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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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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

THE PROSECUTOR
VERSUS
IGNACE BAGILISHEMA

Case No. ICTR-95-1A-T

JUDGEMENT

The Office of the Prosecutor:

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CHAPTER I. INTRODUCTION

1. The International Criminal Tribunal for Rwanda

1. This Judgement is rendered by Trial Chamber I of the International Criminal Tribunal for Rwanda (the "Tribunal"), composed of Judge Erik Møse, presiding, Judge Asoka de Zoysa Gunawardana, and Judge Mehmet Güney, in the case of The Prosecutor v. Ignace Bagilishema.

2. The Tribunal was established by United Nations Security Council Resolution 955 of 8 November 1994[1] after official United Nations reports revealed that genocide and other widespread, systematic, and flagrant violations of international humanitarian law had been committed in Rwanda.[2] The Security Council determined that this situation constituted a threat to international peace and security, and was convinced that the prosecution of persons responsible for serious violations of international humanitarian law would contribute to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda. Accordingly, the Security Council established the Tribunal, pursuant to Chapter VII of the United Nations Charter.

3. The Tribunal is governed by its Statute (the "Statute") annexed to Security Council Resolution 955, and by its Rules of Procedure and Evidence (the "Rules"), which were adopted by the Judges on 5 July 1995 and subsequently amended.[3]

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[1] UN Document S/RES/955 of 8 November 1994.

[2] Preliminary Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994), Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994) (Document S/1994/1405) and Reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (Document S/1994/1157, Annexes I and II).

[3] The Rules were amended on 12 January 1996, 15 May 1996, 4 July 1996, 5 June 1997, 8 June 1998, 4 June 1999, 18 February, 26 June and 3 November 2000 and 31 May 2001.

2. Indictment

4. The initial Indictment against Ignace Bagilishema and seven other accused was confirmed by Judge Navanethem Pillay on 28 November 1995.[4] It was subsequently amended on 29 April 1996 and confirmed by the same Judge on 6 May 1996. On 17 September 1999, following a further request by the Prosecution, leave to amend the Indictment was granted by this Trial Chamber.[5] This Indictment, which is set out in full as **Annex A** to this Judgement, provides the basis for the criminal proceedings against the Accused, before this Chamber.

3. Jurisdiction of the Tribunal

5. Pursuant to the Statute, the Tribunal has the authority to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda. The Statute also empowers the Tribunal with the authority to prosecute Rwandan citizens, who are natural persons, responsible for such violations committed in the territory of neighbouring States. Under Article 7 of the Statute, the Tribunal's temporal jurisdiction limits prosecution to acts committed between 1 January 1994 and 31 December 1994. Individual criminal responsibility, pursuant to Article 6, shall be established for acts falling within the Tribunal's material jurisdiction, as provided in Articles 2, 3 and 4. These provisions are reproduced in Chapter 3 (Applicable Law) of the present Judgement.

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[4] "Decision on the review of the Indictment", Case No. ICTR 95-1-I.

[5] Oral Decision on the Prosecutor's request for leave to file an amendment indictment.

6. Although the International Criminal Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons suspected of serious violations of international humanitarian law, the Tribunal shall have primacy over the national courts of all States pursuant to Article 8 of the Statute and may formally request that national courts defer to its competence.

4. The Accused

7. The Accused, Ignace Bagilishema was born on 21 May 1955 in Rubengera sector, Mabanza *Commune*, Kibuye Prefecture. After attending military school (*école supérieure militaire*) for only two years, Bagilishema worked as a civil servant for the Ministry of Youth in Rwanda from 1978 to 1980. On 8 February 1980, at the age of 25, he was appointed *Bourgmestre* of Mabanza *Commune*, a post that he held until the middle of July 1994 when he went into exile. He is married and has six children.

CHAPTER II. PROCEEDINGS

1. Procedural Background

8. On 9 February 1999, Ignace Bagilishema was arrested in the Republic of South Africa pursuant to an arrest warrant issued by Judge Navanethem Pillay on 14 December 1998. He was transferred to the Tribunal on 20 February 1999. His initial appearance occurred on 1 April 1999 before former Trial Chamber II, composed of Judge William Sekule, presiding, Judge Yakov Ostrovsky and Judge Tafazzal Khan. At the hearing, the Accused was represented by duty counsel and entered a plea of not guilty to all thirteen counts of the Indictment, as amended on 29 April 1996.[6]

9. On 15 September 1999, the present Trial Chamber granted the Prosecution leave to sever the Accused from the previous Indictment and directed the Registry to assign a new case number for the separate trial of the Accused.[7] On the same day, the Registry designated ICTR-95-1A-I as the new case number in respect of the Accused. By Decision of 17 September 1999, the Prosecution was granted leave to amend the Indictment and to proceed with all the counts in the proposed amended Indictment, with the exception of the count of Conspiracy to commit Genocide. The next day, on 18 September 1999, the Accused pleaded not guilty to all seven Counts in the new Indictment. Pre-Trial Conferences, pursuant to Rule 73*bis* of the Rules, took place on 18 September and 25 October 1999. The trial of the Accused commenced on 27 October 1999 with the Prosecution's opening statement.

10. From 1 to 4 November 1999, all three Judges of the Chamber visited Kibuye Prefecture, Rwanda, in order to see the locations of certain alleged events of relevance in

[6] Section I.2 of the present Judgement.

the case, and thus to better appreciate the evidence to be adduced during the trial. The visit had been requested by the Defence, and the Prosecution had no objections. This was the first such visit by a Trial Chamber in connection with a trial.

11. On 23 November 1999, the Chamber rendered an Oral Decision concerning the number of witnesses the Prosecution was entitled to call during the trial. During a Status Conference held on 13 August 1999, the Prosecution had then stated its intention to call 16 witnesses. The number was 22 in its pre-trial brief of 17 September 1999, whereas a list of 27 witnesses was submitted during the Pre-Trial Conference of 25 October 1999. The Chamber did not consider the Prosecution bound by its submissions during the Status Conference. The final list of witnesses for the Chamber in relation to Rule 73*bis* of the Rules was that of 17 September 1999, as modified on 25 October 1999. However, the Chamber held that the Prosecution was entitled to call only witnesses whose written statements had been disclosed to the Defence by 27 August 1999, i.e. 60 days before the date set for trial as required by Rule 66(A)(ii). Additional witnesses could be called only with leave of the Chamber, provided that the Prosecution had shown "good cause" to do so in accordance with that provision.[8]

12. Consequently, the Prosecution requested leave to rely on additional witnesses' statements and a document which were disclosed after 27 August 1999. The motion was heard on 30 November 1999. In its Oral Decision of 2 December 1999, the Chamber considered whether the Prosecution had shown "good cause" under Rule 66(A)(ii) in relation to each of the witness statements and the document. The Chamber stated, *inter alia*, that a mere reference to on-going investigations was not in itself a sufficient reason to admit new statements after the 60 day time limit set out in Rule 66 had lapsed. The Chamber granted leave to rely on statements of Witnesses AA, Y and Z, which according to the Prosecution contained information relevant to command responsibility of the Accused under Article 6(3) of the Statute. The charges under that provision were

[7] Oral Decision of 15 September 1999 on the Prosecutor's request for severance.
[8] Oral Decision of 23 November 1999 on the Rule 73 motion of the Defence.

included in the amended Indictment of 17 September 1999 following the Chamber's decision of that date, and further investigations were carried out shortly thereafter by the Office of the Prosecutor. The Chamber denied the Prosecution leave to rely on the other witness statements contained in an annex to its motion, with the exception of statements entered as Defence exhibits.[9]

13. No Prosecution witnesses were available from 30 November 1999. On 6 December 1999, the Prosecution, following the Chamber's instructions, submitted a revised list of witnesses. It included Witnesses T, U, X and W. The Defence filed a motion requesting the Chamber to find that these witnesses could not be called to testify at trial. The Prosecution conceded that the 60 day time limit in Rule 66(A)(ii) concerning the disclosure of witness statements had been violated, but argued that this could not in itself automatically be held to estop the Prosecution from calling additional witnesses and presenting their oral testimony during trial. The hearings resumed on 24 January 2000. In its Oral Decision the following day, the Chamber ruled that Witnesses T, U, X and W could not be called to testify at trial. It noted that the 60 day time limit in the first sentence of Rule 66(A)(ii) was formulated in absolute terms. According to the Chamber, the purpose of that provision is to ensure that the Defence is afforded sufficient notice of the alleged facts to which all witnesses are likely to testify, in order to have adequate time and facilities for the preparation of the Defence. However, the Chamber recalled that, under the second part of Rule 66(A)(ii), it has the discretion, upon showing of good cause by the Prosecution, to order the disclosure to the Defence of statements of additional Prosecution witnesses that were not made available within the 60 day time limit.[10]

14. On 17 February 2000, the Chamber rendered an Oral Decision on a Defence motion to have at its disposal as many investigators, assistants and Counsel as does the Office of the Prosecutor. The Chamber observed that the principle of equality of arms is

[9] Oral Decision of 2 December 1999.
[10] Oral Decision of 25 January 2000 on the Defence motion filed under Rule 73 of the Rules.

an inherent element of the right to a fair trial, which is guaranteed in many international instruments. However, present human rights case law does not require that both parties in a case shall be granted the same level of material means and resources, for instance in relation to lawyers and investigators. The Chamber saw no reason to give a wider interpretation of the principle of equality of arms within the specific context of Article 20 of the Statute.[11]

15. The Prosecution closed its case on 18 February 2000, after having presented 18 witnesses, including two of its investigators and one expert witness. The Defence then requested that the trial be adjourned to allow sufficient time to prepare its case. In this context, the Defence referred to a recent plane crash during which one of its investigators was injured and files were lost.

16. After the Pre-Defence Conference on 30 March 2000, held pursuant to Rule 73*ter* of the Rules, the Defence case commenced on 25 April 2000. Following a break requested by the Defence from 4 to 22 May 2000, the Defence closed its case on 9 June 2000. In all, 15 testimonies were heard, including expert witnesses and the Accused.

17. Among the motions decided during the presentation of the Defence case was a request by the Defence to obtain a United Nations memorandum prepared by Michael Hourigan, a former investigator. The memorandum allegedly concerned the circumstances of the shooting down on 6 April 1994 of the airplane carrying the Presidents of Rwanda and Burundi. It had been transmitted to the Tribunal from United Nations Headquarters in New York so that if this matter were to be raised before the Tribunal, the appropriate Trial Chamber could decide whether the document would be relevant to the defence of any of the accused. The President of the Tribunal, after consultation with the other Judges, placed the document under seal in the President's Office immediately upon its arrival; the President stated that neither she nor any of the

[11] Oral decision of 17 February 2000 on the Defence motion dated 28 January 2000 on equality of arms between the parties.

other Judges had read the memorandum. On 8 June 2000, the Trial Chamber in the present case, by a majority, Judge Møse and Judge Gunawardana, directed the Registrar to serve the Defence with a copy of the memorandum forthwith, and to make available a copy of the memorandum to the Prosecution, if it so desired. In the view of the majority, the memorandum might be relevant to the Defence. Irrespective of whether the document would in the event have a bearing on the outcome of the case, the majority was of the opinion that, to deprive the Defence, at this stage of the trial, of access to specific documentation in the possession of the Tribunal, might affect the right of the Accused to a fair trial. Judge Güney expressed a separate and dissenting opinion, according to which the Defence had failed to prove the relevance of the memorandum in the instant matter.[12] Following the decision, the Defence entered the memorandum as an exhibit.

18. On 8 June 2000, the Chamber also ruled on Defence motion for disclosure by the Prosecution of the admissions of guilt of Witnesses Y, Z and AA, all presently detained in Rwanda. In its reply, the Prosecution stated that it was not in possession of the written confessions of these witnesses. The Chamber dismissed the motion of the Defence, which was based on Rule 68 of the Rules. However, the Chamber was of the view that the confessions could be material in evaluating the credibility of said Prosecution witnesses. It therefore ordered, *proprio motu*, the Prosecution, pursuant to Rule 98, to take the necessary steps to obtain the written confessions of the three witnesses.[13] As the Prosecution was able to retrieve the documents, the Defence subsequently tendered these three confessions as exhibits.

19. Furthermore, by Decision of 8 June 2000, the Chamber dismissed a request of the Defence under Rule 54 of the Rules to summon three witnesses, all of whom were personnel of the United Nations Assistance Mission in Rwanda (UNAMIR) in Kibuye in

[12] "Decision on the Request of the Defence for an Order for Service of a United Nations Memorandum prepared by Michael Hourigan, former ICTR Investigator" of 8 June 2000.

1994. However, the Chamber ordered the Prosecution, pursuant to Rule 98, to take the necessary steps to obtain the minutes of a Security Council meeting in Kibuye Prefecture, held on 9 April 1994.[14] The Prosecution subsequently informed the Chamber that its investigations had borne no results.

20. On 11 July 2000, the Chamber dismissed a Defence motion requesting the Trial Chamber to direct the Prosecution to investigate whether a witness had given false testimony. The Chamber held that the submissions of the Defence did not tend to demonstrate that the witness had knowingly and willfully given false testimony, as interpreted by case law under Rule 91 (B) of the Rules.[15]

21. Closing arguments were scheduled from 10 to 14 July 2000. The Prosecution filed its brief with closing remarks on 30 June 2000. However, contrary to the Chamber's order, it was filed in English only. Translation of the voluminous document required time, and the hearing was postponed. New deadlines for the parties were set. The Defence submitted its extensive closing brief on 4 August 2000, which then also needed translation. The oral hearings on the closing arguments took place from 4 to 7 September 2000. On 7 September, the Chamber by majority, Judge Møse dissenting, ordered the Prosecution to file written rebuttal closing arguments by 14 September 2000. The Defence was granted one week from receipt of the translated version of these arguments in which to reply. The parties met the filing deadlines and the oral arguments were subsequently heard on 18 and 19 October 2000. In all, the trial included 60 days in court between 27 October 1999 and 19 October 2000.

[13] "Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z, and AA" of 8 June 2000.
[14] "Decision on the Request of the Defence pursuant to Rule 73 of the Rules of Procedure and Evidence for Summons of Witnesses" of 8 June 2000.
[15] "Decision on the Request of the Defence for the Chamber to Direct the Prosecution to investigate a matter with a view to the Preparation and Submission of an Indictment for False Testimony" of 11 July 2000.

2. Evidentiary Matters

22. The case law of the Tribunal has established general principles concerning the assessment of evidence. The *Akayesu* Judgement contained important statements on, *inter alia*, the probative value of evidence; witness statements; the impact of trauma on the testimony of witnesses; interpretation from Kinyarwanda into French and English; and cultural factors affecting the evidence of witnesses.[16] Subsequent jurisprudence of the Tribunal has developed these principles relating to evidentiary matters, the most recent authority being the *Musema* Judgement.[17] The Chamber will return to them to the extent necessary.

23. In this context, the Chamber simply recalls that, under Rule 89(A) of the Rules, it is not bound by any national rules of evidence. The Chamber has thus applied, in accordance with Rule 89, the rules of evidence which in its view best favour a fair determination of the matter before it and which are consonant with the spirit and general principles of the law.

24. Regarding in particular the assessment of testimony, the Chamber observes that, during the present trial, previous written statements of most witnesses appearing in this case were tendered in their textual entirety as exhibits. On occasions, the parties and, where appropriate, the Chamber, have raised inconsistencies between the content of an earlier statement and the testimony during the trial. The Chamber's point of departure when assessing the account given by a witness is his or her testimony in court. Of course, differences between earlier written statements and later testimony in court may be explained by many factors, such as the lapse of time, the language used, the questions

[16] *The Prosecutor v. Jean-Paul Akayesu*, Judgement of 2 September 1998, Case No. ICTR-96-4-T [henceforth *Akayesu* (TC)] paras. 130-156.

[17] *TheProsecutor v. Kayishema and Ruzindana*, Judgement of 21 May 1999, ICTR-95-1-T [henceforth *Kayishema and Ruzindana* (TC)], paras. 65-80; *The Prosecutor v. Georges Rutaganda*, Judgement of 6 December 1999, ICTR-96-3-T [henceforth *Rutaganda*] paras. 15-23; and *The Prosecutor v. Alfred Musema*, Judgement of 27 January 2000, ICTR-96-13-T [henceforth *Musema*] paras. 31-105.

put to the witness and the accuracy of interpretation and transcription, and the impact of trauma on the witnesses. However, where the inconsistencies cannot be so explained to the satisfaction of the Chamber, the reliability of witness' testimony may be questioned.

25. Finally, the Chamber notes that hearsay evidence is not inadmissible *per se*, even when it is not corroborated by direct evidence. Rather, the Chamber has considered such hearsay evidence with caution, in accordance with Rule 89. When relied upon, such evidence has, as all other evidence, been subject to the tests of relevance, probative value and reliability.

CHAPTER III. APPLICABLE LAW

1. Individual Criminal Responsibility

26. Article 6 of the Statute reads as follows:

> "1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
>
> 2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
>
> 3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
>
> 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires."

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

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

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[18] For example, accomplices as well as principal perpetrators may attract responsibility for the commission of a crime. Moreover, traditional routes of *evasion* of responsibility are blocked off by Article 6. Thus an accused head of state or other government official cannot evade or expect a lesser punishment on the grounds merely that he or she, at the time of commission of the crime, held such office; a superior cannot evade responsibility for the criminal actions of his or her subordinates under certain conditions; and an accused acting pursuant to an order of a superior cannot deny culpability for having so acted. The Chamber notes the opinion of the Appeals Chamber of the ICTY *Prosecutor v. Dusko Tadic*, 15 July 1999 [henceforth *Tadic* (AC)] para. 190, that the modalities of participation not explicitly referred to in the provision are not necessarily excluded.

1.1 Responsibility under Article 6(1) of the Statute

Committing

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

Planning, instigating, ordering

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

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

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[19] An individual incurs criminal responsibility for an *omission* by failing to perform an act in violation of his or her duty to perform such an act. As stated by the Nuremberg Tribunal, "international law imposes duties and liabilities upon individuals" (*Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, vol. 22, p. 65*), who therefore may be held personally responsible for failing to perform those duties.

[20] See *Prosecutor v. Zlatko Aleksovski*, Judgement of 25 June 1999 [henceforth *Aleksovski* (TC)] para. 61.

Aiding and Abetting in the Planning, Preparation, or Execution

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

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

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[21] See *The Prosecutor v. Georges Rutaganda,* Judgement of 6 December 1999 [henceforth *Rutaganda*] para. 39.

[22] On the customary nature of these principles, see *Prosecutor v. Dusko Tadic*, Judgement of 7 May 1997 [henceforth *Tadic* (TC)] paras. 667-669 and 675f.

[23] *The Prosecutor v. Tihomir Blaskic*, Judgement of 3 March 2000 [henceforth *Blaskic*] para. 286.

[24] For a survey of the early case-law on this question, see *Prosecutor v. Anto Furundzija*, Judgement of 10 December 1998 [henceforth *Furundzija* (TC)] paras. 212-226.

[25] *Furundzija* (TC) para. 209.

[26] In *Tadic* (TC) para. 687, to illustrate this point, the Chamber cited the case where a French military tribunal convicted a Nazi party administrator for aiding and assisting in the arrest and deportation of civilians. In that case the accused created and submitted lists to arresting authorities and reported French youths who rejected his attempts to get them to join the German army; the victims were then arrested, interned and forcibly drafted, their families deported to Germany. Though not present when the crimes were committed, the accused was "concerned with" and contributed substantially to the deportations. See also the case-law cited in the *Tadic* (TC) para. 678f and *Aleksovski* (TC) para. 62.

[27] *Furundzija* (TC) para. 199f.

[28] *Tadic* (TC) para. 691.

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

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

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

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[29] *Furundzija* (TC) para. 207.

[30] Ibid. para. 208. Reference is made to the *Pig-cart parade* case also heard by the German Supreme Court in British Occupied Zone under the terms of the Control Council Law No. 10, in which the Accused was found not guilty for having followed only as a spectator in civilian clothes, 'parade' during which two political opponents were publicly humiliated.

[31] *Akayesu* (TC) para. 692.

1.2 Responsibility under Article 6(3) of the Statute

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

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

> (i) the existence of a superior-subordinate relationship of effective control between the accused and the perpetrator of the crime; and,
>
> (ii) the knowledge, or constructive knowledge, of the accused that the crime was about to be, was being, or had been committed; and,
>
> (iii) the failure of the accused to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator.[33]

1.2.1 Superior-Subordinate Relationship

39. A position of command is a necessary condition for the imposition of command responsibility, but the existence of such a position cannot be determined by reference to

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[32] As demonstrated in *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, and Esad Landzo*, Judgement of 16 November 1998, [henceforth *Celebici* (TC)] paras. 333-343. This foundation of the doctrine is apparent also in the *Yamashita* case, where the military commission characterised the accused's failure to prevent the commission of atrocities by forces under his command as a breach of his "duty" as commander (*In re Yamashita*, 327 U.S. 1 (1946), pp. 13-14). The U.S. Supreme Court, in a decision denying Yamashita's writ of habeas corpus, stated that a precedent for imposing such a duty existed in the Hague Convention IV of 1907 (*In re Yamashita*, pp. 15-16). In expounding a rationale for command responsibility, the court observed that given that the purpose of the law of war was to protect civilian populations and prisoners of war from brutality, this would largely be defeated if the commander of an invading army could with impunity "neglect" to take reasonable measures for their protection (p. 15).

[33] See *Celebici* (TC) para. 346; *Blaskic* para. 294. See also *Aleksovski* (TC) para. 69; confirmed by the Appeals Chamber in *Prosecutor v. Zlatko Aleksovski*, 24 March 2000 [henceforth *Aleksovski* (AC)] para. 72. The three constituent elements clearly draw from Article 86 para. 2, of Additional Protocol I, and

formal status alone. The factor that determines liability is the actual possession, or non-possession, of a position of command over subordinates. Therefore, although a person's *de jure* position as a commander in certain circumstances may be sufficient to invoke responsibility under Article 6(3), ultimately it is the actual relationship of command (whether *de jure* or *de facto*) that is required for command responsibility.[34] The decisive criterion in determining who is a superior is his or her ability, as demonstrated by duties and competence, to effectively control his or her subordinates.[35]

Command Responsibility of Civilian Superiors

40. Although the doctrine of command responsibility was applied originally in a military context, Article 6(3) contains no express limitation restricting the scope of this type of responsibility to military commanders or to situations arising under military command. However, the broadening of the case-law of command responsibility to include civilians, has proceeded with caution. In *Akayesu*, the Chamber stated that "the application of the principle of individual criminal responsibility, enshrined in Article 6(3), to civilians remains contentious."[36]

41. The first guilty verdict by an International Tribunal under the doctrine of command responsibility was entered in the ICTY's *Celebici* case. Mucic, a civilian warden of a prison-camp, was held responsible for the ill-treatment of prisoners by camp guards. Although the accused held his post without a formal appointment, he manifested, according to the Trial Chamber, all the powers and functions of a formal appointment as

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Article 6 of the *Draft Code of Crimes* of the International Law Commission (UN Doc. A/51/10, 1996). They are repeated in Article 28 of the Rome Statute of the International Criminal Court.

[34] See *Celebici* (TC) para. 370; *Blaskic* para. 301.

[35] See *Aleksovski* (TC) para. 76.

[36] *Akayesu* (TC) para. 491. The Chamber cited Judge Röling's dissent in the Hirota case of the International Military Tribunal for the Far East, which expressed concern about holding government officials responsible for the behaviour of the army. In the event, the Chamber did not consider the three counts alleging Akayesu's command responsibility, holding that a superior/subordinate relationship between the accused and the local militia, though confirmed by the evidence presented in the case, had not been expressly alleged in the indictment

commander.[37] Since the *Celebici* judgement, the ICTY has found another civilian prison-camp warden guilty on the grounds of superior responsibility,[38] and the ICTR has found two civilians, a *préfet* and a tea factory director, responsible as commanders for atrocities committed in Rwanda.[39]

42. While there can be no doubt, therefore, that the doctrine of command responsibility extends beyond the responsibility of military commanders to encompass civilian superiors in positions of authority,[40] the Chamber agrees with the approach articulated by the International Law Commission,[41] and, more recently, in *Celebici*, namely that the doctrine of command responsibility "extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders."[42]

43. According to the Trial Chamber in *Celebici*, for a civilian superior's degree of control to be "similar to" that of a military commander, the control over subordinates must be "effective",[43] and the superior must, have the "material ability"[44] to prevent and punish any offences. Furthermore, the exercise of *de facto* authority must be accompanied by "the trappings of the exercise of *de jure* authority".[45] The present Chamber concurs. The Chamber is of the view that these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. It is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other persons of influence.

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[37] *Celebici* (TC) para. 750.
[38] See *Aleksovski* (TC) para. 118.
[39] See *Kayishema and Ruzindana* (TC) and *Musema*.
[40] See *Celebici* (TC) para. 357-363.
[41] Commentary on the 1996 Code of Crimes against the Peace and Security of Mankind: "Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26 June 1996" [henceforth I.L.C. Draft Code of Crimes], U.N. Doc. A/51/10 (1996), commentary para. 4 to Article 6.
[42] *Celebici* (TC) para. 378.
[43] Ibid.
[44] Ibid.

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,
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> 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.

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

2. The Crime of Genocide (Article 2 of the Statute)

2.1 Genocide

51. Article 2 of the Statute reads:

> "1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article
>
> 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> Killing members of the group;
>
> Causing serious bodily or mental harm to members of the group;

[53] See *Celebici* (TC) paras. 772f.

[54] See *Blaskic* paras. 487 and 494-495.

[55] This position is evident not only from the case-law, but also from the aim of Article 6(3), which is not that the crimes of subordinates should be punished but that superiors should ensure that the crimes do not occur. See also *In re Yamashita* pp. 14-16; *Akayesu* para. 691; *Celebici* (TC) paras. 772f; *Blaskic* paras. 487f.

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

Imposing measures intended to prevent births within the group;

Forcibly transferring children of the group to another group.

3.The following acts shall be punishable:

Genocide;

Conspiracy to commit genocide;

Direct and public incitement to commit genocide;

Attempt to commit genocide;

Complicity in genocide."

52. Under Count 1 of the Indictment, the Prosecution alleges that the Accused is responsible under Articles 6(1) and 6(3) for the killing or causing of serious bodily or mental harm to members of the Tutsi population and charges the Accused with the crime of genocide pursuant to Article 2(3)(a) of the Statute.

53. The definition of genocide, as provided in Article 2 of the Statute, cites, *verbatim*, Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention").[56]

54. The Genocide Convention is undeniably considered part of customary international law, as reflected in the advisory opinion of the International Court of Justice (1951) on reservations to the Convention.[57] The Chamber also notes that Rwanda acceded, by legislative decree, to the Genocide Convention on 12 February 1975, and that the crime of genocide was therefore punishable in Rwanda in 1994.

55. The definition of the crime of genocide has been interpreted in the jurisprudence of this Tribunal, namely in the *Akayesu, Kayishema and Ruzindana, Rutaganda* and *Musema* Judgements. The Chamber adheres to the definitions of genocide as elaborated

[56] The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly, 9 December 1948.

[57] See also the UN Secretary-General's Report on the establishment of the International Criminal Tribunal for the Former Yugoslavia, 3 May 1993, U.N Doc. S/25704.

in these judgements. It therefore considers that a crime of genocide is proven if it is established beyond reasonable doubt, firstly, that one of the acts listed under Article 2(2) of the Statute was committed and, secondly, that this act was committed against a specifically targeted national, ethnical, racial or religious group, with the specific intent to destroy, in whole or in part, that group. Genocide therefore invites analysis under two headings: the prohibited underlying acts and the specific genocidal intent or *dolus specialis*.

2.1.1 Underlying Acts

56. The acts underlying the crime of genocide may in each case be analysed into physical and mental elements. The offences relevant to the present case are considered below.

(i) Killing – Article 2(2)(a) of the Statute

57. Article 2(2)(a) of the Statute, like the corresponding provisions of the Genocide Convention, uses "*meurtre*" in the French version and "killing" in the English version. The concept of killing includes both intentional and unintentional homicide, whereas *meurtre* refers exclusively to homicide committed with the intent to cause death. In such a situation, pursuant to the general principles of criminal law, the version more favourable to the Accused must be adopted. The Chamber also notes the Criminal Code of Rwanda, which provides, under Article 311, that "Homicide committed with intent to cause death shall be treated as murder".

58. The Chamber therefore finds that Article 2(2)(a) of the Statute must be interpreted as a homicide committed with intent to cause death. Furthermore, to constitute a crime of genocide, the enumerated acts under Article 2(2)(a) must be committed with intent to destroy a specific group in whole or in part. Therefore, by their very nature the enumerated acts are conscious, intentional, volitional acts that an individual cannot commit by accident or as a result of mere negligence.

(ii) Causing Serious Bodily or Mental Harm – Article 2(2)(b) of the Statute

59. For the purposes of interpreting Article 2(2)(b) of the Statute, the Chamber construes "serious bodily or mental harm" to include acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution. In the Chamber's view, "serious harm" entails more than minor impairment on mental or physical faculties, but it need not amount to permanent or irremediable harm.

2.1.2 Dolus Specialis

60. The *dolus specialis* of the crime of genocide is found in the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

61. For one of the underlying acts to be constitutive of the crime of genocide, it must have been committed against a person because this person was a member of a specific group, and specifically because of his or her membership of this group. Consequently, the perpetration of the act is in realisation of the purpose of the perpetrator, which is to destroy the group in whole or in part. It follows that the victim of the crime of genocide is singled out by the offender not by reason of his or her individual identity, but on account of his or her being a member of a national, ethnical, racial, or religious group. This means that the victim of the crime of genocide is not only the individual but also the group to which he or she belongs.[58]

62. On the issue of determining the offender's specific intent, the Chamber applies the following reasoning, as held in *Akayesu*:

> "[...] intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale

[58] *Akayesu* (TC) paras. 521-522.

of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."[59]

63. Thus evidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the Accused, especially where the intention of a person is not clear from what that person says or does. The Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the Accused. The Chamber is of the opinion that the Accused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action.

64. As for the meaning of the terms "in whole or in part", the Chamber agrees with the statement of the International Law Commission, that "the intention must be to destroy the group as such, meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group".[60] Although the destruction sought need not be directed at every member of the targeted group, the Chamber considers that the intention to destroy must target at least a substantial part of the group.[61]

65. The Chamber notes that the concepts of national, ethnical, racial, and religious groups enjoy no generally or internationally accepted definition.[62] Each of these concepts must be assessed in the light of a particular political, social, historical, and cultural context. Although membership of the targeted group must be an objective feature of the society in question, there is also a subjective dimension.[63] A group may not have

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[59] *Akayesu* (TC) para. 523.

[60] ILC, Draft Code of Crimes, p. 88, and *Akayesu* (TC) paras. 496-499.

[61] For example, the Chamber in *Kayishema and Ruzindana* (TC) held that the accused must have the intention to destroy a "considerable" number of members of a group.

[62] Although indicative definitions of these four terms have been provided, for example, in *Akayesu* paras. 512-515.

[63] In this regard, the Chamber agrees with the comment of the Commission of Experts on Rwanda that "to recognise that there exists discrimination on racial or ethnic grounds, it is not necessary to presume or posit

precisely defined boundaries and there may be occasions when it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group. Moreover, the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide.

2.2 Complicity to Commit Genocide

66. By Count 2 of the Indictment, the Prosecutor alleges that the Accused is responsible, under Articles 6(1) and 6(3), as an accomplice to the killing and causing of serious bodily or mental harm to members of the Tutsi population, and charges the Accused with the crime of complicity in genocide, pursuant to Article 2(3)(e) of the Statute.

67. The Indictment indicates that for the charge of complicity in genocide, the Prosecution relies on the same acts that it relies on for the charge of genocide. In the Chamber's view, genocide and complicity in genocide are two different forms of participation in the same offence. The Chamber thus concurs with the opinion expressed in *Akayesu* that "an act with which an Accused is being charged cannot, therefore, be characterized both as an act of genocide and an act of complicity in genocide as pertains to this accused. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same act".[64] Therefore, the Chamber finds that an accused cannot be convicted of both genocide and complicity in genocide on the basis of the same acts.

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the existence of race or ethnicity itself as a scientifically objective fact": Morris and Scharf, *The International Criminal Tribunal for Rwanda*, vol. 1, p. 176.

[64] *Akayesu* (TC) para. 532.

68. The Chamber agrees with the definition of the elements of the offence of complicity in genocide found in the jurisprudence of this Tribunal, as, for example, in *Musema*.[65]

69. With regard to the *actus reus* of complicity in genocide, the Chamber notes that, under Common Law, the forms of accomplice participation are usually defined as "aiding and abetting, counselling and procuring". On the other hand, in most Civil Law systems, three forms of accomplice participation are recognised: complicity by instigation, by aiding and abetting, and by procuring means. The Rwandan Penal Code, in its Article 91, defines, *inter alia*, these three forms of complicity:

> "(a) Complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose;
>
> (b) Complicity by knowingly aiding or abetting a perpetrator of a genocide in the planning or enabling acts thereof;
>
> (c) Complicity by instigation, for which a person is liable who, though not directly participating in the crime of genocide, gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited the commission of genocide."[66]

70. Taking note of the fact that the Civil Law and the Common Law definitions of complicity are very similar, the Chamber defines the forms of complicity, for the purposes of interpreting Article 2(3)(e) of the Statute, as complicity by aiding and abetting, by procuring means, or by instigation, as defined in the Rwandan Penal Code.[67]

71. The *mens rea* of complicity in genocide lies in the accomplice's knowledge of the commission of the crime of genocide by the principal perpetrator.[68] Therefore, the accomplice in genocide need not possess the *dolus specialis* of genocide; rather he or she, knowingly, aids and abets, instigates or procures for another in the knowledge that the

[65] *Musema* paras. 168-175
[66] *Akayesu* (TC) para. 179.
[67] Ibid. paras. 525-548.

other person intends to destroy, in whole or in part, a national, ethnical, racial or religious group as such.

3. Crimes against Humanity (Article 3 of the Statute)

72. Article 3 of the ICTR Statute reads:

> "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
>
> (a) Murder;
>
> (b) Extermination;
>
> (c) Enslavement;
>
> (d) Deportation;
>
> (e) Imprisonment;
>
> (f) Torture;
>
> (g) Rape;
>
> (h) Persecutions on political, racial and religious grounds;
>
> (i) Other inhumane acts."

73. The Accused in the present case is charged with three counts of crimes against humanity: murder, extermination, and other inhumane acts, under Article 3(a), (b), and (i) of the Statute, respectively. The three counts charge the Accused with responsibility under Article 6(1) and 6(3) of the Statute.

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[68] See *inter alia* the conclusions in *Akayesu* (TC) para. 540f.

74. The text of Article 3 of the Statute draws primarily on the benchmark definition of a crime against humanity found in Article 6(c) of the Statute of the Nuremberg Tribunal.[69] In customary international law, crimes against humanity may be directed against *any* civilian population and are prohibited regardless of whether they are committed in an international or internal armed conflict.[70] The UN Security Council, in deciding that crimes against humanity in the Statute of this Tribunal must have been committed as part of a discriminatory attack, applied a narrower definition than that in customary international law.

75. A crime against humanity is a prohibited underlying offence committed as part of a broader criminal attack. The crime therefore invites definition under three headings: the broader attack, the underlying offences, and the mental element.

3.1 The Broader Attack

76. The underlying offences must be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.

3.1.1 Widespread or Systematic

77. A widespread attack is an attack on a large scale directed against a multiplicity of victims, whereas a systematic attack is one carried out pursuant to a preconceived policy or plan.[71] To qualify, the attack must be at least widespread or systematic, but need not be both. Nonetheless, the Chamber notes that the criteria by which one or the other aspects of the attack is established partially overlap. As stated in *Blaskic*:

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[69] Annex to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8 August 1945, p. 85.

[70] *Akayesu* (TC) para. 565; *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141.

> "The fact still remains however that, in practice, these two criteria will often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation. The quantitative criterion is not objectively definable as witnessed by the fact that neither international texts nor international and national case-law set any threshold starting with which a crime against humanity is constituted."[72]

78. It is, therefore, the Chamber's view that either of the requirements of widespread or systematic will be enough to exclude acts not committed as part of a broader policy or plan. Also, the requirement that the attack must be committed against a "civilian population" presupposes a kind of plan; and the discriminatory element of the attack is, by its very nature, only possible as a consequence of a policy. Thus the policy element can be seen to be an inherent feature of the attack, whether the attack be characterised as widespread or systematic.[73] Further, it is clear from Article 3 of the Statute and recent case law[74] that such a policy may be instigated or directed by any organisation or group, whether or not representing the government of a State.

3.1.2 Against any Civilian Population

79. The Chamber concurs with the finding in *Tadic* that the targeted population must be predominantly civilian in nature, but that the presence of certain non-civilians in it does not change its civilian character.[75] It also follows, as argued in *Blaskic*, "that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian."[76]

80. The requirement that the prohibited acts must be directed against a civilian

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[71] For example, the ILC Draft Code of Crimes defines systematic as "meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts." Commentary on Article 18, para. 3.

[72] *Blaskic* para. 207.

[73] Although the Chamber concurs with the statement in *Kupreskic et al*, "that although the concept of crimes against humanity necessarily implies a policy element, there is some doubt as to whether it is strictly a *requirement,* as such, for crimes against humanity", para. 551.

[74] See, for example, *Tadic* (TC) para. 654.

[75] *Tadic* (TC) para. 638.

"population" does not mean that the entire population of a given State or territory must be victimised by these acts in order for the acts to constitute a crime against humanity. Instead the "population" element is intended to imply crimes of a collective nature and thus excludes single or isolated acts which, although possibly constituting crimes under national penal legislation, do not rise to the level of crimes against humanity.[77]

3.1.3 On Discriminatory Grounds

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

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[76] *Blaskic* para. 214.

[77] See *Tadic* (TC) para. 644.

[78] This requirement is additional to the Nuremberg Charter, the ICTY Statute, and the ICC Statute.

[79] Had the drafters of the Statute sought to characterise the individual actor's intent as discriminatory, they would have inserted the relevant phrase immediately after the word "committed", or they would have used punctuation to set aside the intervening description of the attack. In addition, they would have taken care to modify Article 3(h) to redress the resulting repetition of qualifiers. As noted by the Appeals Chamber in *Tadic* (correcting the Trial Chamber's adoption in that case of a supposedly implicit requirement of discriminatory intent for all crimes against humanity under Article 5 of the ICTY Statute), "a logical construction of Article 5 also leads to the conclusion that, generally speaking, this requirement is not laid down for all crimes against humanity. Indeed, if it were otherwise, why should Article 5(h) specify that "persecutions" fall under the Tribunal's jurisdiction if carried out 'on political, racial and religious grounds'? This specification would be illogical and superfluous. It is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements." *Tadic* (AC) para. 284. See also ibid. para. 305; *Kupreskic et al.* para. 558; *Blaskic* paras. 244 and 260.

[80] *The Prosecutor v. Jean Paul Akayesu*, Judgement on appeal of 1 June 2001 (Case No. 96-4-A) para. 469 (AC), and *Kayishema and Ruzindana* (TC) para. 133-134.

3.2 Underlying Acts

82. As discussed above, a crime against humanity is constituted by an offence committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial, or religious grounds. However, an underlying offence need not contain elements of the broader attack. For example, an offence may be committed without discrimination, or be neither widespread nor systematic, yet still constitutes a crime against humanity if the other prerequisites of the principal crime are met. A single act by a perpetrator may thus constitute a crime against humanity. [81]

83. Each enumerated crime contains its own specific mental and physical elements. The three underlying offences charged in the Indictment are described below.

Murder

84. In *Kayishema and Ruzindana*, the Trial Chamber found that:

> "murder and *assassinat* [the word used in the French version of the Statute] should be considered together in order to ascertain the standard of *mens rea* intended by the drafters and demanded by the ICTR Statute. When murder is considered along with *assassinat* the Chamber finds that the standard of *mens rea* required is intentional and premeditated killing. The accused is guilty of murder if the accused, engaging in conduct which is unlawful:
>
> 1. causes the death of another;
> 2. by a premeditated act or omission; and
> 3. intending to kill any person or,
> 4. intending to cause grievous bodily harm to any person."[82]

85. This Chamber concurs with the above description.

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[81] *The Prosecutor v. Mile Msksic, Miroslav Radic, and Veselin Sljivancanin,* Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996 (Case IT-95-13-R61) para. 30 and *Kupreskic et al.* para. 550.

[82] *Kayishema and Ruzindana* (TC) para. 139-140.

Extermination

86. There is very little jurisprudence relating to the essential elements of extermination. In *Akayesu* the Trial Chamber stated that extermination is a crime by definition directed against a group of individuals, differing from murder in respect of this element of mass destruction. Jean-Paul Akayesu was found guilty of extermination for ordering the killing of sixteen people.[83]

87. The Chamber agrees that extermination is unlawful killing on a large scale. "Large scale" does not suggest a numerical minimum. It must be determined on a case-by-case basis using a common-sense approach.

88. A perpetrator may nonetheless be guilty of extermination if he kills, or creates the conditions of life that kill, a single person, providing that the perpetrator is aware that his or her acts or omissions form part of a mass killing event, namely mass killings that are proximate in time and place and thereby are best understood as a single or sustained attack.

89. The Chamber thus adopts the three elements of the underlying crime of extermination articulated in *Kayishema and Ruzindana*.[84] These are that the Accused, through his acts or omissions:

(i) participated in the mass killing of others, or in the creation of conditions of life leading to the mass killing of others;

(ii) intended the killings, or was reckless, or grossly negligent as to whether the killings would result; and,

(iii) was aware that his acts or omissions formed part of a mass killing event.

90. The "creation of conditions of life leading to the mass killing" of others include, for example imprisoning a large number of people and withholding the necessities of life,

[83] *Akayesu* (TC) para. 735-744.
[84] *Kayishema and Ruzindana* (TC) para. 144.

so that mass death results; or introducing a deadly virus into a population and preventing medical care, with the same result.

Other Inhumane Acts

91. Since the Nuremberg Charter, the category "other inhumane acts" has been retained as a category of unspecified acts of comparable gravity to the other enumerated acts. Article 7(k) of the Rome Statute of the International Criminal Court characterises "other inhumane acts" with reference to a preceding list of offences as "acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Commenting on Article 18 of its Draft Code of Crimes, the International Law Commission stated that:

> "... this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity"(para. 17).

92. The Chamber therefore is of the view that, "other inhumane acts" includes acts that are of similar gravity and seriousness to the enumerated acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, or persecution on political, racial, and religious grounds. These will be acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity. As for which acts rise to the level of inhumane acts, this should be determined on a case-by-case basis.

3.3 Mental Element

93. A mental factor specific to crimes against humanity is required to create the nexus between an underlying offence and the broader criminal context, thus transforming an ordinary crime into an attack on humanity itself.

94. The Chamber concurs with the description of the *mens rea* of a crime against humanity as stated in *Kayishema and Ruzindana* (which was cited with approval in the

ICTY cases of *Kupreskic et al.*[85] and *Blaskic*[86]), namely, that the Accused mentally must *include* his act within the greater dimension of criminal conduct. This means that the accused must know that his offence forms part of the broader attack. By making his criminal act part of the attack, the perpetrator necessarily participates in the broader attack.

95. It is worth noting that the *motives* (as distinct from the *intent*) of the Accused are of no relevance to the legal constitution of a crime against humanity.[87] This point was clarified by the Appeals Chamber in *Tadic,* which held that an act committed for purely personal motives was not excluded from being a crime against humanity as long as the underlying offence was committed by the perpetrator as part of the broader attack.[88]

4. Violations of the Geneva Conventions and Additional Protocol II

96. Article 4 of the Statute reads:

> "The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
>
> a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
>
> b) Collective punishments;
>
> c) Taking of hostages;
>
> d) Acts of terrorism;
>
> e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
>
> f) Pillage;

[85] *Kupreskic et al.* para. 557.
[86] *Blaskic* para. 249.
[87] *Kupreskic et al.* para. 558.
[88] *Tadic* (AC) paras. 271-272.

g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;

h) Threats to commit any of the foregoing acts."

