

PROSECUTION v. HABYARABATUMA

[Rwanda SUPREME COURT – RPA0317/08/CS (Kanyange, P.J., Nyirandabaruta and Karimunda, J.) December 17, 2015]

Criminal Law – Command responsibility – There is command responsibility when a commander knew or could have known that his/her subordinates are about to commit an offence and omitted to neither prevent it nor punish them in the aftermath.

Criminal Law – The basis of command responsibility – It does not rely on the crime committed by his/her subordinates, rather on the failure to carry out his/her duty as a superior and to exercise control properly.

Criminal Law – The person liable of command responsibility – There is command responsibility even in case the person held liable was not officially appointed.

Facts: The Military Prosecution alleged that ACP Habyarabatuma Cyriaque was among the planners, organisers and perpetrators of genocide committed against Tutsis, where he arrested secret agents of Inkontanyi in 1990, trained and provided guns to Burundian refugees at Nyaruteja and interahamwe at Stade Kamena. He was also prosecuted for complicity in murder committed in different places, when he omitted to rescue people in danger and they consequently succumbed to death. He was furthermore accused of having provided guns used to kill the Tutsis in Butare, Gikongoro and the fact that he ordered gendarmes under his command to kill the Tutsis located in Butare and Gikongoro.

The Military Court convicted him of complicity in murder committed against the Tutsis who took refuge at Cyahinda and who were killed by gendarmes deployed by him. He was sentenced to life imprisonment and to be stripped off his ranks while he was discharged of other offences. Habyarabatuma Cyriaque and the Prosecution lodged an appeal before the Military High Court, where his appeal was dismissed while the one lodged by the prosecution was given merit in part. He was sentenced to life imprisonment and his ranks were stripped off.

Unpleased with the ruling, Habyarabatuma lodged an appeal in this court, stating that he was convicted of murder committed against refugees at Cyahinda while he was not there and that the court convicted him by analogy. He added that he could have done nothing to stop the killing because he was no longer in command in Butare. The Prosecutor states that the case file proves that on 19 April 1994 afternoon is the time Habyarabatuma Cyriaque got informed that he was transferred and he was not aware of the person who was to replace him because no handover was executed as Major Rusigariye Alfred who should have replaced him had not yet come. Therefore, the command was not transferred to 2nd Lieutenant Ngaboyisonga as Habyarabatuma Cyriaque alleges because he is not the one he had to hand over to.

Held: 1. There is command responsibility when a commander knew or could have known that his/her subordinates are about to commit an offence and omitted to prevent it nor punish them in the aftermath, therefore, the fact that he gave to the gendarmes heavy guns while they were not going to war, without warning them about the safety of the refugees that he knew they were in danger as he had visited and saw the corpses of refugees killed by the gendarmes and those injured by them, proves that he knew or could have known that they could be killed by the gendarmes and he did nothing to prevent it. Furthermore, the fact that he did not punish them, but he waited for them to be punished by the one who did not deploy them,

without even request for the investigation over the killing to outbreak the punishment of the perpetrators, proves that he failed on his duties as a Commander.

2. The command responsibility for a commander does not rely on crimes committed by his/her subordinates, rather on the failure to carry out his/her duty as a superior and to exercise control properly.

3. The power or authority to prevent or to punish does not solely arise from de jure authority conferred through official appointment, as there may be only de facto, self-proclaimed governments and therefore de facto armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, a formal commission or appointment.

**Appeal without merit.
Judgment rendered by the Military High Court sustained.
Court fees charged to the public treasury.**

Statutes and statutory instruments referred to:

Organic Law N°16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca courts, article 51.

Cases referred to:

Prosecutor v. Théoneste Bagosora and Anatole Nsengiyumva, ICTR (Appeal Judgment), Case N°. ICTR-98-41-A, 14 December 2011, para. 697.

Prosecutor v. Krnojelac, ICTY, Appeal Chamber, 13/02/2003, para. 171.

