I told them [the investigators] that it was early in the morning. It was a clear sky. It wasn't the night or darkness. I have told you that when it comes to times and dates, I have problems because I didn't go to school." The witness further testified: "As for 4. a.m. in the morning, I didn't hear that one; in fact, I did not mention that time."

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33. GDO saw Kajelijeli, whom she knew as the leader, coming out of the vehicle, and heard him say that they should look for Tutsi women, *“that Tutsi women should be forcefully raped and killed and [that they] should separate the good grain from the bad.”*²³ The *Interahamwe* took off at once; first, they went to GDO’s house and, then, dashed into the forest, searched everywhere, and found GDO’s daughter.

34. Witness GDO did not recognise Kajelijeli only when he alighted from the vehicle; in fact, when her daughter screamed in pain while being raped, *she looked at Kajelijeli straight in the face*, and was then knocked down unconscious.

35. GDO’s account is logical and consistent. I therefore find that GDO could see Kajelijeli when the latter arrived with the *Interahamwe*, as the sky was clear. Moreover, her view was not obscured because she moved the bamboos out of the way. She could also hear Kajelijeli giving orders to the *Interahamwe*, as the spot where she was overhung the road and the vehicle was parked not very far from her hiding place.

36. The Chamber unanimously found GDO to be a credible witness with respect to the rape of her disabled daughter by the *Interahamwe*, because her testimony was detailed and informative, and showed that the Accused actually participated in the violent acts that were committed in front of her house, including the abduction and killing of her husband and son, the injuries she sustained and the rape and killing of her disabled daughter. I also find the detailed testimony as to Kajelijeli’s arrival with the *Interahamwe*, and his presence during the rape of GDO’s daughter, including GDO’s estimation of the time and distance, which was done in a realistic fashion, to be credible. Considering that I have expressed the view that GDO’s statement to ICTR investigators be disregarded, only her testimony at trial should be considered.

37. GDO also recognised the Accused at trial; having observed the witness’s demeanour and listened attentively to her testimony, I am satisfied that she is reliable and that she did not fabricate evidence as to Kajelijeli’s presence during the rape of her daughter.

(4) *Testimony of Prosecution Witness GDT*²⁴

38. GDT lived on the border between the communes of Mukingo and Kinigi, which are separated by the Kazi River. GDT was raped by Kajelijeli’s *Interahamwe*; the *Interahamwe* went to her house and said “start by looking for the woman”.²⁵ They searched for her, found her and took her outside. She testified that one of the *Interahamwe* told his comrades that Kajelijeli had told them: “You must bring me that lady before I finish drinking this bottle.”²⁶ She also understood from this conversation that Kajelijeli was drinking beer in one of the bars at the trading centre, quite close to her house. I therefore find that the attack was directed specifically at “the woman”.

²³ T., 18 July 2001, pp. 54 to 55 (GDO).

²⁴ *Kajelijeli* Judgement, December 2003, para. 682.

²⁵ T., 6 December 2001, p. 96 (GDT).

²⁶ T., 6 December 2001, p. 85.

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39. Kajelijeli was in permanent contact with his *Interahamwe*, who were required to give him a report on what they had done; in my opinion, he was informed of all the acts his *Interahamwe* committed, including the rapes.

(5) Testimony of Prosecution Witness GDF²⁷

40. Witness GDF lived in Kinigi *commune*, Susa *secteur*. She testified that on 10 April, Kajelijeli came with uniformed *Interahamwe*; he talked to the *Interahamwe*, and then he left in his red vehicle after having dropped them. The *Interahamwe* went to her house; she recognised the *Interahamwe* because of their distinguishing symbols (uniforms and red headbands). She ran away and hid with her sister in a maize field, but the *Interahamwe* found them, and raped them.²⁸ However, the majority of the Chamber did not make any findings to the effect that Kajelijeli came with the *Interahamwe* and dropped them off at GDF's house. The Majority simply states that Kajelijeli was not present at the time of the rape. I also find that Kajelijeli was not present at the time of the rape, but I emphasise that he brought the *Interahamwe* to GDF's house – a piece of evidence I will rely on in my subsequent reasoning.