97. Under Counts 6 and 7 of the Indictment, the Prosecution alleges that the Accused is responsible under Articles 6(1) and 6(3) for the serious violations of Common Article 3 and Additional Protocol II pursuant to Articles 4(a) and (e) of the Statute.

4.1 Applicability

98. Jurisprudence of this Tribunal has established that Common Article 3 and Additional Protocol II were applicable as a matter of custom and convention in Rwanda in 1994.[89] Consequently, at the time the events in the Indictment are said to have taken place, persons who violated these instruments would incur individual criminal responsibility and could be prosecuted therefore.

4.2 Material Requirements

99. Common Article 3 and Additional Protocol II afford protection to, *inter alia*, civilians, non-combatants and persons placed *hors de combat*, in the context of internal armed conflicts. Such conflicts must meet a minimum threshold requirement to fall within the ambit of these instruments. The lesser threshold is that of Common Article 3 which simply applies to armed conflicts "not of an international character". This rules out acts of banditry and internal disturbances but covers hostilities that involve armed forces organized to a greater or lesser extent. To be covered by Common Article 3, the hostilities must take place within the territory of a single State, which, in the present matter would be that of Rwanda.

100. Additional Protocol II offers a higher threshold of applicability inasmuch it applies to conflicts which take place in the territory of a High Contracting Party between

its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. Again, situations ruled out as not being armed conflicts are "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."[90] Considering the higher threshold of applicability of Additional Protocol II, it is clear that a conflict that meets its material requirements of applicability will *ipso facto* meet those of Common Article 3.

101. Whether a conflict meets the material requirements of the above instruments is a matter of objective evaluation of the organization and intensity of the conflict and of the forces opposing one and another.[91] Once the material requirements of Common Article 3 or Additional Protocol II have been met, these instruments will immediately be applicable not only within the limited theatre of combat but also in the whole territory of the State engaged in the conflict. Consequently, the parties engaged in the hostilities are bound to respect the provisions of these instruments throughout the relevant territory.

102. For a violation to be covered by Article 4 of the Statute it must be deemed *serious*. On this, the Chamber follows the definition advanced in *Akayesu*, in which the Chamber stated that a serious violation is "a breach of a rule protecting important values which must involve grave consequences for the victim".[92] Regarding the elements of murder, as covered by Article 4(a) of the Statute, the Chamber refers to its definition of murder in 3.2 above.

103. Common Article 3 and Additional Protocol II afford protection primarily to victims or potential victims of armed conflicts. In the case of Common Article 3, these

[89] See *Akayesu* (TC) paras. 608-610, *Kayishema and Ruzindana* (TC) para. 156 and *Musema* paras. 970-971.
[90] See Article 1 of Additional Protocol II and *Akayesu* (TC) paras. 625-626.
[91] *Akayesu* (TC) para. 624.
[92] *Akayesu* (TC) para. 616.

individuals are persons taking no active part in the hostilities[93] and, under Additional Protocol II, the protection is extended to all persons who do not take or who have ceased to take part in the hostilities.[94] In the present matter, it is clear that the victims of the events alleged are unarmed men, women, and children, all civilians.

104. To take a direct or active part in the hostilities covers acts which by their very nature or purpose are likely to cause harm to personnel and equipment of the armed forces. In assessing whether or not an individual can be classed as being a civilian, the overall humanitarian purpose of the Geneva Conventions and their Protocols should be taken into account. To give effect to this purpose, a civilian should be considered to be any one who is not a member of the "armed forces", as described above, or any one placed *hors de combat*.[95]

105. For a crime to constitute a serious violation of Common Article 3 and Additional Protocol II, there must be a nexus between the offence and the armed conflict. The "nexus" requirement is met when the offence is closely related to the hostilities or committed in conjunction with the armed conflict. The Appeals Chamber in *Tadic* held that it is "sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict".[96] As such, it is not necessary that actual armed hostilities have broken out in Mabanza *commune* and Kibuye Prefecture for Article 4 of the Statute to be applicable. Moreover, it is not a requirement that fighting was taking place in the exact time-period when the acts the offences alleged occurred were perpetrated. The Chamber will determine whether the alleged acts were committed against the victims because of the conflict at issue.

106. The burden rests on the Prosecutor to establish that such a nexus exists.

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[93] Common Article 3 (1).
[94] Article 4.
[95] See 1977 Additional Protocol I Articles 43 and 44 as regards requirements for recognition of combatant status and *Rutaganda* paras. 100 and 101.
[96] *The Prosecutor v. Tadic*, "Decision on the defence motion for interlocutory appeal on jurisdiction" of 2 October 1995 para. 70.

5. Cumulative Charging

107. The Accused is cumulatively charged with seven counts on the basis of his acts as alleged in paragraphs 4.10 to 4.31 of the Indictment (although the Complicity to commit genocide is based only on paragraphs 4.14 to 4.25).

108. With regard to cumulative charging, the ICTY Appeals Chamber in *Celebici* held:

> "Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR." [97]

109. The Chamber concurs with the holding of the ICTY Appeals Chamber endorsing the principle of cumulative charging. Therefore, in the present case, the Chamber will consider all the charges in the Indictment, preferred against the Accused.

[97] *Celibici* (AC) para. 400.

CHAPTER IV. GENERAL ISSUES

1. Introductory Remarks

110. In this section, the Chamber will consider issues of a general nature which have been raised by the parties and which are relevant to establishing whether the Accused was generally supportive of the massacres. The Chamber will assess the evidence relating to the character of the Accused before April 1994, his decision to remain as *bourgmestre* during the events, his possible subordinates, his relationship with assistant *bourgmestre* Célestin Semanza, the role of the *Abakiga*, and whether the Accused effected reasonable measures between April and July 1994 to maintain peace and security in the *commune* of Mabanza. In Chapter V the Chamber will review the evidence presented regarding specific events.

2. Character of the Accused prior to the Events in 1994

111. The Prosecution did not explicitly challenge the good character of the Accused prior to 1994 or his competence as a *bourgmestre*. Regarding the specific actions of the Accused before 12 April 1994, the Prosecution stated: "We accept that more likely than not, up until that time [12 April 1994], he did that in good faith. We make no bones about that. And I want that to be crystal clear. There is no evidence to suggest otherwise."[98]

112. For the Prosecution, evidence of the character of the Accused is irrelevant to the determination of his guilt or innocence for the crimes for which he is charged but is rather an issue to be considered at sentencing.[99]

113. The Defence argues that in assessing the credibility of the testimony of the Accused, the Chamber must take due notice of the previous good character and attitude of the Accused prior to the events in April – July 1994. It submits, *inter alia*,

[98] Transcripts of 18 October 2000 pp. 65–66.
[99] Prosecutor's Rebuttal para. 11.

that where the good character of the Accused has been established, the Chamber must admit that he is less likely to have committed the crimes perpetrated. This applies in particular to situations where the Defence has not presented independent proof to rebut the Prosecution evidence. For the Defence, the fact that the Accused was a tolerant person who did not discriminate against ethnic groups, has a direct bearing on establishing whether or not he committed the crimes for which he is charged.[100] The Defence presented documentary evidence to show that during a period of rising tensions from 1990 onwards the Accused carried out his duties in an objective manner.

114. The Chamber notes that Rule 93 of the Rules of Procedure and Evidence is the only Rule that deals with evidence of a consistent pattern of conduct. However, this Rule is relevant not to evidence of a pattern of conduct which may favour the Accused, but rather to evidence to demonstrate the existence of a consistent practice or systematic practice so as to prove a charge, such as crimes against humanity.[101]

115. The question before the Chamber, then, considering that the Rules are silent on the issue, is what weight should be attached to the evidence presented by the Defence to counter the case of the Prosecution. In its "Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*", of 17 February 1999, in the case of *Kupreskic et al.*, Trial Chamber II of the ICTY stated:

> "... (i) generally speaking, evidence of the accused's character prior to the events for which he is indicted before the International Tribunal is not a relevant issue inasmuch as (a) by their nature as crimes committed in the context of widespread violence and during a national or international emergency, war crimes and crimes against humanity may be committed by persons with no prior convictions or history of violence, and that consequently evidence of prior good, or bad, conduct on the part of the accused before the armed conflict began is rarely of any probative value before the International Tribunal, and (b) as a general principle of criminal law, evidence as to the character of an accused is generally inadmissible to show the accused's propensity to act in conformity therewith;"

116. The present Chamber concurs with the above statement, particularly in the context of serious violations of international humanitarian law, where evidence of

[100] Defence Closing Brief pp. 16-17 paras. 105-112 and Defence Rejoinder paras. 105-112.

prior good character is of little or no probative value. However, were such evidence shown to be particularly probative to the charges at hand, then the burden will be upon the Prosecutor to dispel any resulting doubts there may be regarding its case.

117. Evidence presented to the Chamber by both the Prosecution and the Defence tends to demonstrate that up until the events in 1994 the Accused was a competent *bourgmestre*. He did not discriminate between the ethnic groups, and the population of Mabanza *commune* respected him. However, from 1990 onwards, as tensions rose between the Rwandan government and the Rwandan Patriotic Front (RPF), inter ethnic suspicions and disputes increased. Documentary evidence was presented to show how the Accused dealt with the situation.

118. In October 1990, the Accused sent two letters to the authorities in Kibuye with information on individuals suspected either of illegally possessing rifles or of supporting the *Inkotanyi*. In the first letter, dated 9 October 1990 and sent to the prefect of Kibuye, the Accused forwarded a list of 26 persons, mainly teachers and Tutsi, "suspected of holding illegal rifles".[102] In a concluding note to the letter, the Accused stated that "[a] search of rifles has been carried out in almost all their houses but no single rifle has been found. We are still investigating but it is not easy to find rifles with those people. The population have confirmed that they might possess rifles". Apart from the testimony of Witness G (see V.3.4),[103] there is no evidence that any of the suspects was actually arrested.

119. In a second letter, dated 20 October 1990, the Accused sent to the President of the Security Council in Kibuye, "a list of persons who are suspected by the population ... so that [he] could follow their behaviour which is suspected by the population".[104] The letter contains the names of 12 persons all of whom were teachers

[101] On this issue see ICTY Transcripts of 15 February 1999 in *Prosecutor* v. *Kupreskic et al*, pp. 6889-6890.
[102] Prosecution Exhibit No. 91.
[103] See transcripts of 26 January 2000 pp. 14-15 (closed session): "I was saying that after 1990, he did not like the tutsis any more. He hated them. He threw people into prison and called them – referred to them as accomplices of the *Inkotanyi*".
[104] Prosecution Exhibit No. 90.

and mainly Tutsi. In conclusion to the letter, the Accused wrote that he sent the list "following what people say and know about them but I do not confirm for sure what they are charged with is really true". Consequently, the letter indicates that the Accused, in his capacity as head of the *commune*, was forwarding to the authorities in Kibuye information he had received from the population of Mabanza.

120. During his testimony, the Accused stated:

> "It was my duty as bourgmestre to report what was happening in the commune, what the people were saying, what was happening in the commune needed to be reported to the superiors, depending on the development of the situation in the commune."[105]

121. Asked whether he checked the information he received by conducting searches, he replied:

> "I told you that there was an atmosphere of suspicion within the Tutsis and Hutus. And the Hutus were saying now that the Tutsis had weapons. And the Hutus wanted to attack the Tutsis to recover these arms, these weapons. Now, to resolve the situation or to diffuse the situation, we set up a committee of verification to appease the Hutus, and if [there were] weapons [we] will find them, and if they did not have then this rumor would be found to be baseless. That is why we drew up a list of people who were targeted during that period. And we conducted a search, but we found nothing. And that is how come the situation was diffused in [Mabanza], contrary to what happened in neighbouring communes and elsewhere."[106]

122. There is no conclusive evidence in this case that individuals were arrested or ill-treated in Mabanza before or after the forwarding of the lists by the Accused, or that by his actions, the Accused accentuated the inter-ethnic suspicions. In the Chamber's view, these two reports must be viewed in the context of the situation in which they were written. On 1 October 1990, the RPF attacked Rwanda from Uganda. In such a situation, it is not illegitimate, on the face of it, for authorities to search for weapons among persons suspected of being sympathetic to the attackers. Both reports refer to a "plan" to attack Rwanda. Whether the measures taken by the Accused in October 1990 were proportionate or not would depend on an assessment

[105] Transcripts of 1 June 2000 pp. 147.
[106] Ibid. pp. 147-148.

which falls outside the scope of the present case.[107]

123. In 1992 and 1993, the Accused sent to the Prefect four lists of persons who were said to have joined the *Inkotanyi*. In the initial letter of 23 October 1992, the Accused wrote:

> "... with reference to the prevailing rumors that some young men join the Inkontanyi, I would like to let you know that I assigned the "conseillers" to follow up this issue and they submitted to me the attached list. ... In MUSHUBATI "secteur" it is reported that it is a certain KUBWIMANA Mathias [...] who takes them away. We would like to request for your assistance because in BANDAMIKO "cellule" some parents are not happy with them and they are lamenting."

124. Attached to the letter was a list of 26 persons and names of others suspected to have left.[108] In three follow-up letters sent to the Prefect, and dated 30 December 1992, 14 January 1993 and 12 March 1993, respectively, the Accused forwarded a further three lists of persons, including two Hutus, who were said to have joined the *Inkotanyi*.[109] At the start of each letter the Accused wrote "I feel sorry to send you again another list of young men" who have joined the *Inkotanyi*. The evidence suggests that by using the term *Inkotanyi*, the Accused was referring to the RPF, and thus the lists identified people who had secretly joined them. There is no evidence in this case to establish that the Accused acted improperly in relation to the lists.

125. Documentary evidence presented by the Defence also shows that in early 1993 attacks were being perpetrated by Hutu on Tutsi and their property and that the Accused attempted to prevent such occurrences. The Accused presented a report of such incidents in a letter to the Prefect dated 7 January 1993 and described how, with the help of three policemen and an *Inspecteur de Police Judiciaire*, they laid ambush to one of the attacks. However, regarding other attacks, the Accused wrote that security officers were unable to help as "they are not well informed of the sites of the attacks and also because the sector is immense". According to the letter, the Prefect

[107] It has been submitted that in some parts of Rwanda large-scale imprisonment of Tutsi from October 1990 took part under the pretext of assuring security. See desForges: *Leave None to Tell the Story* (1999) p. 49.

[108] Prosecution Exhibit No. 80.

[109] Prosecution Exhibit Nos. 81, 82 and 83.

had promised to send soldiers but they had never arrived. In conclusion, the Accused asked for continued assistance from the Prefect in order to restore security.[110]

126. According to the Accused, by April 1994, confidence, albeit not total, had been restored in the *commune* of Mabanza.[111] Prosecution Witness I testified:

> "Bagilishema was someone [who] was loved by all the people both Hutus and Tutsis. When they had problems they would go to him for advice and he would provide such advise. And during the war when in 1994 houses started to be destroyed people fled towards the bureau communal in large numbers. This means that he was loved by a lot of people and nobody thought that any harm would come to himself in the presence of Bagilishema."[112]

127. Defence Witness KC stated that the Accused, from the time he was appointed as *bourgmestre* "was appreciated by the population, by the people, the entire population".[113] For Defence Witness TP, the Accused "was a devoted man who carried out his work with a sense of commitment and fairness. Someone who was listened to, who had a good reputation in his commune".[114] According to Defence Witness BE, "during his fourteen years at the helm of the commune, Ignace Bagilishema, who enjoyed the confidence of all the inhabitants... was very close to the people".[115] Defence Witness WE testified that "from the beginning ... the people respected the Accused and he also respected his people".[116]

128. In the opinion of the Chamber, the above evidence does not demonstrate that the Accused generally discriminated between the ethnic groups, to the detriment of the Tutsi, prior to April 1994. The correspondence regarding persons joining the *Inkotanyi* and persons suspected by the local population of either hiding weapons or of being accomplices of the *Inkotanyi*, does not establish that the Accused unjustifiably targeted, arrested or ill-treated Tutsi. Although this correspondence can be subject to interpretation, the Prosecution has not led sufficient evidence to

[110] Defence Exhibit 90.
[111] Transcripts of 1 June 2000 pp. 148-149.
[112] Transcripts of 23 November 1999 p. 27.
[113] Transcripts of 28 April 2000 pp. 11-13.
[114] Transcripts of 27 April 2000 p. 133.
[115] Ibid. pp. 28-29 and 35.

convince the Chamber that the actions of the Accused in 1990-1993 were in furtherance to a policy of purposively singling out Tutsi as alleged RPF accomplices. The letter of 7 January 1993 to the Prefect shows that the Accused attempted to prevent Hutu from attacking Tutsi. Also, according to this letter, the Accused requested additional soldiers from the Prefect, without success. The Chamber notes that even during a period of relative calm, the Accused felt that he had insufficient resources.

3. Decision of the Accused to remain in his Post of *Bourgmestre*

3.1 Introduction

129. The question considered here is whether the Accused's continued occupancy of a centrally appointed position in Rwanda's power structure during the massacres gives rise to his personal responsibility for the crimes committed in Mabanza *commune* in the period April to July 1994. This issue is not related to a specific part of the Indictment, but was raised by the Prosecution in the course of trial and countered by the Defence.

130. The Prosecution argues that the Defence's strategy has been to downplay the Accused's powers as *bourgmestre* during the period from April to July 1994, thus aiming to diminish the Accused's responsibility for many of the atrocities committed in Kibuye prefecture as alleged in the Indictment.[117] In fact, according to the Prosecution, the Accused remained in his official position of his own free will, thus signalling to the government of Rwanda that he was willing to serve it and to conform to its plans.[118] He was responsible for the implementation of government policies throughout his tenure.[119] "Those who remained in government did so because they supported the [Hutu-power] ideology. They had to".[120]

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[116] Transcripts of 23 May 2000 p. 34.
[117] Prosecution's written Closing Remarks p. 41 para. 256.
[118] Transcripts of 8 June 2000 p. 75.
[119] Prosecution's written Closing Remarks p. 41 para. 259 and p. 43 para. 265.
[120] Transcripts of 4 September 2000 p. 38.

131. The Defence submitted that the Accused did not take the easy option in not resigning, and that he "decided to remain on duty to try and protect as well as he could the population he had served for 14 years and thus saved approximately nearly 200 Tutsi". In other words, the Accused as *bourgmestre* did all that he could to manage the situation and save the greatest number of lives with the limited means and resources available.[121] The Defence indicated that the Accused was being reproached by the Prosecution both for not doing enough while in the job and for not resigning his post.[122]

132. The Accused testified that since the advent of multipartism in 1991, *bourgmestres* were expected to remain politically neutral, irrespective of personal political affiliations, and that thenceforth he reduced his involvement with the MRND party.[123] The Accused claimed to have remained *bourgmestre* after the formation of the so-called interim government in April 1994 for the purpose of "serving the people", not the government;[124] he stayed on "to save human lives".[125] While allowing that as *bourgmestre* he had to follow "some" government directives, the Accused denied that he would ever implement a policy that went against his conscience.[126]

133. During his testimony the Accused spoke of his intention on two occasions to resign from his post as *bourgmestre*. Referring firstly to the period 1990 to 1994 - the period of "war", as he called it - the Accused said:

> "... at this time I had problems of inter-ethnic conflicts, but there was, in particular, the problems amongst the parties. The opposition parties were fighting to get a hold, a foothold in Mabanza Commune. And as far as I am concerned in 1993, I wanted to resign, and I was going to work for a Dutch project which was being run in Cyangugu."[127]

[121] Defence Closing Brief paras. 302-315.
[122] Transcripts of 19 October 2000 p. 146.
[123] Transcripts of 8 June 2000 p. 76.
[124] Ibid.
[125] Ibid. p. 77; see also transcripts of 7 September 2000 pp. 108-109.
[126] Transcripts of 8 June 2000 pp. 76-77.
[127] Transcripts of 1 June 2000 p. 146.

134. The Accused was put out by the fact that "management at that time was very, very difficult".[128] The next time the Accused came close to quitting, the reason again was one of management. On the night of 12 April 1994, according to the Accused, after supervising night patrols, he returned to the *bureau communal* at around midnight to find that a busload of one hundred refugees or more, sent there by order of the Prefect, had arrived from Rutsiro (see V.2.6). The new arrivals joined the large mass of refugees already gathered at the *bureau communal*. The Accused telephoned the Prefect:

> "I asked him why he didn't contact me to take the necessary measures to receive these refugees because I myself was overwhelmed by the management of those refugees I had in Mabanza and I also further asked him why he never came to look at the situation that I was handling and then send the reinforcement that I was requesting or food items which I requested for. He told me that he did not find anything. So I asked him why he put me before a further complication before consulting me."[129]

135. The Accused claimed that several times before he had invited Prefect Kayishema to the *commune* for him to see for himself the conditions under which the Accused was working; but that the Prefect never came.[130] Instead of reinforcements and supplies he was being sent more displaced persons to care for. The Accused informed the Prefect that he was not prepared to accept sole responsibility for the management of the refugees, and that if the Prefect did not assist him he was "ready to resign".[131]

136. On the morning of 13 April 1994, as the Accused allegedly prepared to tender his resignation to the Prefect ("to go and give him the keys to the *commune*"),[132] he received a telephone call from the *bourgmestre* of Rutsiro warning him that assailants were on their way to Mabanza to kill the Accused and the refugees sheltering at the *bureau communal*.[133] The Accused thereupon saw to the immediate departure of the refugees south towards Kibuye, but did not himself follow them (see V.3.1). Instead:

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[128] Ibid.
[129] Transcripts of 8 June 2000 p. 187.
[130] Transcripts of 5 June 2000 pp. 30-31.
[131] Ibid. p. 31.
[132] Ibid. p. 32.
[133] Ibid. pp. 32-33.

> "I left to go and see friends to ask for advice, to the pastor who was nearby and to share with him my ideas. He told me it was not really the best time to abandon us like that; take courage. He encouraged me and I, therefore, decided to stick with my job."[134]

137. In the event, the Accused remained *bourgmestre* of Mabanza *commune* until around 15 July 1994, when he fled to Zaïre.[135] The Accused testified: "I remained bourgmestre, despite myself, and despite the conditions that I found myself in."[136]

138. The above testimony of the Accused supports the conclusion that he remained at his post voluntarily. He was under no pressure to continue as *bourgmestre*. His testimony also establishes that in both cases practical rather than principled considerations brought the Accused to the verge of quitting. It was not the grain of governmental policy that disturbed him, but he felt that his capacity to manage had been exceeded. The Accused apparently did not seriously contemplate resigning his position after 13 April 1994.

3.2 Significance of the Decision

139. The Prosecution emphasised that the Accused held the post of *bourgmestre* of Mabanza *commune* for almost fourteen and a half years.[137] In relation to the supposed significance of this staying in power, the Prosecution relied on its expert witness Professor André Guichaoua.[138] He testified that the position of *bourgmestre* "is a major aspect of the chain of command which is centralized",[139] but also that "the *bourgmestre* has power which is personal and which is proportional to the relationships that he had with the national leaders".[140] With reference to the Accused, in particular, Professor Guichaoua said:

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[134] Ibid. p. 83.
[135] Transcripts of 8 June 2000 p. 23.
[136] Ibid. p. 75.
[137] See e.g. transcripts of 1 June 2000 p. 30.
[138] Prosecution's written Closing Remarks pp. 42-43 paras. 260-268.
[139] Transcripts of 14 February 2000 p. 15.
[140] Ibid. p. 24.

> "As far as I am concerned all those who held political office during the genocide could not remove themselves from responsibility, disclaim responsibility. They needed to see what was happening in their environment in order to help in the political radicalization. I will take an example that the Bourgmester of Kivumu who was known as Juvenile Rwanzegushira ... preferred to resign in 1993 because he believed he was powerless in the face of the violent acts that were taking place. All the Bourgmester[s] needed to analyze the situation and someone with 14 years experience behind him should to my mind be able to have those capabilities of analysis."[141]

140. The Prosecution endorsed its expert's reasoning and suggested that the Accused was a political conformist whose longevity in office hinged on his continuing obeisance to higher authorities: "This is a man who remained Burgomaster for 14 years. It takes an art given the history of Rwanda, given the situation in Rwanda".[142] And in relation to the period following 6 April 1994:

> "[The Accused] had no idea how things were going to turn out and having decided to remain in his position, it is my submission on behalf of the Prosecutor, that he had to conform and do all that was necessary to maintain the confidence of his superiors in him."[143]

141. The Prosecution has not argued that the Accused is responsible because the interim government was, at the time of the events alleged in the Indictment, an organization with a criminal purpose. Rather, the Prosecution seems to argue that in order to stay on as *bourgmestre,* the Accused had to expressly support, by words and actions, the policy and purpose of the interim government. This allegation is not explicitly covered by the Indictment. The responsibility of the Accused must be based on specific acts which are covered by the Indictment. These acts are dealt with in Chapter V below.

142. A tangent issue is whether by remaining as *bourgmestre,* with the full

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[141] Ibid. pp. 91-92. French reads: "A mon sens, tous ceux qui ont occupé des responsabilités politiques pendant la période du génocide ne peuvent pas dégager leur implication ou leur responsabilité. Ils ont eu deux ans devant eux pour voir quelle était l'évolution qui se déroulait dans leur environnement, pour assister à la radicalisation politique, et je prendrai un exemple..., mais le bourgmestre de Kivumu, qui s'appelait Juvénal Rwanzegushira ... a préféré démissionner en 1993, parce qu'il s'estimait impuissant face aux exactions qui étaient commises. Donc, je le répète, tous les responsables ont eu 2 ans devant eux pour ... je dirais comprendre, analyser, et quelqu'un qui a 14 ans d'expérience derrière lui, doit quand même, à mon sens, posséder ses attributions" (pp. 110-11).

[142] Transcripts of 18 October 2000 p. 238.

[143] Transcripts of 19 October 2000 p. 159.

knowledge of the interim government's criminal objectives, gives rise to personal liability. This issue is not novel. The Nuremberg military tribunals adopted the guiding principle that, to establish individual criminal liability, the prosecution must demonstrate the intentional commission of a criminal act or the wanton failure to fulfill a legal duty. In the *High Command* case, the prosecution was required to demonstrate "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".[144] The Tribunal added that "[a]ny other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations".[145]

143. The application of this general principle of individual responsibility to defendants who knew of illegal activities of their organisations but who lacked authority and power over those actions resulted in numerous acquittals. In the *Hostage* case, defendant Förtsch, who served as chief of staff to various generals, was acquitted despite passing on orders instructing subordinate units to take hostages and to exact reprisals in occupied territories.[146] The Tribunal held:

> "The evidence fails to show the commission of an unlawful act which was the result of any action, affirmative or passive, on the part of this defendant. His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law. He must be one who orders, abets, or takes a consenting part in the crime. We cannot say that the defendant met the foregoing requirements as to participation. We are required to say therefore that the evidence does not show beyond a reasonable doubt that the defendant Foertsch is guilty on any of the counts charged".[147]

144. Thus a person found to have knowingly been part of an organisation with criminal objectives will not necessarily incur responsibility. The person must have positively participated in the group's crimes by substantially contributing to the crimes or by influencing the course of related events; alternatively there must have been personal dereliction. Consequently, there is a need for a concrete assessment of

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[144] *United States v. Wilhelm von Leeb* [the *High Command* case], *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol. 11 (1950), pp. 543-544.
[145] Ibid. p. 489.
[146] *United States v. Wilhelm List* [the *Hostage* case], *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol. 11 (1950).
[147] Ibid. p. 1286.

the facts in each individual case.

145. This approach is also applicable in relation to the situation in Rwanda in 1994. In this regard, the Chamber notes that the Defence submitted the Judgement in the matter of *The Public Prosecutor v. Ignace Banyaga*, delivered on 26 June 1999 by the Court of First Instance of the Specialised Chamber sitting in Kibuye, Rwanda.[148] From April to July 1994, Banyaga was an assistant secretary with the prefectural authority of Kibuye. In May 1994, he became responsible for the security of a certain locality in Kibuye. In acquitting Banyaga of charges of genocide, the Court looked to Banyaga's conduct. Finding no evidence of criminality, the accused was acquitted. The Trial Chamber was informed that the judgement is on appeal.

3.3 Conclusion

146. The Chamber finds that, while the Accused had links with the interim government by virtue of his position, the Prosecution has not led evidence in support of the contention that the Accused was thereby associated with a criminal "conspiracy" which he positively assisted or from which he declined to extricate himself.

4. Possible Subordinates of the Accused

4.1 Introduction

Submissions

147. The Indictment suggests that the Accused was the superior of at least five groups of persons: the employees of Mabanza *commune*, the communal policemen, members of the *Gendarmerie nationale*, *Interahamwe* militiamen, and "armed civilians".[149] Three members of the first group are named: Nzanana (communal accountant), Semanza and Nsengimana (assistant *bourgmestres*).

[148] Defence Exhibit No. 104.
[149] See, for example, paras. 3.2, 3.3, 4.16, 4.19, 4.24 and 4.26.

148. The Prosecution's closing brief added more groups to the above list: "the residents of Mabanza and the Abakiga";[150] and "civilians answerable to the accused in his capacity as Bourgmestre".[151] The brief named, among other individuals, Nkiriyumwami (*conseiller*) and Hakizimana (brigadier);[152] Nshimyimana (communal driver);[153] Rwamakuba and Munyandamutsa (communal policemen);[154] and Witnesses Y and Z (roadblock attendants).[155]

149. In its concluding oral argument, the Prosecution offered this summary:

> "The issue of the subordinates ... as per evidence led by the prosecution, are the following; The two Assistant Burgomasters, the other staff of the commune, the communal policemen, the gendarmes who were stationed in Mabanza, the local Hutu civilians, be they the Abakigas or the Interahamwe, and the Hutu militia who were trained under the civil defence programme as well as the reserve whose services were resorted to during the material time."[156]

150. The Defence contends that the Prosecution failed to distinguish between the *de jure* administrative authority and influence of the Accused, on the one hand, and his superior authority or effective command over the groups and individuals identified above, on the other.[157] It is the latter kind of authority that is a prerequisite for Article 6(3) responsibility. It is evidenced, *inter alia*, by *de jure* powers to issue orders and discipline disobedience.[158] The Defence concludes that of all the *de jure* powers of the Accused, it was only his authority over the communal police which justifies the conclusion that members of that group were his true subordinates.[159]

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[150] Prosecution's written Closing Remarks p. 87 para. 52.
[151] Ibid. p. 95 para. 108.
[152] Ibid. p. 95 para. 106.
[153] Ibid. p. 95 para. 108.
[154] Ibid. p. 96 para. 110.
[155] Ibid. p. 116 paras. 267-269.
[156] Transcripts of 18 October 2000 pp. 210-211.
[157] Defence Closing Brief p. 98 para. 150.
[158] Ibid. p. 96 para. 138 and p. 99 para. 158.
[159] Defence Closing Brief p. 112 para. 280.

Preliminary remarks

151. The law relating to Article 6(3) of the Statute was discussed under III.1.2 The condition of subordination is effective control. To reiterate, a civilian superior will have exercised effective control over his or her subordinates in the concrete circumstances if both *de facto* control and the trappings of *de jure* authority are present and similar to those found in a military context.

152. In what follows, the Chamber will consider the character of the *de jure* or *de jure*-like relationships between the Accused and groups of persons which the Prosecution has alleged were at various times "subordinate" to him, in the sense of Article 6(3) of the Statute. The discovery of *de jure* aspects is only the first step towards satisfying the formal condition of subordination; for the character of a civilian's *de jure* authority (whether real or contrived) must be comparable to that exercised in a military context. If the relationship of the Accused to a particular group had no *de jure* aspects, and if moreover it lacked even the trappings of *de jure* command, then by definition no member of that group can be considered a subordinate of the Accused. The relationship will have been too dissimilar to that enjoyed by a *de jure* commander.

153. The existence of the second element of subordination, namely *de facto* control, will be considered, as necessary, on a case-by-case basis, in the course of the Chamber's analysis of the Prosecution's factual allegations (Chapter V). Additionally, the relationship between the Accused and roadblock attendants with be dealt with in V.5.

4.2 Communal Staff

154. For the period covered by the Indictment, the administration of Mabanza *commune* was, according to Rwandan law, under the direct authority of the

bourgmestre.[160] The staffing of the communal administration was subject to the following general principles, set out in Articles 92 to 94 of the law of 23 November 1963, on the organisation of *communes*:

> "92.Communes may employ personnel to perform communal functions. Furthermore, should there be need, representatives from State Administrative Services may be assigned to Communal Administrative positions, pursuant to statutory provisions.
>
> 93. The *bourgmestre* has the authority to employ, suspend or terminate [personnel], after conferring with Communal Council pursuant to instructions from the Minister of the Interior.
>
> 94. All decisions in regard to employment, suspension, or termination of personnel must be approved by the Prefect or his representative."[161] (Non-official translation.)

155. The communal staff was subdivided into three groupings. There were the "personnel administratif" (comprising the secretarial and accounting staff), the "personnel technique" (technical staff), and the "police communale" (communal police force).[162] Members of the "personnel technique" were specialists in agricultural, social, economic and cultural fields.[163]

156. Additionally, in April 1994, the Accused had three assistant *bourgmestres*. There was a special procedure by which assistants were appointed and, potentially, dismissed. The Accused's three assistants were appointed in 1988 by the Ministry of the Interior.[164] The Accused said that his input regarding their selection was limited to giving advice – it was up to the Ministry, finally, to hire and fire assistant *bourgmestres*.[165] The Accused did not indicate whether the Ministry of the Interior routinely acted upon the advice of the *bourgmestre* in such matters. Nevertheless, in 1988, the Ministry appears to have appointed the three candidates proposed by the *bourgmestre* for the assistants' posts.[166] The Accused made the following observation

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[160] *Organisation communale, 23 Novembre 1963, Disposition organique*, Article 60; reprinted in F. Reyntjens and J. Gorus (ed.), *Codes et lois du Rwanda*, 2nd ed. (Butare: Université Nationale du Rwanda, 1995), vol. II, pp. 914-20.
[161] Ibid.
[162] Ibid. Articles 3 and 4.
[163] Ibid. Article 5.
[164] Transcripts of 1 June 2000 p. 68.
[165] Ibid. p. 69.
[166] Ibid. p. 70.

about the day-to-day management of his assistants:

> "It was the bourgmestre who should have managed these assistants but each time there was a problem, it was necessary to follow the hierarchical structures through the prefecture to the ministry up to the civil authority."[167]

157. However, the Chamber notes that in Article 58 of the law on the organisation of *communes*: "The *bourgmestre* is particularly responsible... 11) to exercise administrative authority over affected State representatives within the *commune*" (non-official translation).

158. The *commune*'s decision-making body was the *Conseil communal*.[168] It was composed of one *conseiller* per *secteur*, elected by the people for a term of five years.[169] The communal council was chaired by the *bourgmestre* and met twice a month in open session. Decisions were taken by majority vote. The vote was secret when the matter related to the nomination or removal of personnel.

159. Having briefly considered certain formal aspects of the communal administration, the Chamber will now look at the *purpose* of this staff, placed by statute under the authority of the *bourgmestre*. Article 57 of the law on the organisation of *communes* states:

> "The *bourgmestre* is responsible by virtue of his superior administrative authority for the economic, social and cultural development of the *commune* and for the execution of laws and regulations." (Non-official translation.)

160. Leaving aside the *bourgmestre*'s law-enforcement authority (which will be considered in the next section on communal police), the Chamber is in no doubt that Mabanza *commune* was organised and was run, at least until April 1994, in a fashion consistent with its intended purpose, namely, communal economic development. On the basis of the available evidence, the Chamber cannot conclude that the Accused's *de jure* authority over his communal employees had martial features.

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[167] Ibid. p. 69.

[168] *Organisation communale*, Articles 3-37.

[169] *Organisation des élections des conseillers communaux, 13 Novembre 1979, Décret-loi no. 36/79*, Article 8; in Reyntjens & Gorus pp. 921-927.

161. Prosecution Expert Witness Guichaoua wrote in a paper on local government in Rwanda:

> "[In the late 1970s] the role of the *communes* as agents of development was enhanced with the creation of new bodies with an economic rather than administrative mandate. It was primarily in this sphere that the institutional autonomy of the *communes* was to be exercised from then on. ... The communal structure was explicitly organised around development activities".[170]

162. Defence Expert Witness Clément, who worked in Rwanda during the period 1989 to 1994, assisted *communes*, including Mabanza, in development planning. In his testimony he referred to the operations of Mabanza's Development Council and Technical Commission.[171] He offered the following assessment of the Accused:

> "The Bourgmestre of Mabanza was of the nine communes the Bourgmestre who got more involved and with more success in the planning of the development of his commune."[172]

163. Both in law and in practice, therefore, the Accused's formal relationship with his administrative and technical staff, at least until April 1994, appears to have been equivalent to that of a general manager of a public agency focused essentially on social development.[173] This model implies that the Accused's *de jure* authority over lower-level staff was altogether different from that of a military commander over subordinates.

164. Of course, this finding does not exclude the possibility that the Accused, at some time early in 1994, appropriated the ready-made staffing structure of the communal administration and contorted it into a quasi-militia. However, in the present case, such a transformation or adaptation of the administration's personnel could not have been achieved quietly or overnight. The Prosecution's concession that the Accused acted in good faith up until 12 April 1994 suggests that any

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[170] Prosecution Exhibit No. 71 pp. 2 and 5.
[171] Transcripts of 29 May 2000 pp. 43f.
[172] Ibid. pp. 53-54.
[173] Note the similar statement in *Akayesu* (TC) para. 62: "The relationship between a bourgmestre and the communal workforce ... is very much a relationship of employer and employee and, therefore,

reorganisation must have come after that date.

165. In any case, the Chamber is unable to conclude from the evidence before it that the employees of Mabanza *commune* were, vis-à-vis the Accused, in a *de jure*-like relationship, whether pre-existing or contrived, that bore the marks of a military-style command. The Prosecution has not adduced sufficient proof on this point, even though its charges of command responsibility presuppose such evidence. The Chamber therefore finds that no administrative communal employees were subordinates of the Accused in the sense required by Article 6(3) of the Statute.

166. Moreover, contrary to the Prosecution's submission, it is clear that members of the *Conseil communal*, an elected advisory body of sectoral representatives, were not *de jure* subordinates of the Accused in the sense of Article 6(3) even though each member's work was supervised by the *bourgmestre*, who was entitled to a quarterly report on his or her activities.[174] This follows from the applicable legislation: "The bourgmestre is responsible, generally, for executing the decisions of the Communal Council."[175] (Non-official translation.)

167. A different question to that considered above concerns the Accused's duty to keep personnel, with whom he had a supervisory relationship, in line. There is no doubt of the existence of such a duty in Rwandan law. The *bourgmestre*'s general law-enforcement obligation was cited above. Moreover, "any breach of the [communal] representative's duty constitutes a disciplinary matter" (non-official translation), which only the *bourgmestre* could punish.[176] This implies that he was under a duty to punish where the need arose. In relation to communal staff, the Accused could control inappropriate or illicit conduct by means of five categories of statutory sanctions (discussed in the next section); for more serious infractions he could fall back on his broader powers of detention or referral to prosecution.

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strictly limited to the scope of employment." The Trial Chamber in *Akayesu* chose not to consider the responsibility of the Accused under Article 6(3).

[174] See, for example, *Organisation communale*, Article 37.

[175] Ibid. Article 58.

[176] *Statut du personnel communal, 25 Novembre 1975, Arrêté présidentiel no. 254/03*, Article 32; in Reyntjens & Gorus pp. 943-946.

168. Nevertheless, in legal terms, the Accused's possible breach of his duty to control staff (or persons generally) who were not his true subordinates does not come under the purview of Article 6(3). If anything, it is a matter for Article 6(1), in the event that it can be shown that the Accused, although reasonably able in the circumstances to do so, omitted to punish his staff because he did not wish to obstruct their criminal behaviour.

4.3 Communal Police

169. In April 1994, according to the Accused, Mabanza's communal police force had a total of eight members, including a brigadier and an assistant brigadier.[177] In this period a *bourgmestre*'s formal relationship with the communal police was described in Articles 1 and 4 of a 1977 statute on the organisation of the *Police communale*:[178]

> "1. The communal police force, which is organized at the communal level, is subject to the authority of the *bourgmestre*, who uses the police in his duty to maintain and re-establish public order and to execute laws and regulations.
>
> 4. The *bourgmestre* bears full responsibility for the organisation, operation and control of the communal police corps. He is assisted, in his duty, by the *brigadier*."[179] (Non-official translation.)

170. In the course of his testimony, the Accused said that the brigadier was the direct supervisor of the communal police.[180] More accurately, under law, he was their "commander".[181] The brigadier was supervised by the *bourgmestre*. The Accused said that his responsibility in this regard was to ensure that "the brigadier did his job properly of coordinating the activities of the police in terms of the maintenance of public law and order and security".[182]

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[177] Transcripts of 1 June 2000 p. 56.

[178] *Organisation de la Police communale, 4 Octobre 1977, Arrêté présidentiel no. 285/03*; in Reyntjens & Gorus pp. 946-949. See also discussion in *Akayesu* (TC) para. 65.

[179] The tasks of the communal police are set out in greater detail in *Organisation communale*, Article 109.

[180] Transcripts of 1 June 2000 p. 53.

[181] See *Organisation communale*, Article 108.

171. That the communal police was quasi-militaristic in structure and operation is evident from the terms of the statute. For example, a brigadier preferably was to be an army reservist;[183] he was responsible for the transmission of "orders" from the *bourgmestre*, the maintenance of weapons, and the conduct of training and parade drills;[184] and the quarterly reports on the performance of the communal police, which fell to the *bourgmestre* to prepare for the attention of the Prefect, were copied to the *Gendarmerie nationale*.[185]

172. A member of the communal police was, under Rwandan law, an employee of the *commune* and subject to the same basic conditions of employment as other communal staff.[186] The *bourgmestre*'s power to discipline members of the communal police was the same as for other staff. The law prescribed five categories of sanctions, as shown below. While it was the *bourgmestre* who was exclusively empowered to discipline communal staff, sanctions described in the fourth and fifth categories could be imposed by the *bourgmestre* only on the advice of the *Conseil communal* and with the prior approval of the Prefect:[187]

> "1) warning;
>
> 2) withholding of one quarter salary for one month maximum;
>
> 3) disciplinary suspension for one month maximum; this sanction involves prohibition from exercising any duties and withholding of salary;
>
> 4) extended disciplinary action for an indeterminate period; this sanction involves termination of all salary and of all indemnities;
>
> 5) termination of service."[188] (Non-official translation.)

173. These were substantial penalties that could be used by the *bourgmestre* to regulate the conduct of communal policemen. The Accused's authority to impose penalties for indiscipline, while not a sufficient indicator of command responsibility,

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[182] Transcripts of 1 June 2000 p. 53.
[183] *Organisation de la Police communale*, Article 7.
[184] Ibid. Articles 8, 12 and 14-15.
[185] Ibid. Article 16.
[186] Ibid. Article 2.
[187] *Statut du personnel communal*, Article 33.
[188] Ibid. Article 32.

is nevertheless a necessary element, and it is clearly present here.