Prosecutor v. Mucic et al, ICTY (Appeal Chamber), judgment of 20 February 2001, paragraph 195.

Authors cited:

An Introduction to International Criminal Law and Procedure, Cambridge: Cambridge University Press, 2010, p.399.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] The case started in the Military Court, whereby ACP Habyarabatuma Cyriaque was accused by the Military Prosecution for having been part of planners, organizers and perpetrators of genocide committed against the Tutsis, where he arrested secret agents of Inkontanyi in 1990, trained and provided guns to Burundian refugees at Nyaruteja and Interahamwe at Stade Kamena. He was also prosecuted for complicity in murder committed in different places namely Tumba, National University of Rwanda (NUR), Matyazo, Rukira, Ngoma, Sahera, Kabutare, Nkomero, Kigembe and Kabakobwa, when he omitted to rescue people in danger and they consequently succumbed to death. He was furthermore accused of having provided guns used to kill the Tutsis in Butare, Gikongoro and the fact that he ordered gendarmes under his command to kill the Tutsis located in Butare and Gikongoro.

[2] The Military court convicted him of complicity in murder committed against the Tutsis who took refuge at Cyahinda and were killed by gendarmes deployed by him, and sentenced him to life imprisonment and to be stripped of his ranks while he was discharged of other offences.

[3] Habyarabatuma Cyriaque and the Prosecution lodged an appeal before the Military High Court, where his appeal was dismissed while the one lodged by the prosecution was given merit in part. He was sentenced to life imprisonment with special provisions and his ranks were stripped off.

[4] Deciding so, the Military High Court based on the fact that the Military court misused the legal provision used to condemn the offence, using article 78 of the Organic Law N°16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and crimes against humanity, committed between October 1, 1990 and December 31, as amended to date, the provision used being the one for those aged of (14) years or more but less than eighteen (18) years. The court decided that the fact that the accused was beyond 18 years when he committed the offences charged against him, as he was born 1955, article to be used was 72(1) of the Organic-Law N°16/2004 of 19/6/2004 mentioned above as amended and completed by article 17 of the Organic Law N°13/2008 of 19/5/2008.

[5] The court found that with regard to mitigating circumstances considered by the Military Court leading to the penalty reduction for the accused of genocide, are provided for in paragraph 2 and 3 of article 72 of the Organic Law N° 16/2004 of 19/6/2004 above mentioned for those who plead guilty and seek forgiveness and that in case there are more mitigating circumstances, article 81 is the one to refer to in delivering the lower penalty for such an offence. Therefore, the Military Court was mistaken and used article 82 of the Decree - Law N°21/77 of 18/08/1977 instituting the penal code while it is for other offences.

[6] Unpleased with the ruling of the case RPA0001/GEN/010/HCM rendered by the Military High Court on 29 September 2011, Habyarabatuma Cyriaque lodged an appeal in this court, stating that he was convicted of murder committed against refugees at Cyahinda while he was not there and that the court convicted him by analogy. He added that he could nothing to stop the killing because he was no longer of command of Butare.

[7] The case was heard in public on 2 November 2015 Habyarabatuma Cyriaque being assisted by Counsel Bimenyimana Emmanuel while the Prosecution was represented by Lt. Nzakamwita Faustin, the Military Prosecutor.

II. ANALYSIS OF LEGAL ISSUES

II.1. Whether Habyarabatuma Cyriaque was in command of Gendarmerie of Butare at the time refugees at Cyahinda were murdered.