41. In my opinion, GDF is a reliable witness and her testimony is consistent, notably as regards her seeing Kajelijeli when he arrived with his *Interahamwe*.

42. At that moment, Kajelijeli was very close to the location where the rapes were committed.

IV. LEGAL FINDINGS

(1) Provisions invoked by the Prosecution

43. According to Count 7 of the Indictment entitled "Crimes against humanity-Rape", Kajelijeli "[I]s responsible for the rape of Tutsi(s) as part of a widespread and systematic attack against a civilian population on political, ethnic or racial grounds, and thereby committed crimes against humanity, pursuant to Article 3(g) and punishable in reference to Articles 22 and 23 of the Statute of the International Criminal Tribunal of Rwanda" [pursuant to Articles 6(1) et 6(3) of the Statute].

44. Article 6(1) reads:

"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."

²⁷ *Kajelijeli* Judgement, 1 December 2003, para. 682.

²⁸ *Ibid.*, para. 682.

45. This Article enshrines the principle that criminal responsibility shall lie on the person who executes the crime, and also that a person who participates or otherwise aids or abets in the execution of the crime shall be liable as an accomplice.

46. Article 6(3) reads 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."

47. Article 6(3) enshrines the doctrine of command responsibility. The basis of this doctrine is that a superior possesses the power to control the actions of his subordinates. A superior who fails to act, in this instance, to prevent the commission of a crime or to punish the perpetrators thereof, incurs individual criminal responsibility. This responsibility is sometimes referred to as "vicarious responsibility or command responsibility".

48. As stated in the Judgement under "*Legal Findings*", the Accused is guilty under Article 6(3) if three requisite elements are established: the existence of a superior-subordinate relationship; the superior knew or had reason to know that the rape was about to be committed; and the superior failed to take all the necessary and reasonable measures to prevent the crime or to punish the perpetrators thereof, and failed to exercise effective control to prevent the criminal act or to punish the perpetrators thereof.

49. The Prosecution highlighted these three elements in its closing arguments to establish Kajelijeli's responsibility for the rapes.

50. The Prosecution submitted that Kajelijeli knew that crimes were being committed, because he directed the attacks and took no action to prevent or denounce the crimes; the Defence vehemently disputed this allegation, contending that it was entirely fabricated, exaggerated and false.

51. At this juncture, I wish to emphasise the distinction between the two Articles: while Article 6(1) relates to Kajelijeli's participation in the crime, Article 6(3) seems to relate to his superior responsibility, either because he did not prevent his subordinates from committing the rapes or failed to punish them.

52. However, I would add, as stated by the Appeals Chamber in *Celebici*,²⁹ that the two types of responsibility differ in nature, and that "these principles are quite separate and neither is dependent in law upon the other."

²⁹ See *Prosecutor v. Celebici*, Appeal Judgement, 20 January 2000, para. 338.

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53. In my opinion, it is necessary to determine whether the Accused must be held criminally responsible for having instigated, ordered, aided and abetted the execution of the crime or whether he is to be held criminally responsible as a superior of the *Interahamwe*. These two provisions cannot be applied concurrently, as I will explain below.

(2) Legal analysis of the crimes

54. As framed, Article 6(1) encapsulates several modes of participation. However, in the instant case, although the terms of Article 6(1) were not cited in the Indictment, except for “ordered”, the word “participated” is sufficiently broad to encompass the others, namely “planned, instigated, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred in Articles 2 to 4 of the Statute”.³⁰ The *Celebici* Appeal Judgement confirms that the word “participated” covers the terms used in Article 6(1). I would hold that Kajelijeli participated only as an accomplice to the actual perpetration of the crime.

- **Planning of the crime**

55. Planning implies that one or more persons conceive a design for the commission of a crime at both the preparatory and execution phases. The level of participation must be substantial, such as, *inter alia*, formulating a plan or endorsing a plan proposed by another person.