174. In light of the foregoing, the Chamber finds that there a *de jure* superior-subordinate relationship existed between the Accused and members of the communal police of Mabanza *commune* throughout the period in question. This is not disputed by the Defence.[189]

4.4 Gendarmerie Nationale

175. The Accused testified that during a security meeting on 9 April 1994 in Kibuye he proposed that security efforts and reinforcements should be concentrated in sensitive areas, which according to him included Rutsiro and Mabanza *communes*. However, as other *bourgmestres* also requested *gendarmes*, his proposal was rejected. Instead, it was decided to distribute the *gendarmes* to all the *communes*. According to the Accused, he received only five *gendarmes*. In his view, this number was insufficient to meet the needs of the *commune*, and he testified that he repeatedly requested more *gendarmes* directly from the Prefect up until 12 April 1994, without success.[190] He gave up requesting when the five *gendarmes* that he had been given "were withdrawn around the 13th and 14th of April. The reason that we were given was that they had been called to go to the war front by Kigali".[191] During his testimony, the Accused described how he deployed the available manpower to deal with the deteriorating security situation.[192]

176. The Prosecution has argued that there is no evidence to support the testimony of the Accused that he received only fives *gendarmes*, that he made repeated requests to the Prefect for reinforcements, or that the *gendarmes* were withdrawn on 13 April 1994.[193] Regarding these arguments of the Prosecution, the Chamber recalls that the burden is not upon the Accused to prove his case. Rather it is on the Prosecution to

[189] Defence Closing Brief p. 89 para. 71.
[190] Transcripts of 2 June 2000 pp. 86-91.
[191] Transcripts of 1 June 2000 pp. 133-137.
[192] Transcripts of 2 June 2000 pp. 78-86.
[193] Transcripts of 4 September 2000 pp. 117-118.

refute his testimony. If the Prosecution believes that this aspect of the testimony of the Accused is false, then it must so demonstrate it. The Prosecution cannot simply rely on there not being evidence to support the statements of the Accused as proof to discredit him. Furthermore, the Chamber notes that the Prosecution, during its final closing arguments, did not specifically contest the number of *gendarmes* at the disposal of the Accused but rather questioned their deployment and use by the Accused.[194] Consequently, the arguments of the Prosecution do not refute the testimony of the Accused as regards the number of *gendarmes* at his disposal between 9 and 13 April 1994.

177. At the time of the events of 1994, the *Gendarmerie nationale* was essentially a branch of the national army. It was accountable to the Minister of Defence, and its members were "subject to the decisions, disciplinary measures and military jurisdictions" (non-official translation).[195] They could be asked to operate alongside the army, where the need arose.[196]

178. The 1963 law on communal organisation contains provisions for the allocation of members of what was then referred to as the *Police nationale* to *communes*:[197]

> "103....Furthermore the Prefect may dispatch constituents of the National Police to the Commune.
>
> 104. The *bourgmestre* alone has authority over members of the communal Police and, upon designation by the Prefect, over the constituents of the National Police dispatched to the commune. ...
>
> 105. The Prefect will continue to administer all personnel and resource issues in regard to the constituents of the National Police placed under the authority of the *bourgmestre*...." (Non-official translation.)

179. These provisions, which were not explicitly rescinded when the law creating the *Gendarmerie nationale* was decreed in 1974, suggest that a *bourgmestre* had

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[194] Transcripts of 18 October 2000 pp. 47-48.

[195] *Création de la Gendarmerie, 23 Janvier 1974, Décret-loi*, Article 2; in Reyntjens & Gorus pp. 735-739.

[196] Ibid. Articles 7 and 45.

[197] The *Police nationale* was integrated into the Rwandan army in 1973 – see *Intégration de la Police dans l'Armée Rwandaise, 26 Juin 1973, Arrêté Présidentiel no. 86/08*; in Reyntjens & Gorus p. 713.

considerable *de jure* authority over an allocated detachment of *gendarmes*. However, the later law of 1974, which by convention must be understood to prevail over any earlier inconsistent provisions, makes this interpretation untenable. Article 28 of the 1974 law states, generally:

> "Members of the National Police Force (*Gendarmerie Nationale*) are subject to the exclusive authority of their ranking superiors in order to carry out their mission."[198] (Non-official translation.)

180. In April 1994, a *bourgmestre*, not being part of the *gendarmerie*'s hierarchy, could not have had operational command of the allocated unit. The limited nature of the *de jure* relationship existing between the two sides is evident from the following clause:

> "In the execution of a requisition, the National Police must maintain authority, while liaising with the administrative authority of the petitioner and providing information, not withstanding exigent circumstances, regarding the means that it plans to use. Similarly, the administrative authority must convey to the National Police command all useful information to accomplish the mission." (non-official translation)[199]

181. Prosecution Witness N was, at the time of his testimony, a Rwandan government official whose knowledge of current functions of *bourgmestres* is not in dispute. The witness stated that the duties of a *bourgmestre* to maintain peace and security had not changed since 1994 and the relevant laws remained essentially the same.[200] According to the witness, the *bourgmestre* had to approach other officials if he needed military assistance. Reinforcements, such as *gendarmes*, who come to the *commune* to ensure security do "what the *bourgmestre* instructs or orders. They don't come just to operate. They operate according to the instructions ... ". However, the *bourgmestre* "can not directly prevent a *gendarme* from carrying out an illegal act". In such situations, the *bourgmestre* had to report the *gendarme* to the commander of the unit so as to be disciplined.[201] In *Akayesu*, the Chamber stated:

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[198] *Création de la Gendarmerie.*
[199] Ibid. Article 39.
[200] Transcripts of 15 February 2000 p. 13.
[201] Transcripts of 15 February 2000 (closed session) pp. 12-13 and 23-24.

"It is the prefect, not the bourgmestre who can request the intervention of the Gendarmerie. The Gendarmes put at the disposal of the commune at the request of the prefect operate under the bourgmestre's authority. It is far from clear, however, that in such circumstances a bourgmestre would have command authority over a military force."[202]

182. The Defence submitted that while the *bourgmestre* could request *gendarmes* from the Prefect to deal with specific security threats, he no more than collaborated with the officer in charge of the unit dispatched to the *commune*. The Accused would have had to refer any problems that emerged to the commander of the *gendarmerie* in Kibuye town.[203] These submissions appear to be accurate.

183. For the above reasons, the Chamber finds that the Accused did not have *de jure* authority over *gendarmes* assigned to Mabanza *commune* in 1994. The Prosecution has led no evidence that the Accused sought to establish a contrived *de jure*-like authority over them. Therefore, the *gendarmes* were not the Accused's subordinates and he is not liable under Article 6(3) for their actions.

4.5 Reservists

184. The foundational statutes of the Rwandan army created a strict hierarchical structure of military personnel: "The organisation of the Armed Forces is based on a hierarchy in which each one's place is defined" (non-official translation).[204] At every level of this structure a subordinate's obedience to the orders of his superiors is valued highly, and any initiative outside the framework is open to punishment.[205] A civilian administrator such as the Accused could not have interposed himself in the structure. Therefore he could not have had *de jure* authority over soldiers.

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[202] *Akayesu* (TC) para. 69.

[203] Defence Closing Brief p. 90 paras. 81-83.

[204] *Règlement de dicipline des Forces Armées Rwandaises*, Article 10.

[205] Ibid. Article 15. See also *Statut des Officiers des Forces Armées Rwandaises, 3 Janvier 1977, Arrêté Présidentiel no. 01/02*, Articles 13-16; and *Statut des Sous-Officiers des Forces Armées Rwandaises, 3 Janvier 1977, Arrêté Présidentiel no. 02/02*, Articles 17-20, in Reyntjens & Gorus pp. 713-721 and 724-731, respectively.

185. Reservists of the Rwandan army could be recalled for the purposes listed in Article 8 of the law *Organisation de la réserve de l'Armée Rwandaise.*[206] Upon recall their exact role would be determined by the regional army commander.[207] They were reabsorbed into the army: "For the duration of the call-ups [of the reservists], ... the soldiers ... were subject to all the regulations and orders in force in the Rwandan Army" (non-official translation).[208]

186. The Chamber finds that the Accused, as *bourgmestre*, did not have *de jure* authority over reservists in Mabanza *commune* in the sense of Article 6(3) of the Statute.

4.6 *Interahamwe*

187. The term "*Interahamwe*" usually refers to the youth wing of the MRND (*Mouvement révolutionnaire national pour le développement*) party.[209] However, in the present case, a number of witnesses did not distinguish between *Interahamwe*, *Abakiga* and citizens of Mabanza.

188. Prosecution Witness AB testified that the *Interahamwe* were Hutu members of "the party called Power and MRND".[210] She stated that they were armed with clubs, machetes and bamboo sticks, and about their clothing she said: "... the *Interahamwe* wore dried banana leaves. They ... had this on their head and on their waist. This used to be a distinctive sign for the Hutu Interahamwe".[211] Membership of the *Interahamwe* was very broad: "There were all sorts of people. Men, women, children. Only the elderly, old men and old women, were ... excluded."[212] The youngest child-*Interahamwe* was about twelve years old.[213]

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[206] *2 Janvier 1963, Arrêté Ministériel no. 3/11,* in Reyntjens & Gorus p. 712.
[207] Ibid. Article 7.
[208] Ibid. Article 14.
[209] See for instance *Rutaganda* para. 378.
[210] Transcripts of 15 November 1999 p. 62.
[211] Ibid. p. 64; see also p. 98.
[212] Ibid. p. 64.
[213] Ibid. p. 122.

189. Prosecution Witness AC testified that by *Interahamwe* she meant those Hutu who killed Tutsi. The difference between *Interahamwe* and ordinary Hutu was that the former "were armed to kill" whereas the latter carried no weapons.[214] The witness followed this up with a seemingly different definition: "In my language *Interahamwe* means members of the MRND party who were opposed to the Tutsis who were members of the Liberal party".[215] Later on she gave the following description: "... the *Interahamwe* came and they surrounded the stadium. Some of them were in vehicles, others were on foot, and on their heads they wore leaves, and they were armed with spears, machetes, clubs, sticks and axes".[216]

190. The Chamber notes that the descriptions of both witnesses varied between a broad understanding of *Interahamwe*, denoting anyone who attacked Tutsi, and a party-political definition of membership of the group. A third variation was introduced with the mention by both witnesses of decorative features associated with the *Abakiga*.

191. Prosecution Witness I also seemed to be referring to *Abakiga* (discussed under IV.4.7 below) when she testified that immediately after the death of President Habyarimana, "*Interahamwe*" from Gisenyi Prefecture pursued the fleeing Tutsi south, all the way to Mabanza.[217] Similarly, Prosecution Witness K stated that on the morning of 13 April 1994, the Accused told refugees at the *bureau communal* that the "*Interahamwe*" were coming, and would kill them if they did not flee to Kibuye town.[218] In cross-examination he insisted that this was the term used by the Accused and not "*Abakiga*".[219] (As will be seen later in this chapter, the consensus account is that *Abakiga* invaded Mabanza *commune* from the north on 13 April 1994.) When asked what she understood by the term *Interahamwe*, Witness I stated: "The *Interahamwe* are youths who were found throughout the country and who were

[214] Transcripts of 18 November 1999 p. 47.
[215] Ibid.
[216] Ibid. p. 49.
[217] Transcripts of 23 November 1999 p. 20.
[218] Transcripts of 25 January 2000 p. 88.

formed by the MRND party. They did jobs asked of them by the MRND. And when they started these youths were trained to kill and they did kill."[220] Later she came to distinguish between *Abakiga* (people "from the hills") and *Interahamwe* ("a youth group").[221]

192. Defence Witness WE was the only witness who used the terms "*Abakiga*" and "*Interahamwe*" almost as synonyms throughout his testimony, twice reducing them to a hyphenated noun – "the *Abakiga Interahamwe*".[222]

193. Prosecution Witness Z was asked about the relationship between the MRND party and the *Interahamwe*. He replied that the *Interahamwe* was the youth wing of the party.[223] That the Accused had a long-standing association with the MRND is not in dispute; at the time of the events in question he was a member of the party's local committee.[224] Witness Z said that prior to 1994 there had been no military training for *Interahamwe* youth. This commenced at the beginning of 1994, when all young Hutu began to receive military training – "it used to be called civil defence".[225]

194. Prosecution Witness A was a survivor of the attack on Kibuye Stadium. He returned to hide in Mabanza at around the end of April 1994. From a place called Kunyenyeri he could observe a field where civil defence personnel were being trained. The witness said: "I saw the Burgomaster Bagilishema having these young *Interahamwe* trained. I saw them about four times."[226] The trainees carried fake wooden rifles with a string for a shoulder strap. On one occasion the witness allegedly saw the Accused fire from a firearm while the young men stood by his side watching. At other times they engaged in physical exercises ("somersaults" and

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[219] Ibid. p. 96.
[220] Transcripts of 23 November 1999 pp. 21-22.
[221] Ibid. pp. 36-37.
[222] Transcripts of 23 May 2000 pp. 21 and 63.
[223] Transcripts of 8 February 2000 p. 90.
[224] Transcripts of 1 June 2000 p. 139.
[225] Transcripts of 8 February 2000 p. 91.
[226] Transcripts of 17 November 1999 p. 55.

rolling along the ground).[227]

195. Prosecution Witness Q also testified to seeing the *Interahamwe* training in Mabanza *commune*. The training sessions involved persons from various *secteurs* who would make their way to the communal office carrying "sticks shaped like guns". This was at the beginning of June 1994.[228] The witness said that the training was conducted by the secretary of the *commune*, Hakizimana, as well as the "leader" of the *Interahamwe*, assistant *bourgmestre* Appolinaire Nsengimana.[229]

196. Two other witnesses testified to Nsengimana's association with the *Interahamwe*. Witness I said that the assistant *bourgmestre* had (at some unspecified time) taken over the leadership of the MRND party in Mabanza from an infirm incumbent, and that he was also the "leader" of the *Interahamwe*.[230] Witness B referred to a meeting that the Accused held "with the assistant who was the chief of the *Interahamwe*. His name was Appolinaire Nsengimana".[231]

197. Finally, some evidence suggests that the term *Interahamwe* was given to people staffing roadblocks, whether or not they were *Interahamwe* in the formal sense. Defence Witness WE, who was from Kigali and had seen the roadblocks there, said: "... in Kigali it's the people who were killing one another. ... most of the people involved had given themselves the name *Interahamwe*".[232] Defence Witness RJ described a roadblock she crossed in Mabanza, after paying a visit to the Accused at his home.[233] The roadblock was at a place called Gashyushya, about three kilometres from the *bureau communal*. She said that the roadblock was attended by three *Interahamwe*: "That's what name we gave to those people."[234]

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[227] Ibid. pp. 55-56.
[228] Transcripts of 25 January 2000 pp. 29-30.
[229] Ibid. p. 30.
[230] Transcripts of 23 November 1999 p. 29; see also p. 48.
[231] Transcripts of 24 January 2000 p. 63; see also pp. 64 and 66.
[232] Transcripts of 23 May 2000 p. 36.
[233] Ibid. p. 29 (closed session).
[234] Ibid. p. 30 (closed session).

198. In conclusion, while many witnesses stated that *Interahamwe* were present in Mabanza during the events in question, many employed the term broadly to connote persons who attacked Tutsi. The Accused cannot have had command responsibility over an unspecified assortment of attackers.

199. Regarding the *Interahamwe* as a branch of the MRND youth wing or more broadly as a civil defence force, five witnesses (Z, A, Q, I and B) alluded to a formal organisation of *Interahamwe* in Mabanza *commune*. One witness suggested that it was under the command of the Accused, and three others stated that the organisation was accountable to one of the assistant *bourgmestres*. The evidence is insufficient to establish that that there existed a *de jure* superior subordinate relationship between the Accused and the *Interahamwe*. Whether the Accused excercised *de facto* control and authority over them must be addressed on a case by case basis (Chapter V).

4.7. *Abakiga*

200. The Prosecution alleges that the Accused had the ability to control the activities of the *Abakiga*. He exercised this control "when the occasion demanded".[235] Thus the *Abakiga* obeyed his orders to stop harming Hutu in Mabanza and instead to attack Tutsi gathered in a neighbouring *commune*. Witness N testified:

> "Normally the term [Abakiga] is for ... the inhabitants of the highlands ... Even now if you go to the high mountains you will meet such people. [They] are part and parcel of the society just as all others and the Bourgemester of the commune where they live wills power over them just as the other members of the ... commune. [In April to July 1994, the bourgmestre] could prevent them from killing or participating in massacres."[236]

201. According to the Prosecution, the *Abakiga* were "invaders" in Mabanza *commune*.[237] When Witness N was asked where *Abakiga* came from during the events of 1994, he replied: "In my own commune Mabanza, when you talk about Abakiga you are referring specifically to the inhabitants of the commune close to us

[235] Transcripts of 18 October 2000 pp. 217-18.
[236] Transcripts of 15 February 2000 pp. 19-20.
[237] Prosecution's written Closing Remarks p. 1 para. 9.

that is Rutsiro".[238] Rutsiro is located to the north of Mabanza.

202. Of other Prosecution witnesses, Witness K said that the *Abakiga* who "within the week after the death of the president" commenced attacks in Mabanza came from Rutsiro.[239] Witness AA also spoke of Rutsiro and other northern *communes*, but added that *Abakiga* also came from Mabanza itself.[240] Witness H testified that the *Abakiga* were Hutu who "lived in the high forest lands of the Mabanza commune, they also live in the Rutsiro region".[241] Witness Z said that the *Abakiga* came from the northern prefecture of Gisenyi but could also be found around the Gisenyi-Kibuye border.[242] Witness I testified that they originated in Gisenyi and the "highlands" of the Urukuga region, and that they were mainly Hutu.[243] Women and children accompanied them "to help them to carry their loot".[244] Witness AB also mentioned Urukuga as a homeland of the *Abakiga*; she said that there was some overlap between that region and Mabanza. Other groups of *Abakiga* came from Gisenyi and elsewhere north of Mabanza.[245]

203. For the Defence, Witness AS stated that the *Abakiga* originated from the north – they were not known locally.[246] Witness BE testified that "in our region, when we talk about the *Abakiga*, we are referring to those from Rutsiro, all the way to Kayove, Gisenyi, Ruhengeri, and even Byumba".[247] Witness RA explained that she knew *Abakiga* from before the outbreak of violence, when they would come from Rutsiro and other northern parts to Mabanza to sell potatoes.[248] The Accused testified that *Abakiga* covered their bodies with leaves found "on the high mountains of Gisenyi,

[238] Transcripts of 15 February 2000 p. 25.
[239] Transcripts of 25 January 2000 pp. 85-86.
[240] Transcripts of 10 February 2000 p. 17.
[241] Transcripts of 19 November 1999 p. 18.
[242] Transcripts of 8 February 2000 p. 21.
[243] Transcripts of 23 November 1999 pp. 31 and 36-37.
[244] Ibid. p. 32.
[245] Transcripts of 15 November 1999 pp. 80-81.
[246] Transcripts of 25 April 2000 pp. 27-28.
[247] Transcripts of 27 April 2000 p. 103.
[248] Transcripts of 2 May 2000 pp. 120-121.

Rutsiro and Mabanza".[249] They were known as people from the north of the country.[250] Like other witnesses, he described the *Abakiga* "arriving", completing their attacks, then "departing".[251]

204. The *Abakiga* have not expressly featured in previous judgements of this Tribunal. Despite the number of witnesses who spoke about the *Abakiga* in the present case, the identity of these people "from the north" is still somewhat unclear. Prosecution expert witness Guichaoua said that "north" in this context had special connotations in Rwanda:

> "It was normally said that [the *Abakiga*] were people from the North but the North was anything that wasn't home. In other words they came from communes of Gisenyi and Ruhengeri. ... in many reports mention is made of the fact that disorder came about from bandits who came from other communes. So that's what was said in the communes, especially in Mabanza. Now in the communes in the south, it was said that these people came from Rutsiro, Mabanza and Kivumu communes. In other words the communes from the North. So each person had one's own image of what was the North. The North being ... the place where bad people came from."[252]

205. The majority of the witnesses were of the view that the *Abakiga* were strangers to mainstream Mabanzan society; they belonged for the most part, if not entirely, to other *communes* or prefectures; they dressed in an unusual manner; and they were regarded with suspicion, if not dread, by many of Mabanza's residents, and not just the Tutsi. No witness identified an *Abakiga* by name.

206. The main source of the Chamber's uncertainty about the *Abakiga* is the unresolved questions about their organisation, leadership and objectives. Witness Z said that it was very difficult to identify a leader among the *Abakiga* because they all dressed in the same fashion and looked alike.[253] The Accused testified that about 100 *Abakiga* came to his house on 13 April 1994. They wanted to know what he had done with the refugees sheltering at the *bureau communal*: "I was not able to identify the

[249] Transcripts of 5 June 2000 p. 111.
[250] Ibid. p. 107.
[251] See, for example, transcripts of 5 June 2000 pp. 106-113.
[252] Transcripts of 14 February 2000 p. 113.
[253] Transcripts of 8 February 2000 p. 24.

leader but all of them were speaking at the same time. So, I tried to calm them down".[254] On the other hand, Witness I maintained that the groups of *Abakiga* visiting Mabanza did have leaders: "... this leader was saying that he had a list with names of people whose houses had to be destroyed and people who had to be killed. So it was this chief ... who gave the instruction which had to be followed and that's why I think they were organised".[255] Witness I believed also that the objective of the *Abakiga* in coming to Mabanza was to avenge the death of President Habyarimana, who was a native of their area and whom they considered a "brother".[256]

207. Witness AA said of the Accused that he had "invited" the *Abakiga* to Mabanza to kill Tutsi.[257] Witness Z went further, asserting that the Accused's family came to settle in Mabanza from the region of the *Abakiga*, and that the Accused had "absolute power" over them, illustrating this with an example of how they had obeyed the *bourgmestre*'s request to desist from local attacks, and attack Tutsi elsewhere. [258] At other times the *Abakiga* could be persuaded with money, and both Witness RA and the Accused gave examples of how the *Abakiga* could be made to move on for a small sum.[259] The Accused testified that on 13 April 1994, about one hundred *Abakiga* came to his house and threatened him and told him that he was an *Inyenzi* and an *Inkotanyi*.[260] His family was inside. The *Abakiga* were asking him where he had hidden the Tutsi who had been at the communal office.[261] The Accused testified that "seeing how ferocious they were, I gave them ten thousand Francs for them to leave my house and they left".[262]

208. Defence Witness RJ, a Tutsi, who at the time was hiding with her Tutsi cousin named Chantal in the servants' quarters at the residence of the Accused, testified that one day (she did not give a date) the Accused "came to see us ... because the Abakiga

[254] Transcripts of 5 June 2000 p. 108.
[255] Transcripts of 23 November 1999 p. 32.
[256] Ibid. pp. 35-36.
[257] Transcripts of 10 February 2000 p. 17.
[258] Transcripts of 8 February 2000 pp. 21-23.
[259] RA: transcripts of 2 May 2000 pp. 46-47; Accused: transcripts of 5 June 2000 p. 109.
[260] Transcripts of 5 June 2000 pp. 107 and 108.
[261] Ibid. pp. 108-109.

were coming to attack and he wanted to warn us". She stated:

> "He advised us to close the door, and that's what we did. ... We heard the noise that they were making during the attacks, and we could also hear the whistles they were blowing, but we didn't see them with our own eyes."[263]

209. Whatever one makes of the Accused's claim to have been personally threatened by the *Abakiga*, there is little doubt that the "invaders" came into conflict with the local authority. Defence Witness ZJ described a scuffle at Kibilizi market in April 1994 between *Abakiga* and shop-owners supported by communal policemen:

> "At that time, they wanted to loot a shop but the communal policemen prevented them. They fired into the air. There were two communal policemen. The attackers were not able to loot as they wanted to do. The first wave of attackers left. They went towards Kibilizi, Gitarama, and, they went through the commune. Thereafter, a second wave of attackers arrived. Regarding these attackers who were very many, the policemen and the traders tried to fight them off but this was not possible. ... By that I meant that the policemen and the traders attempted to prevent the Abakiga from looting and that was when the two gendarmes, who came from the Kibuye road, arrived. The two groups could not agree. They nearly fought. And, it was at that stage that the policemen were not able to fight off the Abakiga. And the Abakiga went on to loot." [264]

210. The Accused testified that on 18 April 1994, at around 8 a.m., he confronted the *Abakiga* at Rubengera parish. He was in the company of a number of pastors, a certain Hubert Bigaruka, the *conseillers* of Gacaca and of Rubengera, and two policemen. There were about two hundred *Abakiga*. The Accused testified that he told the *Abakiga* that "we had had enough of them, and that we were asking them never to come back again to Mabanza". One of the *Abakiga* said to the Accused that he "had no right to stop them to move wherever they wanted. They could go anywhere in the country." The Accused explained that he then told them that they were unwanted in Mabanza: "You are looking for enemies, and there are no enemies in Mabanza". However, according to the Accused, the *Abakiga* "revolted" and told him that he could not stop them from using a public road. The Accused explained that after the *Abakiga* left, he felt humiliated in front of his "people"as he had no

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[262] Ibid. pp. 107 and 109.
[263] Transcripts of 23 May 2000 p. 15.
[264] Transcripts of 3 May 2000 pp. 74-75.

authority. [265]

211. Other evidence supports the testimony of the Accused that during the events in 1994, he addressed the *Abakiga* in Mabanza and asked them to leave the *commune*. Prosecution Witness Z testified that one morning before "the people from Gatwaro were killed" (V.3.), the Accused held a meeting at Rubengera parish where he addressed the *Abakiga*. According to the witness, the Accused told the *Abakiga* that he had "had enough of their killings and that they should stop the killings and that they should no longer worry people by going through the paths in between the house". According to the witness, the *Abakiga* "never again took sheep from people and they used the main road going towards Karongi to go to Kibuye"[266] The Chamber notes that it is unclear from his evidence whether the witness was present when the meeting occurred.

212. Defence Witness RA testified that in the morning of 18 April 1994 the Accused, in the company of pastor Eliphas, a policeman and the headmaster of the college, attempted to talk with the *Abakiga*. She stated that around 10 a.m. the pastor explained to her what had happened:

> "When he came back, he said that they did as was discussed. They attempted to negotiate or discuss with the *Abakigas*, and to get them to desist from their ravages in the community, in Ru[b]engera. And, in that respect they were -- they agreed not to go to the community. But, that did not prevent them from going elsewhere."[267]

213. Prosecution Witness J described a meeting involving the *Abakiga* and the Accused at "Hutu junction", the Gisenyi junction road. It occurred "after the people came back from Gatwaro". The witness stated: "The *Abakiga* took interest in the killing but the [mother-in-law of the] burgomaster was a Tutsi and he was scared that he might be killed". Then, according to the witness, the Accused told the *Abakiga* that "the remaining Tutsis should be left and he would take care of them personally.

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[265] Transcripts of 5 June 2000 pp. 136-141.
[266] Transcripts of 8 February 2000 pp. 21-23.
[267] Transcripts of 2 May 2000 p. 63.

... we know where the remaining Tutsis are and we will kill them ourselves".[268]

214. In contrast to the above, Witness J also testified that meetings were held, three times a week on occasions, in the hall at the Rubengera school compound. She explained that "... the attacks lasted over several months and each time they needed to give instructions to the *Interahamwe* a meeting was held". The meetings were called to incite the *Interahamwe* to kill the Tutsi, and "the people were incited to revolt and kill". According to the witness, "a vehicle of the commune came by with a megaphone inviting people to the meeting." The witness stated that she saw the Accused at these meetings and that "the commune vehicle always came round and the announcement was given that - - calling people to the meeting that the Burgomaster wanted to meet the people. So it was the Burgomaster who held the meetings". Although the witness was not able to see the hall, she was able to "clearly hear what they were discussing as they were using a megaphone". With regard to the *Abakiga*, Witness J testified that they were also present at the meetings, "where they were told what to do" and the *Abakiga* were "called upon ... to kill the Tutsi".

215. The Chamber notes that this testimony of Witness J suffers from frailties. It is unclear whether she actually saw the Accused during these meetings, even though she stated that she did. Indeed, the witness did not attend any of the meetings and only heard them as megaphones were used. Questioned as to the presence of the Accused, Witness J explained that because the announcement from the *commune* vehicle invited people to meetings led by the Accused, logically, the Accused must have held the meeting. However, no other witness testified about hearing announcements from the *commune* vehicle inviting persons to such meetings. This is somewhat surprising, considering that these meetings allegedly occurred up to three times a week in a central location, and a number of other witnesses have testified to being in the centre of Mabanza during the relevant period. Additionally, it is peculiar,

[268] Transcripts of 31 January 2000 pp. 8-13 (closed session). The Chamber notes that in the French version of the transcripts, reference is made to the mother in-law of the Accused being Tutsi and not to the Accused himself being Tutsi. It reads: "Oui, il y a eu une réunion au carrefour, là où se trouve... au niveau de la route qui vient de Gisenyi, c'est tout près de chez moi, et les Abakiga avaient pris goût aux tueries. Alors à un certain moment, Bagilishema a eu peur parce que sa belle-mère était Tutsie, alors il

if Witness J is to be fully believed, that the Accused, on the one hand, incited the *Abakiga* to kill at Rubengera, and on the other hand, told them to leave Mabanza and stop killing, when at the "Hutu junction".

216. Prosecution Witness H also testified to a meeting in April at Rubengera *secteur* on the Gisenyi road. During this meeting, the Accused told the *Abakiga* to leave for Bisesero (V.4.4). According to the witness, the Accused wanted the *Abakiga* to leave the *commune* because they had started to eat Hutu livestock and this was causing trouble.[269] The witness added:

> "He told them that they should go to Bisesero while the local population was going to do the job itself. The population itself was going to do the job. So the search started and the people were killed...".

217. Witness H explained that after the *Abakiga* had left, houses, sorghum fields and the banana plantation were searched in pursuit of Tutsis.[270] Witness H is the only witness to state that following a meeting between the Accused and *Abakiga*, the local population started seeking out Tutsi. Also, there is no other evidence to suggest that it was the intention of the Accused that the local population, as a result of his confrontations with the *Abakiga*, should start seeking out Tutsi to be killed. The evidence is also insufficient to establish that people started looting and killing as a direct consequence of what the Accused had said to the *Abakiga*.

218. There is also evidence to suggest that Célestin Semanza, the assistant *bourgmestre*, had some control over the *Abakiga*. Witness AA testified that on 17 April 1994, the day before the attack on the Stadium (V.3.3), he visited assistant *bourgmestre* Semanza's house, where he found about forty *Abakiga*.[271]

219. Defence Witness KA testified about a meeting he attended in Mabanza, which

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avait peur qu'on ne la tue. Il a dit : "Maintenant, les Tutsis qui restent nous savons où ils sont, nous allons nous occuper d'eux personnellement" (p. 22).

[269] Transcripts of 19 November 1999 pp. 40-41.

[270] Ibid. p. 45.

[271] Transcripts of 10 February 2000 p. 24.

occurred soon after mid-April 1994 behind the Rubengera school building. He stated that he was on his way to Gitikinini when he came across approximately 50 to 100 young people, who had gathered outside within the school premises. He stayed and listened for about twenty minutes. Among the crowd were *Abakiga*, whom the witness recognised by their dress of leaves. They were also armed with machetes and bamboo sticks.[272] The witness did not see the Accused, or any *conseillers de secteurs*, communal police or heads of *cellule*.[273]

220. Witness KA testified that when he arrived at the meeting, Semanza was already speaking. According to the witness, "the issue at hand was that young people were being told to go and help the *Abakiga* to kill." The witness thought that Semanza "was speaking to these youths as a political leader".[274] Witness KA based his assessment on the fact that the meeting had not been announced to the local people, because the *Abakiga* "who came from the North" were present and because Semanza was a member of the MDR political party. The witness stated that "the other conclusion I draw was that given the fact that Semanza himself was member of the *Abakiga* he came from that area of the *Abakiga*, and that most people at the meeting were also *Abakiga*, I concluded that he had this political responsibility of speaking to these people". The witness added that when Semanza "started talking about killing the Tutsis I became furious because my mother is Tutsi, and so I left immediately".[275] The Prosecution did not specifically contest that this meeting occurred, but questioned the witness' conclusion that it was as a political meeting *per se*, or that Semanza organised it.[276]

Conclusion

221. In the Chamber's opinion, taking account of all the evidence, an impression remains of the *Abakiga* as roaming opportunistic bands, generally unknown to their victims, with diverse but uncertain origins, lacking in hierarchy or organisation,

[272] Transcripts of 22 May 2000 pp. 26-32.
[273] Ibid. p. 53.
[274] Ibid. p. 30.
[275] Ibid. p. 37.

roused rather than led, thriving in the relative anarchy of the times, with essentially two aims: the elimination of Tutsi, and general looting.

222. The evidence has shown that on 13 April 1994 the *Abakiga* arrived in Mabanza where they proceeded to kill and loot. Although there is some evidence that Mabanza *commune* may have been experiencing some attacks from *Abakiga* as late as 24 June 1994, well after the destruction of its Tutsi population[277], the evidence suggests that the attacks from the *Abakiga* had receded considerably by the end of April 1994.

223. The evidence does not establish that the *Abakiga* were *de jure* subordinates of the Accused or that he exerted *de facto* control over them.

224. Regarding the occasions on which the Accused addressed the *Abakiga,* in the opinion of the Chamber, there subsists a doubt as to whether the Accused led meetings at Rubengera school inciting *Interahamwe* and *Abakiga* to kill Tutsi. However, the evidence does establish that the Accused confronted the *Abakiga* in Rubengera on or about 18 April 1994.

225. The Chamber finds that it is reasonably possible that the *Abakiga* ignored the request of the Accused to leave the *commune* as a whole, stating that they were free to go where they pleased. However, on the basis of the testimony of Witness RA, it would appear that the *Abakiga* agreed not to attack the religious community.[278] The evidence is insufficient to demonstrate that as a result of confrontation(s) between the Accused and the *Abakiga*, the latter left the *commune* of Mabanza and desisted from further attacks after 18 April 1994.

[276] Ibid. pp. 97-100.
[277] See Prosecution Exhibit 94.
[278] Transcripts of 3 May 2000 p. 130.

5. Measures taken by the Accused to Prevent Crimes

5.1. Introduction

226. For the Prosecution, the Accused was in complete control of the situation in Mabanza *commune* throughout the period of April, May and June until the time he fled.[279] It is the Prosecution's case that the Accused as a powerful and well-respected local government official was capable of morally supporting the commission of criminal acts by his mere presence and that the Accused, as *bourgmestre*, exerted authority and control over the people of Mabanza *commune*. The Prosecution alleges that between April and June 1994, rather than protect the Tutsi civilian population in Mabanza *commune*, the Accused encouraged other members of the population to kill them. The Prosecution alleges that the Accused selectively exercised his authority and control to protect only the chosen few. According to the Prosecution, the Accused was in a position to put an end to attacks if he so chose.[280] The Prosecution stated:

> "The testimony of several defence and prosecution witnesses is indicative of the selective approach utilised by the accused in administering Mabanza commune and which he used extensively to protect only the chosen few. In particular, Defence witnesses, WE, RA, ZD and KC, testified as to how the accused was able to provide them or their associates with false identity cards".[281]

227. However, the Defence contends that the measures taken by the Accused were of a general nature and that he took the necessary and reasonable measures to prevent and punish offences, with the resources available to him. The Defence denies that the Accused ever said anything to encourage Hutu to attack Tutsi or to destroy the latter's properties. According to the Defence, the only meetings convened by the Accused were for pacification and security purposes.[282] The Defence stated:

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[279] Transcripts of 18 October 2000 pp. 260-262.

[280] Prosecutor's written Closing Remarks p. 5 para 33; p. 11 para. 74; pp. 14-15 paras. 91-100; p. 17 paras. 107-113; pp. 68-70 paras. 369-381; pp 98-105 paras. 102-110, 112-114, 147-148 and 193; Rebuttal pp. 9-10 para. 31.

[281] Prosecutor's written Closing Remarks p. 49 para. 293.

[282] Defence Closing Brief pp. 40-47 paras. 300-374.

"Because of the scant means at his disposal Bagilishema was not able to reestablish security in his *commune* for all the time that the Abakiga were there, i.e. until about 25 April 1994. After that date, the situation in the *commune* was a bit less chaotic and Bagilishema did all he could to resume his activities as *bourgmestre* despite the difficulties and threats still made against him."[283]

5.2 Powers and Resources of the Accused

228. As *bourgmestre*, the Accused wielded considerable *de facto* and *de jure* power in his *commune* and "embodie[d] the communal authority".[284] In *Akayesu*, *bourgmestres* were described as "the most important representatives" of the central power.[285] According to the expert witness in *Akayesu*, "the *bourgmestre* was the most important authority for the ordinary citizens of a Commune, who in some sense exercised the powers of a chief in pre-colonial time".[286]

229. According to Prosecution Expert Witness Professor Guichaoua, the Accused "was in second position among the most efficient burgomasters". He stated that the Accused "was a man considered to be powerful, supported, and obviously his activism in the area was appreciated by the people".[287] The witness opined that to remain *bourgmestre* for 14 years was "because one has been able to establish in his own commune a strong power base which ensures a certain legitimacy in relation to the outside".

230. The manpower available to the Accused has been considered above (IV.4). As for other resources, the evidence presented by the Defence Expert Witness François Clément shows that there were only one or two vehicles belonging to Mabanza *Commune,* and that the police did not have their own vehicle.[288] According to the Accused, the *commune* had a blue Toyota Hilux and an ambulance, although the

[283] Defence Closing Brief p. 114 paras. 300-301.
[284] See Loi du 23 novembre 1963 sur l'organisation communale (reprinted in Codes et Lois du Rwanda, Reyntjens, F. et Gorus, J. (eds.), 1995). Article 56: "Le bourgmestre est ... la foi représentant du pouvoir centrale dans la commune et personnification de l'autorité communale."
[285] *Akayesu* (TC) paras. 60-61.
[286] *Ibid.* para. 73.
[287] Transcripts of 14 February 2000 pp. 44-45.
[288] Transcripts 29 May 2000 p. 22

latter had broken down.[289]

5.3 Prevention of Crimes by the Accused

231. The Chamber will now consider the evidence relating to the measures said to have been taken by the Accused to prevent crimes from April to July 1994.

Witness Q

232. Prosecution Witness Q testified that soon after the President's death, Hutu began killing Tutsi. As a result of the disturbances Tutsi fled their homes and sought refuge in various parts of the *commune*. The witness, who is Tutsi, her husband, who is Hutu, and her two children, went to the home of her husband's parents, who are also Hutu. The witness said that she spent about three weeks there, until the end of April.[290]

233. Witness Q stated that she survived attacks after seeking help from the Accused. She explained that "people were obviously being killed and they were almost all finished and they had even started attacking women who were married to hutus. ... the husbands were against that attempt and that is why there was a misunderstanding between the hutus themselves on this particular issue." The witness testified that, as a consequence, a meeting led by the Accused was held at the *bureau communal*. The Chamber notes that from the context of her testimony, this would have taken place about the end of April. Part of the population was saying that even Tutsi women married to Hutu men should be killed. Others were against this as "that was not a good thing because their hutus, their husbands, were going to attack the other hutus. In other words, the hutus would be killing one another". It was decided at the meeting that women married to Hutu men should be spared. [291]

[289] Transcripts of 1 June 2000 pp. 142-143.
[290] Transcripts of 25 January 2000 pp. 14-18 and p. 35.
[291] Ibid. pp. 19-20.

234. Witness Q explained that later in the day at her parents in-law's house, attackers who were tired from looting and killing had told the witness and her family that they would return the next morning with reinforcements to re-launch the attack. The witness stated that between 2 and 3 p.m. "the *conseillers* of the sectors when they learnt that people had come to kill me, they arrived and they announced the decision which had been taken during the meeting". That evening, she and her husband went back to their own house.[292]

235. Early the next morning, her husband went to see the Accused and asked him for documentation to prove that the decision to spare Tutsi women married to Hutu men had been taken. According to the witness, the Accused gave her husband two letters, the first to be read out by the *conseiller* to the assailants who were intent on attacking her house, and the other was destined to the people from the area who were denouncing Tutsi. She testified:

> "The conseiller read the letter before the people at the market place. These were people who had been part of the attack the day before. It was explained to them that the letter came expressly from the burgomaster Bagilishema stating that they should no longer participate in the killings. And there was also the contents of the second letter which said that there should no longer be search[es] for tutsis to be killed and that in the event that such searches did take place, persons responsible would have to answer for their actions. But at that point in time in fact, almost all the tutsis had been exterminated."[293]

236. Witness Q testified that she continued to hide until the time that "all the people fled". The witness testified that she was identified as a Hutu on her identity card. She explained that her grandfather changed their ethnic group and it helped them gain access to education and employment. However, according to the witness, this did not spare them from insults as "from time to time because the people, our neighbours, knew us by face …".[294]

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[292] Ibid. pp. 21-22 and p. 34.
[293] Ibid. pp. 22-23.

Witness J

237. Prosecution Witness J testified that on 13 April 1994, she was attacked by *Interahamwe* at her home, which was then looted. She explained that as the *Interahamwe* had removed her property outside, the Accused, Major Jabo, the commander of the *gendarmerie* in Kibuye, and two policemen arrived. According to the witness, Major Jabo stated that as she was the wife of a Hutu, nothing should happen to her, while the Accused said "that he was the representative of the Préfet who had announced that the time of the Tutsis had come". The witness added that the Accused said that: "... the property belonged to the Hutu and that the property of the Tutsi should stay there, while the Tutsis who were to be killed would be sent off. And then the Burgomaster sent one of the *Interahamwe* who was in the house to go and fetch my husband so that he could come and look after his house – keep it in safe custody as I myself was going to die". The Accused, Major Jabo, the policemen and the *gendarmes* then left. Her husband, on returning to the house, gave some of the *Interahamwe* money, whilst others preferred to take some of the property.[295]

238. One other witness testified about this incident. Defence Witness AS described how on hearing Witness J shout, he ran towards her house. As he climbed through an opening in the fence, he saw a group of attackers leaving and he noticed that two of them were holding "some currency in their hands". Witness AS stated that Witness J, whose hand was wounded, "was at the entrance to her house, trying to explain to those who had come ... what had happened to her". According to the witness the attackers were not *Abakiga* and were not dressed like them, but were "delinquent people who were attacking people in their houses".

239. The witness testified that, by the time he arrived, the Accused was already at Witness J's house, where "the issue was one of knowing where [Witness J's] husband was". The Accused ordered that "they go and look for him". The witness did not know who went to fetch the husband as the Accused spoke generally to those present. The Accused also posted a police officer to wait at the house until the

[294] Ibid. p. 26.

[295] Transcripts of 31 January 2000 pp. 3-8 (closed session).

husband returned. According to the witness, the Accused, on departing, asked all other persons to leave. The witness did not remember seeing the commander of the *gendarmerie*.[296] The testimony of the Accused conforms to that of Witness AS (see V.3.2.6 below).

240. The Chamber notes that the testimonies of the two witnesses do not coincide in detail. According to Witness J, the *Interahamwe*, who had attacked her, stayed at her house in the presence of the Accused. However, according to Witness AS, the attackers fled the house and did not stay with the Accused. Witness J testified that, although the Accused had departed, the *Interahamwe* only left after being paid by her husband when he returned, whereas, by Witness AS's account, the Accused, on departing, told everyone else to leave. A police officer was posted at the house to wait until the return of the husband. Unlike Witness J, Witness AS did not see the commander of the *gendarmerie*.

241. Even though Witness AS was not present during the whole incident, the above inconsistencies between his testimony and that of Witness J create an unclear picture, and thus doubt, as to what actually happened during the attack on Witness J's house. The Prosecution has not dispelled this doubt. Also, as a result of these inconsistencies, and because Witness J is alone in so testifying, the Chamber is not convinced that the Accused announced that "the time of the Tutsi had come" and that Tutsi who were to be killed would be sent away. In the opinion of the Chamber, all that can be said with certainty is that, in the morning of 13 April 1994, the house of Witness J was attacked and that the Accused intervened.