[8] Habyarabatuma Cyriaque argues that on 18 April 1994 around 3h00PM, he deployed 2nd-Lieutenant Majoro to Cyahinda and he stayed in Butare. The same evening, he received a message that he was transferred to Kigali and he left early morning of the next day because the military decisions are immediately executed, and he was replaced by 2nd-Lieutenant Ngaboyisonga who was also replaced by Major Rusigariye Alfred two days later. He states that although he agrees that he was still chief of Gendarmerie of Butare when 2nd -Lieutenant Majoro was deployed to Cyahinda, he was not notified of the killings of the refugees at

Cyahinda because they did not plot it together, he was no longer at the place, and if he were there he could not stop it, considering that he no longer had authority over him due to relocation, and he could not disobey the order to transfer him as it would be an offence. He adds that he got aware of the killings committed against the refugees on 26 April 1994 when he was in leave of few hours and went back to Butare for the handover with Major Rusigariye Alfred, all proving that 2nd -Lieutenant Majoro is the one to be held liable for his own actions, and he must be proven not guilty as they were not accomplices.

[9] Counsel Bimenyimana Emmanuel argues that the refugees were executed when Habyarabatura Cyriaque was transferred to Kigali by the Headquarter, proving that his transfer and the one of the Prefect of Butare occurred on 19 April 1994 permitted the killing of Tutsis to start. Therefore, the Military High Court convicted him with analogy because when the killings were committed, he was no longer in command of the Gendarmerie of Butare.

[10] The Prosecutor states that the case file proves that on 19 April 1994 afternoon is the time Habyarabatura Cyriaque got informed that he was transferred and he was not aware of the one who will replace him because no handover was executed because Major Rusigariye Alfred who should have replaced him had not yet come. Therefore, the command was not transferred to 2nd Lieutenant Ngaboyisonga as Habyarabatura Cyriaque pretends because he is not the one he had to hand over to.

[11] He keeps stating that the fact that Habyarabatura Cyriaque deployed 2nd Lieutenant Majoro to Cyahinda while he stayed in Butare, it does not mean that he could not give order because they could not shot without him knowing, implying that if he was not in their plot, he would have called them back the same day. However, when gendarmeries brought corpses of their fellows, they found him in the Gendarmerie as asserted by Corporal Dufitumukiza Anaclet and he did not inform Major Rusigariye Alfred that the gendarmes he had deployed to Cyahinda did the evil, that he has not yet proved that he was at Kigali, even though it was proved that he was at Kigali, he would not be out of criminal responsibility because he was still commander as long as he was not yet replaced, thus, he must be held liable.

THE OPINION OF THE COURT

[12] Habyarabatura Cyriaque argues that he received the transfer in the evening of 18 April 1994 while the case file proves that he stated in the Military Prosecution that he got a telegram requesting him to report to Kacyiru on 19 April 1994 at 2:00 PM, and he was not immediately replaced (“Le 19/04/1994, j’ai reçu un telegramme de l’EM/GDN (Etat Major/Gendarmerie Nationale) qui m’appelait à Kacyiru au plus tard à 14 h00 comme Commandant d’Unité sans me faire remplacer” pages 2, 19 and 24). When he was asked whether there were road blocks in Butare center after the death of Juvénal Habyarimana, he replied as follow “yes, after my departure for Kigali on 19 April 1994” (Après mon départ pour Kigali le 19/04/1994) (see page 21).

[13] The court finds that Habyarabatura Cyriaque is the one who deployed gendarmes to Cyahinda, and he was still in Butare when refugees at Cyahinda were killed because he acknowledges that he left on 19 April 1994 the next day of the day refugees were killed by the gendarmes he had deployed. The fact that he received a telegram transferring him to Kigali on 18 April 1994, cannot remove command responsibility from acts committed by the gendarmes he deployed, as he recognizes that he did not immediately leave nor was replaced,

implying that as long as he was still there, he was chief, even though this was the case, nothing could have prevented him to stop the killing or request the one who had replaced him to take measures preventing or stopping the killing. The fact that he omitted to do so, he failed on his duties as a reasonable commander and he must be held liable.

II.2. Whether Habyarabatuma Cyriaque knew or could have known that the gendarmes he deployed to Cyahinda will kill Tutsis who took refuge there.