56. In the instant case, there is not sufficient evidence to establish that Kajelijeli planned the crime of rape.

- **Kajelijeli instigated and ordered the commission of rape**

- *Instigation to commit the crime of rape*

57. “Instigation” involves “prompting another person to commit an offence”; in the instant case, the words used by Kajelijeli, that is, “to forcefully rape them [Tutsi women] and kill them”, consist in prompting and stirring up the *Interahamwe* to commit the crimes of rape and murder.

58. Another requirement for instigation to commit a crime is the existence of a causal link between the act of instigating the *Interahamwe* to commit rape and the actual perpetration of the crime. There is a cause and effect relationship between the order given and the actual perpetration of the crime, and this is evidenced by the fact that the instigation to rape Tutsi women led to the rapes that have been recounted before us in this case.

59. Thus, GDO’s daughter, Joyce, Kizungu, GDT, ACM, were raped on the same day, while GDF and her sister were raped three days later.

60. As regards Joyce and Kizungu, the rapes began almost at the same time as the killings on

³⁰ See *Celebici* Appeal Judgement, 20 January 2001, para. 351.

7 April, after Kajelijeli had instigated the crowd and his *Interahamwe* to kill Tutsis at Byangabo market.

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- *Orders given by Kajelijeli*

61. Kajelijeli not only instigated the *Interahamwe*, but he also, by the same token, gave orders to forcefully rape and kill Tutsi women. Following this instigation, Tutsi women were raped at different locations where Kajelijeli was with his *Interahamwe*, either when he dropped them off at the location or when he sent them there. There is no doubt that in the cases listed earlier, the *Interahamwe* acted on the orders of Kajelijeli, the more so as he appeared in the immediate vicinity of the sites of the rapes, at the very locations where the rapes took place, or had just left the location.

62. Ordering presupposes the existence of a superior-subordinate relationship between the person giving the order and the one executing it, or his subordinate. In other words, the person in a position of authority uses it to convince another to commit an offence.³¹

63. The Chamber found that Kajelijeli exercised effective control over his *Interahamwe*; he had the power to control them, to give them orders and to direct them. In the present judgement, the fact that Kajelijeli was the *Interahamwe* leader and that he had a superior-subordinate relationship with them is not disputed.

64. In brief, the Chamber unanimously found that Kajelijeli had effective control over *Interahamwe* in Mukingo and Nkuli *communes*.³²

65. To conclude, I would like to emphasize that it is pointless establishing that he was the hierarchical superior of the *Interahamwe*; but it suffices to establish that he had the authority over them, and this, in the instant case, has been amply established.

• **Kajelijeli aided and abetted the commission of rape**

66. Aiding and abetting are two different concepts. Aiding refers not only to material assistance (the act of carrying the *Interahamwe* on board his vehicle to transport them to the scenes of the crime), but also to the fact of having witnessed the rape of the daughter of GDO and of Joyce; the presence of Kajelijeli at the scene constitutes moral support and serves to justify and encourage the acts of the *Interahamwe*, and contributes substantially to the commission of the rape; the presence of a person in authority encourages the assailants. Case law refers to the case of an "approving spectator".

67. The criminal liability of the "approving spectator" can only be established if he is actually present at the scene of the crime or is at least present in the immediate vicinity of the scene, and his presence is interpreted by the perpetrator of the crime as an approval of his

³¹ *Akayesu* Judgement, 2 September 1998, para. 483; *Bagilishema* Judgement, 7 June 2001, para. 30.

³² *Kajelijeli* Judgement, 1 December 2003, paras. 780 to 782.

conduct.³³

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68. In *Akayesu*, the Trial Chamber found that the Accused aided and abetted the acts by allowing them to take place on or near the premises of the *bureau communal*, while he was present on the premises or in his presence, and because he had reason to know that sexual violence was occurring.³⁴

69. The presence of Kajelijeli at the scene of the crime and the fact that he witnessed the rape prove that he abetted and supported the perpetrators of the crime and that he knew that his presence was interpreted by his *Interahamwe* as an encouragement. The mental element required is knowing that the person aiding and abetting encourages the commission of a specific crime by the perpetrator.

70. In my view, the evidence earlier adduced has established that he aided and abetted the *Interahamwe*, by his presence, to commit the crimes in question.