Witness KC

242. Defence Witness KC, who knew the Accused as an "official", explained that he fled Kigali on 6 April 1994 and rejoined his family in Gitarama. On 23 May they travelled to Mabanza and rented some accommodation in a "home" in Gitikinini, Rubengera. Here they met, amongst many others, the *bourgmestre* of Tambwe, his

[296] Transcripts of 26 April 2000 pp. 41-44, 110-110 and 115 (closed session).

wife and his mother-in-law, and a medical assistant, also from Tambwe. The witness testified that whilst at the "home" a group of *Abakiga* came looking for Tutsi "in order to take them away with them". The witness and others intervened to prevent those being searched for from being taken away and paid the *Abakiga* 10000 Francs.

243. As the *bourgmestre* of Tambwe wanted to go to Cyangugu with his family, and as it was difficult for people to travel without documents, at their request, Witness KC went to see the Accused so as to obtain the necessary travel documents. Witness KC confirmed that the Accused was aware that the two women were Tutsi, as he had to produce their identity cards at the *bureau communal*. The witness explained to the Accused that "neighbours had been threatened by the attackers and that the neighbours needed laissez-passers to continue on their way". The Accused issued the *laissez-passer* and the *bourgmestre* of Tambwe, his wife, his mother-in-law, and the medical assistant then left Mabanza.[297]

Witness RJ

244. Defence Witness RJ, a Tutsi, who at the time was living with her husband in Kigali, but who had returned to Mabanza *commune* in March 1994, testified that when some members of her family went to the *bureau communal*, on 8 April 1994, she and two of her children sought refuge at the house of the Accused.[298] The wife of the Accused was a childhood friend of the witness.[299] They hid in the servants' quarters in the courtyard of the main house. After two days a cousin of Witness RJ named Chantal, also a Tutsi, joined them.[300] She was pregnant. They remained in hiding in the Accused's house for one month.[301] During his testimony, the Accused confirmed that he had hidden them.[302]

[297] Transcripts of 28 April 2000 pp. 11, 16-20, and 48-53.
[298] Transcripts of 23 May 2000 (closed session) pp. 6-8, 10 and 12-13.
[299] Ibid. p. 21.
[300] Ibid. p. 17.
[301] Ibid. p. 14.
[302] Transcripts of 5 June 2000 pp. 19-24

Witness AS

245. According to Defence Witness AS, the Accused provided help to people during the massacres. Amongst them were Witness RJ and Chantal, and an orphaned Muslim child, and the wife of Pastor Albert Muganga, including her children.[303]

Witness WE

246. Defence Witness WE testified that he went to Kibuye, his prefecture of origin, twice during the war. On the first occasion, 11 April 1994, he visited Mabanza *commune*. As he was leaving Kigali, a neighbour of his, a Hutu man with a Tutsi wife, asked him "to help because the wife had a problem" with her ID card, and they feared that she would be killed by the *Interahamwe*. The husband gave the witness a letter addressed to the Accused.

247. The witness stated that he spoke to a communal officer and told him that he wanted to see the Accused. The communal officer took him to the office of the Accused. The witness gave the Accused the letter and waited about 40 minutes for the document he had requested. The witness added that when the Accused returned:

> " ... he gave me the ID card of the lady that I referred to, the lady I referred to at the beginning. But when I met him, I told him that there were a lot of problems in Kigali, and that there were other people who could be in the same situation as the lady who sent me to him. So, I asked him if it were possible to give me other ID cards to be given to this lady who could in turn give them to other people who might have the same problem. ... After giving me the ID card for the lady, he gave me ten other ID cards signed by him to be filled in by the people who were ... to receive them. ... The bourgmestre told me that anyone who wanted assistance, similar assistance, should contact the lady, and that they should fill in the ID card, affix the photograph, and send them to the communal office for the communal stamp. ... Among other recommendations, he told me to keep this a secret because if the Interahamwe or Abakiga were to find these ID cards, his life and mine could be in danger. ... When I was speaking with the bourgmestre he told me quite clearly that I should ask the lady in question to be careful and only to give these extra cards to people who were originally from Mabanza commune who were in similar difficulties as those she had encountered."

[303] Transcripts of 26 April 2000 pp. 18-21. See Chapter V.4.2 regarding the killing of Pastor Muganga.

248. Witness WE was able to return to Kigali where he gave the lady the identity cards.[304] The Witness asserted that he had no family ties with the Accused, and that he went to see him because he was "an official in Mabanza".[305]

Witness RA

249. Defence Witness RA testified that the Tutsi sisters from a religious community decided that they wanted to find refuge in Kibuye as they did not want the whole community to be killed because of them. On 17 April 1994, the witness went with Pastor Eliphas and five sisters to discuss the situation with the Accused. At his office he warned them not to go to Kibuye because of the roadblocks. The Accused gave them a room in which to hide. They stayed there for the day, before leaving with Pastor Eliphas under the cover of darkness. One of the sisters asked the Accused "if it were possible for him to change her identity card for her. He agreed, and did that". She left the next day.[306]

Witness ZD

250. Defence Witness ZD testified that in the middle of May, his family came to join him in his village of origin in Mabanza. As they had arrived late the night before, they "passed through the home of the Accused". The next morning the Accused and his wife accompanied the witness' family to him. The witness testified that his wife told him that in the home of the Accused "there were Tutsis who were hiding":

> "She spoke to me of women and, in turn, I told her that that wasn't surprising because I had heard it said of him that he was doing that. ... At that point in time it was said that he distributed false identity cards bearing Hutu tribe to Tutsis so that they could be helped to cross the road blocks and flee."[307]

251. The witness gave the example of an individual, originally from Kibuye, who had gone to Mabanza "in order to obtain from Ignace Bagilishema a false identity

[304] Transcripts of 23 May 2000 pp. 14-33.
[305] Ibid. p. 58.
[306] Transcripts of 2 May 2000 (closed session) p. 51.
[307] Transcripts of 3 May 2000 pp. 24-25.

card bearing the mention of Hutu for his mother-in-law who was a Tutsi".[308]

252. Witness ZD stated that before 17 April 1994, he personally heard the RPF radio, Muhabura, thank "the Bourgmestre of Mabanza commune for the manner in which he behaved in order to contain the situation and to protect the population, and ... encouraged [other authorities] to do as he did".[309]

Witness ZJ

253. Defence Witness ZJ testified that his brother-in-law who was living in Kigali, and whose wife was Tutsi, did not "know how to bring his wife to Kibuye because of the roadblocks". According to the witness, his brother-in-law came to Mabanza in the last days of May, and the Accused provided him with "an identity card which would have Hutu written on it". The witness stated that he personally saw the card.[310]

Witness BE

254. Defence Witness BE testified that one week after the death of the President, the RPF radio, Muhabura, congratulated the Accused. According to the witness, "[i]t was being said that he is not like the other Burgomaster who was causing the killing of the other members of the population". The witness stated that he "heard the portion which said that all the other Burgomasters should follow the example of the Burgomaster of Mabanza".[311]

The Accused

255. The Accused testified that during the massacres he issued in total about 100 *laissez-passers* or *feuille de route* to persons from outside Mabanza *commune* and identity cards to persons living in the *commune*. He stated that "I knew very well that

[308] Ibid. p. 26.
[309] Ibid. pp. 25-26.
[310] Transcripts of 3 May 2000 pp. 82- 83.
[311] Transcripts of 27 April 2000 pp. 30-34.

it was illegal.... But in order to save lives, I was ready to lie in order to save people". He explained:

> "I had many requests from the people who no longer had identity cards, either because they had lost them or because the Abakiga had destroyed their identity cards. So, it was important that they had other identity cards issued to them. But furthermore, there were persons who were in danger, who wanted to escape and flee to other places, and I knew these people were Tutsis. I knew very well these people were Tutsis, but I wrote on their cards that they were Hutus."

256. He added that he sent a number of blank signed identity cards with Witness WE, so as to help citizens of Mabanza who were living in Kigali. [312]

257. The Accused also testified that he falsified the *commune*'s register of residents.[313] People whose names were entered in the register were issued with a resident's card that could be shown to authorities requesting an identity card. The Accused gave the example of the individual at entry 75 of the Register, identified as a Hutu therein, and stated that he was in fact a Tutsi. The Accused did not personally know this person. The Accused testified that he started to falsify the register as early as in 1990, at the start of the war, and that up to 60% of individuals in the Register were actually Tutsi. The Accused added that he helped only those persons who specifically asked him to.[314] For the Prosecution, the falsification of the population census by the Accused supports its argument that the Accused selectively exercised his authority and control.[315]

258. The Defence referred to the *commune*'s register of outgoing mail to show that the Accused also took measure to punish crimes from about 27 April, once he had been able to regain some of his authority in the *commune*.[316] The Accused also stated that the *commune* had been paralysed between 13 and 25 April due to the many

[312] Transcripts of 6 June 2000 pp. 40-60.
[313] Defence Exhibit No. 93.
[314] Transcripts of 6 June 2000 pp. 60-94.
[315] Prosecution written Closing Remarks para. 292.
[316] Defence Exhibit No. 18.

assailants from the North whom they could not identify.[317]

259. On 27 April 1994, the Accused wrote to the *Procureur de la République* in Kibuye town regarding the transfer of the assassins of Biziyaremye and Bamporineza. The Chamber notes that there is no information as to the ethnicity of the victims.[318] On 2 May 1994, he suspended the communal driver, Ephrem Nshimiyimana, and a communal policeman, Munyandamutsa, for having stolen the engine from a vehicle left at the communal office.[319] The letters written to the driver and the policemen were filed in support.[320] On 3 May 1994, the Accused sent a letter to the *Procureur de la République* at Kibuye, regarding the transfer of five persons accused of having assassinated a certain Kangabe. According to the Accused, he was killed for ethnic reasons.[321] On 5 May, the Accused sent a letter regarding the investigations into the stolen cows of a certain Karekezi, who was Tutsi.[322] On the same day he wrote to the *conseiller* of Mushubati and to a certain Nyakabande for special protection for a family that had hidden Tutsi within their home. According to the Accused, the Tutsi were still with the family.[323] On 9 May, the Accused wrote a similar letter to the *conseiller* of Buhinga regarding the protection of a resident of Buhinga. The Accused explained that the resident was "a Tutsi woman, married to a Hutu, who was threatened.[324] Two days later, the Accused wrote to the *bourgmestre* of Gitesi to inform him about a murder by a soldier. According to the Accused, the soldier had killed someone in Mabanza and then fled to Gitesi *commune*.[325] The Accused, on 19 May, sent a letter to the *conseiller* of Gihara *secteur* requesting to ensure the protection of property left behind by Tutsi.[326] The day after, the Accused wrote to the *gendarmerie* commander of the area so that he could take the necessary measures against *gendarmes* who had injured the president of the CDR party who

[317] Transcripts of 6 June 2000 p. 105 and pp. 116-117.
[318] Defence Exhibit No. 18 at 0279.
[319] Ibid. at 0280 and 0281.
[320] Defence Exhibit Nos. 94 and 95.
[321] Defence Exhibit No. 18 at 0286. Transcripts of 6 June 2000 p. 116.
[322] Defence Exhibit No. 18 at 0289.
[323] Ibid. at 0291. Transcripts of 7 June 2000 p. 16.
[324] Defence Exhibit No. 18 at 0294. Transcripts of 7 June 2000 p. 18.
[325] Defence Exhibit No. 18 at 0297. Transcripts of 7 June 2000 pp. 19-20.
[326] Defence Exhibit No. 18 at 0308.

had tried to stop their vandalism of property in Mabanza.[327]

260. On 20 May 1994, the Accused wrote to the committee established to deal with the recovery of property abandoned by displaced persons. The Accused testified that the committee was to ensure that the property "could be stored or kept under the custody of the commune to avoid [its] misappropriation".[328] According to the Accused, people had started fighting over the property".[329] On 24 May, the Accused wrote to the *conseiller* of Rubengera to "call ... to order" members of the "Committee for the Restoration of Peace of Kabatare, Kibanda and Kigabiro" who had attacked Rubengera hospital. According to the Accused, members of the committee established at the beginning of May 1994 "were not fulfilling their functions properly" and had attacked the Rubengera Health Center. The Accused was therefore requesting the *conseiller* to "call this committee to order."[330]

261. The Chamber notes that the register of outgoing mail shows that the Accused continued to take means in order to restore security in the *commune* of Mabanza until 14 July 1994. In particular, the Chamber notes that on 24 May, 27 May, 6 June, 13 June, 14 June, 21 June, 28 June and 12 July, the Accused sent letters to the *Procureur de la République* at Kibuye regarding the transfer of numerous individuals accused of crimes, varying from killing others to stealing cows.[331]

262. The Accused testified that he was perceived as an accomplice of the RPF, partly because Radio Muhabura had broadcast that he was "a good *bourgmestre*" and that he protected the Tutsi.[332]

Conclusion

263. In the opinion of the Chamber, the above evidence does not support the case

[327] Ibid. at 0309. Transcripts of 7 June 2000 pp. 26-27.
[328] Defence Exhibit No. 18 at 0311.
[329] Transcripts of 7 June 2000 pp. 31-33.
[330] Defence Exhibit No. 18 at 0313. Transcripts of 7 June 2000 pp. 34-35.
[331] Defence Exhibit No. 18 at 0315, 0320, 0332, 0340, 0341, 0353, 0367, 0368 and 0377.
[332] Transcripts of 7 June 2000 pp. 105-106.

of the Prosecution that the Accused acted selectively to aid a chosen few. The testimony of Prosecution Witness Q alone casts doubt on the Prosecution's position. Although there is no evidence to support the contention of the Accused that he issued at least 100 identity cards and *laissez-passers* to help individuals, there is no evidence to refute it.

264. The evidence also shows that the Accused was praised by the RPF radio Muhabura, albeit before 17 April 1994, when the refugees were killed at Kibuye stadium (see V.3.4). The Chamber notes that the Prosecution did not expressly address the issue of whether this radio broadcast actually occurred.[333] Similarly, regarding the *commune*'s register of residents, the Chamber finds that there is a possibility that the Accused falsified the register to protect Tutsi.

265. With respect to the conduct of the Accused after 27 April 1994, as shown by the *commune*'s register of outgoing mail, the evidence demonstrates that the Accused took measures to restore law and order in the *commune* of Mabanza. It has not been established by the Prosecution that in doing so the Accused acted to the detriment of the Tutsi. However, the Chamber notes that the majority of the crimes for which the Accused is specifically charged in the Indictment occurred before 27 April. Also, from the evidence, by this date, a substantial percentage of the Tutsi had fled the *commune*. His liability therefor is discussed in Chapter V.

5.4 Meetings

266. According to the Prosecution, the Accused held a number of meetings during which he encouraged the local population to kill the Tutsi. Regarding so-called "pacification" meetings, the Prosecution did not contest that they occurred. Rather, the Prosecution argued that the Accused did not threaten to impose sanctions on persons breaching his advice.[334] However, the Defence contended that the Accused held a number of pacification meetings in an attempt to restore security and ethnic

[333] Transcripts of 18 October 2000 pp. 232-233.
[334] Prosecution written Closing Remarks paras. 369-381.

harmony in Mabanza.

Witness J

267. Witness J testified that a meeting was held at a place referred to as CERAI. People were called to these meetings as "they were scattered around looking for people to kill". The witness explained that people were sensitized to go out and kill and that "they used a strategy that peace had returned to get those people hiding in the sorghum fields to come out and those hiding in ceilings to come out and those who came out were killed." The witness did not attend this meeting.[335]

268. The testimony of Witness J about this meeting is sketchy and of a general nature. As she did not attend the meeting herself, her testimony is hearsay, and it is wholly uncorroborated. Consequently, the Chamber finds that there is is a doubt as to whether the Accused held a meeting at CERAI during which persons, including *Abakiga*, were incited to kill Tutsi.

Witness H

269. Prosecution Witness H testified that the Accused held a meeting in Gacaca *commune*. According to the witness, the Accused "said all Tutsi houses which were destroyed and which were close to the road, should be cleared off completely because apparently there was a commission of white men which was to come and gather information on the owners of these houses". The witness stated that the instructions were followed.[336]

270. The Chamber notes that the testimony of Witness H is uncorroborated and sketchy, and it is unclear when the meeting occurred, whether he was present at the meeting or whether his evidence is hearsay. Consequently, the Chamber finds that a doubt subsists as to whether the Accused held such a meeting at Gacaca, and what may have been said at the meeting.

[335] Transcripts of 31 January 2000 pp. 23-25 and pp. 15-16 (closed session).

Witness KA

271. Defence Witness KA testified that a meeting was held in Gihara *secteur* at the end of May or early in June, "when there was a calm, a lull in the killings".[337] He went with his mother and his maternal uncle. The witness saw the *conseiller* of Gihara, some *secteur* officials and communal policemen. According to the witness, whose mother and uncle were Tutsi, among the crowd were orphaned Tutsi children and Twa. The *conseiller* of Gihara opened the meeting and introduced the Accused. The witness stated that the Accused:

> "[...] emphasised to the people of Kijoy and Gihara that that is where the *Abakigas* normally come to -- that is where they normally came from so he told them to do everything possible to prevent them from killing and looting and he further emphasised by telling them that they should ensure their own security and prevent the *Abakigas* from passing through to go into the various houses to kill and loot."[338]

272. Witness KA added that the Accused told the people who were able to do so that they should take into their care one or two of the orphaned Tutsi children and "keep them and educate them as their own children". Consequently, he and his mother took two children. The Accused also explained to those gathered how to ensure their own security within the sub-*cellules*.[339] The Chamber notes that the Prosecution did not specifically refute the testimony of the witness regarding this meeting.

Witness WE

273. Defence Witness WE who had fled from Kigali at the start of the massacres, testified that, towards the end of the month of April, he attended a meeting led by the Accused in Mabanza. The witness explained that he went to visit a friend who was hiding in Kibilizi. After speaking with his friend, he came across about 100 people,

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[336] Transcripts of 19 November 1999 pp. 61-62.
[337] Transcripts of 22 May 2000 pp. 40-41.
[338] Ibid. p. 58.

some standing, others sitting, at Kibilizi market. On hearing someone address the crowd, he approached and saw the Accused speaking.[340] The witness stated:

> "He was speaking to the people out loud, and he was telling them to distinguish between the enemy, the enemies of the people, and he said the enemies of the people were the RPF, whereas the Tutsis were nervous just like others and that they should cooperate to resolve their day-to-day problems, and that they should not listen to the propaganda of people from outside, that is the *Abakiga* and the *Interahamwe*, who came to kill and loot."[341]

274. Witness WE also saw two policemen. He stayed for approximately 15 minutes and did not hear the Accused threaten to punish anyone he found out killing.[342]

275. There is no evidence that announcements were made inviting people to the meeting or that there were other authorities present. Although the testimony of Witness WE is not corroborated, it is consistent with his statement of 13 December 1999.[343] Additionally, there were no specific challenges by the Prosecution during cross-examination regarding the veracity of the witness' description of the meeting.

Witness KC

276. Defence Witness KC testified that he attended two meetings. The first took place near the "Islam camp" at the beginning of the month of June. The witness stated that there were about 150 men, women and young people sitting and standing. He was with four friends. The witness had not heard an announcement convening the meeting. The witness saw the Accused, the assistant *bourgmestre* Antère and communal policemen. He did not see any Tutsi during the meeting.

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[339] Ibid. pp. 60-62.
[340] Transcripts of 23 May 2000 pp. 38-39.
[341] Ibid. p. 41.
[342] Ibid. pp. 60-65.

277. Witness KC stated that the Accused spoke without a megaphone or a loud speaker.[344] The witness stated:

> "I remember that he was telling the people that they should not listen to the people who came from the North, those I referred to as the *Abakiga* who were trying to divide the people. He exhorted them to continue living together in peace and added that the only enemy was the RPF and that the army was facing up to them on the war front and their duty, their role was to remain united".[345]

278. The witness testified that the Accused, in answer to questions, told the crowd that they should not occupy the land of Tutsi who had fled or destroy anything on the land as they would return one day.[346] Witness KC stated that "nobody complained because those who had problems were always in hiding. So those who could complain, who had anything to complain about were always in hiding".[347]

279. Witness KC said that he attended another meeting one or two days later at Kibilizi market where he had gone to buy beer. He explained that the Accused and his assistant were present and about 200 hundred people had gathered. According to the witness, the Accused spoke without using a megaphone, and repeated what he had said during the first meeting. The witness left before the end of the meeting.

Witness K

280. Prosecution Witness K, who was then hiding with the Muslims, testified that she attended a meeting at a clinic addressed by the Accused. The witness explained that she was dressed up like a Muslim "and asked ... to join the crowd", and that it was hoped that during the meeting "they would declare peace". She did not know in which month this took place and whether there were any other authorities present or any other Tutsi. The Chamber notes that according to her written witness statement

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[343] Defence Exhibit No. 78.
[344] Transcripts of 28 April 2000 pp. 20-24 and p. 27.
[345] Ibid. p. 25.
[346] Ibid. pp. 25-26.
[347] Ibid. p. 32.

of 10 July 1999 the meeting occurred in early June 1994.[348]

281. Although she could not hear everything that was being said, the witness heard some of the words of the Accused. She stated, in cross-examination, that the Accused was using a megaphone at the meeting.[349] The witness testified: "I heard him say to the people to destroy all the houses and raze them down to the ground." The witness understood the houses to be those of the Tutsi. According to the witness, the Accused explained "white people might come and ask to whom these houses belong, therefore these houses had to be destroyed so that such questions could be avoided".[350]

282. Witness K testified that members of the crowd asked a number of questions. One individual who was taking care of two Tutsi children who had "lost their mother", asked whether the Accused could help educate and raise them. In response, according to the witness, the Accused said "that he was not the red cross who should provide them with education and that if there were possibilities he should take them to Kinihira ...". By Kinihira the witness understood "the large mass graves into which Tutsis were placed after they had been killed."[351]

283. Witness K stated that another member of the crowd asked the Accused what should happen to people found hiding in sorghum fields as the harvest approached. The Accused mocked "the person asking the question and told him to take them to Kinihira." The witness took fright and went to hide. [352]

Witness ZD

284. Defence Witness ZD testified that he participated in two meetings in May-June 1994. The first meeting took place at Ryanyirakabano in Rubengera *secteur*. The witness explained that one afternoon he was returning from visiting his cousin in

[348] Defence Exhibit No. 14.
[349] Transcripts of 25 January 2000 pp. 56-57 and pp. 100-101.
[350] Ibid. pp. 57-58.
[351] Ibid. p. 60.

Gitikinini when the Accused, who was travelling in the same direction, gave him a lift. The witness went with him to the meeting. He stated that there were about a hundred men, women and children. According to the witness, the Accused wanted to ask the people to stop pursuing the Tutsi. He stated that he "... understood that he wanted to transmit this message to the people so that the people also can pass the message onto assailants who wanted, this time around, to attack families suspected of hiding Tutsis. I think the message was well received, and survivors can testify to that fact".[353]

285. Witness ZD said that the Accused did not speak through a megaphone. Others present included the police bodyguard of the Accused, the *conseiller* of the Rubengera *cellule* and members of other *cellules*.[354]

286. With regard to the second meeting, the witness testified that the *conseillers* and heads of *cellules* advised the population that the Accused was to hold a meeting in Mushubati. The meeting concerned the restoration of peace. He stated that the Accused asked "the heads of the [N]yumbakumi and the leaders of the *cellules*, to make an inventory of the property [t]hat was there so that these properties could be rented at a small amount of money and the funds thus made - - transmitted to the Mabanza *commune* so that an end can be put to the disputes surrounding these properties".[355]

287. The audience was Hutu as "at that point in time Tutsis had been killed and others had fled and others still were hiding elsewhere." Witness ZD agreed that the effect of the arrangement suggested by the Accused would be that the land would go back to the Hutu. However, he added that "the objective was to put an end to the disputes amongst the Hutus who had appropriated the belongings of those who were no longer there, those who had already died or had fled".[356] The witness added:

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[352] Ibid. p. 61.
[353] Transcripts of 3 May 2000 pp. 38-39.
[354] Ibid. p. 40.
[355] Ibid. p. 42. The term *nyumbakumi* refers to a neighbourhood consisting of ten houses.
[356] Ibid. pp. 44-45.

"In fact, he wanted, in one way or another, to delegate power, to have a solution to this problem concerning the use of property by asking the conseiller and the leaders of the Nyumbakumi that from henceforth they should distribute the property, because it wasn't possible that each person can come and possess half a village. He wanted these people to come to solving themselves this problem concerning property without imposing himself as an authority. He wanted to ask them, to say that this property was no longer going to be free, it was going to be rented, and if there's any funds, this would be given to the commune. So he wanted to give the people a choice of a solution to the local leaders."[357]

288. The witness stated that the property was already in the hands of the Hutu, so it was not a matter of giving land to the Hutu but to ensure better distribution.[358] Witness ZD was unaware of any meetings said to have been held by the Accused in Rubengera school.

Witness ZJ

289. Defence Witness ZJ testified that he participated as a member of a political party in a meeting at the beginning of the month of May held in the meeting hall of the *bureau communal.* The meeting was called by the Accused and it was attended by all the members of the committees of all the political parties within the *commune*, including the MDR (*Mouvement démocratique républicain*), the PSD (*Parti social-démocrate*), the MRND (*Mouvement révolutionnaire national pour le développement*), and the CDR (*Coalition pour la défense de la république*). The witness could not remember whether the PL (*Parti libéral*) was represented. The witness stated:

"The Bourgmestre explained the situation which was prevailing within the commune, and he said that since everybody had seen this and was aware, the security had been disturbed by those who came from outside the commune, and he insisted that people come together, and they should no longer fight one against the other, and they should be together so that they can ensure security. He said that those who had not been killed, and who were in hiding should be kept well, and he said that he no longer wanted to hear of any killings.

[357] Ibid. p. 48.
[358] Ibid. p. 49.

> He spoke of a project which would involve setting up committees in sectors and cellules in order to safeguard the property of these people."[359]

According to the witness, everyone accepted the idea of the Accused.[360]

The Accused

290. The Accused stated that:

> "There were Tutsi extremists; there were Hutu extremists. And I had to manage that situation. And still operating a new trial manner and show fairness without showing bias, without favour for any side. But there were extremists on both sides, Hutu and Tutsi, as well. ... During that period, there were rumors that the RPF were going to invade the whole country in less than three days. Among the Tutsis, there were some who were bragging that RPF was going to take over the country in less than three days. And you can imagine the situation I was up against. I had about 70 percent Hutus and 30 percent Tutsi. I had to appease the Hutu, particularly, by convincing them that the enemy is not their neighbour, but the enemy, the one coming from outside, attacking from outside. And on the other hand, I had to stop the Tutsi who were generating hatred among the people."[361]

291. The Accused testified that on 4 May 1994 he sent out a letter to political parties, religious denominations, *conseillers*, heads of departments and *cellule* committees, asking them to come to a meeting on 6 May. The letter is entered at 0287 in the *commune*'s register of incoming and outgoing mail.[362] The Accused explained that the purpose of the meeting was to try "to put an end to the disturbances in the *commune*". He stated that "[a]t any level of the *commune*, we wanted to speak the same language, we wanted to send the same message that the killing could be stopped, massacres which had taken place during the month of April". So as to prepare for the meeting of 6 May, the Accused invited, also by letter, representatives of political parties to a meeting on 5 May.[363] The Accused explained that he wanted these representatives and him to "speak the same language before the next meeting". He stated that during the meeting of 5 May, "there were differences of

[359] Transcripts of 3 May 2000 pp. 79-80.
[360] Ibid. p. 80.
[361] Transcripts of 6 June 2000 pp. 20-21.
[362] Defence Exhibit No. 18.

opinion, accusations and counter accusations" by the various political parties. The Accused added:

> "MRND for example was saying that DRD was trying to kill-- CDR was saying that they knew that the other party had a list of people that had to be eliminated from among the opponents. This meeting was held on the previous day, and we knew that these were rumours to bring about confusion in the population. After we identified this problem, we held a meeting of the 6, this time round with everybody knowing where the main problem which was dividing us was coming from."

292. The Accused testified that at the end of the meetings, "everybody adopted the same objective, that is of stopping the killings in Mabanza *commune*".[364]

293. Although Witness ZJ did not specify exactly on which date the meeting occurred, he placed it at the beginning of May. His testimony coincides in much detail with that of the Accused regarding the meeting of 5 May, in particular on the identity of the participants, who were representatives of political parties, and the objective of the meeting, namely to put an end to the killings and disturbances.

294. There is no independent corroboration about what occurred at the meeting of 6 May at the *bureau communal*. However, the Chamber is of the opinion that the evidence regarding the first meeting, in particular the testimony of Witness ZJ, is such that the testimony of the Accused that the second meeting was also held for legitimate security reasons, cannot be rejected as implausible. Consequently, the Chamber finds that the evidence relating to these two meetings does not support the allegation that the Accused encouraged individuals to seek out and kill Tutsi. The Prosecution did not specifically contest that these meetings occurred.[365]

295. In a letter dated 1 June 1994, and addressed to the *conseillers* of Kibilizi, Rubengera and Gacaca, the Accused called a "meeting of the people with the *bourgmestre*".[366] The Accused testified that this was one of the "pacification

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[363] Ibid. at 0288.
[364] Transcripts of 6 June 2000 pp. 118-121 and of 9 June 2000 p. 67.
[365] Prosecition written Closing Remarks para. 373.
[366] Defence Exhibit No. 18 at 0324.

meetings" and explained:

> "Yes, it is one of these meetings that I chaired in the secteurs to appraise myself with the situation on the ground, discuss with the people and resolve their problems and, above all, to give them instructions to be followed during that period."[367]

296. The meeting was held at Kunyenyeri located in the Gacaca *secteur*. Present were the *conseillers* of the *secteurs*, members of the *cellules*, *committee de cellules* of those *secteurs* as well as the people of the three *secteurs*, including some Tutsi who had remained in the *commune*. The Accused testified that as there were many people, he addressed the crowd with a megaphone. He stated:

> "That day it was a meeting of pacification. I was asking the people not to mistake their neighbours for the enemy. I was saying that the enemy was the RPF, which was attacking the country from outside. I, therefore, asked them not to attack their neighbours because those days they were identifying the Tutsis as RPF agents. Generally that was the general trend of the meeting, the general theme of the meeting, but the people also asked questions."[368]

297. Individuals asked questions about property that had been abandoned by the refugees and about the general situation of insecurity. The Accused testified that people complained about the "people from the North" and requested him to ensure that they did not return to "create chaos". According to the Accused, "... they wanted to point out the bandits and delinquents that we knew in Mabanza and whom we could deal with". None of the Tutsi in attendance asked the Accused why he had failed to protect the Tutsi.[369]

298. The Accused testified that he also organised meetings in Mukaru and Kigeyo *secteurs*. He explained that he told the Hutu "not to use the idea of accomplice to kill" as "in so doing they were killing their own brothers and sisters".[370]

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[367] Transcripts of 7 June 2000 pp. 51-52.
[368] Ibid. pp. 52-53.
[369] Ibid. pp. 54-59.
[370] Ibid. p. 63.

299. Still according to the Accused, on Friday 10 June 1994, the Accused held a meeting "with the people" at Kabuga in Gihara *secteur*. The meeting had been arranged by letter sent out on 7 June to the *conseillers* of Kigayu and Gihara *secteurs*.[371] Present at the meeting were the *conseiller* of the *secteur*, a member of the *cellule* committee and many inhabitants. The Accused testified that his message was the same as during his previous meetings. He explained that he was asked about the security situation, the misappropriation of property, people being wrongly accused of being accomplices and disagreements between various individuals of the *secteurs*.[372]

300. The Accused testified that he held two meetings on 30 June 1994, one in the morning and one in the afternoon. The letter convening these meetings was sent out on 28 June 1994 and addressed to the *conseillers* of Kibingo, Rukaragata, Nyagatovu, Buhinga and Mushubati.[373] The subject was "that of bringing about peace". Regarding questions from persons who attended these meetings, the Accused stated:

> "Examples would be, for instance, in Kibingo sector, it's quite close to Kayove commune, I was speaking to them about restoring peace and respect for one's neighbour. And they were asking me why I was telling them that whereas in the other communes the same language was not being used to. So, I was trying to make them aware, I was trying to explain to them how we should behave given the disturbances that we are experiencing but it was difficult. It was difficult because this is an area which neighbours Kayove and Rutsiro."[374]

301. During cross-examination, the Accused confirmed that he held one meeting in the Moslem quarter. He could not remember whether it took place before or after the Habayo incident (section V.4.7) but recalled that he held it "because of the differences between the Moslem population and the neighbouring people". The Accused explained:

> "During that period, there were a lot of war displaced people who were fleeing from the war front, from Kigali, from Gitarama, and the other regions of the country. So there were a lot of vehicles parked and a lot of people who had gathered in that place, and as I have said, among my people there were deliquents, there were thieves who wanted to

[371] Defence Exhibit No. 18 at 0335.
[372] Transcripts of 7 June 2000 pp.76-78.
[373] Defence Exhibit No. 18 at 0369.
[374] Transcripts of 7 June 2000 pp. 128-129.

extort money from these people, and who were saying that -- who claimed that the Moslems where hiding guns and weapons, and that they even had radio telecommunication facilities to communicate with the RPF, so I had to hold a meeting there to let them know that these rumours were unfounded and that these people who have come to us are displaced people who have problems, and that on the contrary we needed to help them because they were people who were in danger."[375]

Conclusion

302. In the opinion of the Chamber, the above evidence, except for the testimony of Witness K, about the so-called "pacification" meetings of May-June, gives some support to the position of the Accused that he acted to prevent killings of Tutsi and to re-establish law and order. The fact that abandoned property was distributed to Hutu appears as a means to ending the disturbances between the Hutu over misappropriated property.

303. The only witness who has a different recollection of the meetings is Witness K. Her testimony is uncorroborated and sketchy. She is unable to remember in which month the meeting she attended occurred, despite stating it was in June in her witness statement. She did not know whether, apart from the Accused, other authorities were present. Considering this and the fact that her description of the meeting is in stark contrast with the descriptions of all the other meetings presented by Witnesses KA, KC, ZD, and RA, who have not been found to be unreliable, the Chamber cannot attach decisive weight to her testimony regarding the meeting at the Moslem quarter.

6. The Accused's Relationship with Célestin Semanza

304. It is alleged by the Prosecution that the Accused and the assistant *bourgmestre*, Celestin Semanza, were implicated in various atrocities committed in Mabanza *commune* and Kibuye prefecture between April and June 1994. The Defence submits that following the introduction of multipartism in 1992, the relationship between Célestin Semanza and the Accused, was tense, verging on

[375] Transcripts of 9 June 2000 pp. 68-70.

insubordination. This persisted until the departure of the Accused in July 1994. The Defence maintains that the evidence before the Chamber demonstrates that the Accused had no real authority or effective control over Semanza.[376]

305. The Accused explained that with the advent of multipartism, each party wanted to establish itself in a given region or area. Two out of his three assistant *bourgmestres* were from the MDR party, whereas Appolinaire Nsengimana and the Accused belonged to the MRND party. The Accused explained that as his co-workers belonged to different political parties, "[i]n their work, they became [u]ndisciplined, they did not want to obey my orders anymore. I always had problems with them ... so much so that I had wanted them to be sent back to the Ministry". With regard to Semanza, the Accused added that he "became unmanageable. I tried to manage him, so I had suggested that he be sent back to the Ministry, the civil service but, the Prefet ... did not comply with my request. He did not want to support my proposal which I had sent in".[377]

306. The Accused testified that Célestin Semanza was doing everything to sabotage his work. He explained that Semanza, Munyadola Etienne and Habiyaremye, respectively Secretary, Chairman and Treasurer of the MDR party in Mabanza, wrote a rebuttal on 1 September 1992 to a confidential report he had sent to the Prefect of Kibuye.[378] According to the Accused, his report had come after he had requested that Semanza be withdrawn as assistant *bourgmestre*. As such, "Semanza wanted, by all means, to take vengeance".[379] In the rebuttal the signatories wrote:

> "We take this opportunity, Mr. *Prefét*, to inform [you] that this report is based on lies and on the fact that the *Bourgmestre* wants to vindicate himself from the failure to transmit the true reports within the set time-limits. ... Mr. *Préfet*, we feel that it would be advisable that you yourself conduct your own investigations on what happened in this *Commune* as well as on the *Bourgmestre*'s statements so as to establish the truth, given that the outdated reports they are submitting to you are inaccurate and aim at discrediting the MDR, thereby giving the impression that the latter is the source of the riots, whereas

[376] Prosecutor's Closing Remarks pp. 45-47 paras. 277-285; Defence Closing Brief pp. 103-107 paras. 190-228.
[377] Transcripts of 1 June 2000 pp. 71-72.
[378] Defence Exhibit No. 57.
[379] Transcripts of 1 June 2000 pp. 81-91.

in reality, he himself caused the situation because he failed to meet the population so as to hear their opinions and to seek together with them solutions to their problems."

307. According to the Defence, the strained relationship between Semanza and the Accused can also be seen in correspondence over Semanza's embezzlement of *commune* funds and his failure to report to work. In a letter dated 3 June 1992 from the Accused to Prefect Kayishema, the Accused asked the Prefect to request the Ministry of Public Service to help in the recovery of 133 400 Rwandan Francs from Semanza. This money had been misappropriated by Semanza whilst the Accountant was on leave.[380] The then Prefect of Kibuye, Pierre Kayondo, followed up this issue with a letter to the Minister of the Interior and Communal Development on 10 June 1992, with copy to the Accused. In the letter, he requested the Minister to order the "proper deduction of this money from the salary of the employee, Semanza Célestin, in order that the funds be paid back into the Treasury of the commune".[381]

308. On 9 November 1992, Semanza addressed a letter to the Accused in which he explained why there was a deficit in the funds. He added that he was in the process of regularising the situation and intended to reimburse on a monthly basis the outstanding claims.[382] However, by letter of 14 November 1992 from the Accused to Semanza, Bagilishema intimated that Semanza acted with premeditation. He also noted that he had yet to receive any payments from Semanza despite the latter's promise.[383] On the same day, the Accused sent a letter to the Minister of the Interior and Communal Development in Kigali again requesting help in recovering the sum owed by Semanza and in imposing a financial penalty upon him. The Accused noted his intention to take the matter to court if no administrative measures were taken in time.[384]

309. The Accused testified that Semanza finally agreed to pay his debt. A contract was drawn up between the *commune* and Semanza, whereby Semanza agreed to pay

[380] Defence Exhibit No. 31.
[381] Defence Exhibit No. 30.
[382] Defence Exhibit No. 29.
[383] Defence Exhibit No. 38.

by instalments the balance of his deficit.[385]

310. Reference to the misappropriated funds is made in an "Evaluation Sheet" for Semanza covering the period of 1 April 1993 to 31 March 1994 and signed by the Accused on 6 November 1992.[386] In the evaluation, the Accused stated that "[i]t is difficult for this bad example, which may spread among the tax collection staff of this *Commune* Treasury, to disappear". Asked by the Prosecution why the Accused had recommended Semanza to be fit for promotion in the evaluation, the Accused explained "[q]uite frankly, I said that it was premature but later on I see that it has been crossed out and "fit" ... has replaced the "premature". I don't know why premature has been crossed out". The Accused could not remember exactly when he filled in the document or whether he made the changes, although he confirmed that on the basis of the overall rating in the evaluation, it was premature to promote Semanza. [387] The Chamber notes that there are three "very high" and five "average" ratings, with the overall grade being "good".

311. In further support of the tense relationship between the Accused and Semanza, the Accused tendered a number of letters relating to Semanza's absence from work on 15 December 1992. By letter dated 16 December 1992 to Semanza, the Accused demanded an immediate explanation from Semanza for his absence.[388] In the reply thereto, dated 17 December 1992, Semanza explained that the Accused had verbally granted him permission to attend ceremonies in Kibuye. Semanza added that: "... if you were not setting a trap for me, it would be incomprehensible that you should be denying that you actually gave me permission yourself".[389] On 19 December 1992, in a letter to Semanza, the Accused responded:

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[384] Defence Exhibit No. 27.

[385] Defence Exhibit Nos. 25 and 26.

[386] Defence Exhibit No. 20. The French original reads "Bulletin de Signalement valable pour la période du [...] 1er Avril 1993 au 31 Mars 1994".

[387] Transcripts of 9 June 2000 pp. 107-111.

[388] Defence Exhibit No. 24.

[389] Defence Exhibit No. 23.

"I am sorry to inform you that it is not good to lie and especially to lie in order to incriminate your superior. ... Since you have always tried to outsmart your superior and shy away from other important, official duties, I am forced to send you back at the disposal of the supervisory ministries which employed you".[390]

312. The Accused testified that he had sent this letter to the Ministry of Interior with a view to having Semanza withdrawn from service, but that he had not received a response. The Accused explained that, following the refusal of his superiors to remove Semanza, Semanza felt "untouchable and did whatever pleased him".[391] In this regard, the Chamber notes that Prosecution Expert Witness André Guichaoua stated that a *bourgmestre*'s power was proportional to the relationship that he had with the national leaders.[392]

313. According to the Defence, the source of much of the tension between the Accused and Semanza emanated from political differences following the advent of multipartism. The Accused, who was a member of the MRND party, pointed out that Semanza was the Secretary of the MDR party in Mabanza. He added that each of the political parties wanted to have a representative in the *commune*, and that "their tactic initially was to be able to remove [representatives from other parties] with people from their own parties".[393] The Accused explained that "each party wanted to acquire the *commune* ... the MDR wanted to have the *commune* and the same thing with the other parties. So this led to confrontation between the parties".[394]

314. Witness ZD was a senior official of an opposition political party from 1992 until the time of the events. He testified that the strategy of the opposition parties was to replace the Accused with the MDR candidate, Semanza, and that Semanza had the support of the most of the MDR leaders. Witness ZD explained that "well, I said if when you want power it's no longer a matter of saying this one is my friend. We wanted power. And we wanted grass root -- we wanted positions at the grass-

[390] Defence Exhibit No. 22.
[391] Transcripts of 1 June 2000 pp. 84-85.
[392] Transcripts of 14 February 2000 p. 24.
[393] Transcripts of 1 June 2000 pp. 71-72.
[394] Ibid. p. 140.

root".[395] He added:

> "I told you that our objective was to get [the Accused] out of that seat. I'm sorry to say this. Unfortunately, the person we wanted to propose was behaving in an irreverent manner, particularly in 1994. That is what we observed. Maybe this proposal, this idea of proposing him to replace the bourgmestre got into his head. This was Semanza who was supported by a top party official and I don't want to mention his name."[396]

315. Witness ZD stated that in 1994 most of the people in Mabanza belonged to the MDR party.[397]

316. Defence Witness KA testified that with the advent of multipartism, "people were happy with the MDR party". He testified that during the massacres the MRND did not have any power. He stated that "the example is that in April during the killings when Semanza was holding meetings this was showing that he had power because the *Bourgmestre* never held any meetings during this period of time". He added that the Accused did not call any meetings whilst the *Abakiga* were in the *commune*.[398]

317. Witness KA explained that in mid-April "the MDR was stronger because the MDR members were ... in the majority in the *commune*. ... Semanza was, therefore, the favourite of the people, so to speak, and had an eye on the position of *bourgmestre*". The witness added that during the political meetings of the MDR, the members used to sing "that the *bourgmestre* should resign".[399]

318. Defence Expert Witness François Clément, a doctor of sociology who had worked in Rwanda, including Mabanza, between 1989 and 1994, testified that as Semanza and the Accused came from two different parties, tension built up between them.[400] He explained that during meetings Semanza would challenge what the

[395] Transcripts of 3 May 2000 (closed session) pp. 35-36.
[396] Ibid. p. 41.
[397] Ibid. p. 32.
[398] Transcripts of 22 May 2000 p. 40.
[399] Ibid. pp. 105-106.
[400] Transcripts of 29 May 2000 pp. 95-96.