[14] Habyarabatuma Cyriaque acknowledges that on 18 April 1994, he deployed the gendarmes to Cyahinda, but for another purpose than killing refugees, that even him was considered as a spy, the reason why the Prefect of Butare and himself were transferred and his brother was killed, that since the beginning of the killing, he did not plot to kill Tutsis, something approved by the letter written to him by the Prefect of Butare, thanking him for the good collaboration between two entities and the research conducted by André Guchaoua who affirmed in his book entitled *Rwanda 1994: Les politiques du génocide à Butare* at pages 250 up to 303, that there was no killing in Butare under commandment of Habyarabatuma Cyriaque. Habyarabatuma states that starting from 18 April 1994, after being transferred to Kigali, the commandment was given to 2nd Lieutenant Ngaboyisonga who was also replaced by Major Rusigariye, that even when Tutsis refugees were killed at Cyahinda, he was still there but he was not commander and he did not send the gendarmes to kill, requesting the court to rectify mistakes committed by the Military High Court that convicted him for the offence he did not commit, so that he may be declared not guilty.

[15] Counsel Bimenyimana Emmanuel states that Habyarabatuma Cyriaque was convicted for murder committed against refugees at Cyahinda while he was innocent, that the statements that he would have given guns to the gendarmes to kill people at Cyahinda are wrong because Cpl Dufitumukiza Anaclet stated that Major Habyarabatuma gave no orders of killings to gendarmes deployed to Cyahinda, that if he had plotted to, he would have killed a Tutsi at least, because as the Prosecution argues, the killing started on 7 April 1994, while until 18 April 1994, no Tutsi was killed in Butare and the Prosecution does not prove that Habyarabatuma Cyriaque ordered to kill refugees or that the gendarmes he deployed to Cyahinda were known as barbarous, to the extent that the one who deployed them should have known that they might kill people. He states furthermore that Habyarabatuma Cyriaque was not able to punish the gendarmes who killed people, because he was no longer their commander as he was transferred, implying that the Military High Court disregarded the principle that the criminal liability is personal, avoiding that Habyarabatuma Cyriaque be punished for the offence committed by 2nd-Lieutenant Majoro.

[16] He argues furthermore that the case for Habyarabatuma Cyriaque should be considered as the one opposing the Military Prosecution and Brigadier General Wilson Gumisiriza who was accused for the killing committed against the religious people by soldiers under his command, whereby the court held that Brigadier General Wilson Gumisiriza did not know and could not know that those soldiers were about to commit killings, implying that such decision should be the one to take with Habyarabatuma Cyriaque because he did not know and could not know that the gendarmes he deployed to Cyahinda to protect refugees will kill them instead. He requested to the court to rectify such mistake and declare his client not guilty.

[17] The prosecutor states that Habyarabatuma Cyriaque and his lawyer do not state the truth, that Habyarabatuma Cyriaque, as commander “Commandant de Groupement”, on 17 April 1994, when he was with the Prefect of Butare, guaranteed security to the refugees and

the next day, he sent the gendarmes with the mission to collect guns from the refugee camp and bring the corpses of the gendarmes killed by the refugees as affirmed by Cpl Dufitumukiza Anaclet, the gendarmes left being very angry and once arrived in the refugees camp, they killed the refugees. He kept on stating that Habyarabatura Cyriaque is not accused of giving order to kill the refugees but of not giving orders to not kill the Tutsis refugees of having omitted to take an action preventing the gendarmes to kill Tutsis who took refuge at Cyahinda. Therefore, he added, he must be held liable for the acts committed by those he deployed as provided for by article 53(2) of the Organic Law N°16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1st, 1990 and December 31, 1994.