71. Witness GBV further testified that the *Interahamwe* arrived at Rudatinya's house; that they began to kill people, and that Kajelijeli was present. Indeed, Joyce was raped in those premises.³⁵ In conclusion, the presence of Kajelijeli at the sites where the daughter of GDO, Joyce and Kizungu were raped, or in the immediate vicinity of the locations where ACM, GDF and her sister, GDT, were raped, clearly points to the fact that the acts of rape were not only tolerated but also encouraged.

72. With regard to *mens rea*, Kajelijeli had the intent and willingness to participate in the commission of rape, and he was quite aware that by his acts (in this case, the act of ordering, instigating the commission of a crime, aiding and abetting the *Interahamwe*), he knowingly contributed to the criminal conduct of his *Interahamwe*, and he was aware that his participation had a significant effect on the commission of the rape.

(3) Conclusion

73. In conclusion, and in the light of the foregoing, there is substantial, specific and corroborative evidence to sustain the allegation that Kajelijeli committed the crime with which he is charged, and that, consequently, he is responsible for the rapes perpetrated on women. This is established by:

- *Circumstantial evidence of time:*

³³ *Bagilishema* Judgement, 7 June 2001, para. 36; *Blaskic* Judgement, 3 March 2000, para. 284; *Aleskovski* Appeal Judgement, 24 March 2000, para. 65.

³⁴ *Akayesu* Judgement, 2 September 1998, para. 693.

³⁵ T., 4 July 2001, p. 115 (GBV).

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The rapes that have been recounted before this Chamber took place on 7 and 10 April, at the same time as the genocide. The Chamber found that Kajelijeli supervised the attacks and, for this reason, it was easy for him to move within the *préfecture* and to go from one place to another to drop his *Interahamwe*.

- *Circumstantial evidence of place:*

The rapes were committed in Ruhengeri *préfecture*, particularly in Mukingo *commune* and its environs.

- *Circumstantial evidence of action:*

The killings and rapes began just after Kajelijeli publicly instigated his *Interahamwe* to kill Tutsis in the Byangabo market and also after Kajelijeli instigated people to forcefully rape and kill Tutsi women. It has been established that at the time the rapes were committed, Kajelijeli was present on the very premises (Kizungu and Joyce and the daughter of GDO), or in the immediate vicinity of the premises. The evidence regarding the *actus reus* has been stated above.

74. In the light of the foregoing, it is, to my mind, established that Kajelijeli ordered and instigated the commission of rapes, and aided and abetted the rapes; but there is insufficient evidence to sustain the allegation that he supervised the rapes.

75. I am therefore of the opinion that it has been established beyond a reasonable doubt that the Accused participated in the modes enumerated under Article 6(1), including the fact that:

- Kajelijeli gave orders to his *Interahamwe* to search for and forcefully rape and kill Tutsi women;
- Kajelijeli instigated the commission of the crime of rape against Tutsi women;
- Kajelijeli aided and abetted the perpetration of the crime of rape by providing material aid or assistance by ferrying the *Interahamwe* to the scene, and moral support by aiding and abetting his *Interahamwe* by his presence at the location or in the immediate vicinity of the location.

76. As regards the *mens rea*, Kajelijeli fully, wilfully and knowingly participated in criminal conduct, and his participation had a direct and substantial effect on the commission of rape.

77. I am of the opinion that the Accused clearly knew, or had reason to know since he gave orders for the acts to be carried out, that the rapes were about to take place. It has been established by direct and circumstantial evidence that he actually knew that the *Interahamwe* were about to commit or had committed the rapes after he had incited them and given them instructions to do so.

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78. Furthermore, the facts stated above have probative value and show that Kajelijeli is criminally responsible for the rape of Tutsi women.

V. APPLICABLE LAW IN THE INSTANT CASE

79. The Prosecution also argues that at all times material to the Indictment, with regard to the rapes, the Accused, despite the authority he had over the attackers, failed to take any measures to prevent the nefarious acts perpetrated against Tutsi females.