Accused was saying, "challenges which did not appear credible and which appeared to be a bit over the top and which brought the two men in opposition". In his opinion, "there was a political opposition in the background".[401]

319. Defence Expert Witness Jean-Francois Roux who, up to April 1994, headed a development project in Kibuye prefecture, dealt with Semanza regarding planning issues. The witness confirmed that there had been a political conflict between the Accused and Semanza as the latter belonged to a party that was opposed to that of the Accused. He added that he had personally received a letter from Semanza regarding the project in which Semanza questioned the conduct and attitude of the Accused.[402]

320. The Accused testified that his fractious relationship with Semanza continued up until July 1994. In a letter dated 24 June 1994, from the Accused to Prefect Kayishema, the Accused intimated his problems with his political rivals: "I would like to inform you that this rumour is spread out by my political opponents whose intention is to take my place".[403] In testimony, he explained that he had in mind, amongst others, Semanza. In response to a question from the Bench, "[a]nd that is the position that you are taking up in this Court even today, that Semanza was designing or planning to take over from you?" the Accused answered in the affirmative.[404]

321. In his letter dated 27 April 1994 addressed to all the Prefects, the Prime Minister indicated that all the political parties forming the Government had met and discussed how to deal with the loss of the main leaders of the country. The Prefect of Kibuye forwarded the letter to all the *bourgmestres* in the *commune*.[405] The Accused explained that despite the fact that the political parties were consulting at national level on how to manage the country, the "opposition parties, by all means, wanted to win the elections and take the presidential seat".[406] As to whether this had any repercussions at local level, he stated:

[401] Ibid. p. 99.
[402] Transcripts of 4 May 2000 pp. 19-23.
[403] Prosecution Exhibit No. 84 (IV.7 below).
[404] Transcripts of 7 June 2000 pp. 111-112.
[405] Prosecution Exhibit No. 77B.

"I will say it did not change anything, or did not change my relationship with Mr. Semanza. What was happening, was to try and stop the disturbances, but the opposition still persisted. [...] The objective was still to take over political power, so nobody was happy to share power with others. Each party wanted to win and take over all the political power."[407]

Conclusion

322. In the opinion of the Chamber, the evidence shows that the Accused had a strained relationship with Célestin Semanza, which at times verged on insubordination. It is clear that Semanza, as a member of MDR, had his own political agenda, and that he was supported in this cause by other parties. There is insufficient evidence to establish that the Accused was in direct conflict with Semanza, or that the latter stopped carrying out his duties as an assistant *bourgmestre,* or that he was "out of control". On the other hand, the evidence does not support the position of the Prosecution that, during the trial, the Accused purposively "went to great lengths" to distance himself from the actions of Semanza.[408] Whether or not the Accused may be held responsible for criminal acts perpetrated by his assistant during April-June 1994 will be discussed in Chapter V below.

[406] Transcripts of 8 June 2000 pp. 86-88.
[407] Ibid. pp. 89-90.
[408] Prosecution's written Closing Remarks para. 277.

7. Letter of 24 June 1994

323. During the trial both parties referred to a letter of 24 June 1994 from the Accused to the Prefect of Kibuye.[409] Copies were sent to the *bourgmestres* of Rutsiro and of Kayove *communes*. The Chamber deems it useful to quote the letter in its entirety:

> "The *Préfet* of Préfecture
> KIBUYE
>
> Mr *Préfet*,
>
> According to the information at our disposal, the preparations of a series of attacks are reportedly under way in ZONE MURUNDA and ZONE RUTSIRO (Northern RUTSIRO) of RUTSIRO commune; the attacks target MABANZA commune between lst and 5th July 1994, under the pretext that accomplices are still hidden in Mabanza; they have also dared to include myself among the accomplices stating that I am married to a Tutsi woman.
>
> I am sorry to inform you that there is no more accomplice in Mabanza. Even if this were true, the population of Mabanza is selfsufficient. We do not want to be considered as the defeated so that people from KAYOVE and RUTSIRO communes need to come to loot at anytime and anyhow in our commune. That is the reason why, Honourable Préfet, I request you, to warn the people from KAYOVE and RUTSIRO communes so that they stop their attacks against MABANZA commune, because people of our commune are able to check themselves whether there is any accomplice hiding among them.
>
> Concerning the problem of my wife, people believe that she is a Tutsi and that leads them to think that I am an accomplice and that I support Hutu who married Tutsi women and the Tutsi population. I would like to inform you that this rumor is spread out by my political opponents whose intention is to take my place. My wife is a Hutu from the BAGIGA family, a very large family residing at Rubengera in Mabanza commune.
>
> As for those pretexting that my mother-in-law is a Tutsi, this is not sound at all, even if she were a Tutsi, a child belongs to the father not to the mother; those who maintain that that my mother-in-law is Tutsi are wrong since she is native from sector RURAGWE, Gitesi commune from the BARENGA family, a well-known family of Hutu as confirmed by the *Bourgmestre* of Gitesi commune in his letter no. D 249/04.05/3 dated 06/06/1994, addressed to the *Conseiller* of sector RURAGWE a copy of which was reserved to you.

[409] Prosecution Exhibit No. 84.

Therefore, I would like Honourable *Préfet*, to request you to do your utmost to stop those attacks. Otherwise, the population of Mabanza commune would defend itself, which can result in a confrontation between the Hutu whereas, what we presently needed the most is their unity to face the Inyenzi-Nkotanyi. We cannot fight against the Inyenzi-Nkotanyi who are threatening to attack from Gitarama *Préfecture* and, at the same time, counter-attack the Hutu from KAYOVE and RUTSIRO. That is why your assistance is urgently sollicitated.

Thank you in advance."[410]

324. The Chamber notes that this letter can be interpreted in various ways. First, it confirms the Accused's testimony that he was accused of being a Tutsi accomplice. On the other hand, the letter also shows that he strongly refuted this accusation, but in view of the prevailing circumstances in 1994 it is difficult to consider this as a decisive argument against him. Second, the Accused wrote that there were no more accomplices left in Mabanza in June 1994 and that his *commune* was able to deal with them alone. This would seem to support the Prosecution's case, but the statement may also be seen as a way to avoid further attacks against his *commune*. Third, the letter offers some support to the Accused's testimony that political opponents tried to take over his position as *bourgmestre* (see IV.6 above about Semanza). Fourth, it gives the impression that one of the Accused's primary considerations was to avoid internal confrontation amongst the Hutu in order to mount an efficient defence against the *Inyenzi-Inkotanyi*. Read alone, this could convey the impression that the Accused was fighting Tutsi in general, but it follows from the context that he was referring to attackers coming from another prefecture and not Tutsi inside his own *commune*.

325. In the present case, the Prosecution did not produce any evidence concerning the use of "double language" in Rwanda. However, even interpreting the letter in the light of this possibility the Chamber concludes that the letter of 24 June 1994 does not in itself provide clear support for the Prosecution's case.

[410] French original.

8. Conclusions

326. On the basis of the above evidence, it is clear that the Accused had limited resources at his disposal during the period April – July 1994. In essence, his resources consisted of one vehicle and eight communal policemen. The *gendarmes* that had been given to him by the authorities of Kibuye on 9 April were withdrawn at a time when the security situation was still precarious, thereby limiting the measures the Accused could reasonably be expected to effect. Moreover, the evidence suggests that Célestin Semanza had some influence over the *Abakiga*.

327. There is evidence that the Accused helped many individuals, including Tutsi, during the peak of the massacres. The evidence does not support a finding that the Accused dispensed this help in a selective manner to a chosen few, to the detriment of Tutsi. After 27 April 1994, the Accused took some measures to restore law and order and instill a sense of normality in the *commune*.

328. The evidence discussed in this section has not demonstrated that the Accused generally acted in an outright discriminatory manner against the Tutsi or that he generally encouraged their killing before or after April 1994. The evidence is also insufficient to establish that the Accused generally turned a blind eye to the killings of Tutsi and thereby acquiesced to the massacres.

329. The Prosecution has led evidence implicating the Accused in specific events against Tutsi. The Chamber will consider these events in Chapter V below.

CHAPTER V. FACTUAL AND LEGAL FINDINGS

SPECIFIC EVENTS

1. Introduction

330. In the present Chapter, the Chamber shall assess the evidence presented in the approximate chronological order of the specific events alleged. The Chapter is divided into four main sections:

– The first section covers events in Mabanza *commune* following the death on 6 April 1994 of President Habyarimana of Rwanda. The focus is on the period from 6 to 12 April 1994 (see V.2);

– The events in Kibuye town from 13 to 19 April 1994 are dealt with in the second section. It includes the movement of "refugees"[411] out of Mabanza *commune* and the attacks at the Home St. Jean Complex and Kibuye Stadium (see V.3);

– The third section covers a period from the middle of April until July 1994 and relates to specific events said to have occurred in Mabanza *commune*, in the course of which persons were killed (see V.4);

– The final section deals with matters that are closely related to the setting up and operation of roadblocks in Mabanza *commune* (see V.5).

[411] The term "refugee" is used in this Judgement with the meaning of "a person seeking refuge" and not in the dictionary definition of "a person who has been forced to leave their country ..." (*Concise Oxford*). The reason for this is that the Indictment employs the term in the former sense, and it was subsequently used in this sense by both Parties throughout the trial.

2. Events between 6 and 12 April 1994

2.1 Attacks in Mabanza *Commune*

The Indictment

331. The early attacks in Mabanza *commune* are covered in paragraph 4.7 of the Indictment:

> "On 6 April 1994, the plane transporting President Juvénal Habyarimana of Rwanda crashed on its approach to Kigali airport, Rwanda. Attacks and killings of civilians began soon thereafter throughout Rwanda."

332. According to the Prosecution, many witnesses, including Witnesses A, AA, AB, AC, G, H, I, J, K, and O testified that following the plane crash on 6 April 1994, Tutsi civilians were attacked and their properties destroyed. The Defence did not challenge the allegation that Tutsi from Mabanza *commune* were attacked in the days following 6 April 1994 but added that Hutu and Twa were also attacked.

333. The Chamber finds paragraph 4.7 to have been proved. The Prosecution has not alleged that the Accused was directly involved in these early attacks, and the Chamber notes that there is no evidence supporting his involvement.

2.2 Attacks at Nyububare Hill

The Indictment

334. The Prosecution refers to attacks around 8 April 1994 against members of the Tutsi population at Nyububare Hill, Buhinga *secteur*, in Mabanza *commune*.[412] This incident comes under paragraph 4.10 of the Indictment, which reads:

[412] Prosecution's written Closing Remarks, filed on 30 June 2000, p. 10 para. 69.

"In Mabanza commune, members of the Tutsi population sought refuge in various areas within the 13 secteurs of the commune. These individuals were regularly attacked, throughout the period of 9 April 1994 through to 30 June 1994. The attackers, comprising of members of the Gendarmerie Nationale, communal policemen and Interahamwe militiamen, used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis in Mabanza commune."

Submissions of the Parties

335. The Prosecution relies on Witness AC, who, with members of her family, fled to Nyububare Hill. There she found hundreds of Tutsi men, women and children who were also seeking refuge from attacks. While at Nyububare Hill, the refugees were attacked by Hutu civilians and two communal policemen. The Hutu attackers used traditional weapons. The policemen, acting under the authority and control of the Accused, used guns. Many refugees, including Witness AC and her family, then fled to the *bureau communal* in Mabanza.[413] The Prosecution charges the Accused with genocide and crimes against humanity in relation to this event.

336. The Defence asserts that Witness AC's testimony cannot be given weight in relation to the activities of the policemen. If the witness were correct that over 300 persons had sought refuge at Nyububare Hill, the two policemen could not have "surrounded them". The Defence also notes that according to Witness AC, the alleged attack by the policemen was limited to gunshots fired into the air. The refugees' reaction was to head for the *bureau communal.* This indicates that they trusted the communal authorities and the policemen, and that the shots fired were intended to chase away the attackers.[414]

Deliberations

337. According to the testimony of Witness AC, she and her family reached

[413] The French expression *"bureau communal"* broadly refers to the compound containing the offices and other buildings of the administration of Mabanza *commune*. The office of the Accused was within a building in the *bureau communal.* In the text of the Judgement, the *bureau communal* often is referred to simply as "communal office".
[414] Defence Closing Brief pp. 30-31 paras. 209-213.

Nyububare Hill on 8 April 1994, where they found three to four hundred other refugees. They were attacked by Hutu from her area. The attack on the refugees continued the next day. On the second day, the witness saw the arrival of two communal policemen. She identified them as Rwamakuba and Munyandamutsa. She testified that "[t]hey came trying to circle the hill on which we were hiding". She also said that they wanted "to shoot at us but they didn't. Instead they fired into the air...".[415]

338. The witness did not claim that any injuries or deaths were sustained by the refugees during the two days. She did not testify that the Accused was directly involved in the attacks or that he ordered or somehow provisioned the attacks.

339. The Chamber notes that in her statement to investigators of 21 June 1999 the witness stated that "the *bourgmestre* dispatched the policemen".[416] She did not state how she acquired this information, and in her testimony she did not repeat the allegation. There is no specific information that the communal policemen – for whose actions the Accused may be responsible – committed any offences against the refugees. Moreover, there is no evidence that the policemen were acting under the direction or control of the Accused during the attack. The Chamber also notes that the Prosecution, in its final oral submission, did not dispute that the Accused acted in good faith prior to 12 April 1994 (see IV.2 above and para. 354 below).

Findings

340. Witness AC did not specify any crimes committed at Nyububare Hill. She identified the communal policemen but said that they only fired into the air. She made only general reference to Hutu attackers, without indicating who they were or what they did. The evidence led in the present case fails to demonstrate that any crimes committed at Nyububare Hill can be attributed to the Accused. Therefore, the Chamber finds that the Prosecution's charges of genocide and crimes against humanity for the alleged attack on Nyububare Hill cannot be sustained.

[415] Transcripts of 18 November 1999 p. 20.

2.3 Night Patrols

341. According to the Prosecution, following the crash of the presidential plane on 6 April 1994, the Accused instructed *conseillers* in Mabanza *commune* to organise night patrols in their spheres of operation. Between 7 and 11 April 1994, Tutsi and Hutu patrolled together. Thereafter, Hutu started attacking Tutsi in the *commune*, forcing them to flee to the communal office for safety. There is no specific allegation as to any wrongdoing by the Accused in this regard.[417]

342. Prosecution Witness Z testified that a meeting was held by the Accused during the night of 7 April 1994. It involved neighbours in the *cellule* of the witness, including the *conseiller* Daniel Nkiriyumwami, Daniel Sebuhoro, head of the *cellule*, and heads of the neighbourhoods consisting of ten houses (*nyumbakumi*). The witness described how the meeting was "impromptu" and had been called by the Accused who was present in his capacity as a neighbour and in order to give advice.[418] During the meeting, the Accused asked those gathered to be of good behaviour and to start night patrols. He explained that the night rounds were required for the security of the area and its people. Until 11 April 1994, according to Witness Z, the night patrols were carried out by Hutu and Tutsi together. He explained that the Tutsi stopped participating in the patrols probably because they were afraid, following attacks against them in Kayove and Gisenyi.[419]

343. Defence Witness BE also testified that on the night of 7 April 1994 one of his neighbours called a security meeting of about twelve neighbours, including Hutu and Tutsi. The Accused passed by, and they asked him to join them. He stopped and made a few suggestions. The Accused explained that the enemy wanted to drive a wedge between Hutu and Tutsi. He asked the people at the meeting to ensure that there was no discrimination between the ethnic groups. He also said that they should

[416] Defence Exhibit No. 8.
[417] Prosecution's written Closing Remarks p. 8 para. 55.
[418] Transcripts of 9 February 2000 p. 12.
[419] Transcripts of 8 February 2000 p. 11.

maintain security for one another, as he had no other available means, and should report to him any problems that arose to enable him to resolve them. According to the witness, the Accused added that he had given the same advice to people in Mushubati. After the meeting, the group of neighbours started night patrols.[420]

344. According to Witness BE, the night patrols stopped operating on the night of 12 April 1994. This was because *Abakiga* from Rutsiro said that they intended to kill the refugees at Mabanza's communal office, as well as any Hutu who did not assist them in this task. The witness went home early that night as he was afraid.[421]

345. The Accused testified that the population of Mabanza *commune* endeavoured, through patrols, to prevent attackers from entering the *commune*.[422] He did not specify the period over which the patrols operated, although he indicated that he was involved in the patrols on the night of 12 April 1994.[423]

Findings

346. The Chamber finds that the testimonies of Witnesses Z and BE show that the Accused supported the constitution of night patrols by both Hutu and Tutsi in Mabanza *commune*, from 7 to 11 April 1994. These patrols were set up to protect the *commune*'s population, irrespective of ethnicity.

2.4 Security Meeting on 9 April 1994

347. Paragraph 4.8 of the Indictment reads:

> "Following the news of the death of President Habyarimana, Ignace Bagilishema between 9-13 April 1994, attended several meetings with the prefet of Kibuye, Clement Kayishema and other local authorities including the Commanding officer of the Gendarmerie Nationale stationed in Kibuye Prefecture."

[420] Transcripts of 27 April 2000 pp. 41-47.
[421] Ibid. pp. 48-49.
[422] Transcripts of 2 June 2000 p. 52.
[423] Transcripts of 5 June 2000 p. 29.

348. Evidence was presented during trial as to a security meeting that took place on 9 April 1994. In its final written submission, the Prosecution argued that "in the absence of the Minutes of this Meeting the assumption that the meeting was not to concert with a view to carrying out genocide is unattainable".[424] This statement suggests that in the Prosecution's view the Accused contributed to the formation of a genocidal plan as early as 9 April 1994. During final oral remarks, the Prosecution stressed that the plan to massacre the Tutsi at the Stadium and the Home St. Jean complex was agreed to during a meeting between the Accused and Prefect Kayishema on 12 April 1994.

349. The Accused admitted attending a meeting on 9 April 1994 in Kibuye town. He explained that during the meeting he proposed that security efforts and reinforcements should be concentrated in sensitive areas, which, according to him, included Rutsiro and Mabanza *communes*. But other *bourgmestres* also requested *gendarmes*, so his proposal was rejected. Instead, it was decided to distribute the *gendarmes* to all the *communes*. The Accused received only five. This number was, in his view, insufficient to meet the needs of the *commune*. He testified that he repeatedly requested more *gendarmes* directly from the Prefect up to 12 April 1994, without success.

350. In support of the argument that the meeting addressed conventional security concerns, the Defence relied on a letter and a report on the security situation in Kibuye, both dated 10 April 1994, which were sent by Prefect Kayishema to the Minister of the Interior and Communal Development.[425] The report contains a summary account of a "restricted" meeting of the Prefectural Security Council (*Conseil de Sécurité Préfectoral restreint*), held on 8 April 1994 at 10 a.m. At the end of this account the report indicates that a meeting of the so-called security committee (*comité de sécurité*) would take place on 9 April 1994. Amongst those expected to attend were members of the restricted Prefectural Security Council, *bourgmestres* and

[424] Prosecution's Rebuttal of 14 September 2000 p. 4 para. 14.
[425] Prosecution Exhibit 76.

Kibuye-based representatives of the United Nations Assistance Mission in Rwanda (UNAMIR). The Accused testified that three UNAMIR representatives came to the meeting.

Findings

351. The Chamber finds that it has been established that the Accused met with Prefect Kayishema, amongst others, on 9 April 1994.

352. However, the Prosecution did not present any evidence to the effect that the meeting of 9 April 1994 was held in furtherance of a plan to massacre Tutsi. The Defence argued that the presence of three UNAMIR representatives rules out the possibility that the purpose of the meeting was to plan genocide. In the Chamber's view, the invitation to UNAMIR to attend the meeting would seem to suggest that it was held for security purposes only. There is no evidence to contradict the testimony of the Accused that UNAMIR representatives were present.

2.5 Refugees fleeing to Mabanza Communal Office

The Indictment

353. Paragraphs 4.18 and 4.19 of the Indictment read:

> "4.18 From 9 April 1994, Ignace Bagilishema encouraged thousands of Tutsi men, women and children seeking refuge from the attacks in the commune, to seek safe refuge within the premises of the communal office at Mabanza. Many others, who had fled to the hills, were on the instructions of Ignace Bagilishema, ferried back to the communal office in vehicles belonging to the commune and confined to the jailhouse therein on the instructions of Ignace Bagilishema.
>
> 4.19 By 11 April 1994, Ignace Bagilishema had placed communal policemen outside the commune office with instructions to them to prevent the refugees gathered therein from leaving the said office. Ignace Bagilishema also instructed the communal policemen to admit incoming refugees to the communal office."

Submissions of the Parties

354. At the beginning of trial the Prosecution argued that in encouraging the Tutsi to gather at the communal office, the Accused knew or had reason to know the fate that awaited them, namely, that they were to be sent to Kibuye town to be massacred.[426] However, in its oral closing arguments, the Prosecution conceded that there was lack of evidence in relation to paragraph 4.18 of the Indictment:

> "I think that my learned friend seems to get the impression that ... we are saying that the witnesses were deliberately gathered at the Mabanza Commune office as a scheme to eliminate them. We don't say that. We accept that more likely than not, up until that time, he did that in good faith. We make no bones about that. And I want that to be crystal clear. There is no evidence to suggest otherwise. No evidence to suggest that up until that time, he was gathering people there with a view to, you know – no, no, no, no. We say that everything changed at that time, after that meeting, and everything that happens flows on from there. We make that clear distinction. So when they come and say well, he is a man of good character, this doesn't help ... I make no bones about that."[427]

355. The Prosecution later stated: "The evidence at least adduced in this court, which we as the Prosecution cannot manufacture eventually has not supported point 4.18 in its totality."[428]

356. The Defence submits that Tutsi went to the communal office not as a result of the Accused's encouragement, but of their own accord, because they thought they would be safe with the authorities. The Defence argues that there is no evidence to support the allegation that refugees were ferried in official communal vehicles to the *bureau communal* and subsequently confined in the jailhouse, on the instructions of the Accused. Moreover, refugees were free to come and go from the communal office, as shown by the testimonies of Prosecution witnesses.[429]

Deliberations

357. The Chamber will first summarise the relevant testimonies.

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[426] Transcripts of 27 October 1999 pp. 27-28.
[427] Transcripts of 18 October 2000 pp. 65-66.
[428] Ibid. pp. 73-74.
[429] Defence Closing Brief pp. 59-60 paras. 497-505.

Witness AC

358. Prosecution Witness AC, after fleeing Nyububare Hill, sought refuge at the *bureau communal* on 10 April 1994, where she found other Tutsi and their livestock. She testified that on arrival the conditions at the communal office were "bad because we had nothing to eat". The refugees were divided into two groups, one in front of the communal office and the other near the so-called IGA building. On 12 April, the refugees were served inedible rice smelling of waste oil from the container in which it was cooked. This was the only time the refugees received rice from the communal authorities. The refugees, some with their cattle, were unable to leave during this period, not even to buy foodstuffs, because three policemen were guarding the *bureau communal* compound. Although there was no enclosure around the communal office, the three policemen "played the role of an enclosure because they stopped us from leaving". Nonetheless, according to the witness, some Hutu attackers were able to steal cattle.[430]

Witness AB

359. Prosecution Witness AB, a Tutsi woman born in 1964, testified that she sought refuge at the *bureau communal* on 9 April 1994, with about twenty members of her family, including her parents. Her husband and children joined her the next day.

360. During her testimony, Witness AB described how, on 10 April 1994, she and other refugees met with the Accused to explain to him that because their houses had been pillaged and their cattle stolen, they had taken refuge with the authorities at the *bureau communal.* The Accused told them not to be afraid. Since they were in the presence of authority they would no longer have any problems. When the Accused learned from the refugees that some Tutsi were still in their homes, he gave the order that all remaining refugees had to come to the communal office for their security to

[430] Transcripts of 18 November 1999 pp. 23 and 87, respectively.

be ensured. Later that day, the witness saw the communal vehicles – a Hilux and a Daihatsu – transport some refugees to the *bureau communal*. She explained that a certain Michael, who was aboard one of the vehicles, told her that he and others had been fleeing to the communal office when they were ambushed. Some people were killed, but Michel managed to get to the vehicle that transported him to the communal office.[431]

361. Witness AB testified that from 11 April 1994 refugees were not allowed to leave the communal office. She stated that the refugees were told that they had to stay there for their own protection, so as not to be killed. The witness heard the Accused order a policeman not to allow anyone out, but to allow refugees in. She named two policemen at the *bureau communal* as Rwamakuba and Munyandamutsa. The witness testified that she did not leave the communal office until 13 April 1994.[432] However, in her written statement of 1 February 1996, the witness stated: "On Tuesday, the 12th, while I was on my way to the commercial centre of Rubengera, I saw *gendarmes* arriving in Mabanza *commune* at 1 p.m. aboard a red Toyota".[433] This seems to contradict her assertion that the refugees were prevented from leaving the compound; in cross-examination the witness did not offer a satisfactory explanation of this inconsistency.[434] The first mention of any restrictions on their freedom of movement occurred in the witness's second statement, dated 22 June 1999.[435]

362. Witness AB testified that on 11 April 1994, because the children at the compound were still hungry, a number of refugees approached the Accused and asked him for food. He ordered that rice be distributed to the children. However, according to the witness, the rice was uncooked. The cans given to the refugees for boiling the rice in had remnants of coal tar.[436]

[431] Transcripts of 15 November 1999 pp. 34-35.
[432] Ibid. p. 41.
[433] Defence Exhibit No. 2.
[434] Transcripts of 16 November 1999 pp. 35-41.
[435] Defence Exhibit No. 3.
[436] Transcripts of 15 November 1999 p. 42.

Other witnesses

363. Prosecution Witness O sought refuge at the *bureau communal* on 9 April 1994 with her two children and other family members, where she remained until 13 April 1994. The witness testified that there were approximately 1,500 refugees at the communal office during that period. The cows of the refugees were able to graze in a neighbouring area called "Nyenyeri". The owners of the cows took them to graze, following instructions of the communal policeman.[437]

364. Defence Witness BE stated that he went at least twice to the *bureau communal* to see if there was anyone there whom he knew. He had convinced some of the refugees at the *bureau communal* to hide in his house, and gave food to others. He explained that when the first refugees arrived at the communal office the conditions were not bad, but that they worsened when large numbers of refugees arrived with their livestock.[438]

365. Defence Witnesses BE and ZJ both testified about a *communiqué* from the Accused which was read out at many churches, requesting the population to assist the refugees.[439] The two witnesses said that the refugees, who were mainly Tutsi, were free to come and go from the *bureau communal*. Their cattle initially grazed on land around the communal office and later, when the number of refugees increased, at "Kunyenyeri" Hill. Witness ZJ explained that on 10 April 1994 he went to the communal office and spoke to refugees whom he knew. They told him that they had gone to the market and had been able to purchase beer.[440]

366. Defence Witness RA, who went to the communal office on 11 April 1994 or thereabout, described the situation as "terrible". She spoke with the Accused for

[437] Transcripts of 24 November 1999 p. 79.
[438] Transcripts of 27 April 2000 p. 51.
[439] Ibid. p. 52; and transcripts of 3 May 2000 pp. 62-63.
[440] Transcripts of 3 May 2000 p. 63.

about half an hour.[441] According to the witness, the Accused had made an appeal to the community for assistance and was doing all that he could within his powers to manage the situation. He tried to ensure security with the few policemen at his disposal. Witness RA stated that after their discussion the Accused sent a policeman to accompany one of the pastors to the market to buy some rice and beans, and said that he would do what he could to acquire some firewood. She also stated that she knew of certain refugees who were able to leave the communal compound.[442]

367. Prosecution Witness H testified that refugees started arriving with their cattle at the communal office on a Thursday and stayed until Tuesday, when they left for Kibuye town. He indicated that on some days persons brought them food.[443]

The Accused

368. The Accused testified that refugees from Kayove, Gisenyi, Kibingo, Nyagatovu and Kibishito started arriving at the *bureau communal* from 8 April 1994 onwards.[444] By the evening of 12 April 1994, they numbered between 1,000 and 1,500. The sanitary conditions were a problem, there only being six or seven toilets at the communal office. Regarding food for the refugees, the Accused explained that he was able to obtain some food items from Mushubati parish where there was a store of food donated by Caritas. The communal authorities also bought some food items at the Kibilizi commercial centre and received help from the Seventh Day Adventists and others.[445]

369. The Accused, according to his testimony, organised the refugees into groups according to their *cellule* of origin. Whenever he had something to tell the refugees, he called their representatives to discuss what could be done. If he had some food to give them, the Accused showed them what he had and then they discussed how to

[441] Transcripts of 2 May 2000 p. 18 (closed session).
[442] Ibid. p. 20.
[443] Transcripts of 19 November 1999 pp. 14 and 77.
[444] Transcripts of 8 June 2000 p. 107.
[445] Transcripts of 2 June 2000 p. 94.

distribute it. The Accused testified that as the communal office did not have any means to cook for the refugees, he had requested the local population to bring cooking pots for the refugees to do their cooking, with firewood brought to the communal office.[446]

370. The Accused testified that during the daytime the livestock of the refugees grazed on land at Nyenyeri, whilst at night the animals were kept near the *bureau communal*. The refugees were free to come and go from the grounds of the communal office, which was not fenced. If there was relative calm, many would go home during the day and return to the communal office at night for protection from the attackers.[447]

Findings

371. The Chamber finds that the above witnesses, save for Witnesses AB and AC, gave a similar account of the treatment of the refugees at the *bureau communal*. According to their evidence, the refugees began arriving of their own volition at the communal office with their cattle and goods on 8 and 9 April 1994. Although they arrived in small numbers at first, they began to arrive by the hundreds as security quickly deteriorated in the region. By the night of 12 April 1994, between 1,000 and 1,500 refugees had gathered in the communal office compound. The sanitation and supply of food worsened. It appears that the Accused struggled to cope and resorted to seeking help from the local community. Witnesses testified that the Accused sent out a *communiqué* to various churches requesting assistance. Food items and cooking utensils, mainly pots, were brought by members of the local population. (Witness AC said that the refugees were provided with food by the communal authorities only on 12 April 1994, but this is not corroborated.) Moreover, the evidence shows that the refugees could come and go, and that their livestock could graze on grounds around the communal office and in an area called "Nyenyeri" or "Kunyenyeri".

[446] Ibid. p. 95.

372. In relation to the testimonies of Witnesses AB and AC, that the refugees were unable to leave the *bureau communal*, the Chamber makes the following observations. Witness AB was explicit in her statement of 1 February 1996 that she was able to go to the Rubengera commercial centre on 12 April 1994, despite having already sought refuge at the communal office. Witness AC testified that the refugees were unable to leave because three policemen "played the role" of an enclosure. This is in clear contrast with the testimony of the other witnesses.

373. Apart from the testimony of Witness AB, no evidence has been presented to demonstrate that the Accused "encouraged" thousands of Tutsi men, women and children to seek refuge at the *bureau communal*, as alleged in the Indictment.

374. Moreover, Witness AB is alone in alleging that the Accused ordered that Tutsi were to be brought to the communal office. She was also the only witness to testify that communal vehicles brought Tutsi to the *bureau communal*. Her evidence in this regard is limited and does not establish that the Accused gave instructions that refugees who had fled to the hills had to be "ferried back" to the communal office. No evidence has been presented to support the allegation that individuals who may have been "ferried" there were subsequently confined to the communal jail. The Chamber takes note that the testimony of Witness AB was in several respects at odds with that of other witnesses and on one point also inconsistent with her previous written statement.

375. Considering all the above evidence, the Chamber finds that the allegations against the Accused in paragraphs 4.18 and 4.19 of the Indictment have not been established beyond reasonable doubt.

[447] Ibid. pp. 96-97.

2.6 Meeting between the Accused and the Prefect on 12 April 1994

The Indictment

376. Paragraph 4.20 of the Indictment reads:

> "On 12 April 1994, Ignace Bagilishema met with Prefet Clement Kayishema, during which the latter commented that Mabanza commune was the only commune left in Kibuye with 'scum and filth'. The refugees that had sought refuge in the communal office in Mabanza were on the instruction of Ignace Bagilishema divided into 2 groups. The first group comprising of intellectuals were put in a military truck and driven towards Kibuye and were never seen again. The second group of refugees comprising mostly of peasants were detained at the communal office in Mabanza and were subsequently transferred to Gatwaro stadium in Kibuye Town where they were killed."

377. Only the first sentence of this paragraph relates to the alleged meeting on 12 April 1994. The remainder of the paragraph will be considered in section V.3.1.

Submissions of the Parties

378. The Prosecution's case is that the meeting on 12 April 1994 between the Accused and Prefect Kayishema is crucial to the demonstration of the genocidal intent of the Accused. This meeting and the subsequent transfer of the refugees from the Mabanza communal office to Kibuye town show that the Accused was party to a plan to exterminate the Tutsi.

379. The Defence submits that Kayishema did not visit the *bureau communal* on 12 April 1994 and that the Accused did not hold a meeting with the Prefect on that day.[448]

Deliberations

380. Witnesses O, AB and Z and the Accused testified in relation to this event.

Witness O

381. Prosecution Witness O, a Tutsi woman born in 1967, testified that on 9 April 1994, following attacks against houses of Tutsi, she sought refuge with her two sisters, one of whom was pregnant, and their respective children at the *bureau communal*. They stayed there with many other refugees until 13 April 1994.[449]

382. The witness testified that three days after her arrival, at around 6 p.m., whilst standing next to the building of the communal office, she saw the Accused and Kayishema, in the company of *gendarmes*, arrive from the direction of Rutsiro. She specified that the Accused, Kayishema, one *gendarme* and a driver were in one vehicle, a double cabin pick-up. Three *gendarmes* and a driver (Nshimyimana) were in the other vehicle, a blue Hilux, which belonged to the *commune*. The *gendarmes* were armed and wore khaki uniforms and red berets. They alighted the vehicles. Some persons said that Prefect Kayishema had arrived. Although the witness had not seen him before, she knew him by name to be the Prefect of Kibuye.[450]

383. According to Witness O, as the arrivals walked over to the IGA building, where many of the refugees were gathered, Kayishema said "remove the filth", and added that there were more *Inyenzi* here than in Rutsiro.[451] The witness said later in her testimony that Kayishema had used the words "dirt and filth".[452] She walked behind them when they left the vehicles. In cross-examination she affirmed that she was unaccompanied when she walked towards the IGA building. Kayishema, the Accused and another person entered a room in the building. She went to a window so that she could hear what they were saying. Her older sister, who was about to give birth, was also nearby.[453]

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[448] Defence Closing Brief pp. 63-65 paras. 526-545.
[449] Transcripts of 24 November 1999 pp. 15-16.
[450] Ibid. p. 17.
[451] Ibid. The French version reads: "enlevez la saleté; ici il y a plus d'Inyenzi qu'il y en a à Rutsiro" (pp. 17-18).
[452] The French version of the transcripts reads: "il a fait référence à la saleté et à la vermine" (ibid. p. 20).

384. Witness O testified that she stood alone outside the window of the room of the IGA building where a meeting took place. Although the curtains were drawn shut, there remained a gap for her to see inside the lit room. She specified in cross-examination that there was a *gendarme* in the room with Kayishema and the Accused, who were seated. According to the witness, the Accused said, in Kinyarwanda:

> "Mr Prefect, this place is too small and if we kill all these people who are so many here, the commune will be destroyed and we will prefer to take them to Kibuye because it's bigger."[454]

385. This, according to the witness, was in reply to the Prefect's initial statement upon arrival that there were too many *Inyenzi* there. She alleged that no one else spoke after the Accused, and that Kayishema "accepted" what he had said.[455] The whole meeting lasted two to three minutes, but the witness became scared and left before the men came out of the room. She told members of her family and other refugees who were nearby that the Accused wanted to send them to Kibuye town to be killed. There was no reaction on their part. The witness said that she was not able to circulate the information more widely among all the refugees.[456] She spent the night at the *bureau communal*. Her sister gave birth around 3 a.m.

386. The witness explained that when the Accused asked the refugees to go to Kibuye town the next morning, the other refugees left, but she stayed behind "because I could not leave my big sister behind and she could not go all the way to Kibuye".[457] The refugees who left included many members of her family: her two children, her four grandchildren, her sister's three children and her sister's husband.[458]

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[453] Ibid. p. 18.
[454] Ibid. pp. 29-30. The French version is more precise: "Monsieur le préfet, cet endroit est très petit. Si nous tuons tous ces gens qui sont très nombreux ici, la Commune sera détruite, et mon avis est que vous les ameniez à Kibuye, parce que c'est plus grand" (p. 30).
[455] Ibid. p. 27.
[456] Ibid. p. 100.
[457] Ibid. p. 33.
[458] Ibid. p. 15.

387. In view of the critical importance of Witness O's testimony to the Prosecution's case, the Chamber will now compare it with her earlier written statements to Prosecution investigators, filed as exhibits in their textual entirety. These were at issue during her testimony. Her first statement was taken on 17 October 1995. She described how on 11 April 1994, whilst standing in front of the *bureau communal* with her sister, she saw Prefect Kayishema arrive in the evening with three *gendarmes* in a vehicle. Nearby was another vehicle with more *gendarmes*. In this statement, unlike in her testimony, she stated that she was outside the communal office with her sister, not alone, and that Kayishema arrived on 11, not 12, April 1994.[459]

388. In her subsequent statement of 23 and 24 February 1998, Witness O again dated the event to 11, not 12, April 1994. In this statement she described how both Kayishema and the Accused came to the communal office together from Rutsiro with a *gendarme* in an unspecified vehicle. She added that there were three *gendarmes* following in a blue Hilux belonging to Mabanza *commune*. This version, taken nearly four years after the events, is consistent with her testimony, but different from her statement taken only eighteen months after the events.[460]

389. In her statement of 1995, Witness O did not explicitly state that Kayishema had made any derogatory remarks. The meeting between him and the Accused in the presence of three – not one – *gendarmes*, is said by the witness to have taken place in the office of the Accused, not in the IGA building. Moreover, the witness stated that she overheard Kayishema tell the Accused that he and the *gendarmes* had come to kill the refugees. This formulation is absent from her testimony before the Chamber. Still according to the 1995 statement, the Accused answered that there was not enough space in the *commune* buildings for all the refugees. He added that if the killing were to be carried out there, the buildings would be damaged. The Accused then suggested that the refugees should be taken to Kibuye town. Kayishema told the

[459] Defence Exhibit No. 11.
[460] Prosecution Exhibit No. 62.

Accused to send them there the next morning. However, in her testimony before the Chamber, Witness O made no mention of these alleged final instructions by the Prefect.

390. It was only in her statement of February 1998, nearly two and a half years after her initial interview, that Witness O first quoted Kayishema as saying, before going into the IGA building: "Let's get rid of the garbage; this place has more *Inyenzi* than Rutsiro." The witness also allegedly recalled the Accused saying words to the effect that Mabanza's *bureau communal* was too small for the refugees to be killed there. The 1998 statement did not make reference to any response by the Accused, or to any orders given by Kayishema.

391. The parties referred to the testimony of Witness O in the trial of Kayishema and Ruzindana (where her designation was Witness WW). She testified in that case on 19 February 1998, a few days before her aforementioned statement of 23-24 February 1998. But for one significant exception (below) that written statement reflected her testimony in the 1998 trial.

392. The Chamber notes that the *Kayishema and Ruzindana* Judgement does not refer to refugees gathering at the *bureau communal* in Mabanza, and no mention is made in that judgement of Ignace Bagilishema, or of any meeting between him and Kayishema.[461] There is also no reference in that judgement to the testimony given by Witness WW. Nevertheless, the Chamber has compared the transcripts of her testimony in the trial of Kayishema and Ruzindana with her testimony in the present case, and has noted certain differences. Regarding the arrival of Kayishema and the Accused from Rutsiro, the witness, when testifying in the earlier trial, did not specifically identify the two vehicles. She described the vehicle of Kayishema and the Accused as being an "almost white" pick-up. When asked for details about the second vehicle, carrying the *gendarmes*, she stated: "We were so afraid. We did not have time to pay attention to vehicles." She "did not remember the colour of that

[461] See *Kayishema and Ruzindana* Judgement, in particular paras. 296, 304-306 and 322.

vehicle".[462] This is in contrast with Witness O's testimony in the present case, and her statement of February 1998, where she described the second vehicle as a blue Hilux belonging to Mabanza *commune*.

393. Further, when in the trial of Kayishema and Ruzindana, the witness described the meeting between the Prefect and the Accused, she at first indicated that there were no curtains on the window of the room of the IGA building. In cross-examination in the same trial, the witness said that there were curtains, but that they were not fully drawn, and that the window was partly open. Finally, again in the Kayishema and Ruzindana case, the witness estimated that the conversation between Kayishema and the Accused lasted between 10 and 15 minutes. By contrast, in the present case, "the entire conversation" lasted between two and three minutes.[463]

Witness AB

394. According to Prosecution Witness AB, on 12 April 1994, between 4 and 5 p.m., Prefect Kayishema arrived at the communal office with armed *gendarmes* in khaki uniforms and red berets. The Accused was in an office in the *bureau communal*. The witness was standing in front of the communal office towards the avocado trees.[464] She noted that Kayishema was angry and heard him say: "What is this filth doing here in the Mabanza *commune*? We have already cleared the filth in the Rutsiro *commune*".[465] By filth, the witness understood "Tutsi". The refugees said that "we cannot leave this place, they are going to kill us".[466]

395. Witness AB explained that after having made those statements, Kayishema and the *gendarmes* entered the *bureau communal*. The witness was unable to hear

[462] Defence Exhibit No. 12: Transcripts of Witness WW's testimony on 19 February 1998 in the trial of Kayishema and Ruzindana pp. 52 and 57.
[463] Transcripts of 24 November 1999 p. 28.
[464] The English version of the transcripts of 16 November 1999 incorrectly refers to "pear trees" (p. 53).
[465] Transcripts of 15 November 1999 pp. 49-50. French version: "Que fait cette saleté ici dans la commune de Mabanza? Nous avons déjà enlevé la saleté de la commune de Rutsiro" (p. 57).

anything as there were too many persons present. After a while, Kayishema and the *gendarmes* left the communal office. The Accused left in a vehicle soon thereafter. Immediately after the departure of Kayishema, *Interahamwe* armed with clubs arrived. They threw stones at the refugees and tried to steal their cattle. Some of the refugees were able to run away and hide in the forest.[467]

396. The Chamber noted above (V.2.5) that Witness AB gave a picture that differed from that of other witnesses as to the conditions at the communal office. Moreover, when the witness was questioned in cross-examination about an inconsistency between her testimony and her earlier statement of 1 February 1996, she gave an unsatisfactory reply.[468] The Chamber again notes that in the same statement the witness gave a description at variance with her testimony: Kayishema apparently spoke twice with the Accused, not just once in his office; and moreover, he addressed the refugees after having gathered them together.[469]

397. In her second statement, of 22 June 1999, Witness AB indicated, for the first time, that on 12 April 1994 *Interahamwe* came to the *bureau communal.* They told the refugees that they smelt bad and that they (the *Interahamwe*) would come back to clean up the scum at the communal office. Around 4 p.m., Prefect Kayishema, the Accused and *gendarmes* came to the *bureau communal.* The Prefect spoke to the Accused in the presence of the refugees, saying that only Mabanza *commune* still had scum because elsewhere the scum had been cleaned up.[470] Kayishema then went into the office of the Accused and thereafter left for Kibuye town.

398. Thus, according to the witness's second written statement, unlike that of 1996 and her testimony before the Chamber, the Accused arrived with Kayishema at the communal office and was not already there when Kayishema arrived.

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[466] Transcripts of 15 November 1999 p. 51. French version: "Ça en est fait de nous, nous avons été livrés, nous ne pourrons pas sortir d'ici, ils vont nous tuer" (p. 59).
[467] Ibid. pp. 52-53.
[468] Transcripts of 16 November 1999 pp. 39-40.
[469] Defence Exhibit No. 2.
[470] Defence Exhibit No. 2.