THE OPINION OF THE COURT

[18] Article 51 of the Organic Law N°16/2004 of 19/6/2004 above mentioned provides: “Following acts of participation in offences referred to in article 1 of this Organic Law, committed between October 1, 1990 and December 31, 1994, the accused can be classified in one of the following categories: The person who, at that time, was in the organs of leadership, at the national level, at the level of Prefecture, Sub-prefecture, Commune, in political parties, army, gendarmerie, communal police, religious denominations or in militia, has committed these offences or encouraged other people to commit them, together with his or her accomplices; 3° The well-known murderer who distinguished himself or herself in the location where he or she lived or wherever he or she passed, because of the zeal which characterized him or her in killing or excessive wickedness with which they were carried out, together with his or her accomplices. As for 51 of the same Organic Law provides that the fact that any of the acts aimed at by this Organic Law has been committed by a subordinate, does not free his or her superior from his or her criminal responsibility if he or she knew or could have known that his or her subordinate was getting ready to commit this act or had done it, and that the superior has not taken necessary and reasonable measures to punish the authors or prevent that the mentioned act be not committed when he or she had means”.

[19] The case file proves that Munyeshuli Protogène stated before the Military Prosecution that the refugees at Cyahinda started with resistance against the gendarmes and killed some of them with arrows and took two guns off them, then on 17 April 1994, the Prefect Habyarimana came with Major Habyarabatura Cyriaque, and the latter promised them that he was about changing the wicked gendarmes with the right ones able to ensure their safety, but the next day on 18 April 1994, instead of mutating the gendarmes who were at the place, he deployed others with heavy guns (pages 154-156). As for Rusatsi Jean, he stated that the gendarmes came from Butare and with the help of those who were at the place, they encircled and shot them with big and small guns and those who survived them were killed by malicious interahamwe (page 151).

[20] With regard to Nteziryayo Jean Baptiste, he declared before the Military Prosecution that the Prefect of Butare and the chief of gendarmes arrived at Cyahinda and the refugees showed them the corpses and the wounded of refugees caused by the massacres of two days between the refugees, the gendarmes and interahamwe militia. He goes on to speak that they promised them to change the guards but in the next night, the fight had become very serious and they managed to kill two gendarmes and take their guns. The next day, he added, on 18 April 1994, more gendarmes were deployed and encircled the refugees camp around 9h00AM and shot from different corners with the guns that were never used before and those

who managed to survive were killed by interahamwe militia including Burundians (pages 128-130).

[21] The case file proves that Caporal Dufitumukiza Anaclet also stated before the Military Prosecution that the gendarmes gathered the refugees at Cyahinda with the aim to take tradition weapons off them, and the refugees killed two gendarmes with machete and take guns off them, and the next day (18 April 1994) is when Major Habyarabatuma Cyriaque gave to the “Section” in which the killed gendarmes were grouped with supervision of 2nd Lieutenant Majoro and gave them strong weapons [machine guns and others] “with mission to take guns off the refugees and bring the corpses of gendarmes”, that those gendarmes stayed for three days and many people were killed (mark 192).

[22] The court finds that the aforementioned prove that Major Habyarabatuma Cyriaque decided to deploy the gendarmes to Cyahinda after that those who were there had fought against Tutsis refugees and the latter killed two of them and took guns off them. Therefore, the option of deploying the gendarmes of the same section than those killed there with heavy guns such as machine guns, with the mission to bring back the corpses and their guns in the possession of Tutsi refugees, being aware that in that special period, Tutsis were being hunted and killed for nothing, it contradicts what he stated that the gendarmes were for the security of the refugees (mark 27). Therefore, as he states that he did not give the mission to the gendarmes to kill the refugees, the fact that he gave them the heavy guns while they were not going to war, without warning them about the safety of the refugees that he knew they were in danger as he had visited and saw the corpses of the refugees killed by the gendarmes and those injured by them, prove that he knew or he could have known that the refugees could be killed by the gendarmes and he did nothing to prevent it.