80. It is not necessary to hold him responsible for having given orders and incited the commission of rapes and, at the same time, accuse him of having failed in his obligation to prevent the rapes and punish the perpetrators thereof. It would be pointless to seek to establish that fact, and such an approach would be superfluous, given that he incited others to commit the rapes and that he himself ordered their commission.

81. GDO's daughter, Joyce, Kizungu, ACM, GCT, GDF and her sister were victims of Kajelijeli's acts, including his orders and incitement to commit the rapes and his aiding and abetting the perpetrators of the crime.

82. In my opinion, the requirements of Article 6(1) are fully met, and it would be preferable to establish Kajelijeli's responsibility solely on the basis of the provisions of paragraph (1) of the said Article.

(1) *Choosing the application of Article 6(1)*

83. As I reiterated earlier, it has been established by the Trial Chamber that Kajelijeli had effective control over his *Interahamwe*, especially because he could give them orders and instructions. Were his responsibility to be considered under Article 6(3), it could also be demonstrated that:

- Kajelijeli had command responsibility.
- He knew that rapes were going to be committed (because he had given orders to that effect).
- He was in a position to prevent the commission of these rapes, even if only by giving the order to prevent them.

If, as a superior, he was unable to punish them directly, he, nevertheless, had the material ability to do so, even by merely reporting the acts of his subordinates to the relevant authority.

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84. In fact, there is no point in discussing these two conditions, because it is difficult to see how he could have prevented the crime, or punished his subordinates when he had himself given the orders that Tutsi females be sought, raped and killed.

85. Kajelijeli may incur criminal responsibility under Article 6(1) or 6(3), but *I am of the opinion that it is more appropriate to establish his responsibility as an accomplice, given that such responsibility has been amply demonstrated under Article 6(1).*

86. In *Kordic*, the Trial Chamber emphasized that the responsibility of the superior was indirect, and that it did not flow from a direct involvement in the crimes but from his or her failure in the obligation to prevent the crime or punish the perpetrators. Therefore, the Chamber held that not only did the Accused know or had reason to know that crimes were being committed by his subordinates, but he also exercised his powers to plan, instigate, order or otherwise aid and abet in the planning, preparation or execution of these crimes, and also that *the type of criminal responsibility incurred may be better characterized by Article 6(1).*³⁶

87. In the *Krstic* judgment the Trial Chamber held that:

"The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) and Article 7(3) are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime *through his subordinates*, by "planning", "instigating" or "ordering" the commission of the crime, *any responsibility under Article 7(3) is subsumed under Article 7(1).*"³⁷

88. In the *Krnjelac* judgment, the Trial Chamber stated that it was inappropriate to convict under both heads of responsibility for the same conduct and *that it therefore had the discretion to choose which is the most appropriate one.*³⁸

89. While I recognize that I can choose the basis of Kajelijeli's responsibility for rape, I agree with the opinion expressed above and consider that it is not quite necessary, as the Prosecution would wish, to convict Kajelijeli both as an accomplice, and also as a superior pursuant to Article 6(3).

90. In the *Blaskic* judgment the Trial Chamber favoured the concurrent application of Articles 7(1) and 7(3)³⁹ when subsequent crimes were committed. The Chamber was of the view that failure to punish past crimes can be the basis of a superior's responsibility not only under Article 7(3), but also under Article 7(1) of the Statute for either aiding and abetting or instigating the commission of further crimes.

³⁶ *Kordic* Judgment, 26 February 2001, para. 371.

³⁷ *Krstic* Judgment, 2 August 2001, para. 605.

³⁸ *Natelic and Martinovic* Judgment, 31 March 2003, para. 81.

³⁹ The provisions of Articles 7(1) and 7(3) in the ICTY Statute are identical to those of Articles 6(1) and 6(3) of the

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91. That Trial Chamber stated, however, that: "It would be illogical to hold a commander responsible for planning, instigating or ordering the commission of crimes and, at the same time, reproach him for not preventing or punishing them. However, as submitted by the Prosecution, the failure to punish past crimes, which entails the commander's responsibility under Article 7(3), may, subject to the fulfillment of the respective *mens rea* and *actus reus* requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of further crimes".⁴⁰

92. In the light of the foregoing, I hold the view that although it is also possible to apply Article 6(3), the application of Article 6(1) in respect of Kajelijeli's responsibility in the matter is appropriate. Indeed, Article 6(1) would apply better to Kajelijeli as an accomplice to the rapes committed by his *Interahamwe* and I therefore find him individually responsible in that regard. *Kajelijeli knew that rapes were going to be committed* because he incited, ordered or otherwise aided and abetted their commission.