399. Prosecution Witness Z, a Hutu, was at the time of his testimony detained in Rwanda for having confessed to killing three persons in Mabanza *commune* in 1994.

400. Witness Z testified that on the night of 12 April 1994 Prefect Kayishema came in his vehicle to the *bureau communal*. The witness, who was then at a place called Gitikinini (more than 150 meters away), went to see if Kayishema would address the refugees. He arrived as the Accused and the Prefect came out of the Accused's office to stand in the courtyard of the *bureau communal*. The Accused asked the refugees to come closer and said:

> "The Prefect has just said that for reasons of your own security you should all go to Kibuye because here there are not enough persons to ensure your security whereas in Kibuye there will be enough people to protect you. So you should be there by tomorrow morning at [the] stadium, Kibuye stadium."[471]

401. Witness Z testified that Kayishema did not himself address the refugees. The witness added that two assistant *bourgmestres* and a *conseiller* were present, in addition to the Accused and Kayishema. After the Accused spoke, Kayishema left in a vehicle with *gendarmes*.

402. Witness Z, whose credibility has been questioned in other parts of the present Judgement (see in particular V.4.2, V.5.5 and 5.6) made a written statement on 18 September 1999.[472] Although this statement was taken less than five months before his testimony in court, there are inconsistencies between the two. Witness Z indicated in his statement that he learned that Prefect Kayishema was at the Mabanza communal office and "I thus went there, as many others, to hear what he had to say". He then stated:

> "Addressing the refugees, he said that he was going to look into their problem [together] with the *Bourgmestre*; I was present when he said that. He and the *Bourgmestre* went into

[471] Transcripts of 9 February 2000 p. 22.
[472] Defence Exhibit No. 65.

the latter's office. When they came out, the *Bourgmestre* told a policeman to blow his whistle to attract the people['s] attention. He addressed the refugees and told them to spend the night at the *commune* office, adding that they were to leave very early the next morning for Kibuye stadium, where their security would be ensured".[473]

403. Thus, according to Witness Z's written statement, Kayishema himself addressed the crowd of refugees before going into the Accused's office. According to Witness Z's testimony, by contrast, the witness arrived at the *bureau communal* when the Accused and Kayishema were exiting the building; and it was the Accused who addressed the crowd. (In the 1999 statement there is also mention of a whistle used by a policeman to gather the refugees, a fact omitted during testimony.)

Other Witnesses

404. Prosecution Witness A, who took refuge at the *bureau communal* for three days, until he left for Kibuye town with the other refugees in the morning of 13 April 1994, testified that he did not see Kayishema at the *bureau communal* during this period.[474] Prosecution Witness AC, a refugee at the communal office from 10 to 13 April 1994, made no mention of a visit by Kayishema. A number of Defence witnesses who were in Mabanza *commune* during this period, including Witnesses RA, BE, KA and AS, also did not indicate that they were aware of a visit by the Prefect.

405. Finally, in contrast with Witnesses O, AB and Z, Prosecution Witness G, who in this period had sought refuge at the *bureau communal*, referred in her testimony not to a meeting but rather to a telephone conversation between the Prefect and the Accused.[475] The witness affirmed the relevant passage in her prior written statement of 19 June 1999, which reads:

"Before they [the attackers from Rutsiro and Kivumo *communes*] came, *bourgmestre* Bagilishema telephoned *Préfet* Kayishema and asked for military reinforcements to guard

[473] Ibid.
[474] Transcripts of 17 November 1999 p. 71.
[475] Transcripts of 26 January 2000 (Closed session) pp. 33-34.

the refugees at the Mabanza *commune* office. The *Préfet* answered that he was the only one with 'scum' in his area to send him the scum for cleaning. These remarks were reported to Pastor Siméon ... who in turn informed the people he was hiding in his home about the remarks."[476]

The Accused

406. The Accused testified that in the evening of 12 April 1994 he was supervising night patrols. On his return to the *bureau communal*, he was astonished to see that more than 100 refugees from Rutsiro had been sent there in a bus by the prefectural authorities. The Accused telephoned the Prefect, even though it was around midnight, for an explanation.[477]

407. The Accused testified that he had asked the Prefect on several occasions for security reinforcements, which he did not receive. He had also asked that the relief organisations be alerted so that they could come to the assistance of the refugees. Instead, more refugees were being sent to the *commune*.[478]

408. The Accused told the Prefect on the phone that he was unable to work under these conditions, when no reinforcements were forthcoming, especially in view of rumours of an imminent attack on Mabanza *commune*. If the sole responsibility for the population were placed on him, he would rather resign. He asked the Prefect to see the situation for himself.[479] The Accused added: "I expressed this and I even told him that I was going to bring him the keys of the *commune* the following day on the 13th because I was tired of working in that manner."[480]

409. The Accused asserted that he did not see the Prefect on 12 April 1994. However, the Accused indicated that he had been informed that on this particular day the Prefect had passed by the communal office on the road on his way to Rutsiro, but

[476] Prosecution Exhibit No. 65.
[477] Transcripts of 5 June 2000 pp. 29-30.
[478] Ibid. p. 30.
[479] Ibid. p. 32.
[480] Transcripts of 8 June 2000 p. 188.

that Kayishema "didn't even want to look at the *bureau communal*".[481]

Findings

410. As discussed above, there are a number of inconsistencies in the testimonies of Witnesses O, AB and Z. Not only are there discrepancies among the testimonies of these three witnesses, there are also differences between the statements given by each witness and that witness's testimony.

411. The Chamber's point of departure when assessing the account given by a witness is his or her testimony in court. It should be recalled that differences between earlier written statements and later testimony in court may be explained by many factors, such as the language used, the questions put to the witness and the accuracy of interpretation and transcription. The impact of trauma on the witnesses should not be overlooked (see, in general, above II.2). However, some discrepancies cannot be thus explained.

412. Witness O, upon whom the Prosecution relies most heavily, presented a contradictory account. According to her testimony before the Chamber and her 1998 statement, the Accused travelled to Mabanza *commune* from Rutsiro with Kayishema and *gendarmes* in two vehicles, including a blue Hilux belonging to the *commune.* The witness was alone when she saw them arrive and when she overheard Kayishema speak of "scum and filth". The meeting between the Accused and the Prefect took place in the IGA building, which is some 150 to 200 metres away from the Accused's office.

413. By contrast, according to her 1995 statement, the witness was with her sister when Kayishema arrived. The witness was not explicit as to any derogatory remarks by the Prefect. The context of her statement indicates that he was unaccompanied by the Accused. There is no mention of a communal vehicle. The meeting between the Accused and Kayishema took place in the office of the Accused (which was not in the IGA building). Here, according to the statement, the Prefect told the Accused that

[481] Transcripts of 5 June 2000 pp. 39.

he had come with the *gendarmes* to kill the refugees. During testimony in the *Kayishema and Ruzindana* case in 1998, given four days before her second written statement, Witness O was asked about the two vehicles that arrived at the communal office. She answered that she was too afraid to pay any attention to the vehicles and did not know the colour of the second vehicle; in her second statement and in her testimony in the present trial she stated that it was a blue Hilux.

414. In both her statements and her testimony the witness is consistent about the Accused's remark that the refugees should not be killed in the *commune* but should be taken to Kibuye town. However, only according to her 1995 statement did she hear Kayishema tell the Accused to send the refugees to Kibuye town the next morning.

415. Witness AB, for her part, testified that Kayishema came to Mabanza *commune* unaccompanied by the Accused. He was angry, uttered derogatory remarks about the Tutsi, referring to them as "filth", and then met with the Accused in his office. The witness did not observe the meeting. However, according to her 1996 statement, while Kayishema arrived alone, he met once with the Accused outside the *bureau communal* after having first gathered the refugees. He then went into the office. By contrast, in the statement of 1999, Witness AB stated that the Accused himself arrived from Rutsiro with Kayishema. Then, in front of the refugees, they spoke between themselves about the filth to be cleaned up, after which they had a meeting in the office of the Accused. Again, the Chamber notes several differences.

416. Witness Z stated in his testimony of 8 February 2000 that, from his location at Gitikinini, he saw Kayishema's car. He went to the *bureau communal* in time to see the Accused come out of his office with the Prefect. Unlike Witnesses O and AB, Witness Z testified that the Accused, with Kayishema, gathered together the refugees and told them that they should travel to Kibuye town the next day. In his 1999 statement, the witness did not see Kayishema's car, but rather was told of his arrival at the *commune*. Witness Z's statement, in further contrast with his testimony, continues that Kayishema addressed the refugees before going into the office, and not

only after the meeting with the Accused; and the statement mentions a policeman blowing a whistle to gather the refugees, a detail absent from the witness's testimony.

417. Witness Z, unlike Witnesses AB and O, did not mention any derogatory remarks made by Kayishema, either in his statements or in his testimony. However, in his 1999 statement, the witness explained that the Prefect addressed the refugees, saying that he and the Accused were going to look into their problems. No other witness presented a similar account.

418. The Chamber has noted that Witnesses O, AB and Z maintained that there was a meeting between the Kayishema and Accused on 12 April 1994. As mentioned above, the credibility of Witnesses AB and Z has been questioned in relation to other events. Moreover, the testimonies given by the three witnesses before the Chamber differ in various respects, and over time. Even if some of the differences may be explained by the passage of time, trauma suffered by witnesses, and the context in which questions were posed, the Chamber finds that so many inconsistencies give rise to doubt as to the accuracy of any one version concerning the alleged meeting of 12 April 1994. Even assuming that there was such a meeting, only Witness O supposedly overheard the conversation between the two men. But she gave differing accounts as to where the meeting took place, and she was the only witness during the trial to testify that it occurred in the IGA building. Furthermore, she was the only witness who testified that Kayishema and the Accused arrived together at the *bureau communal*.

419. Two Prosecution Witnesses, A and AC, who were also at the *bureau communal* during the pertinent period, did not recall any visit by Kayishema. The fact that they did not see Kayishema at the communal office does not exclude the possibility that he was there. However, the Chamber is of the view that a meeting involving the most senior executive authorities of the Prefecture and the *commune* at such a critical time would have become general knowledge among the refugees at the *bureau communal*. Further doubt is added by Prosecution Witness G, who referred not to a meeting but to a telephone conversation during which the Prefect stated that

the Accused was the only one left with "scum" in his area.

420. Another remarkable feature of the evidence is Witness O's claim to have overheard a conversation to the effect that the refugees were to be transported to Kibuye town where they would be killed. This information was vital to the survival of the refugees. The witness stated that she informed her family members and other refugees nearby. However, there is no evidence before the Chamber that the few refugees who allegedly received this information discussed it among themselves, passed it on to other refugees, or declined to leave the *bureau communal* for Kibuye town. Asked why she did not depart Mabanza *commune* the next morning with the other refugees, Witness O stated, incongruously in the Chamber's view, that she had to stay behind to attend to her sister who had just given birth. Her other family members left for Kibuye town.

Conclusion

421. Taking all the above into account, the Chamber finds that it has not been established beyond reasonable doubt that on 12 April 1994 the Accused and Prefect Kayishema held a meeting at the Mabanza *bureau communal* during which they discussed how to kill the Tutsi who were gathered at the communal office. Consequently, the allegation in the first sentence of paragraph 4.20 of the Indictment has not been demonstrated. The remainder of paragraph 4.20, concerning the division of the refugees into groups and their transfer to Kibuye town, will be considered next.

3. Events in Kibuye Town from 13 to 19 April 1994

3.1 Movement of Refugees from Mabanza Communal Office to Kibuye Town

The Indictment

422. This event is covered in paragraphs 4.20 to 4.22 of the Indictment:

> "4.20 ... The refugees that had sought refuge in the communal office in Mabanza were on the instruction of Ignace Bagilishema divided into 2 groups. The first group comprising of intellectuals were put in a military truck and driven towards Kibuye and were never seen again. The second group of refugees comprising mostly of peasants were detained at the communal office in Mabanza and were subsequently transferred to Gatwaro stadium in Kibuye Town where they were killed.
>
> 4.21 On or about 13 April 1994, Ignace Bagilishema ordered members of the Tutsi population, who at his request, had gathered at the communal office for protection, to go to Gatwaro stadium in Kibuye Town, Gitesi commune.
>
> 4.22 On arrival in Kibuye town, Gitesi commune, on 13 April 1994, Ignace Bagilishema acting in concert with others including Clement Kayishema, Semanza Celestin, Nsengimana Apollinaire, Nzanana Emile and Munyampundu, divided the refugees into two groups. Ignace Bagilishema ordered the first group to seek refuge at the Catholic Church and Home St. Jean complex (hereinafter 'the complex'); and the second group to Gatwaro stadium (hereinafter, 'the Stadium') both in Kibuye town Gitesi commune."

Submissions of the Parties

423. The Prosecution alleged that on 13 April 1994 the Accused ordered the refugees gathered at the *bureau communal* to go to the Stadium in Kibuye town. The Accused followed them in the communal vehicle, and policemen prevented the refugees from departing from the main road. When the refugees reached the town, the Accused, in concert with others, divided them into two groups. One group was directed towards the Home St. Jean complex, the other towards the Stadium. The Prosecution submitted that the Accused acted pursuant to a plan decided upon at a meeting with Prefect Kayishema on 12 April 1994, and that the Accused knew or ought to have known what would happen to the refugees in Kibuye town.[482]

[482] See, in particular, Prosecution's written Closing Remarks pp. 27-28 paras. 166-173, p. 29 paras. 179-184, pp. 59-62 paras. 330-339 and para. 345.

> "I think if you accept that the genocidal intent has been formed on the 12th April, ... it is immaterial whether or not he was following them in a vehicle. Which was all in the scheme of things. If he didn't follow them himself, he asked the communal police to follow them. ... [I]s it material also to this case that the Accused was perhaps standing at the roundabout in Kibuye directing the gendarmes to send these people in one direction or the other? I say no."[483]

424. During final closing arguments, the Prosecution emphasised that "it was all done pursuant to a scheme to get these people to Kibuye Stadium, a scheme that the Accused was party to, having agreed with the Prefect".[484] Less emphasis was put on the allegation that the Accused himself accompanied the refugees.

425. The Defence submitted that the Accused decided in the morning of 13 April 1994, following a telephone call from the *bourgmestre* of Rutsiro, to advise refugees to go south, towards Kibuye town, as he feared that they would be attacked by *Abakiga* coming from the north. The Accused did not order the refugees specifically to go to Kibuye Stadium, and he did not accompany them there himself. For the Defence, had the Accused not sent the refugees to Kibuye town, they would, more likely than not, have been killed by the *Abakiga* who attacked Mabanza *commune* on 13 April 1994 and on following days. Consequently, the Accused did what he could to save the refugees. The Defence admitted that the Accused asked two policemen to escort the refugees halfway, to the border of Gitesi *commune*. The Accused telephoned Prefect Kayishema to inform him of the arrival of the refugees and to ensure that the Prefect would provide an escort for the rest of the journey.[485]

Deliberations

Witnesses

426. Prosecution Witness A, AB, AC, G, K and O had all sought refuge at the Mabanza *bureau communal* in the relevant period.

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[483] Ibid. p. 51.
[484] Transcripts of 18 October 2000 p. 49.
[485] See, in particular, Defence Closing Brief pp. 65-67 paras. 547-566 and p. 73 paras. 613-620.

427. Witness A testified that in the morning of 13 April 1994 the Accused addressed the refugees and told them to go to Kibuye where they would be safe.[486] The refugees departed on foot along the main road. According to the witness, the Accused followed in a vehicle.[487] Witness A was the only witness to have made this allegation, which will be examined in greater detail below (V.3.2). The witness testified that at the Kibuye-town roundabout, *gendarmes* directed refugees towards the Home St. Jean complex. The road leading to the Stadium eventually was opened and the *gendarmes* directed refugees towards the Stadium by shooting into the air.[488]

428. Witness AC testified that on Wednesday 13 April 1994, at 8.30 a.m., the Accused, in the company of a communal policeman, raised a flag and assembled the refugees by blowing a whistle.[489] The Accused told them that they were to take the road to Kibuye town, where "the authorities had the possibilities of ensuring their security and that ... our security would be ensured by the soldiers in Kibuye".[490] The refugees were not to use the pathways that went through the hills.[491] The witness and her family made the journey with the other refugees. She stated that there was "a long queue of animals and persons, whoever could move forward moved, there was no particular order in which people went about".[492] On arriving at the town roundabout, *gendarmes* directed the refugees to the Stadium.

429. Witness O testified that on 13 April 1994 at around 6 a.m., the Accused organised a meeting in front of the IGA building.[493] He said that the refugees "should go to the Kibuye stadium" where their security could be ensured and where they could be assisted. He also stated that there was not enough space at the communal office, that the place was becoming dirty and that some people were falling sick.[494] The refugees left shortly thereafter. The witness stayed in Mabanza *commune* to care

[486] Transcripts of 17 November 1999 p. 11.
[487] Ibid. p. 13.
[488] Ibid. pp. 17-18.
[489] Transcripts of 18 November 1999 p. 33.
[490] Ibid. p. 101.
[491] Ibid. p. 33.
[492] Ibid. p. 34.
[493] Transcripts of 24 November 1999 pp. 32 and 101-102.
[494] Ibid. p. 32.

for her sister who had given birth the night before. She did not know if the Accused or *gendarmes* accompanied the refugees.[495]

430. With reference to the night of 12 April 1994, Witness AB testified that the *Interahamwe* arrived at the communal office. They were armed with clubs, threw stones at the refugees and tried to steal their cows.[496] No other witness recalled such an incident. The next morning, according to Witness AB, at 6 a.m., she heard a whistle; the Accused gathered the refugees together and told them to go to Kibuye town as there was not enough food or space at the communal office and there was no one to ensure their security.[497] The refugees responded that they feared being killed along the way, for already they had been attacked at the communal office. The Accused said that if the refugees remained, attackers would arrive and kill them there.[498] According to the witness, the Accused added that he would provide the refugees with *gendarmes* to accompany them, and that nothing would happen to them. The Accused also said that all refugees who left the road should be found and asked to join the main group.[499] The refugees left the communal office on foot. *Gendarmes* stayed with them part of the way.[500]

431. Witness AB did not go to Kibuye town. At Kayenzi, she boarded a bus taking soldiers to Kigali. The soldiers, learning that the witness had been going to Kibuye town, warned her not to go there as the security situation was poor. The witness got off at Gitikinini (in Mabanza *commune*) and went to hide in a sorghum field.[501]

432. Witness K testified that early in the morning of 13 April 1994 the Accused announced to the refugees that the *Interahamwe* would kill them if they stayed at the communal office, for he did not have enough soldiers to protect them. The Accused told them to go to Kibuye town where there were enough soldiers to ensure their

[495] Ibid. pp. 32-33.
[496] Transcripts of 15 November 1999 pp. 52-53.
[497] Ibid. pp. 53-54.
[498] Ibid. p. 54.
[499] Transcripts of 16 November 1999 p. 66.
[500] Transcripts of 15 November 1999 pp. 56.
[501] Ibid. pp. 58-62.

436. Of other Hutu residents of Mabanza *commune*, Prosecution Witness Z testified that on 13 April 1994 the killing had already begun, particularly around Gitikinini. People came from Gihara and Mushubati. They "were Bakiga people", who chased and killed all Tutsi they met on their way.[510] Prosecution Witness I, without specifying a date, also testified to seeing attackers.[511]

437. A number of Defence witnesses testified about attacks in Mabanza *commune* following the departure of the refugees for Kibuye town.

438. Witness RA spoke of *Abakiga* arriving in the *commune* on or after 13 April 1994.[512] Witness ZJ was told by two refugees, at around 7 a.m. (date unspecified), that those gathered at the *bureau communal* had departed that same morning. The two refugees had stayed behind to gather their property. They told him that they would follow the other refugees as there was no longer any security in the *commune*. Their explanation was that some refugees from Rutsiro and Mushubati had said that they had seen many people pursue them, and that if those people arrived in Mabanza *commune* there would be no security. The two had therefore decided to go to the Prefecture where they would be afforded better security.[513]

439. Witness TP testified that one morning around 13 April 1994, between 9 and 10 a.m., he saw many persons, some carrying sticks, others machetes, going towards Kibuye town on foot with their cattle. According to the witness, they were going to the town of their own free will. The refugees were not led by police or *gendarmes*, nor were they being attacked.[514] The witness stated that he did not see the communal vehicle or the Accused along the route.[515] Later, after he returned home, two Tutsi whom he knew came to visit him. They said that due to insecurity in Rutsiro they were fleeing the *Abakiga*. In Mabanza they did not have sufficient protection because

[510] Transcripts of 8 February 2000 p. 20.
[511] Transcripts of 23 November 1999 p. 32.
[512] Transcripts of 2 May 2000 p. 43.
[513] Transcripts of 3 May 2000 pp. 67-68.
[514] Transcripts of 27 April 2000 pp. 136-137.
[515] Ibid. p. 146.

security.[502] The refugees left immediately, although without Witness K. She went to fetch her mother and four children who were hiding elsewhere. Seeing a large group of attackers approaching, they too set out for Kibuye town.[503]

433. In the Kibilizi sector, around 10 a.m., Witness K and her family came across the Accused and others in a vehicle. "I told them to take me to Kibuye and they told me they were not going there."[504] They were nevertheless taken a very short distance by the Accused, after which the witness and her family fled through the hills towards Kibuye town. Before reaching the town they turned back and later hid in a banana plantation.[505]

434. Witness G testified that on 11 April 1994, at around 8 a.m., the Accused addressed the refugees in the grounds of the *bureau communal*. He told them to go to Kibuye town where they would be better protected.[506] Witness G walked among those at the front of the column of refugees. She did not see the Accused along the way. At the roundabout she saw *gendarmes*. She testified that she knew nothing about refugees being directed to Home St. Jean. She continued on the road to the Stadium.[507]

435. Prosecution Witness AA, a Hutu resident of Mabanza *commune*, testified that the refugees left on foot for Kibuye town with their livestock, accompanied by soldiers and *gendarmes*.[508] According to the witness, "... there were some gendarmes and soldiers who wanted to kill [the refugees] there at the Communal office but Bagilishema said I will be sending you to Kibuye and that is where the Prefet is going to resolve your problem".[509] This allegation was not corroborated by another witness. The reliability of Witness AA's testimony is called into question below (V.3.4).

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[502] Transcripts of 25 January 2000 p. 88.
[503] Ibid. p. 52.
[504] Ibid. p. 53.
[505] Ibid. pp. 53-54.
[506] Transcripts of 26 January 2000 p. 12.
[507] Ibid. p. 49.
[508] Transcripts of 10 February 2000 pp. 12-15.
[509] Ibid. p. 13.

these attackers were very fast. Hence they would seek refuge at the Prefecture.[516]

440. Defence Witness BE testified that the refugees began leaving Mabanza *commune* in the morning of 13 April 1994. He did not know why they left or why they went to Kibuye town, though he had heard that the security forces of Mabanza *commune* were not in a position to protect the refugees from the advancing attackers.[517] The witness said that the *Abakiga* arrived about one hour after the last refugees had left, around 9 a.m. He saw them searching, looting and destroying houses. The witness said he hid from them, even though he was a Hutu, as the *Abakiga* had announced that Hutu who did not co-operate with them would also run into trouble.[518]

The Accused

441. The Accused testified that early in the morning of 13 April 1994 he received a telephone call from the *bourgmestre* of Rutsiro *commune*, informing him of the imminent arrival in Mabanza of attackers from the north.[519] The Accused thereupon asked a policeman to assemble the refugees by blowing his whistle. The Accused climbed on a stack of wood and told the refugees that they were in danger because assailants in large numbers were coming to kill them.[520] He advised them to go south, specifically to Kibuye town, where the authorities could provide better protection. He asked two policemen to accompany the refugees halfway to Gitesi *commune*, this being a distance of approximately ten kilometers. The Accused remained at the *bureau communal* with one policeman. He did not have time to contact the *gendarmes* stationed in Mushubati.[521]

442. The Accused explained that he thought the refugees would be better protected in Kibuye town because a company of *gendarmes* was stationed there. He thought his decision was correct given the situation, and that there would have been a massacre

[516] Ibid. p. 140.
[517] Ibid. p. 58.
[518] Ibid. pp. 59-64.
[519] Transcripts of 5 June 2000 p. 32.
[520] Ibid. p. 35.

had the refugees stayed at the Mabanza communal office. After speaking to the refugees, the Accused testified that he called Prefect Kayishema at around 6.30 a.m. to inform him that the refugees were on their way to Kibuye town because of the threat of attack by persons coming from Rutsiro *commune*. He alleged that he had asked the Prefect to ensure the security of the refugees travelling to Kibuye town.[522]

Findings

443. The evidence establishes that early in the morning of 13 April 1994, the Accused addressed the refugees and told them that they should go to Kibuye town where the authorities would ensure their security. The refugees, with their livestock, as well as two communal policemen thereupon left for the town on foot. The Chamber has noted that Witness O testified that the Accused specifically directed the refugees to go to Kibuye Stadium. The reliability of her testimony has been called into question above (V.2.6). Moreover, she is not corroborated on this particular point. Therefore, it has not been established that the Accused ordered the refugees to go to the Stadium, as alleged in paragraph 4.21 of the Indictment.

444. It is the contention of the Prosecution that the Accused acted pursuant to a plan to massacre the refugees, and therefore knew or ought to have known what was going to happen to them at Kibuye Stadium. However, the Chamber has concluded that a meeting between Kayishema and the Accused at which a plan was agreed upon has not been proved beyond reasonable doubt (V.2.6). The Accused testified that he acted out of concern for the safety of the refugees gathered at the communal office as he had been informed by the *bourgmestre* of Rutsiro about imminent attacks. Several witnesses confirmed that in the morning of 13 April 1994 the Accused referred to attackers. Witnesses K, Z and BE actually saw attackers or *Abakiga* in Mabanza *commune* that morning. Witness ZJ testified in the same way on the basis of a conversation with two refugees. Other witnesses gave similar testimonies, but were less precise about the date. Moreover, refugees who remained at the *bureau communal* were killed by attackers on 13 and 14 April (see V.4.3). Under these

[521] Ibid. pp. 39-40.
[522] Ibid. pp. 37 and 40-41.

circumstances, the Accused's explanation cannot be rejected as implausible, even if the witnesses did not mention that he referred specifically to the *Abakiga* when directing the refugees to go to Kibuye town.

445. The Prosecution's allegation that the Accused by sending away the refugees was acting pursuant to a preconceived plan with Kayishema has not been demonstrated. Moreover, the evidence considered this far does not show that the Accused ought to have known what would happen to the refugees once in Kibuye town.

446. The Chamber finds no evidence to support the allegation in paragraph 4.20 of the Indictment that the refugees at the *bureau communal*, on the instructions of the Accused, were divided into two groups: intellectuals and peasants.

447. The Accused denied that he went with the refugees to Kibuye town. Only Witness A testified that the Accused travelled with the refugees. As discussed below (V.3.2), it cannot be ruled out that the Accused may have accompanied the refugees part of the way, but the evidence is not conclusive.

448. Finally, no evidence has been presented that the Accused divided the refugees into two groups at the Kibuye-town roundabout. The allegations in paragraph 4.22 of the Indictment therefore have not been substantiated.

3.2 Detention and Maltreatment of Refugees at Gatwaro Stadium, Kibuye Town, 13-17 April 1994

3.2.1 Introduction

The Indictment

449. The Accused's alleged liability for inhumane acts committed against Tutsi refugees at Gatwaro Stadium (the "Stadium") in Kibuye town is set out in paragraphs 4.23, 4.24 and 4.31 of the Indictment:

> "4.23 By about 17 April 1994, thousands of men, women and children from various locations sought refuge in the Catholic Church and Home St. Jean Complex (the Complex) and at the Gatwaro stadium located in Kibuye town. These men, women and children were unarmed and were predominantly Tutsis. They were in the Complex seeking protection from attacks on Tutsis which had occurred throughout the Prefecture of Kibuye.
>
> 4.24 After people gathered in the complex and at the stadium, these locations were surrounded by persons under Ignace Bagilishema's control, including members of the Gendarmerie Nationale and communal policemen. These persons prevented the men, women and children held therein from leaving, thus denying them access to basic amenities such food and water for several days.
>
> ...
>
> 4.31 Ignace Bagilishema, during the months of April, May, and June 1994, in Mabanza, Gitesi, and Gisovu communes, Kibuye Prefecture, in the Territory of Rwanda, did commit other inhumane acts including but not limited to, persistently searching for Tutsis, separating Tutsis from other ethnic or racial groups, beating Tutsis, knowingly leading Tutsis to the massacre sites, and unlawfully confining the Tutsis at the commune office and Gatwaro Stadium without water, sanitation or food, thereby forcing the Tutsis to eat grass."

Submissions of the Parties

450. According to the Prosecution, following the dispatch of refugees from Mabanza to the Stadium in Kibuye town, persons under the Accused's control, including *gendarmes* and communal policemen, detained the refugees within the Stadium and denied them access to basic amenities for several days.[523] The Prosecution alleges that this unlawful confinement of Tutsi civilians at the Stadium without water, sanitation or

food, which was the cause of great suffering, amounts to a crime against humanity (inhumane acts), for which the Accused is liable.[524]

451. The Defence does not contest the allegation at paragraph 4.23 of the Indictment.[525] However, the Accused, according to the Defence, did not go to Kibuye town in the period 13 April to 19 April 1994.[526] The Defence submits that the Prosecution has failed to prove beyond reasonable doubt that subordinates of the Accused detained the refugees at the Stadium.[527] The Defence disagrees that refugees were prevented from leaving the Stadium or that they were dying of hunger, and states that up to 18 April 1994 only two *gendarmes* were guarding the Stadium.[528] At any rate, the Accused cannot be held responsible for what allegedly happened at the Stadium because he exercised neither *de jure* nor *de facto* authority over persons in the *commune* of Gitesi, where Kibuye town and the Stadium were situated.[529]

Deliberations

3.2.2 A Preconceived Plan?

452. The Prosecution argued that the Stadium-related crimes occurred pursuant to a preconceived plan, and that the Accused was aware of this plan. In support of this, the Prosecution argued, in the first instance, that a decision to massacre Tutsi was taken at a security meeting on 9 April 1994 in Kibuye, at which the Accused was present. The Chamber has set this allegation aside as unsubstantiated (see V.2.4 above).

453. The Prosecution also alleged that a meeting between the Accused and Kayishema took place in the evening of 12 April 1994, at Mabanza's *bureau*

[523] Prosecution's written Closing Remarks pp. 30-32 paras. 189-198 and pp. 109-110 paras. 206-209.
[524] See also Count 5 of the Indictment.
[525] Defence Closing Brief p. 67 para. 566.
[526] Ibid., for example, p. 67 para. 564, p. 69 para. 584 and p. 72 para. 612; Rejoinder para. 249.
[527] Defence Closing Brief p. 68 para. 574.
[528] Ibid. pp. 68-69 paras. 577-580.
[529] Ibid. p. 68 paras. 573 and 575.

communal. This was emphasised, in particular, during the oral closing arguments.[530] According to the Prosecution, it was at this meeting that Kayishema and the Accused decided to send the refugees to Kibuye, where ultimately they would be killed. The Prosecution argued that the Accused formed his genocidal intent at the alleged meeting. The Chamber has found that the Prosecution failed to prove that such a meeting took place (see V.2.6 above).

454. Furthermore, the Prosecution submitted that the Accused attended a security meeting in Kibuye town on 13 April 1994, convened by Prefect Kayishema. It was attended by the *bourgmestres* of the nine communes of Kibuye, including the Accused, Commander Jabo of the *gendarmerie* and the Prosecutor of Kibuye. At the meeting the decision allegedly was taken to kill the Tutsi gathered at the Home St. Jean complex (the "Complex") and the Stadium. The Prosecution relied on Kayishema's testimony during his trial that a security meeting was held in Kibuye town on 13 April 1994. The Prosecution also argued that the meeting of 13 April 1994 would correspond to that referred to in an entry in the register of Mabanza *commune's* out-going mail, indicating that on 12 April 1994 the Accused wrote to *conseillers* and political party leaders in Mabanza *commune* informing them of a planned security meeting.[531]

455. In reply, the Defence argued that while the transcripts of the direct examination of Kayishema do refer to a "security council meeting" of 13 April 1994, the meeting was "restricted", meaning that *bourgmestres* were not invited to participate.[532] In relation to the register of out-going mail, the Accused testified that because communal staff had not come to work on 12 April 1994, on that day he wrote to them requiring them "to come to work as quickly as possible on 13 April".[533] He also wrote a second letter on the same day, calling all *conseillers* and political party leaders to a security meeting on 13 April 1994.[534] This was not related to the restricted security meeting in Kibuye town.[535]

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[530] Transcripts of 18 October 2000, in particular pp. 7-12.
[531] Prosecution's written Closing Remarks pp. 62-63 paras. 346-347.
[532] Transcripts of 4 September 2000 p. 148 and 5 September 2000 pp. 188-120.
[533] Entry 0277 of Mabanza *commune*'s out-going mail register (Defence Exhibit No. 18).
[534] Ibid. entry 0278.
[535] Transcripts of 6 June 2000 pp. 97-100.

456. The Chamber notes that the Prosecution did not follow up the above allegation during its closing arguments on 18 October 2000. Entry no. 0278 in the Mabanza *commune* register of out-going mail does not refer to a security meeting of the Prefect with *bourgmestres* in Kibuye town but only to a security meeting of *conseillers* and political party leaders in Mabanza *commune*. The register of in-coming mail does not mention any letter inviting the Accused to a security meeting on 13 April 1994.[536] Therefore, the Chamber finds that the Prosecution has failed to prove that the Accused participated in a security meeting in Kibuye town on that day.

457. There is no other evidence that the Accused took part in a plan, or had knowledge of a preconceived plan, to exterminate the Tutsi refugees at the Stadium, or elsewhere in Kibuye town, in April 1994. The Prosecution argued that the Accused would not have sent a large number of refugees to Kibuye town without prior consultation, and that the subsequent massacres indicate that there was such a plan.[537] The Accused's version was that he received a telephone call from his colleague in Rutsiro in the morning of 13 April 1994 alerting him to the fact that the Abakiga were heading to Mabanza *commune*. The Accused therefore advised the refugees to go towards Kibuye town. He also testified that he informed the Prefect once the refugees had left the communal office. The Chamber notes that a number of Tutsi remaining in the *commune* were in fact killed by the Abakiga on 13 April 1994. Therefore, the evidence supports the Accused's version.

458. Consequently, the Chamber is unable to conclude that the Accused was aware of a plan to exterminate the refugees by 13 April 1994. His criminal liability, if any, must therefore be decided on the basis of the subsequent events.

3.2.3 Description of Gatwaro Stadium

459. By way of introduction, the Chamber will give a brief description of Gatwaro Stadium in Kibuye town. The description is based on the evidence produced in court,

[536] Defence Exhibit No. 19.

including photographic exhibits, as well as the Chamber's visit to Kibuye Prefecture (II.1 above). The stadium is an enclosed rectangular field, approximately 100 metres on its east-west sides and 80 metres north-south. Its northern side borders a steep hill, Gatwaro Hill, which rises at a sharp angle from the edge of the field. A brick wall of variable height, generally between 2 to 3 metres high, defines the other sides of the Stadium.

460. Two spectator stands face each other at opposite ends of the field. The "smaller stand", abutting the eastern wall, has the appearance of a long shed. It is a low structure with a corrugated-iron roof supported by numerous columns. Apart from the wall at its back, its sides are open. A lip on the western edge of the roof slopes down towards the field. A six-metre long, two-metre wide porch projects out into the field from the middle of the structure, its roof continuing from the lip and sloping down at the same angle.

461. The "larger stand" abuts the western wall. It is a modern structure, with stepped seating and a high roof sloping up from the wall, over the field. By contrast with the smaller stand, it has fewer and finer structural supports and offers excellent visibility onto the field and good visibility on its two sides. The larger stand is closest to the Stadium's "main entrance", which is a few metres east of the south-western corner of the field.

462. Two other entrances, on either side of the smaller stand, were sealed and not used during the events. A hospital was located immediately to the west of the Stadium. Parallel to the southern wall of the Stadium runs a road which rises towards the east. About 700 metres away, in the eastern direction, is Kibuye town roundabout.[538]

3.2.4 Conditions at the Stadium – Deliberations

463. The Chamber will first assess the evidence in order to decide whether the refugees were detained at the Stadium, whether they were treated inhumanely, and whether any maltreatment inflicted upon them was such as to reach the legal threshold

[537] Transcripts of 18 October 2000 p. 38.

of "inhumane acts". The testimonies of Prosecution Witnesses A, AC and G, and Defence Witness CP, are relevant to these questions. The Chamber will then consider whether the Accused can be held criminally responsible for such acts.

Witness A

464. Prosecution Witness A, who in 1994 was sixteen years old, travelled with the mass of refugees from Mabanza's *bureau communal* to Kibuye town on 13 April 1994. He was trailing the crowd when he set out: "I was behind but as we moved on, I was going fast and I overtook certain people".[539] The witness testified that they were followed by the communal vehicle. Travelling in it were the Accused, a policeman, two *gendarmes* and the communal driver, Nshimyimana. The policeman and the *gendarmes* were armed.[540] By the time the witness reached Kibuye town he was "in the middle of the convoy of refugees".[541] (The question of the presence of the Accused at the Stadium will be discussed below.)

465. Witness A did not recall how long the journey to Kibuye town took, "but it [was] a long distance".[542] He said that as he and his fellow refugees arrived in town, the road to the Complex was being blocked off, and the refugees were forcibly directed by *gendarmes* towards the Stadium.[543] When the witness arrived at the Stadium, the gates were closed. He estimated that it was around 2 p.m. but added that "I didn't have a watch with me and the hour I have given is a rough estimate".[544] Armed *gendarmes* duly opened the gates. They searched for and took away the refugees' traditional weapons before allowing them inside. The refugees from Mabanza were the first to arrive at the Stadium.[545]

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[538] Transcripts of 27 October 1999 p. 123.
[539] Transcripts of 17 November 1999 p. 17.
[540] Ibid. pp. 12-14 and 72-73.
[541] Ibid. p. 75.
[542] Ibid. p. 15.
[543] Ibid. pp. 17-18. According to the witness, shots were fired by the *gendarmes* to redirect refugees towards the Stadium.
[544] Ibid. p. 74.
[545] Ibid. pp. 19-20.

466. Witness A testified that *gendarmes* guarded the main entrance and allowed only refugees to enter. He did not leave the Stadium.[546] Some managed to fetch water from the nearby hospital, from a path behind the Stadium. When asked if he had water himself, Witness A said that it was the "young people who could go and fetch some from the hospital who had some".[547] Of those who attempted to fetch water in this manner some were beaten with clubs or killed by assailants running after them and hitting them with bladed weapons.[548] It is not clear from Witness A's testimony who these attackers were. The witness described how some refugees resorted to eating their cattle. The animals were slaughtered with weapons which refugees had managed to bring into the Stadium.[549] The meat was not well cooked because of the lack of firewood. Leaves were used to light fires.[550]

467. Asked whether government officials took any measures to prevent criminal activity against the refugees at the Stadium, the witness replied: "No I didn't see any authority or any official taking the initiative to ensure the security of the refugees. However even the *Interahamwe* that we ourselves arrested were released."[551] The witness was not asked to clarify this last point.

Witness AC

468. Prosecution Witness AC testified that on Wednesday, 13 April 1994, at around 8.30 a.m., the refugees left Mabanza's *bureau communal* for Kibuye town.[552] She walked in the middle of the group and could not see what was happening behind her.[553] The witness testified that "[w]e could see Hutus alongside the road"; these onlookers made attempts to steal the refugees' cattle. According to the witness, four refugees were killed trying to recover their cattle, including one Kalinda from Buhinga *secteur*,

[546] Ibid. p. 25.
[547] Ibid. p. 26.
[548] Ibid. p. 27.
[549] Ibid. p. 63.
[550] Ibid. pp. 25-26.
[551] Ibid. p. 63.
[552] Transcripts of 18 November 1999 p. 94.
[553] Ibid. p. 35.

who was known to the witness.[554] She also mentioned that she met a vehicle with *gendarmes* heading in the opposite direction to that of the witness.[555]

469. Upon arriving in town, Witness AC and others were directed by *gendarmes* to the Stadium.[556] They arrived at its gates at around 3 p.m. (In cross-examination, the witness said that they arrived there at 11 a.m.[557]) All machetes, sticks and spears had to be left at the entrance.[558] On the same day, in the afternoon, some refugees were hit by *gendarmes* when they attempted to follow the Accused as he was leaving the Stadium.[559] (The alleged presence of the Accused will be examined below.) After the Accused had left, the *gendarmes*, who were positioned on either side of the entrance, said that no one was to leave the Stadium. They only allowed people in. The *gendarmes* were joined by soldiers on Thursday, and civilians and policemen on Friday.

470. According to the witness, while at the Stadium, she and the other refugees "lived like animals".[560] They ate grass: "We gathered the grass, we chewed it and swallowed the juice from it."[561] They had no privacy: "we were shown a certain area. There was no hole. [P]eople in the neighbourhood could see you attending to the call of nature".[562] They were not allowed to go out to get drinking water.[563]

471. The witness testified that on Friday, 15 April 1994, some Hutu came to steal the refugees' cattle. By Saturday morning people were feeling very hungry. The witness and others killed a cow, using machetes they had managed to bring in with them, and ate the roasted meat.[564] The refugees took turns slaughtering their cows. Those who had no meat continued to eat grass.[565] The witness said that she ate more grass on Sunday,

[554] Ibid. pp. 35-36.
[555] Ibid. pp. 35-36.
[556] Ibid. pp. 36-37.
[557] Ibid. p. 93.
[558] Ibid. pp. 37-39.
[559] Ibid. p. 68.
[560] Ibid. p. 42.
[561] Ibid.
[562] Ibid.
[563] Ibid. pp. 42-43.
[564] Ibid. p. 46.
[565] Ibid.

17 April 1994.[566]

472. Asked if law-enforcement officers or any other officials, including the Accused, took any measures to prevent criminal activity and to ensure the security of the refugees at the Stadium, the witness replied: "I didn't see anyone."[567]

Witness G

473. Prosecution Witness G testified that she reached the Stadium with other refugees from Mabanza on 11 April 1994. This, according to the witness, was the date on which refugees left Mabanza's *bureau communal* for Kibuye town. They remained there until 18 April 1994.[568] The refugees encountered *gendarmes* at the Kibuye town roundabout.[569] When they arrived at the Stadium, soldiers ushered them inside.

474. The refugees "had a difficult life" at the Stadium.[570] The soldiers maltreated them as they entered, hitting them with the butts of their rifles. At other times they stepped on the feet of those sitting on the ground. The witness estimated that there were about 20,000 Tutsi men, women and children in the Stadium.[571] They were not allowed to leave.[572] Some had been able to bring a cow or a mattress or other belongings onto the grounds. The witness said she noticed that people were dying of hunger.[573]

Witness CP

475. Defence Witness CP was a civil servant who lived in Kibuye town.[574] He

[566] Ibid. p. 49.
[567] Ibid. p. 100.
[568] Transcripts of 26 January 2000 pp. 11 and 14.
[569] Ibid. p. 49.
[570] Ibid. p. 13.
[571] Ibid.
[572] Ibid. p. 21.
[573] Ibid.
[574] Transcripts of 24 May 2000 p. 7. Witness CP's earlier statement of 27 February 2000 indicates that in April 1994 he was a teacher (Defence Exhibit No. 79).
[575] Transcripts of 24 May 2000 p. 8.
[576] Ibid. pp. 9-11.

testified that on 17 April 1994, at about 10 a.m., he went to the town roundabout. This was a place where locals liked to meet.[575] After a while he saw a large number of people coming along the Mabanza-to-Kibuye town road. The witness estimated that there were about five to six hundred men, dressed in an unusual manner: covered with branches, wearing banana leaves, and each with a string around his head. They were armed with traditional weapons and were singing "let us exterminate them".[576] The witness later referred to these men as *Abakiga*.[577]

476. The *Abakiga* tried to enlist others at the roundabout to assist them in their cause. The witness did not see the Accused in the crowd. He did not see any officials attempting to control this activity.[578] He hurried away. Not everyone followed suit, with the result that some of those present ("bandits", according to the witness) were forced to join the *Abakiga*.[579] The witness went to the Gitesi *bureau communal* where he stayed for two to three hours.