[23] The Court finds furthermore that the statements made by Habyarabatuma Cyriaque and counsel Bimenyimana Emmanuel on the principle that the criminal liability is personal was disregarded by the Military High Court lack merit because Habyarabatuma Cyriaque is accused as commander, of international crime of genocide, with regard to that crime, the International Criminal Tribunal for the former Yugoslavia (ICTY) held that the principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary international law and that in such case, an accused is not charged with the crime of his subordinates but with his failure to carry out his duty as a superior to exercise control¹. Furthermore, the same was the opinion of the International Criminal Tribunal for Rwanda, in the case opposing the Prosecution against Bagosora Théoneste and Anatole Nsengiyumva, where the court held that Bagosora Théoneste is liable for failing in his duty to prevent the killing of civilians committed by the soldiers under his command.²

¹ “The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary international law.” Prosecutor v. Mucic et al, ICTY (Appeal Chamber), judgment of 20 February 2001, paragraph 195. “where superior responsibility is concerned, an accused is not charged with the crime of his subordinates but with his failure to carry out his duty as a superior to exercise control.” Prosecutor v. Krnojelac, ICTY, Appeal Chamber, 13/02/2003, para. 171.

² “The Appeals Chambers affirms the Trial Chamber’s findings that he [Bagosora Théoneste] is liable under Article 6(3) of the Statute for failing in his duty to prevent the killing of Prime Minister Agathe Uwilingiyimana, Joseph Kavaruganda, Frédéric Nzamurambaho, Landouard Ndasingwa, and Faustin Rucogoza, as well as the crimes committed at Centre Christus, Kabeza, Kibagabaga Mosque, the Saint Josephite Centre, Karama Hill, Kibagabaga Catholic Church, and Gikondo Parish.” See Prosecutor v. Théoneste Bagosora and Anatole Nsengiyumva, ICTR (Appeal Judgment), Case N^oICTR-98-41-A, 14 December 2011, para. 697.

[24] The Court finds that the Law Scholars in International Criminal Law also affirm that the concept of superior responsibility is an original creation of international criminal law for which there are no paradigms in national legal systems and that it is today anchored firmly in customary international law and that the command responsibility moves from deliberate failure to intervene despite a duty to do so, which fall close to traditional complicity ideas, to essence, conduct which is close to, if not the same as negligent dereliction of duties,³ all proving that Habyarabatuma Cyriaque must be held liable for the genocide committed by the gendarmes he sent to Cyahinda on 18 April 1994.

[25] The Court finds furthermore that the case law of Brigadier General Wilson Gumisiriza referred to by Habyarabatuma Cyriaque and his counsel, requesting that the case of Habyarabatuma Cyriaque be held in such way because he did not know and he could not know that the gendarmes he deployed to Cyahinda would kill the refugees, is not the same as this case, because as highlighted above, Habyarabatuma Cyriaque knew that Tutsis are being hunted and killed, that specifically, the refugees at Cyahinda were being killed and he is the one who deployed the gendarmes who killed the Tutsi refugees, knowing or able to know that they could be killed, something different from what was held in the case of Brigadier General Wilson Gumisiriza, that he did not know and could not know that the military officers under his command would commit murder.

II.3. Determine whether in the aftermath of the killing of the refugees at Cyahinda, Habyarabatuma Cyriaque failed to his duty of punishing the perpetrators gendarmes.

[26] Habyarabatuma Cyriaque and his counsel Bimenyimana Emmanuel state that on 19 April 1994 when Habyarabatuma and Prefect of Butare were transferred, it is when the killing started, because the fact of transferring them enabled those who plotted the genocide to execute it and since that time until 26 April 1994, when he came for the handover with Major Rusigariye Alfred, he had not yet known that the refugees were killed and at that time he no longer had authority over the “unit” in Butare so that he would had punished those who killed the refugees at Cyahinda because he was removed from being commander of that unite since 19 April 1994, all proving that the Military High Court rendered the verdict by analogy, therefore, he requests this Court to rectify the mistake and declare the accused not guilty.