(2) I also find that there exist aggravating circumstances

93. *In my view, the fact that Kajelijeli was a superior constitutes aggravating circumstances* (without thereby necessarily finding Kajelijeli, as I have mentioned earlier, responsible as a superior in accordance with Article 6(3)). In the present judgment, there is no challenging the fact that Kajelijeli was the leader of the *Interahamwe* and that he had effective control over the *Interahamwe* of Mukingo and Nkuli from 1st January to July 1994. He had the power to control his subordinates, to give them orders and to direct them.

94. In the *Celebici* and *Aleskovski* Appeal Judgments, the Appeals Chamber held the view that the form of responsibility which was not chosen must be considered as an aggravating circumstance, because the final sentence should reflect the totality of the culpable conduct.

95. Similarly, in the instant case, we did not have to consider whether Kajelijeli was a superior; *and yet, he was*, and he had effective control over his *Interahamwe* who committed the crime of rape; hence, I would consider as an aggravating circumstance the fact that he was a superior of the *Interahamwe*.

96. Moreover, in the orders given by Kajelijeli and in his incitement to commit rape, I understand that the Tutsi women had to be forced, raped and also killed.

(3) The responsibility attributed to Kajelijeli for the crime of rape is part of a widespread attack against any civilian population on ethnic grounds, and is part of that attack.

97. I am convinced that the acts of rape and sexual violence were exclusively perpetrated against Tutsi women (of which only some cases were reported to us) and were committed on

ICTR Statute.

⁴⁰ *Blaskic* Judgment, 3 March 2000, para. 337.

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grounds of their ethnicity. The women were raped on orders from Kajelijeli because they were Tutsi, that is, members of the group that was targeted by the attacks. The reactions of some *Interahamwe* during the rapes prove that too. According to Witness GDF, for example, three *Interahamwe* who raped her spoke in shocking and contemptuous terms such as: "Allow me to taste the vagina of a Tutsi woman." the fourth said "I cannot fall on a Tutsi [woman]" and jabbed a cigarette stub into her sexual organ and kicked her.⁴¹

98. Rape is a component of the process to destroy the Tutsi ethnic group, especially its mind and its very existence. The intent to destroy the minds and lives of Tutsi women can be inferred from the utterances made by Kajelijeli when he arrived at the location where GDO's daughter was raped. GDO was traumatized by the rape of her disabled daughter and still suffers the consequences (the Chamber was witness to a violent fit she had in the courtroom when recounting the rape of her daughter, and she had to be stretchered off from the courtroom). GDF was also traumatized by the rape that she suffered, and her sister lost her mind due to her own experience. Joyce was raped and killed in an atrocious manner.

99. *Rapes were part of a widespread attack.* They were committed throughout Ruhengeri *préfecture* where the *Interahamwe* gang-raped. The victims were found in different locations. These rapes took place at the same time as the genocide.

100. *Consequently, I am satisfied beyond a reasonable doubt that by reason of the acts described above, Kajelijeli is, pursuant to Article 6(1) of the Statute, criminally responsible for the crime of rape perpetrated against the following victims: Joyce, Kizungu, ACM, GDO's daughter, GDT, GDF and her sister, as part of a widespread attack against any civilian population on political, ethnic or racial grounds, and thereby committed a crime against humanity pursuant to Article 3(g) of the Statute, punishable in reference to Articles 22 and 23 of the Statute of the International Criminal Tribunal for Rwanda.*

101. Accordingly, a separate sentence for Kajelijeli's criminal responsibility for rape should be envisaged.

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

Arusha, 1 December 2003

[Signed]
Arlette Ramaroson



⁴¹ T., 10 July 2001, p. 86 (GDF).