477. Witness CP did not go to the Stadium until 18 April 1994.[580] As he walked back past the Stadium he saw that the gates were open. There were two *gendarmes* guarding the entrance.[581] There were no vehicles about.[582] The witness noticed livestock with the refugees inside the Stadium.[583] One of the refugees called out to Witness CP from within the Stadium. It was a former schoolmate. His friend asked a *gendarme* for permission to speak to the witness and, once authorised, he was able to step outside.[584] The witness testified:

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[577] Ibid. pp. 70 and 76.
[578] Ibid. pp. 21 and 86-88.
[579] Ibid. pp. 15 and 24.
[580] Ibid. p. 36.
[581] Ibid. pp. 31 and 39.
[582] Ibid. p. 38.
[583] Ibid. pp. 47, 57 and 71-72. In a statement taken on 27 February 2000, Witness CP declared about the division of refugees at the town roundabout: "On arriving in Kibuye, those who owned small or major livestock moved towards the stadium. There was enough space for their livestock in the stadium. The others went to the church premises and to 'Home St. Jean'." (Defence Exhibit No. 79.)
[584] Transcripts of 24 May 2000 pp. 39-40.
[585] Ibid. p. 32.

"From what I know, I know people, other people I knew who could go in and out of the stadium without any hindrance. I do not know whether these people needed authorization before leaving the stadium but I know that where we lived there were people who came to see us and go back without any hindrance".[585]

478. The witness added that refugees could leave the Stadium, go to their homes, and then return. (He did not refer to his own experience to illustrate his statement). He also stated that some refugees came to his house.[586] The witness nevertheless acknowledged that there must have been constraints on the refugees' freedom of movement, "or they would have been able to go elsewhere. I don't know how all this was organised".[587]

3.2.5 Conditions at the Stadium – General Findings

479. The Chamber will now consider the three questions set out at the head of this section (see paragraph 463).

(i) Were the Refugees detained at the Stadium?

480. It is clear that the refugees from Mabanza *commune* who ended up at the Stadium were directed to go to there. Witness A testified that on approaching Kibuye town he and others were steered to the Stadium by *gendarmes* who had blocked off other routes and were forcibly directing the crowd. This early assumption of control over the refugees was confirmed also by Witnesses AC and G.

481. Entry into, and exit from, the Stadium were strictly controlled. Witnesses A and AC testified that *gendarmes* searched or removed weapons from refugees as they entered the Stadium. *Gendarmes* remained on guard at the gates. To obtain water refugees had to leave the Stadium surreptitiously. Those discovered were beaten or killed. The refugees were not allowed to go out to obtain food. Their only options were to eat their cattle or to eat grass. According to Witness AC, some refugees who attempted to follow the Accused out of the Stadium were beaten back by the guards.

[586] Ibid. p. 66.

482. Witness CP, who was a resident of Kibuye town, said that refugees could leave the Stadium as they wished. He did not provide a concrete example of such free movement. He conceded that authorisation may have been necessary. This is indeed apparent from the witness's only example of contact with a refugee at the Stadium: his former school acquaintance had to obtain the permission of a *gendarme* before he was allowed out to speak to the witness.

483. Armed *gendarmes* remained at the gate of the Stadium up until the day of the attack (Witness CP). They were joined by soldiers on the second day, policemen and civilians on the third day (Witness AC). On the day of the attack the Stadium was sealed off (see V.3.4 below).

484. In the Chamber's view, it has been established that refugees from Mabanza *commune* were effectively detained at the Stadium from the moment of their arrival there on 13 April 1994 until the day of the attack, on 18 April 1994.

(ii) The Treatment of the Refugees

485. The three Prosecution witnesses who were refugees at the Stadium testified as to difficult living conditions there. It appears that a large number, perhaps thousands, of refugees had been directed to the Stadium on and following 13 April 1994. Food, water and sanitary facilities were in short supply or non-existent.

486. Witness A testified that some refugees who attempted to fetch water from the nearby hospital were chased down and beaten or killed. Witnesses AC and G testified that the guards were violent. According to Witnesses A and AC, the authorities took no measures to stem this violence or to provide for the safety of refugees.

487. Those responsible for the detention of the refugees did not supply them with food or water. Witnesses A, AC and G testified that some refugees were able to feed off livestock they had brought with them. However, others went hungry and thirsty

[587] Ibid. p. 64.

over the five days prior to the attack. Witness AC said that the refugees chewed grass for its juice and for sustenance. There were no sanitary facilities at the Stadium.

488. The Chamber is convinced by the evidence that the treatment of refugees at the Stadium was unacceptable.

(iii) Was the Maltreatment Inflicted upon the Refugees such as to Reach the Legal Threshold of "Inhumane Acts"?

489. The Chamber's definition of "inhumane acts" was presented above (see III.3.2):

> "'[O]ther inhumane acts' includes acts that are of similar gravity and seriousness to the enumerated acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, or persecution on political, racial, and religious grounds. These will be acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity. As for which acts rise to the level of inhumane acts, this should be determined on a case-by-case basis."

490. The confinement of a large number of people on exposed ground without water, food or sanitary facilities will amount to an inhumane act if the act is deliberate and its consequences are serious mental or physical suffering or a serious attack on human dignity. "Seriousness" is to be understood as being on a par with other acts proscribed by Article 3 of the Statute.

491. In the present case, the confinement lasted at least five days. In this amount of time a person may die of thirst, or may suffer seriously from hunger. There is no evidence that any refugee actually died for lack of water or food, although, according to Witness A, some people were killed while trying to fetch water. Nevertheless, the evidence suggests that by the fifth day the physical suffering of most refugees must have been extreme.

492. Moreover, confinement of a large number of people under conditions described above necessarily constitutes a serious attack on human dignity.

493. There is no doubt that the refugees of Mabanza were confined at the Stadium deliberately. There is no evidence of any care extended to the refugees. On the contrary, the evidence is of an intensifying assault on the physical and mental condition and human dignity of the refugees, culminating in an all-out attack on 18 April 1994.

494. The Chamber therefore finds that the maltreatment of refugees at the Stadium during the period 13 April 1994 up until the day of the attack, on 18 April 1994, amounts to "inhumane acts", as covered by Article 3 (i) of the Statute.

3.2.6 Was the Accused Present at the Stadium 13-17 April 1994? - Deliberations

495. In view of the above finding, the Chamber will now consider whether the Accused was present at the Stadium in the period of 13-17 April 1994 and whether he in any way contributed or consented to the maltreatment of the refugees. As a preliminary point, the Chamber notes that Witnesses G and CP, two of the five witnesses giving evidence relevant to this period, did not see the Accused. The Accused's responsibility for the conduct of other persons will be considered further below. The Chamber will now consider the evidence as to the location and actions of the Accused in the period 13 to 17 April 1994

Wednesday 13 April 1994

496. Witness A testified that the Accused followed the refugees in a vehicle from Mabanza *commune* towards Kibuye town. At some point along the way the witness passed two buses carrying *gendarmes*. The Accused stopped alongside them to talk.[588] Witness A confirmed that he had witnessed this scene.[589] (Witness AB, a fellow refugee, encountered a bus transporting "soldiers" coming from the direction of Kibuye town.[590]) It would seem that this was the last time that Witness A saw the Accused

[588] Transcripts of 17 November 1999 p. 31.
[589] Ibid. p. 74.
[590] Transcripts of 15 November 1999 p. 59.
[591] "[Q.] Did Mr. Bagilishema follow you all the way to Kibuye Stadium on the 13th? [A.] Yes, he

before reaching the Stadium.[591] While he was waiting for the Stadium gates to be opened, at around 2 p.m. by his estimation, he saw the Accused.[592]

497. Later in the course of his testimony, Witness A insisted that there was no question as to his ability to recognise the Accused:

> "[Q.] Witness, how can you be so sure that it was Bagilishema you saw on all these occasions, what makes you so sure?
>
> [A.] I knew him before then.
>
> [Q.] How well did you know him before then?
>
> [A.] It's not possible that I would not know our Burgomaster and I was so close to these people that I could identify their faces."[593]

498. Witness A's earlier statements of 1 February 1996 and 29 June 1999 do not allege that the Accused followed the refugees any part of the way to the Stadium.[594] Nor do they state that the witness saw the Accused at the Stadium on 13 April 1994.

499. Witness AC testified that at around 3 p.m. on this day, she was in the Stadium close to the gates when she saw the Accused, in civilian clothing, and Semanza arrive in the communal vehicle. The Accused, who was unarmed, "at one point attempted to enter the stadium but he didn't". She testified that he "spoke to the people who were in the stadium and asked if the people who he sent had arrived".[595]

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followed us to Kibuye, but along the way we encountered two buses transporting gendarmes. He stopped to speak. He then joined us in Kibuye. But that was before the gates of the Stadium were opened." Transcripts of 17 November 1999 p. 31. The English version has been aligned to the French text (p. 37).

[592] Ibid.

[593] Ibid. p. 56. Moreover, in his statement of 29 June 1999, Witness A declared that the Accused "was a family friend" (Defence Exhibit No. 7).

[594] Defence Exhibits 6 and 7, respectively.

[595] Transcripts of 18 November 1999 p. 39. French version: "Bagilishema a fait quelques pas, comme s'il voulait entrer au stade, mais il n'y est pas entré. Mais, par contre, il s'est adressé aux gendarmes qui gardaient le stade et leur a demandé: 'est-ce que les gens que j'ai envoyés sont arrivés?'"

500. The witness marked a photograph indicating the location where she was standing when she saw the Accused.[596] She said: "He came and he entered, he took a few steps into the Stadium."[597] She also indicated the place where the Accused's vehicle was parked outside the wall enclosing the Stadium. She explained: "The wall is not very high, but someone who is inside cannot see a person who is outside the wall".[598] Asked how she could have seen a car parked on the road outside, she replied that the Accused came in and went out again, and as he left some refugees including herself followed him towards the entrance. The *gendarmes* hit them. At the entrance she saw the Accused getting into the vehicle.[599] "After his departure the *gendarme[s]* said no one was to get out of the stadium".[600] Apart from the *gendarmes* guarding the gate, the witness stated that she did not see any other security personnel on that day.

501. Witness G testified that she did not see the Accused when the refugees left for Kibuye town: "We left him at the communal office. He had just told us to leave for Kibuye. How could I have seen him on the road?" she exclaimed.[601]

502. Other Prosecution witnesses, who did not go to Kibuye town on 13 April 1994, testified as to the Accused's presence in Mabanza *commune* at various times during that day. Witness AB, without specifying a time, said that from her hiding place at Gitikinini she saw the Accused inciting people to attack Karungu.[602] Witness H testified that at around 8 a.m. on 13 April 1994, he saw the Accused in the communal vehicle with *Interahamwe* going in the direction of Karungu's house (see V.4.1 below).[603]

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[596] Ibid. pp. 63-67, and Prosecution Exhibit No. 60. The marked photograph is in the possession of the Chamber.
[597] Ibid. p. 67. French version: "Il est venu, il est entré, il a fait quelques pas vers l'interieur du stade" (p. 83).
[598] Transcripts of 18 November 1999 p. 67.
[599] Ibid. p. 68. French version: "Le bourgmestre Bagilishema il est venu, il est entré, il a dit les mots dont je vous ai dit... parlé, ensuite il est sortie" (p. 84).
[600] Ibid. p. 39.
[601] Transcripts of 26 January 2000 p. 49.
[602] Transcripts of 15 November 1999 p. 74.
[603] Transcripts of 19 November 1999 pp. 37-38 and 40 and 22 November 1999 pp. 9-10.

503. Witness K alleged that she and her family were still in Mabanza *commune* on 13 April 1994, when at around 10 a.m. or, at any rate, "a long time" after the other refugees departed for Kibuye town, they encountered the Accused driving a vehicle with many persons on board, including assistant *bourgmestres* Semanza and Nsengimana.[604] The witness assumed that the Accused was headed for Kibuye town and requested that she be taken there too because the attackers were close by.[605] However, "they told me they were not going there".[606] Witness K boarded the vehicle anyway and was taken a short distance to a place close to Kibilizi Church, where the Accused told her to "get down".[607]

504. Prosecution Witness J testified that on 13 April 1994 *Interahamwe* from the Gitikinini neighbourhood arrived at her house in Rubengera and proceeded to beat her and loot her house.[608] After the incident, when the *Interahamwe* had removed her property outside the house, the witness saw the Accused arrive on foot in the company of Commander Jabo and two policemen.[609] She could see the communal vehicle in the distance. The time was around 10 a.m.[610] The witness said:

> "On that day, people went to the stadium. They [reference includes the Accused] accompanied the people all the way to the stadium. They came to ... my house after having accompanied the people to the stadium".[611]

505. Witness J alleged that the Accused arrived at her house when the *Interahamwe* and the property they had taken were still at the scene and "the Burgomaster said that the property of the Tutsi should stay there, while ... the Tutsis who were to be killed would be sent off."[612] The Accused dispatched one of the *Interahamwe* to fetch Witness J's husband, after which the Accused and Jabo "left immediately".[613]

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[604] Transcripts of 25 January 2000 pp. 90-91.
[605] Ibid. pp. 52-53.
[606] Ibid. p. 53.
[607] Ibid. p. 92.
[608] Transcripts of 31 January 2000 p. 4 (closed session).
[609] Ibid. pp. 5-6 and 41.
[610] Ibid. p. 43.
[611] Ibid. p. 45.
[612] Ibid. p. 6.

506. In her earlier written statement of 8 July 1999, which was generally consistent with her testimony, Witness J described the same incident without being precise about the time (from the context it is clear, however, that it occurred before 2 p.m.).[614]

507. The Accused testified that on 13 April 1994 he woke up intending to resign his post.[615] At 6 a.m. he received a call from the *bourgmestre* of the neighbouring *commune* of Rutsiro, who informed him that the *Abakiga* were headed for Mabanza *commune* with the intention to kill the refugees at the communal office and also to kill the Accused for his practice of hiding Tutsi.[616] The Accused went to the communal office to warn the refugees of the danger.[617] He assembled them and asked them to flee south, towards Kibuye town.[618] He assigned two policemen to accompany them part of the way, while he remained with one policeman at the *bureau communal* (see V.3.1 above).[619]

508. The Accused testified that after the departure of the refugees, at around 6.30 a.m., he telephoned the Prefect. From the communal office he went to Pastor Cyuma's house to ask for his advice. In the meantime, according to the Accused, Mabanza *commune* was invaded by a large number of attackers from Rutsiro.[620]

509. The Accused said that from the Pastor's house he saw, at Gitikinini, a crowd of people armed with traditional weapons going in the direction of the *bureau communal.* The Accused went home to his family.[621] The Abakiga, on their way to the communal office, found some "peasants" in hiding, who then fled towards the *bureau communal* and seven or eight of them were killed there.[622] When the *Abakiga* found the communal office otherwise deserted, they split into several groups, some going off to find

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[613] Ibid. p. 8.
[614] Defence Exhibit No. 63.
[615] Transcripts of 5 June 2000 pp. 32-33.
[616] Ibid. p. 33.
[617] Ibid. pp. 35-36.
[618] Ibid. p. 37.
[619] Ibid. p. 40.
[620] Ibid. pp. 14-15.
[621] Ibid. pp. 47-48 and 106; transcripts of 8 June 2000 p. 195.
[622] Transcripts of 5 June 2000 pp. 125 and 129; 8 June 2000 pp. 196-197.

Karungu (see V.4.1 below) and others coming to the house of the Accused.[623]

510. In front of his house, about one hundred *Abakiga* "threatened me, telling me I am an Inyenzi, an Inkotanyi".[624] The Accused's family was inside. The *Abakiga* were asking him where he had hid the Tutsi who had been at the communal office.[625] The Accused testified: "seeing how ferocious they were, I gave them ten thousand Francs for them to leave my house and they left".[626]

511. Defence Witness RJ, a Tutsi, who at the time was living with her husband in Kigali, but who had returned to Mabanza *commune* in March 1994, testified that on 8 April 1994, when some of her family went to the *bureau communal*, she and two of her children sought refuge at the house of the Accused.[627] The wife of the Accused was a childhood friend of the witness.[628] They hid in the servants' quarters in the courtyard of the main house. After two days a cousin of Witness RJ named Chantal, also a Tutsi, joined them.[629] She was pregnant. They remained in hiding in the Accused's house for one month.[630] Witness RJ said that one day (she did not give a date) the Accused "came to see us ... because the *Abakiga* were coming to attack and he wanted to warn us":

> "He advised us to close the door, and that's what we did. ... We heard the noise that they were making during the attacks, and we could also hear the whistles they were blowing, but we didn't see them with our own eyes."[631]

512. According to the Accused, the *Abakiga* brought "total chaos" to Mabanza.[632] As they departed the *commune*, delinquents and thieves began pillaging everywhere. The Accused said that he went from place to place trying to stop them.[633] At the school complex he met Witness J, who had been attacked; "when the bandits saw me they

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[623] Transcripts of 5 June 2000 pp. 48; 8 June 2000 pp. 206-207.
[624] Transcripts of 5 June 2000 pp. 107 and 108.
[625] Ibid. pp. 108-109.
[626] Ibid. pp. 107 and 109.
[627] Transcripts of 23 May 2000 pp. 6-8, 10 and 12-13.
[628] Ibid. p. 21.
[629] Ibid. p. 17.
[630] Ibid. p. 14.
[631] Ibid. p. 15. See also (in another context) IV.4.7 of the present Judgement.
[632] Transcripts of 23 May 2000 p. 113.

fled".[634] The time was between 11 a.m. and noon.[635] The Accused left a policeman with Witness J to fend off any further attacks. He then went to the *bureau communal* where he hoped to find more policemen to help him with the situation.[636] At the office he came upon Major Jabo, the *gendarmerie* commander based in Kibuye town. Jabo told him "that the refugees had got to Kibuye and that he was coming to assess the security situation in Mabanza".[637] (The Accused sought to discredit Witness J's allegation that Jabo was with him when he came to her house earlier that day.[638])

513. The Accused testified as to having gone together with Jabo to the Kibilizi commercial centre in Rubengera, and later in the afternoon to Mushubati to see "the damages that [the *Abakiga*] had caused".[639] When he reached Mushubati, at around 1 or 2 p.m., Jabo took the *gendarmes* stationed there back to Kibuye town, explaining to the Accused that the *gendarmes* had another mission.[640]

514. Later, the Accused sent the communal driver with a message to the "Chinese camp" to borrow an excavator to bury the refugees killed in the morning raid: "we dug a hole in front of the *bureau communal* and we buried the eight bodies"(see also V.4.3).[641] Throughout the rest of the afternoon, until the evening, the Accused remained at the communal office where he listened to "complaints" about lost identity cards. Then he went home, ate and rested.[642]

Thursday 14 April 1994

515. Witness A testified that on Thursday, 14 April, from the top of the larger stand of the Stadium, he saw the Mabanza commune vehicle bringing more refugees. He

[633] Ibid. pp. 113-114.
[634] Ibid. p. 114.
[635] Transcripts of 8 June 2000 p. 198.
[636] Transcripts of 5 June 2000 p. 115. See also (in another context) IV.5.3 of the present Judgement.
[637] Ibid. p. 115; also p. 56.
[638] Transcripts of 8 June 2000 pp. 201-202.
[639] Transcripts of 5 June 2000 p. 116; also p. 49.
[640] Transcripts of 1 June 2000 p. 137 and 5 June 2000 pp. 117-118.
[641] Transcripts of 5 June 2000 p. 131.
[642] Transcripts of 8 June 2000 p. 203.

twice saw the communal vehicle transporting refugees to the Stadium on this day.[643] The witness did not specify the time of day.

516. At some point, Witness A saw the Accused, Semanza and Dr. Leonard come to the Stadium. The refugees inside the Stadium cried out: they are "coming to kill us".[644] The Accused and the others emerged from the communal vehicle and went to the entrance of the Stadium where they spoke to *gendarmes*. The witness stated that he could not hear what was being said.[645] The visitors moved into a position from where they could observe the refugees inside the Stadium.[646]

517. Witness AC testified that on this day *gendarmes* continued to allow refugees to enter the Stadium, while prohibiting those already inside from leaving.[647] Soldiers later joined the *gendarmes*.[648] The witness said that at 9 a.m. she was close to the gates of the Stadium when she saw the Accused with Semanza, the communal driver and two communal policemen aboard "Bagilishema's vehicle", stopping and speaking to *gendarmes*.[649] The witness at first said that this visit occured on a Friday. Later she corrected it to Thursday.[650]

518. According to Witness AC, the Accused was dressed in civilian clothing and was unarmed; the policemen were armed.[651] The witness testified that she could not hear what was being said.[652] From her location, the communal vehicle and its passengers were visible. Using a photograph, the witness indicated that the vehicle was parked alongside the wall of the Stadium, further away from the entrance than on the previous day (see above).[653]

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[643] Transcripts of 17 November 1999 pp. 21-22.
[644] Ibid. p. 28.
[645] Ibid. pp. 22, 27-29 and 48-49 (for the position of the parked vehicle).
[646] Ibid. pp. 28-29.
[647] Transcripts of 18 November 1999 p. 41.
[648] Ibid. p. 43.
[649] Ibid. pp. 43-44.
[650] Ibid. p. 68.
[651] Ibid. p. 95.
[652] Ibid. pp. 43-44.
[653] See ibid. pp. 68-69, and Prosecution Exhibit No. 60. The marked photograph is in the possession of the Chamber.

519. Other Prosecution witnesses testified as to the Accused's presence in Mabanza *commune* at various times during Thursday 14 April 1994. According to Witness AB, the attack against Karungu continued on this day. It was launched by the Accused and lasted the whole day, from 9 a.m. to 5 p.m. (see V.4.1 below).[654] Witness H testified that the Accused followed the attackers heading for Karungu's house on 14 April 1994.[655] Witness Z testified that he was present on the morning of that day when a communal policeman delivered a message from the Accused to the effect that Pastor Muganga should be killed (see V.4.2 below).[656]

520. The Accused testified that on 14 April 1994 the *Abakiga* returned to Mabanza *commune* in greater numbers than the day before.[657] They arrived at around 8 a.m. The Accused was at home.[658] Some policemen who were at the *bureau communal* tried without success to repel the *Abakiga* by shooting into the air. The policemen retreated, and the *Abakiga* again went to Karungu's house.[659]

521. At around the same time, another group of "peasants" who had been in hiding returned to the *bureau communal* and were taken by surprise by the *Abakiga*. While attempting to flee towards the Kibilizi market, they were attacked from the football field and seven or eight were killed, including, according to the Accused, Pastor Muganga (see V.4.2 below).[660] Later, as the *Abakiga* withdrew from the *commune*, they looted and attacked people without discrimination. They allegedly even looted the house of the Accused's parents, from where they stole sofas, chairs, food and other items.[661]

522. The Accused testified as to having asked policemen and members of the Kamuvunyi *cellule* committee to call on the people to help bury those killed in the

[654] Transcripts of 15 November 1999 p. 85.
[655] Transcripts of 19 November 1999 pp. 39-40.
[656] Transcripts of 9 February 2000 p. 72.
[657] Transcripts of 5 June 2000 pp. 113 and 121.
[658] Ibid. p. 121.
[659] Ibid. p. 122.
[660] Ibid. pp. 125-126 and 129; transcripts of 8 June 2000 p. 225.
[661] Transcripts of 5 June 2000 p. 125.

morning's raid. Pastor Muganga's body and that of another were claimed. The bodies that were not claimed were buried close to the football field.[662]

523. The Accused stated that on this day a Tutsi named Chantal Mukasano and another (unnamed) Tutsi who was an officer of the communal administration came as well to seek refuge at the Accused's residence.[663] Mukasano allegedly stayed with the Accused until he arranged for her to be taken to safety in Gitarama. (As mentioned above, Witness RJ testified that her cousin Chantal sought refuge at the house of the Accused two days after she herself hid there on 8 April 1994.)

Friday 15 April 1994

524. No witness testified as to having seen the Accused, Mabanza communal authorities, or the communal vehicle at the Stadium on this day. The only alleged sighting of the Accused on 15 April 1994 was at the *bureau communal* of Mabanza, by Witness AB, in connection with the killing of Pastor Muganga (V.4.2).

525. The Accused offered no account of his actions on this or the next day. Other potential sources of information, such as the Accused's diary (to which he referred),[664] or the *commune*'s register of incoming and outgoing mail,[665] also are of no assistance.

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[662] Ibid. p. 133.

[663] Ibid. pp. 19-24.

[664] Prosecution Exhibit No. 85 consists of photocopied pages of the diary kept by the Accused in 1994. In fact, the printed diary is for the year 1991, but the Accused adapted it for use in 1994 by dating his entries – or at least some of them – by hand (see transcripts of 6 June 2000 p. 29). The diary does not appear to contain any entries for the period in question. On the page marked 107 (this being a file reference number) there are entries for 8, 10 and 9 April 1994, in that sequence. The next dated entry is on p. 108 and relates to 20 April 1994.

[665] During the examination-in-chief of the Accused, there occurred the following exchange: "[Q.] How do you explain this gap between the date of 12 April 1994 and 27 April 1994? [A.] Between the 12 and 27 April 1994 that indicates the chaos which was prevailing in the commune. The commune was totally paralysed. The secretariat was not functioning. All the communal departments were paralysed. That is why between the 12 and 27 there is no letter, there is no other letter which went out of the commune." (Transcripts of 6 June 2000 p. 100; see also 8 June 2000 p. 260.)

Saturday 16 April 1994

526. According to Witness AC, in the afternoon of this day, the Mabanza communal vehicle arrived at the Stadium transporting three policemen and "armed Hutus who were planning to kill".[666] Among them were five or six *Interahamwe*, who moved around brandishing machetes and spears. The visitors did not stay – they "went back the way they came ... that is towards Mabanza", at around 5 p.m.[667] Soon after their departure the witness heard gunshots coming from the "catholic church"; later that evening some wounded people came from the church and said that others had been killed there.[668]

Sunday 17 April 1994

527. Witness Z testified that he was stationed at the Trafipro roadblock in Mabanza from the day it was erected on 14 April 1994 until it was dismantled by the French in July (see V.5.4 below).[669] He said that the Accused regularly stopped to exchange greetings with those working at the roadblock. Each time the Accused went to Kibuye town he would ask the Trafipro staff to tell anyone looking for him where he had gone.[670] This encounter and request also occurred on the day of the attack on the Complex or – the witness could not remember clearly – on the day of the attack on the Stadium. On this day (whichever it was) the Accused was in the communal vehicle with Semanza and some *Abakiga*. The Accused was armed and one of the *Abakiga* was also carrying a gun.[671] Witness Z's testimony was generally consistent with his earlier statement of 18 September 1999.[672]

528. Witness AA indicated that he arrived with the Accused at the Kibuye town roundabout in the afternoon or evening of 17 April 1994. The witness did not allege

[666] Transcripts of 18 November 1999 pp. 46-47.
[667] Ibid. p. 48.
[668] Ibid.
[669] Transcripts of 8 February 2000 p. 50.
[670] Ibid. p. 53.
[671] Ibid. pp. 53-54.

that the Accused visited the Stadium on this day (see 3.3.2 below).

529. The Accused testified that very early in the morning of 17 April 1994 Pastor Eliphas and some Tutsi nuns came to ask for his protection. He hid them in an office of the *bureau communal*. At around 9 p.m. they returned to their parish.[673]

530. In this connection, Defence Witness RA testified that very early on 17 April 1994, after the Abakiga had threatened to kill the Tutsi nuns if they were still around when that group of attackers returned, she went together with the five nuns and Pastor Elephas to the communal office. The Accused discouraged them from going to Kibuye town because of the roadblocks along the way. Instead, he provided them with a room in the IGA building where they remained hidden the whole day. He changed the identity card of one of the nuns. At night the fugitives went to the house of Pastor Elephas, and from there they went again into hiding.[674]

3.2.7 Findings on the Accused's Responsibility

(i) General Observations

531. The question whether the Accused was present at the Stadium is critical to all the charges covering the period 13 to 18 April 1994. It follows from case law that mere presence at the scene of criminal events is not in itself incriminating (see III.1.1). One obvious reason for this is that presence may have the purpose of preventing the commission of crimes. Nonetheless, if the Prosecution can establish that the Accused was at the Stadium during the critical period in question, other elements of participation in the crime may be presumable or imputable. A person in authority, such as the Accused, runs the risk of being identified with the perpetrators of the crimes unless he is seen to be actively and demonstrably opposing the crimes. Therefore, the Prosecution must lead sufficient evidence to convince the Chamber beyond reasonable doubt that the Accused was present at the Stadium at some point during the relevant period.

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[672] Defence Exhibit No. 65.
[673] Transcripts of 5 June 2000 pp. 134-135 and 8 June 2000 p. 248.

532. In view of this, the Chamber will have to treat a bare allegation of presence with caution. Put differently, a lack of detail will raise doubts. The Chamber will then examine the testimonies of other witnesses, or look to prior statements to clarify or test a witness's allegations. If corroboration is not found through this process, doubts will remain and presence will not have been established. It is incumbent on the Prosecution to adduce sufficient evidence to convince the Chamber that the Accused was present and, if so, to demonstrate his role during the events.

(ii) Presence of the Accused on Wednesday 13 April 1994

533. Two Prosecution witnesses, A and AC, testified that the Accused was at the Stadium at around 2 p.m. and 3 p.m., respectively, in the afternoon of 13 April 1994. Other witnesses claimed to have seen him in Mabanza *commune* on this day, and the Accused stated that he was there the whole day. The Chamber will first examine whether the evidence relating to the Accused's presence in Mabanza *commune* rules out the possibility that he was at the Stadium. In this context, the Chamber observes that the distance between Mabanza's *bureau communal* and Kibuye town is only about 16 km. The Chamber will then assess the evidence of the two witnesses who allegedly saw the Accused at the Stadium.

534. According to the Accused, he spent the afternoon of 13 April 1994 dealing with the aftermath of the attack by the *Abakiga*. He was in Mushubati at around 1 or 2 p.m. and at the *bureau communal* during the rest of the afternoon.

535. With regard to the morning, Witness J testified that the Accused and Commander Jabo came to her house at around 10 a.m., after it had been looted by *Interahamwe*.[675] The Accused said that his visit to Witness J occurred between 11 a.m. and noon of that day. Of other Prosecution witnesses, Witness K claimed to have encountered the Accused in Mabanza *commune* around 10 a.m., while Witnesses AB and H implicated the Accused in the attack against Karungu, the former without specifying the time and the latter stating that it was around 8 a.m. Be that as it may, the

[674] Transcripts of 2 May 2000 pp. 49-51.

Chamber observes that there are no confirmed sightings of the Accused in Mabanza *commune* during the afternoon.

536. Of the two witnesses who claimed to have seen the Accused at the Stadium, Witness A made the sighting at around 2 p.m., as the refugees waited for the gates to be opened. According to this witness, the Accused had followed the refugees from the communal office in Mabanza. No other witness testified to having seen the Accused on the way to Kibuye town (see V.3.1). In the Chamber's view this is not significant. The witness was at the rear when the refugees left the communal office. If the Accused followed the crowd, this would explain why Witness G, who was in the front, did not see him. Moreover, according to Witness A's testimony, along the way the refugees came upon *gendarmes* in two buses, with whom the Accused stopped to talk.[676] It is possible that the Accused, after first having followed the crowd, turned back and then rejoined it later, when the refugees were in front of the Stadium.

537. The Chamber notes that Witness A's observation of the Accused was recounted with the minimum amount of information. The witness did not mention what the Accused was doing, whether he was accompanied or alone, whether he was standing or sitting in a vehicle, whether he was armed or unarmed. In fact, the Prosecution adduced not a single detail over and above the mere allegation that Witness A saw the Accused in the proximity of the Stadium gates.

538. In this connection the Chamber observes that in none of his two previous statements to investigators did Witness A mention any sighting of the Accused on 13 April 1994. His second statement, dated 29 June 1999, dealt with information specifically about the Accused. The witness there stated that "we walked to the stadium and [the Accused] *joined us there the following day*, that is, Thursday".[677] Thus, a statement taken less than five months prior to his testimony before the Chamber indicates that the Accused came to the Stadium not on the Wednesday with the refugees, as Witness A testified, but on Thursday, the day after their arrival. This would

[675] Transcripts of 31 January 2000, in-camera session, pp. 4-7 and 43.
[676] Also in his statement of 1 February 1996, the witness stated that the refugees passed "two buses transporting soldiers" (Defence Exhibit No. 6).

coincide with his testimony that on 14 April he saw the Accused, Célestin Semanza and Dr. Leonard arrive at the Stadium (see below). In his first statement, dated 1 February 1996, the witness indicated that "by 16 April" he had seen the Accused, Semanza and Doctor Hitimana Leonard and others aboard a Toyota Hilux around the Stadium.[678] It was only during his testimony that Witness A stated that he saw the Accused on both 13 and 14 April. The Chamber finds that this creates some doubt as to whether the recollection of the witness was correct when he testified that he saw the Accused at the Stadium on 13 April 1994.

539. Also, Witness AC testified to seeing the Accused on 13 April 1994 at the Stadium, but at around 3 p.m. The Chamber does not attach significance to the fact that Witness A made his observation at 2 p.m., whereas Witness AC apparently saw him at 3 p.m. Witness A testified that he was giving only an estimate, as he had no watch. Moreover, it is quite understandable if both witnesses had difficulties in recalling the exact time of their observation almost six years after the event. However, Witness A testified that the Accused joined the refugees ("nous a retrouvé") at around 2 p.m. *before* the gates of the Stadium were opened, whereas Witness AC observed him arrive at around 3 p.m. *after* the refugees were already inside. Moreover, if the Accused was present when the refugees from Mabanza were about to enter the Stadium, it seems unlikely that he would return at a later stage to ask whether the refugees he had sent had arrived, as suggested by Witness AC.

540. Witness AC provided somewhat more detail about her alleged sighting of the Accused on 13 April 1994. However, the detail is inconsistent both in her testimony and when compared with her earlier statement of 21 June 1999, where she declared:

> "At around 3:00 p.m., *Bourgmestre* BAGILISHEMA and his deputy, SEMANZA, arrived at the stadium in a *commune* vehicle. They entered the stadium and stopped a few metres from the gate. Addressing the gendarmes, he told them: "We have sent you the people you requested." He left after saying that to the gendarmes. I heard him make those remarks."[679]

[677] Defence Exhibit No. 79 (emphasis added).
[678] Defence Exhibit No. 6.
[679] Defence Exhibit No. 8.

541. During her testimony, the witness at first said that the Accused attempted to enter the Stadium but did not. Later in testimony she said that the Accused took "a few steps" into the Stadium. (Her statement of 21 June 1999 also has the Accused entering the Stadium.) Moreover, according to the statement, the witness overheard the Accused tell *gendarmes* that "[w]e have sent you the people you requested". According to her testimony, however, the Accused instead asked a question, namely whether "the people who he sent had arrived". Witness AC testified that she and others were hit by *gendarmes* as they attempted to follow the Accused towards the entrance, but the witness was not asked whether the Accused had noticed the commotion or the beatings. The evidence adduced by the Prosecution in relation to this visit is a bare sketch. In many ways it is similar to the sketch provided by Witness AC for the alleged visit on 14 April 1994 (see below). In the absence of detail, this coincidence in itself is of concern, for it raises the reasonable possibility that the witness wrongly remembered a single visit as two separate visits.

542. The fact that Witness G did not mention seeing the Accused at the Stadium on any day prior to 18 April 1994 does not cast doubt on the claims of Witnesses A and AC. Depending on a person's location within the Stadium, the crowded circumstances there would not rule out that a brief visit could go unnoticed.

543. For the above reasons, the Chamber finds that it has not been proved beyond reasonable doubt that the Accused was present at the Stadium in Kibuye on 13 April 1994. Even assuming that he was there, the testimonies of the witnesses provided little information about the purpose of the visit. Witness AC's testimony seems to indicate that he simply came to verify whether the refugees had arrived at the Stadium. There is insufficient evidence of criminal intent. No crimes under the Statute had been committed at the Stadium by that stage. Therefore, there can be no question of liability.

(iii) Presence of the Accused on Thursday 14 April 1994

544. Witnesses A and AC testified to seeing the Accused again on 14 April 1994 at the Stadium. Witness AC alleged that she saw him arrive in the communal vehicle with

Semanza at 9 a.m. Witness A claimed to have seen the Accused and Semanza arrive at a time he did not specify; Dr. Leonard was with them.

545. Two Prosecution witnesses located the Accused in Mabanza *commune* on this day. Witness AB testified that the attack against Karungu was launched by the Accused at around 9 a.m. Witness H testified that the Accused followed Karungu's attackers on the morning of 14 April 1994.

546. The Accused did not account for his movements on 14 April 1994, aside from locating himself at his home at 8 a.m. and tending to the burial of victims of the *Abakiga* at some unspecified time later in the day.

547. The circumstances of Witness A's sighting of the Accused on this day are not clear. He purported to have seen the communal vehicle arrive twice carrying refugees. It is unclear from the witness's account whether the Accused was on board on one or both these occasions, or whether he came at another time. The witness was on the larger stand (across from the Stadium's main entrance) when he saw the Accused. It has not been established where the witness stood along the length of the stand, and in particular, whether he was closer to the gate-side or hill-side end of the stand.

548. As for the Accused's conduct and other details concerning the course of his visit, the information supplied by Witness A was very limited. The Accused went from the communal vehicle to the main entrance, where he spoke to *gendarmes*. At this point the refugees cried out: they are "coming to kill us". From the gates the Accused repositioned himself (to an unspecified place) so as to have a view of the refugees. No further details were provided.

549. In the absence of details, the Chamber has looked into the witness's previous written statements. The chronology of visits by the Accused as found in Witness A's testimony does not coincide with that of his statement of 29 June 1999. In this statement, Witness A mentioned a visit on Thursday 14 April 1994 by the Accused to the Stadium, appearing to suggest that this was the Accused's first such visit since the refugees departed Mabanza *commune*:

"We walked to the stadium and he joined us there the following day, that is, Thursday. He was with his deputy, Semanza, and Dr Léonard ... They stopped at the stadium entrance. When the refugees shouted: 'They have come to kill us' the three men left. The following day, the *Bourgmestre* came back, this time only with his deputy, but they left without entering the stadium."[680]

550. The second visit, according to the testimony, appears to be the same as the first visit, according to the statement (both mention Dr. Leonard and the refugees' vocal reaction). In the earlier of Witness A's two statements, dated 1 February 1996, a reference apparently to this visit states that it took place "by 16 April"; the visitors included "a few *Interahamwe*"; and the refugees pelted them with stones. [681]

551. Witness AC testified that the Accused, Semanza, the communal driver and two communal policemen arrived in a car at the main entrance of the Stadium. They stopped to speak to *gendarmes*. The Accused was unarmed and dressed in civilian clothing. The witness observed this event from her ground-level position close to the gates. It is not clear to the Chamber how she was able to see the Accused through the Stadium gates, or indeed how she saw the car, which was parked on the other side of the Stadium wall. Witness AC's testimony does not convincingly corroborate that of Witness A. Apart from Semanza, the persons who arrived with the Accused are different in each account. And Witness AC did not include a most striking and relevant detail alleged by Witness A, namely the refugees' cries that the visitors had come to kill them.

552. Witness AC at first testified that the visit in question took place on Friday, that is, on 15 April 1994. Later she changed the day to Thursday. The doubt in the Chamber's mind is not dispelled by consideration of the witness's statement of 21 June 1999. There she declared that it was the Prefect (rather than the Accused) who came to the Stadium on 14 April, encircling it with soldiers and *gendarmes*. In other words, five months before her testimony, in a statement that specifically related to the Accused, the witness did not mention his presence on that day. According to the statement, the Accused's second visit to the Stadium after 13 April 1994 did not occur until "16

[680] Defence Exhibit No. 7.

April".[682] However, this date also creates uncertainty, as the witness declared that the attack on the Complex occurred on this date, whereas the facts of the case reveal that it occurred on 17 April 1994.

553. In light of the above, the Chamber does not find that it has been established beyond reasonable doubt that the Accused was present at the Stadium on 14 April 1994. The paucity of the evidence as to the Accused's presence (including the conditions of observation in a crowded Stadium) adduced by the Prosecution from Witnesses A and AC, when considered together with the lack of mutual corroboration, the signs of uncertainty in the accounts of both witnesses as to the date of the sighting, and the suggestion by two other Prosecution witnesses that the Accused was in Mabanza *commune* at 9 a.m. on the day in question, means that the Prosecution's evidence of the Accused's presence at the Stadium on 14 April 1994 falls short of the applicable standard of proof.

554. There is no witness testimony before the Chamber of sightings the Accused at the Stadium on 15-17 April 1994. Consequently, the Chamber finds that it has not been established beyond reasonable doubt that the Accused was present at the Stadium on 15-17 April 1994.

(iv) Conclusion

555. The fact that the Prosecution has not been able to demonstrate that the Accused was at the Stadium at some point during the period 13 to 17 April 1994 means that the Accused cannot bear *direct* responsibility for the detention of the refugees or for the conditions of their detention. In a later section (V.3.4.4(iii)), the Chamber will consider further grounds of liability of the Accused in the Kibuye-town events.

[681] Defence Exhibit No. 6.
[682] Defence Exhibit No. 8.

3.3 Attack on Refugees at Home St. Jean Complex, Kibuye Town, 17 April 1994

3.3.1 Introduction

The Indictment

556. Paragraphs 4.25 and 4.28 of the Indictment read:

> "4.25 On 17 April 1994 those individuals who were ordered by Ignace Bagilishema to seek refuge at the complex, were attacked by a combined force of attackers consisting of the Gendarmerie Nationale, communal police, Interahamwe and armed civilians. The attackers used guns, grenades, machetes, spears, cudgels and other weapons to kill the people in the Complex.
>
> ...
>
> 4.28 In ordering the Tutsi men women and children to the complex and stadium, Ignace Bagilishema knew or had reason to know that attacks at these locations [were] imminent."

Submissions of the Parties

557. The Prosecution alleges that on 17 April 1994 Mabanza refugees directed to the Complex were attacked and killed by *gendarmes*, communal police, *Interahamwe* and armed civilians.[683] The Prosecution appears not to allege that the Accused participated in killings at the Complex. This is evident from the wording of paragraphs 4.25 and 4.28 of the Indictment, and from oral submissions: "... it is the Prosecution case that not only did the Accused ensure that the Tutsis reach Kibuye stadium and the ... complex, but also that he participated in the attack on the Tutsis *at the Kibuye stadium*".[684] The Prosecution does, however, suggest that the Accused may have visited the Complex on 17 April 1994, after the attack had ended.[685] The Prosecution charges the Accused with genocide in relation to this event.[686]

[683] Prosecutor's written Closing Remarks p. 32 paras. 200-203.
[684] Transcripts of 4 September 2000 (oral closing arguments) p. 75, emphasis added.
[685] Transcripts of 18 October 2000 (oral closing arguments) p. 58.

558. The Defence argues that the Prosecution has failed to present any evidence to prove that the Accused ordered refugees to go to the Complex.[687] The Accused did not in any way participate in the attack on the Complex. On 17 April 1994 he was in Mabanza *commune* assisting a pastor and five Tutsi sisters to hide from the *Abakiga*.[688]

3.3.2 Deliberations

559. Of all Prosecution witnesses, only Witness AA suggested that the Accused found out about the massacre at the Complex on the day it occurred, namely, on the afternoon before the attack on the Stadium.