[27] The prosecutor states that the Military High Court held that if Habyarabatuma Cyriaque had punished the gendarmes, he would have proved that he was not in their plot and even on 18 April 1994, he was able to recall them from Cyahinda, implying that as long as he was still in the Military camp, Second-Lieutenant Ngaboyisonga was not able to be on command, that his statements that he was immediately replaced or that he did not have time to punish are wrong, because in no way a second-lieutenant can take over while a Major is still around, especially that Caporal Dufitumukiza Anaclet expressed that when the gendarmes came back with the corpses, Habyarabatuma Cyriaque was still around. Therefore, he requests the court to hold that there was no analogy in the judgment appealed against and sustain it.

³ The concept of superior responsibility is an original creation of international criminal law for which there are no paradigms in national legal systems... *It is today anchored firmly in customary international law.” See Gerhard Werle, *Principles of International Criminal Law*, The Hague: Asser Press, 2005, pp. 128-137 and “Command responsibility moves from deliberate failure to intervene despite a duty to do so, which fall close to traditional complicity ideas, to in essence, conduct which is close to, if not the same as negligent dereliction of duties.” Robert Cryer, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, 2010, p.399.

THE OPINION OF THE COURT

[28] The documents in the case file prove that during his interrogation in the Military Prosecution, Caporal Dufitumukiza Anaclet stated that even after the handover with Major Rusigariye, he noticed that Habyarabatuma Cyriaque was still powerful in Butare unit (see mark 191). As for Habyarabatuma Cyriaque, he recognises that he was the commander of Butare gendarmerie till he was transferred to Kigali on 19 April 1994 between ten and eleven o'clock, and that until 26 April 1994 when he handed over to Major Rusigariye Alfred, he was not yet replaced (pages 19-20, 24, 686). It is also noted that when he was before the Military High Court, he was asked if the gendarmes who killed people at Cyahinda were punished and he replied that there was an overflow and the gendarmes killed people and vice versa but that Major Rusigariye Alfred who replaced him punished the second -Lieutenant Majoro who was commanding the gendarmes who killed the refugees, that he did not personally do it because he had a lot to do (pages 684-687).

[29] The Court finds that the killing was committed at Cyahinda on 18 April 1994 by the gendarmes deployed by Habyarabatuma Cyriaque who recognizes that he was not yet replaced on 26 April 1994, implying that until then, he was still considered as the commander of the gendarmerie of Butare even though he was transferred to the headquarter. This is supported by Caporal Dufitumukiza Anaclet who states that even after the handover; he noticed that Habyarabatuma Cyriaque was still commander, all proving that his order would have been respected. Therefore, as he did not prevent the killing, nor did he punish the gendarmes he deployed to Cyahinda and who committed the killing, but he waited for them to be punished by the one who did not deploy them, without even request for the investigation over the killing to outbreak the punishment of the perpetrators, it proves that he failed on his duties as a Commander.

[30] The Court finds that the same opinion was held by the International Criminal Tribunal for the former Yugoslavia, whereby it decided that “the power or authority to prevent or to punish does not solely arise from de jure authority conferred through official appointment. In many contemporary conflicts, there may be only de facto, self -proclaimed governments and therefore de facto armies and paramilitary groups subordinate thereto. Command structure, organized hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment.”⁴

[31] Considering all the above mentioned, the court finds that as held by the Military High Court, Habyarabatuma Cyriaque is guilty of the complicity in genocide committed against the Tutsis refugees at Cyahinda, therefore, his appeal is dismissed.

III. THE DECISION OF THE COURT

⁴ The power or authority to prevent or to punish does not solely arise from de jure authority conferred through official appointment. In many contemporary conflicts, there may be only de facto, self-proclaimed governments and therefore de facto armies and paramilitary groups subordinate thereto. Command structure, organized hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment.” Prosecutor v. Mucic et al, ICTY (Appeal Chamber), judgment of 20 February 2001, paragraph 193.

[32] Dismiss the appeal lodged by Assistant Commissioner of Police Habyarabatuma Cyriaque.

[33] Sustains the judgment RPA/GEN0001/010/HCM rendered by the Military High Court on 29 September 2011.

[34] Orders the court fees to be charged to the public treasury as Habyarabatuma Cyriaque is in jail.