Witness AA

560. Witness AA claimed to have joined a number of *Abakiga* for the purpose of killing refugees gathered in Kibuye town. He said that on the day before the attack on the Stadium, on his way back from work at around 2 p.m., he visited assistant *bourgmestre* Semanza's house, where he found about forty *Abakiga*.[689] They were armed with grenades, clubs and sticks.[690] From Semanza's house they all went to the *bureau communal*. The witness was armed with a club. He said that the Accused distributed firearms to "soldiers" from a stock brought to the *commune* by a certain Munyampundu.[691] In cross-examination, the witness indicated that he did not actually see the alleged distribution take place, for he was standing outside the communal office.[692]

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[686] Prosecution's written Closing Remarks p. 90 paras. 69 and 71.
[687] Defence Closing Brief p. 69 para. 582.
[688] Ibid. paras. 583-584.
[689] Transcripts of 10 February 2000 p. 24. The witness actually said "18 of April". Later in examination-in-chief (p. 33), it transpired that the witness here was referring to the day *before* the attack on the Stadium, which according to the Prosecution's chronology occurred on 18 April 1994. Later still, the witness affirmed that the attack on the Stadium occurred on 18 April, the day after his recruitment by the *Abakiga*, which therefore must be dated 17 April 1994 (p. 51).
[690] Transcripts of 10 February 2000 p. 16.
[691] Ibid. pp. 21-22 and 11 February 2000 pp. 21-25.
[692] Transcripts of 11 February 2000 pp. 20-21.

561. Witness AA and his companions, including the Accused and Semanza, allegedly left Mabanza for Kibuye town in two cars. The witness travelled in a blue communal vehicle driven by Nshimyimana; the Accused was in the second vehicle, a green Daihatsu; others – the witness estimated a total of "10 thousand" attackers – went on foot.[693] The witness then clarified that he and the Accused in fact travelled together, in the communal vehicle. Semanza boarded the other vehicle.[694] The witness could not recall the time of their departure.[695]

562. On reaching Kibuye town roundabout, Witness AA and his companions saw many bodies on the road: "The whole road going to the Home St. Jean was full of bodies."[696] The vehicle had to stop so as not to run them over. The witness got out. The Accused drove off in the car "in the direction of the stadium ... Maybe he went towards the Prefecture".[697] The witness and others walked to the Complex. There they saw more bodies and wounded people. Inside the church the witness encountered some of the killers, who were cooking rice and beans. The witness also went down to Lake Kivu, where he saw more bodies. From there he returned to the roundabout.[698]

563. Witness AA during this time did not see the Accused at the Complex.[699] He spent the night at the court building next to the Stadium. The "authorities" directed him and others to stay there.[700] He was told by the communal driver that the Accused would overnight at the Bethanie hotel in Kibuye town.[701]

Witness A

564. Witness A testified that on the night of Sunday 17 April 1994, while at the Stadium, he heard gunshots and explosions and saw vehicles on the road transporting

[693] Transcripts of 10 February 2000 pp. 18 and 27-28.
[694] Ibid. pp. 29-30 and 11 February 2000 p. 30.
[695] Transcripts of 10 February 2000 p. 30.
[696] Ibid. p. 32.
[697] Ibid. p. 33 and 11 February 2000 pp. 33-34.
[698] Transcripts of 10 February 2000 p. 32.
[699] Transcripts of 11 February 2000 p. 33.
[700] Transcripts of 10 February 2000 p. 35 and 11 February 2000 p. 35.

gendarmes, policemen, and people armed with clubs and sticks. The witness said that two people came from Home St. Jean through the bush to the Stadium saying that they were the only survivors of an attack on the Complex – the others had been shot.[702]

Witness AC

565. Witness AC testified that on "Saturday", at around 5 p.m., she "heard gunshots and people who were with me said those gunshots came from the church".[703] During the night, wounded people came to the Stadium. They said that they came from the Catholic Church and that several other people had been killed there.[704] The witness said that the arrivals were "many in number", but was not able to give an approximate figure.[705] She did not mention seeing the Accused on the day she heard gunshots from the church.

Witness CP

566. After retreating from Kibuye roundabout on 17 April 1994 (see V.3.2.4), Witness CP went to hide at the Gitesi *bureau communal*, which afforded him a view of the surrounding area, including the roundabout.[706] The time was between 10 and 11 a.m. He stayed there for two to three hours.[707] He saw the group of *Abakiga* at the roundabout split into two. One half took the road to the Prefecture, the other headed towards Lake Kivu. The witness stated that he did not see the Accused, the Mabanza *commune* vehicle or any other vehicle on the road at that time.[708] Nor did he see the Prefect.[709] From his vantage point the witness also had a partially obstructed view of

[701] Transcripts of 10 February 2000 pp. 35-36.
[702] Transcripts of 17 November 1999 pp. 29-30.
[703] Transcripts of 18 November 1999 p. 48. Saturday was 16 April 1994, the day before the attack on the Complex, according to the Prosecution's chronology.
[704] Transcripts of 18 November 1999 p. 48.
[705] Ibid. p. 92.
[706] Transcripts of 24 May 2000 p. 22.
[707] Ibid. p. 26.
[708] Ibid. pp. 23-24 and 83-84.
[709] Ibid. p. 78.

the church courtyard at Home St. Jean. He knew that refugees were lodged there because he lived close by and had visited acquaintances of his who were sheltering at the Complex.[710] He had not then seen any *gendarmes* at the Complex.[711]

567. From the grounds of Gitesi's communal office, Witness CP heard grenade explosions coming from the direction of the Complex.[712] He saw people from the church running down the hill to Lake Kivu, where attackers were waiting for them.[713] The witness added: "... we could see people fighting whereas what was happening in the Home was not very clearly visible because of the location ... However, ... you could see people throwing themselves in Lake Kivu and it is clear that people were killed".[714]

568. The Accused's account of his whereabouts on 17 April 1994 was considered under section V.3.2.6 above. (He was at the *bureau communal* in Mabanza early in the morning, when five Tutsi nuns were brought to him for hiding. This conforms with the testimony of Defence Witness RA.)

3.3.3 Findings

569. The parties agree that on 17 April 1994 the refugees at the Complex came under attack. Its time-period is not clear from the evidence. Witness A indicated that the attack started at "night"; Witness AC said around 5 p.m. Witness CP had a view of the unfolding attack from Gitesi's *bureau communal*, where he indicated that he remained until about 2 p.m. Witness AA's testimony does not give the time of his alleged arrival in Kibuye town on 17 April 1994, but in his written statement of 22-23 September 1999 he declared that it was around 3 p.m. By the time Witness AA arrived at the Complex, the attack was already over.

[710] Ibid. pp. 34 and 62.
[711] Ibid. p. 31.
[712] Ibid. pp. 33-34.
[713] Ibid. pp. 28 and 35.
[714] Ibid. pp. 28-29.

570. The Prosecution has not demonstrated beyond reasonable doubt that the Accused ordered refugees gathered at Mabanza's *bureau communal* to assemble at the Complex in Kibuye town (see V.3.1 above). Nor is there any evidence to show that the Accused knew in advance that an attack on the Complex was imminent (see V.3.2 above).

571. No witness alleged that the attack on the Complex was conducted under the authority or with the participation of the Accused. Witness CP observed the attack from a distance. His account did not implicate the Accused in any way. Witness AA was not present during the attack. He merely witnessed its aftermath. According to the testimony of this witness, at the time of the attack on the Complex he was either in Mabanza *commune* or travelling from the *commune* to Kibuye town in the company of the Accused.

572. Moreover, the Accused was not at the Complex, according to Witness AA's testimony. There is no testimonial evidence that the Accused was present at the Complex at any time during the period 13 to 17 April 1994. Equally, there is no evidence that subordinates of the Accused participated in the attack on the Complex.

573. Therefore, the Chamber finds that the Prosecution has not shown beyond reasonable doubt that the Accused is liable for the assembly of and attack on refugees at the Complex. The Chamber will postpone until section V.3.4 its consideration of Witness AA's allegation that the Accused was in Kibuye town on 17 April 1994.

3.4 Attack on Refugees at Gatwaro Stadium, Kibuye Town, 18-19 April 1994

3.4.1 Introduction

The Indictment

574. Paragraphs 4.26 and 4.27 of the Indictment read:

> "4.26 On 18 April 1994, Ignace Bagilishema, acting in concert with others, including, Clement Kayishema, Semanza Celestin, Nsengimana Apollinaire, Nzanana Emile and Munyampundu, brought to Gatwaro stadium, the Gendarmerie Nationale, communal police,

Interahamwe and armed civilians, and directed them to attack the people seeking refuge there.

4.27 In addition, Ignace Bagilishema, on 18 and 19 April 1994, personally attacked and killed persons seeking refuge at Gatwaro stadium, Kibuye town. The attack on refugees at Gatwaro the Stadium continued on 19 April 1994."

Submissions of the Parties

575. According to the Prosecution, the Accused was present at the Stadium on Monday 18 April 1994, the first day of the attack on the refugees confined there. Acting in concert with others, the Accused directly participated in the attack, which continued to a lesser extent on 19 April 1994.[715] The Prosecution alleges that the Accused consulted with *gendarmes* and other attackers, telling them where to position themselves during the attack.[716] Thousands were killed. The Prosecution charges the Accused with genocide and crimes against humanity in relation to this event.[717]

576. In its closing arguments the Prosecution stated that "[b]y his being present there, we say, he knew or ought to have known that there was going to be an attack at the Stadium shortly after two o'clock;"[718] and that "by his presence alone, before and at the beginning of the attack, the Accused knowingly and willingly lent his authority to the said attack".[719] But besides knowing and approving presence, the Prosecution also argued for a more potent form of liability, consistent with the Indictment:

> "Now, what was Bagilishema doing there? He was obviously directing the attacks. He was not an innocent bystander who just happened to be walking by, and that is why we say, that if you now consider his presence at Kibuye Stadium on the 18th and you now rewind to what I have told you about the 12th of April, it clearly supports what we say about genocidal intent. It clearly does. You enter into an agreement, you act pursuant to that agreement the following day; three days later you are there to see that the agreement is executed."[720]

[715] Prosecution's written Closing Remarks pp. 33-36 paras. 206-227.
[716] Ibid. pp. 34-35 paras. 216-219.
[717] Prosecution's written Closing Remarks pp. 90-91 paras. 69-76; pp. 109-110 paras. 205 and 210-212.
[718] Transcripts of 18 October 2000 p. 80.
[719] Transcripts of 4 September 2000 pp. 75-76.
[720] Transcripts of 18 October 2000 pp. 82-83.

577. The Defence submits that the Accused was not in Kibuye town at the material times.[721] In fact, the position of the Defence is that the Accused did not go to Kibuye town at all between 9 and 25 April 1994.[722]

578. Moreover, the Defence contends that the Prosecution has not proved that the Accused acted in concert with others during the attacks. None of the witnesses testified as to having seen the Accused issue orders to those who attacked the refugees at the Stadium.[723] It submits that no clear account of the Accused's alleged participation in the attack emerges from the testimonies of Prosecution witnesses.[724] At best, the evidence adduced by some unreliable witnesses places the Accused at the Stadium in a passive role.[725] This does not establish that the Accused had any control whatsoever over the assailants, nor does it prove, if it were established that he was present, that he was not in fact attempting to persuade others to desist from attacking.[726] Nor does the evidence, according to the Defence, prove that Semanza participated in the attack, or that communal policemen or *gendarmes* based in Mabanza *commune* were present during the attack.[727]

3.4.2 Deliberations

579. The Chamber will consider the evidence on the alleged killing of refugees at the Stadium on 18 and 19 April 1994. It will also examine the evidence on the location and actions of the Accused on those days.

[721] Defence Closing Brief p. 70 paras. 585-588; Rejoinder para. 249.
[722] See transcripts of 6 June 2000 p. 101.
[723] Defence Closing Brief p. 69 para. 585.
[724] Ibid. pp. 70-71 paras. 589-604.
[725] Transcripts of 19 October 2000 pp. 94-95.
[726] Defence Closing Brief p. 123 para. 76.
[727] Ibid.

580. Prosecution Witness AA testified that the decision to attack the refugees at the Stadium was taken on 18 April 1994. Soldiers, *gendarmes*, prison wardens and policemen, "all these people decided to kill the Tutsis. I think it is the official in charge of this town who decided".[728]

581. The witness estimated that at around 1 p.m the attack on the Stadium commenced.[729] Among the attackers were officials, soldiers, *gendarmes*, communal policemen, and *Abakiga*.[730] Some of them were from Mabanza.[731] A certain soldier Muzehe, standing ahead of the witness, fired the first shot.[732] The refugees in the Stadium – about 2,000 by the witness's reckoning – began to defend themselves by throwing stones.[733] This resistance led the attackers to change their tactics, with some moving on to the hill bordering the Stadium. From this height they continued shooting at the refugees, and threw grenades and spread tear gas into the crowd.[734] The witness was with Semanza and some *Abakiga* at the entrance to the Stadium.[735] The *Abakiga* were crying out, "Kill everyone!". The witness clubbed to death someone attempting to flee.[736] After most of the refugees had been killed, *Abakiga*, soldiers and ordinary civilians entered the Stadium to finish off the survivors.[737] The "hutu killers" wore a rope around their neck so as to be easily identifiable.[738]

582. Witness AA testified as to the presence of the Accused at the Stadium after the attack had begun. The witness was positioned outside the gates on a small mound.[739]

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[728] Transcripts of 10 February 2000 p. 34.
[729] Ibid. pp. 38 and 40.
[730] Ibid. pp. 41-42.
[731] Ibid. p. 42.
[732] Ibid. pp. 38-39; and 11 February 2000 p. 38.
[733] Transcripts of 10 February 2000 pp. 39-40; and 11 February 2000 pp. 41-42.
[734] Transcripts of 10 February 2000 p. 39; and 11 February 2000 p. 39.
[735] Transcripts of 11 February 2000 p. 37.
[736] Transcripts of 10 February 2000 pp. 49-51; and 11 February 2000 p. 42.
[737] Transcripts of 10 February 2000 pp. 41 and 51-53.
[738] Ibid. pp. 53-54.
[739] Transcripts of 11 February 2000 pp. 43 and 45.

He saw the Accused pass in front of him, going in the direction of the court building.[740] The witness said that the Accused was wearing a military jacket. He did not see him carrying a weapon. The Accused came to a stop close to the court building.[741] He and the attackers, including Kayishema and some soldiers, consulted among themselves. The witness had not seen Kayishema before, but came to know who he was by overhearing others.[742] The witness did not see precisely where these officials met.[743] He said that after the consultation there was a change in strategy that led to the redeployment of forces to the hill above the Stadium.[744] The witness explained:

> "I believe this new strategy was the result of a consultation between the Kibuye authorities. I didn't know them myself but [I] simply saw soldiers of high rank ... in the company of persons who looked respectable and I saw them consult and I thought they were discussing the strategy and I believe the strategy was the result of their consultations ... he [the Accused] was part of the group."[745]

583. The witness said that he left the Stadium after the attack, to go home. Many other people left with him. He reached Mabanza at around 6 p.m.[746] The next time he saw the Accused was at the latter's house. The Accused was telling Semanza to take possession of the property of Tutsi, and to rent out their fields.[747]

584. Witness AA's statement does not mention Kayishema, nor does it refer to any change of tactics achieved through consultation involving the Accused. Orders appear to have been issued by soldiers and by Semanza.[748]

Witness A

585. Prosecution Witness A said that between 1 and 2 p.m. on 18 April 1994 people came to collect the traditional weapons left by the refugees outside the Stadium. The

[740] Ibid. p. 44.
[741] Transcripts of 10 February 2000 pp. 44-45.
[742] Ibid. p. 44; and 11 February 2000 p. 47.
[743] Transcripts of 11 February 2000 p. 51.
[744] Transcripts of 10 February 2000 pp. 43-44 and 46-48; and 11 February 2000 p. 40.
[745] Transcripts of 10 February 2000 p. 48.
[746] Ibid. p. 54; and 11 February 2000 p. 55.
[747] Transcripts of 10 February 2000 p. 54.

attackers positioned themselves "on the side where there were houses and also on the side of the hill where there was a forest".[749] The witness described seeing attackers wearing dried banana leaves, shooting, throwing tear gas and grenades, and shouting while trying to enter the Stadium.[750] Amongst the attackers were also *gendarmes*, policemen, prison guards and armed civilians.[751]

586. Witness A descended the larger stand, from where he had been observing these events, to join his family. The refugees were at first afraid that their cattle would be stolen, and responded to the attackers by throwing stones. People and cattle were shot. Some of the refugees were, according to the witness, killed by stampeding cattle. The attack lasted until nightfall, when the attackers went home. Witness A testified that after having explained to his mother why he wanted to escape, she gave him some money and he fled to Gatwaro Hill.[752]

587. Witness A testified that he saw the Accused with Semanza and policemen in a vehicle on the morning of 18 April 1994, before the attack on the Stadium. The vehicle came to a stop outside the Stadium and the witness and others ran to the top of the larger stand to look. The witness explained that when the Accused heard the people shouting he left.[753] Witness A did not see the Accused during the actual attack.[754] Nor did he see the Prefect or any other authorities – he was too busy trying to take cover.[755]

Witness G

588. Prosecution Witness G testified that the refugees at the Stadium were attacked on 18 April 1994.[756] Between 9 a.m. and 2 p.m, attackers armed with machetes, spears and guns arrived. Later in examination-in-chief, the witness said that she did not see

[748] Defence Exhibit No. 66.
[749] Transcripts of 17 November 1999 pp. 31-32.
[750] Ibid. pp. 32-33.
[751] Ibid. pp. 35-36.
[752] Ibid. p. 33.
[753] Ibid. pp. 36-37.
[754] Ibid. pp. 52-53.
[755] Ibid. p. 85.

any attackers until the afternoon.[757] The attackers numbered between 1,000 and several thousands, according to the witness.[758] They encircled the Stadium. The attack began at around 2 p.m. and lasted until nightfall – "when one wouldn't be able to see whether a person was alive or dead".[759] The attackers did not enter the Stadium. Rather they used guns, grenades and tear gas to kill their victims. People attempting to escape the grounds were killed with traditional weapons.[760]

589. Witness G indicated that three quarters of the 20,000 refugees at the Stadium were killed.[761] It was "pure chance" that she survived.[762] In the course of the night of 18 April 1994, Witness G fled the Stadium and hid in Gatwaro Hill. She left with a group of about fifty people, who dispersed as they were pursued.[763] She testified as to having seen a large yellow vehicle come to the Stadium the next day in order to collect dead bodies.[764]

590. Witness G identified Prefect Kayishema and the Accused among the attackers positioned on Gatwaro Hill. They were together before the attack started. The witness was not far from them. She saw the Accused also when the attack began: "He was standing."[765] She did not see him carrying any weapon.[766] According to the witness, the Prefect launched the attack and "the others followed by doing the job they had come to do and they shot their guns".[767] The witness marked a photograph showing her location and that of the Accused and Kayishema on Gatwaro Hill.[768] It appears that she was on the first rank of the smaller stand, on the eastern edge of the field.

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[756] Transcripts of 26 January 2000 p. 15.
[757] Ibid. pp. 17-18.
[758] Ibid. p. 20.
[759] Ibid. p. 17.
[760] Ibid. pp. 24-25.
[761] Ibid. p. 17.
[762] Ibid. p. 22.
[763] Ibid. p. 21.
[764] Ibid. pp. 18-23.
[765] Ibid. p. 16.
[766] Ibid. p. 17.
[767] Ibid. p. 15.
[768] Prosecution Exhibit No. 65; see transcripts of 26 January 2000 p. 31. The marked photograph is in the possession of the Chamber.

Witness AC

591. Prosecution Witness AC did not see the Accused on the day of the attack. She testified that on 17 (apparently in reference to 18) April 1994, at about 10 a.m., armed *Interahamwe* surrounded the Stadium.[769] Some of them were in vehicles, others on foot. At around 3 p.m., soldiers came to join the *Interahamwe*.[770] They were carrying guns. Other attackers were armed with grenades, guns, bladed weapons and sticks.[771] A whistle was blown, and the soldiers commenced the attack by shooting and throwing grenades into the Stadium. According to the witness: "Those who could escape from the stadium were attacked with bladed weapons by the interahamwe".[772] The attackers were singing "let us exterminate them". People were killed. The witness hid under the dead body of a victim of a grenade. Her own leg was injured by shrapnel from a grenade.

592. Witness AC said she saw Semanza in the Mabanza *commune* vehicle, before the attack, transporting *Interahamwe* from Mabanza *commune*. The vehicle stopped close to the entrance to the Stadium.[773]

593. When the attack was over, at around 8 p.m., Witness AC was able to leave the Stadium in the dark.[774] (In cross-examination, the witness said that she left around 10 p.m.[775])

Witness CP

594. As mentioned above (see 4.3.2), on 18 April 1994, after leaving his house at around 1 p.m., Defence Witness CP stopped to converse with an acquaintance outside

[769] Transcripts of 18 November 1999 p. 49.
[770] Ibid.
[771] Ibid. p. 50.
[772] Ibid. p. 49.
[773] Ibid. p. 50.
[774] Transcripts of 18 November 1999 p. 52.
[775] Ibid. p. 97.

the entrance to the Stadium.[776] Their conversation was almost immediately interrupted by the approach of a large group of *Abakiga* coming from the direction of the roundabout. It was the same group that the witness had seen on the day before, when the Complex was attacked.[777] He did not see the Accused among the crowd.[778]

595. The witness set off home and his acquaintance re-entered the Stadium. About one hundred meters away from the Stadium road, on a path on the slope of a hill, Witness CP heard gunshots coming from Gatwaro Hill, on the other side of the Stadium. He testified that he was surprised to hear gunshots as those he had seen advancing on the Stadium did not have guns.[779] He also heard grenade explosions.[780] The Stadium was surrounded by a large number of attackers.[781] He could not identify the people who were shooting, nor could he identify any of the people standing in front of the Stadium. The witness was too far away to see their faces.[782] From his vantage point he could see general commotion inside the Stadium and the people running to take cover. By this time it was late afternoon, between 3 and 4 p.m.[783] The witness estimated that the attack commenced between 2 and 3 p.m.[784]

596. Witness CP testified that he did not see any authorities at the Stadium apart from the two *gendarmes* stationed outside the gates.[785] He did not see the Accused, the Mabanza *commune* vehicle, or any other vehicle in the proximity of the Stadium during the attack.[786] The witness's statement of 27 February 2000 paints a similar picture.[787] On 19 April 1994, the witness returned to the Stadium. He noticed members of the Red Cross trying to get survivors out of the Stadium and into vehicles.[788] He saw "dead

[776] Transcripts of 24 May 2000 p. 40.
[777] Ibid. p. 40.
[778] Ibid. p. 43.
[779] Ibid. pp. 43-44.
[780] Ibid. p. 46.
[781] Ibid. p. 51.
[782] Ibid. pp. 52 and 55.
[783] Ibid. pp. 47 and 50.
[784] Ibid. p. 50.
[785] Ibid. pp. 53-54.
[786] Ibid. pp. 40-43, 55, 59 and 83-84.
[787] Defence Exhibit No. 79.
[788] Transcripts of 24 May 2000 p. 57.

bodies all over the place", took fright and went home again.[789]

The Accused's Account of his Whereabouts, 18-19 April 1994

597. The Accused did not contest the allegation that refugees from Mabanza *commune* were killed at the Complex and the Stadium.[790] He said that on the morning of 19 April 1994 he received information that killings had occurred in Kibuye town, although the information was not specifically about the events at the Complex or the Stadium.[791]

598. The Accused testified that on 18 April 1994 at 8 a.m., in the company of two policemen, Pastor Elephas of Rubengera parish and two *conseillers*, he went to ask the *Abakiga* to withdraw from Mabanza *commune*.[792] The Accused and his companions came across two hundred or so *Abakiga* at Rubengera. The Accused claimed to have admonished them "never to come back again to Mabanza", and in addition told them: "You are looking for enemies, and there [are] no enemies in Mabanza".[793] The *Abakiga* refused to listen – according to the Accused, they revolted. They said that the Accused had no right to stop them from using the road.[794] The Accused testified that he felt humiliated, had no authority, that he "was nothing in front of my people".[795] The *Abakiga* continued in the direction of Kibuye town.[796]

599. In this connection, the Chamber recalls the testimony of Defence Witness RA, who testified that around 10 a.m. on 18 April 1994, Pastor Eliphas came to tell her that the Accused had tried to stop the *Abakiga* earlier the same morning.[797] The Pastor was present at the confrontation with the *Abakiga*. He told the witness that the Accused and his following attempted to convince the *Abakiga* to desist from further ravages in

[789] Ibid. p. 56.
[790] Transcripts of 8 June 2000 p. 253.
[791] Transcripts of 5 June 2000 pp. 53 and 57-58; and 8 June 2000 p. 250.
[792] Transcripts of 5 June 2000 pp. 135-137.
[793] Ibid. p. 139.
[794] Ibid. pp. 139-140.
[795] Ibid. pp. 140-141.
[796] Ibid. pp. 141-142.

Mabanza *commune*. The *Abakiga* appeared to honour his request, but "that did not prevent them from going elsewhere".[798] Defence Witness AS referred to a similar incident involving the Accused and the *Abakiga*, but did not precisely date the incident.[799] (See Chapter IV.4.7.)

600. The Accused testified that he remained at the communal office until midday. People came to see him about their problems, and especially to ask him to reissue them with identity cards.[800] In the afternoon he returned home. He continued to see people about their problems (he did not specify the nature of these problems) and wrote letters to councillors and to members of the *cellule* committees, asking them to stand united.[801]

3.4.3 Findings on the Accused's Responsibility

(i) General observations

601. The Chamber will first briefly state its findings on the basis of the evidence as summarised above. There can be no doubt that a massive attack against refugees at the Stadium occurred in the afternoon of 18 April 1994. Essentially the same time of commencement is found in the testimonies of Witnesses A, AC, G, AA and CP – namely, between 1 and 3 p.m. All witnesses agree that guns and grenades were used to kill the refugees. On other points there is less coincidence in their testimonies.

602. Witness A testified that the attackers consisted of *gendarmes*, policemen, prison guards and civilians. Witness AA added soldiers and *Abakiga* to this list. Witness AC spoke of *Interahamwe* surrounding the Stadium, soon joined by soldiers. Witness G did not categorise the attackers but said that their number was very high and that they had encircled the Stadium. Witness CP maintained that *Abakiga* and unidentified people with firearms on the slopes of Gatwaro Hill were the main perpetrators of the attack.

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[797] Transcripts of 2 May 2000 pp. 62-64.
[798] Ibid. p. 63.
[799] Transcripts of 25 April 2000 pp. 30-32 (closed session); and. 26 April 2000 pp. 5-8.
[800] Transcripts of 5 June 2000 p. 142.
[801] Ibid. p. 143.

The witness claimed not to have seen any "peace officers", such as soldiers, policemen or *gendarmes*, except for the two *gendarmes* guarding the gates of the Stadium.[802] The attackers came from the direction of the Kibuye town roundabout (A, CP).

603. On the tactics employed, it seems that the slopes of Gatwaro Hill served as a kind of shooting gallery for the attackers. Evidently it was the safest option for them, given that the refugees proved willing to defend themselves with stones. Those armed only with traditional weapons remained on the periphery of the Stadium, killing anyone who attempted to flee. The first day of the attack lasted until nightfall.

604. Only two witnesses (G and CP) had anything to say about activity at the Stadium on 19 April 1994. Witness G saw a truck remove bodies – survivors were killed. Witness CP saw members of the Red Cross removing survivors. He saw that the dead were everywhere. There is no testimonial evidence before the Chamber that the attack of 18 April 1994 continued into the next day. It follows, in the Chamber's opinion, that the majority of refugees at the Stadium, numbering many hundreds, were killed in the afternoon on 18 April 1994. This is a crime under the Statute of the Tribunal.

(ii) Presence of Accused at the Stadium on 18 April 1994

605. To a large extent the responsibility of the Accused depends on whether he was present during the attack at the stadium. (Other possible grounds of liability will be considered below.)

606. The Chamber recalls that three witnesses testified that they saw the Accused at the Stadium on 18 April 1994: Witness A, Witness G and Witness AA.

[802] Transcripts of 24 May 2000 pp. 53-54.

607. Witness AA has been detained in Rwanda since 1996 on charges of genocide.[803] The Chamber will assess his testimony and any credibility issues that may arise as a whole in chronological order. His statements concerning the presence of the Accused on 18 April 1994 will be dealt with towards the end.

608. In relation to the earlier events alleged in the Indictment, Witness AA testified that when the refugees first arrived at Mabanza's *bureau communal* there were *gendarmes* and soldiers present who wanted to kill them at the communal office; "but Bagilishema said I will be sending you to Kibuye and that is where the Prefet is going to resolve your problem".[804] However, no other witness spoke of *gendarmes* or soldiers being present at the *bureau communal* or about their wish to have the refugees killed there (see V.3.1).

609. Witness AA is also alone in his claim that Semanza led the refugees on foot to Kibuye town.[805] The witness testified: "They left on foot. Bagilishema spoke to Semanza and Semanza [went in front of] these people and then they left."[806] He further added: "Semanza was ahead of the refugees, Bagilishema remained in the office but I don't know whether he followed them later on."[807] As indicated above (3.2.4), Prosecution Witnesses A, AC and G, who, unlike Witness AA, actually made the journey to Kibuye town with the refugees, did not mention Semanza as being present, even though all witnesses knew him and Witness G was at the front of the crowd.[808]

610. Of greater significance, in the Chamber's view, is the doubtful allegation made by Witness AA about the Accused's distribution of weapons to persons assembled in Mabanza *commune* in preparation for the attack on the Stadium. The witness testified:

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[803] Transcripts of 10 February 2000 p. 12.
[804] Ibid. p. 13. In this connection, Witness AA's earlier statement of 22-23 September 1999 refers to *gendarmes* only, not soldiers (Defence Exhibit No. 66).
[805] The witness's earlier statement declares that the Accused ordered Semanza and the *gendarmes* to accompany the refugees to Kibuye town (ibid.).
[806] Transcripts of 10 February 2000 p. 13. (The English version has been corrected.)
[807] Ibid. p. 15.
[808] Transcripts of 26 January 2000 p. 49.

"[A.] ... when we got to the Bureau Communal before leaving for Kibuye, Bagilishema distributed weapons to those who didn't have firearms. These firearms came from a stock which had been brought by a certain Munyampundu [...] Bagilishema was therefore distributing the remainder of the weapons to those who didn't have any. ...

[Q.] Did Bagilishema distribute these weapons in person?

[A.] Actually, there [were] some soldiers among those who were present... they asked him for weapons and he went to fetch them himself and distributed the weapons to them."[809]

611. Witness AA's testimony suggests that he saw the Accused personally hand out arms to the prospective attackers. In cross-examination it emerged that this was not the case:

"... I saw people leave the bureau communal together with the weapons. I don't know from where the weapons came. I ... simply saw people bringing them out of the bureau communal. ... I can't tell you either from which room or office these weapons had been stored."[810]

612. In his statement to investigators of 22-23 September 1999 the witness did not mention that the Accused distributed weapons:

"We went to the communal office in Mabanza, where we were given two vehicles to transport us to Kibuye. Those were Toyota vans, and one of them, the blue one, belonged to Mabanza commune. Before we went to Kibuye, Bagilishema said: "We are going to Kibuye now." He did not say why, but we knew the reason before ... Bagilishema joined us, entered the blue Toyota van, we left Mabanza and arrived to Kibuye at around 15,00 hrs."[811]

613. Witness AA was asked in direct examination why he had not mentioned the distribution of weapons in his written statement. He replied:

"I remember that I said this. I do not know whether the notes were taken down. In any event the investigators promised that they would come back. When they came back they made us sign the statements. I don't know whether they included this information or not."[812]

614. Asked again during cross-examination he answered: "I said nothing about the rape of women or girls or the distribution of weapons to girls but I did say that I knew

[809] Transcripts of 10 February 2000 pp. 21-22.
[810] Transcripts of 11 February 2000 pp. 20-21.
[811] Defence Exhibit No. 66.

about distribution of weapons at the communal office."[813]

615. The Chamber does not find these responses convincing. Witness AA's written statement specifically related to the Accused. Its last sentence reads: "I do not know anything about the training and *weapon distribution*, or victims of ... rape (emphasis added)."[814] Had the witness in the course of the interview alleged that the Accused distributed weapons, there is every reason to believe that the investigators would have recorded this important element.

616. It follows from the statement that the interview was conducted in English and Kinyarwanda, that the statement was recorded in English and translated into Kinyarwanda in the presence of the witness, who acknowledged that the facts as recorded reflected what he knew. As he was an illiterate, he signed by adding his thumb print to the document.[815]

617. Witness AA at first could not remember the date of the alleged distribution of weapons. The Prosecution suggested that the distribution may have occurred on the day on which the witness travelled to Kibuye town, to which the witness agreed. He was then asked whether he recalled the date when he arrived in Kibuye. He answered that it was on 18 April.[816] This was corrected by further questioning by the Prosecution:

> "[Q.] Mr. Witness, do you recall the date of the attack at Kibuye stadium?
>
> [A.] It was the 18th April.
>
> [Q.] When I asked you earlier what date it was that you left Mabanza, I recall that you told me that it was the 18th of April and this was the day before the attack. Were you therefore mistaken when you mentioned the 18th of April in retrospect?
>
> [A.] No, I'm not confusing any dates at all. We left the bureau communal on the 17th and the attack on the stadium took place on the 18th."[817]

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[812] Transcripts of 11 February 2000 pp. 26-27.
[813] Ibid. pp. 27-28.
[814] Defence Exhibit No. 66.
[815] Transcripts of 10 February 2000 pp. 6-8.
[816] Transcripts of 10 February 2000 p. 24.
[817] Ibid. p. 51.

618. The Chamber notes that Witness AA did, in fact, confuse the dates; and that he refused to acknowledge the mistake. This would be of little importance were it not for the additional fact that the witness, in his confession of 11 November 1999 to the Rwandan authorities, indicated that he made the journey to Kibuye town on the same day as the attack on the Stadium (that is, on 18 April 1994), and not the day before.[818]

619. The assessment of Witness AA's testimony so far has shown that it should be treated with caution, and the Chamber will seek corroboration from other sources. The witness's contention that the Accused travelled with him and other prospective attackers to Kibuye town on 17 April 1994 is only weakly corroborated by hearsay evidence from the testimony of Witness Z:

> "I will not always recall correctly but I know that he would pass by the roadblock and he was in the commune vehicle. It was a Hilux pick-up and he told us he was going to Kibuye. I know that he was in the company of assistant bourgmestre, Semanza. At that moment there were some Abakiga who were staying with Semanza and at the time, ... they were leaving together on the vehicle."[819]

620. The Chamber notes that whereas Witness AA stated that the Accused and Semanza left in separate vehicles, Witness Z mentioned only one vehicle in which both travelled together at an unspecified date.

621. Witness AA testified that he spent the night between 17 and 18 April 1994 in Kibuye town, at the Tribunal of First Instance (also referred to as "the courthouse"). He was told by the Accused's driver that the Accused would overnight at the Bethanie Hotel.[820] This is hearsay and must be treated with caution. No other testimony corroborates the allegation. Moreover, it is difficult to reconcile with the Accused's statement that he met the *Abakiga* early in the morning of 18 April 1994, which is corroborated by other witnesses (see above, The Accused's Account of His Whereabouts, 18-19 April 1994.)

[818] Defence Exhibit No. 114.
[819] Transcripts of 8 February 2000 pp. 53-54.
[820] Transcripts of 10 February 2000 p. 35.

622. The courthouse was situated very close to the Stadium, and Witness AA was asked the following question:

> "[Q.] Are you able to tell us whether or not as you proceeded from the roundabout to this courthouse you were aware of the presence of anybody in the stadium at this time?
>
> [A.] At that time, I was still not sure if there were people in the stadium."[821]

However, in his written statement of 22-23 September 1999 he declared:

> "We came back to the roundabout, and proceeded towards the Tribunal's building. We passed by Gatwaro stadium, *which was already packed with the Tutsi refugees* (emphasis added). The stadium was surrounded by the military and gendarmes who carried the guns."[822]

623. The two versions suggest a contradiction between Witness AA's testimony before the Chamber and his written statement.

624. The Chamber will now address Witness AA's description of the initial phase of the attack. The following key paragraph introduces the theme of an early tactical change, which is unique to this witness's account:

> "The situation as it was is that at the time of the attack, everybody gathered and a certain soldier ... fired a shot and then the others started shooting but those who were in the stadium started to defend themselves by throwing stones. When the attackers realised that they were being attacked with stones, they realised that the refugees could escape so they decided to go on top of the hill and from there, they started shooting into the stadium, throwing grenades into the stadium and tear gas."[823]

625. The gist of Witness AA's testimony is that there occurred a repositioning of assailants as a result of a strategy meeting in which the Accused himself participated. Such a tactical change would imply that the Accused was implicated in the overall planning and execution of the attack:

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[821] Ibid. p. 38. This position is contradicted by Witnesses A, AC and G.
[822] Defence Exhibit No. 66.
[823] Transcripts of 10 February 2000 pp. 38-39.

"[Q.] What exactly did you see Bagilishema doing?

[A.] I saw him at the time when he was going up together with the soldiers to consult because before that, the assailants had positioned themselves opposite the entry to the stadium and according to their [new] strategy, one part of them should have remained at the entrance to the stadium whereas the others would shoot from the other side into the stadium."[824]

...

[A.] I believe this new strategy was the result of a consultation between the Kibuye authorities. I didn't know them myself but I [simply] saw soldiers of high rank and in the company of persons who looked respectable and I saw them consult and I thought they were discussing the strategy and I believe the strategy was the result of their consultations.

[Q.] Was Mr Bagilishema part of this group that was being consulted? Yes or no?...

[A.] Yes, he was part of the group."[825]

626. Witness AA's theory that a force of attackers was directed away from the road-side of the Stadium to take up a new offensive position on Gatwaro Hill is made doubtful by the evidence of other witnesses.[826] Witness A, like Witness AA, referred to refugees throwing stones in their defence, but according to Witness A attackers were positioned on Gatwaro Hill already from the beginning.[827] Defence Witness CP testified that the attack commenced with shots fired from Gatwaro Hill.[828] And Prosecution Witness G located the Accused with Kayishema among the attackers positioned on Gatwaro Hill immediately before and after the beginning of the attack.[829] She testified:

"They [the attackers] remained on Gatwaro hill and it's from there that they launched the attack ... The assailants did not come down from the hill but on the contrary, they were killing people who wanted to leave the stadium."[830]

627. That Witness AA's account conflicts with that of Witness G is apparent also from the following exchanges with him:

[824] Ibid. pp. 45-46.
[825] Ibid. pp. 47-48.
[826] The new strategy does not appear in his statement of 22-23 September 1999 (Defence Exhibit No. 66).
[827] Transcripts of 17 November 1999 p. 32.
[828] Transcripts of 24 May 2000 pp. 43-44.
[829] Transcripts of 26 January 2000 pp. 15-16.
[830] Ibid. pp. 24-25.

"[Q.] Where were the attackers standing at the time [of the attack]?

[A.] The attackers were in front of the stadium gate."[831]

...

"[Q.] At what stage of the attack did you see Bagilishema?

[A.] I saw him when the gunshots started because the others resisted and there was a kind of confrontation and all the authorities ran up so that they could advise those who were shooting to move away and place themselves on the hill overlooking the stadium and that's when I saw him."[832]

628. Another uncorroborated aspect of Witness AA's account is his claim that the attackers came close to losing the battle with the refugees:

"[Q.] You just said that everything was done according to a well designed strategy. Who was the master of such strategy that [you were] talking about?

[A.] The authors of that strategy were the soldiers and the prefet. Everyone was saying that they were going to be seeing the prefet because they were about to loose the battle with the refugees despite the fact that the Abakiga had surrounded the stadium completely."[833]

629. No other witness suggested that the refugees ever had the upper hand at the Stadium.

630. An important allegation in Witness AA's testimony is that the Accused was at the Stadium in the company of Kayishema. The witness was engaged in the following exchange:

"[Q.] Was Bagilishema with you as well?

[A.] He was there because in order to change our - the strategy and to go on top [of] this hill close to the stadium, we needed to consult and Bagilishema consulted with Kayishema and others. I saw them moving towards the stadium, discussing, trying to decide on a strategy to attack."

[Q.] Did you say you saw Bagilishema with Kayishema. I thought you didn't know Kayishema?

[A.] The soldiers said that they needed to consult amongst themselves and they moved towards the courthouse to meet the prefet and that is how I explained it.

[Q.] Did you see Mr. Bagilishema yourself?

[A.] I saw him. The only person I did not see was the prefet."[834]

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[831] Transcripts of 10 February 2000 p. 41. The English translation has been corrected.
[832] Ibid. pp. 45.
[833] Transcripts of 10 February 2000 pp. 46-47.

631. After the clarification that Witness AA did not actually see Kayishema (as he did not know him), the witness was asked how he could claim that Kayishema took part in the planning meeting near the Stadium, rather close to the courthouse:

> "[Q.] How do you know that Kayishema was there because you told us earlier that you didn't know him?
>
> [A.] I heard it said around me that the order to attack was supposed to be given by the Prefet. The soldiers didn't take the initiative themselves to attack. Therefore, if, as had been said if they attacked it must have been because the Prefet was there and he gave the order." [...] When you hear people say: "Go and see the Prefet", you see them come back, you hear people say: "The Prefet is right there, but you think there were kilometers separating us. They were right there."[835]

632. The witness was not able precisely to locate the alleged meeting of the authorities:

> "I have already explained that to you. All these authorities were called upon to go to the courtroom to look into the strategy which might help them come to finish off the people who were in the stadium. I don't know whether it was in the courtroom or not but I know that these people left and they discussed."[836]

633. On the basis of this analysis of Witness AA's testimony the Chamber must conclude that Witness AA did not actually see Kayishema in the presence of the Accused, as he did not know the Prefect. Also, the witness did not see or overhear the meeting of high-ranking officials.

634. In this connection, the Chamber observes that in Witness AA's written statement of 22 and 23 June 1999, which specifically relates to the Accused, no mention is made of Kayishema or of the Accused consulting with him. There is no reference to any meeting or change of strategy. The only reference to the Accused is the following: "At [a] certain moment, Bagilishema walked by the stadium while the shooting was going

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[834] Ibid. pp. 43-44. The witness had previously informed the Chamber that he did not know Kayishema (p. 35).

[835] Transcripts of 11 February 2000 pp. 47-48. The English translation has been aligned to the French text, which reads: "Quand vous entendez les gens dire: «Allez voir le préfet», vous les voyez revenir, vous entendez les gens dire: «Le préfet est juste à côté», mais vous pensez qu'il y avait des kilomètres entre les deux endroits? C'était juste à côté."

[836] Transcripts of 11 February 2000 p. 51.

on, and he saw the killings."[837] Here, in contrast with the testimony, the Accused is depicted as a passive observer and not an orchestrator of the attack.

635. Additionally, Witness AA's confessional statement of 11 November 1999 to the Rwandan authorities corroborates the statement of 22-23 September 1999 about the passive role of the Accused.[838] No mention is made there of Kayishema, or of a consultation involving him and the Accused:

> "At about 3 pm, soldiers and the Interahamwe shot at the refugees. We were just onlookers, for we discovered there that other people had been dispatched from Butare-Cyangugu and other regions. They told us to stand at the entrance to the stadium and to kill whoever came out. Bagi[l]ishema saw what was happening. ... When night fell, they locked the stadium. Bagi[l]ishema spent the night at Bethanie and we at the Court of First Instance. ... In the morning, they resumed the killings and told us to be vigilant and not to move. ... At or about 8am, we returned to Rubengera in large numbers on foot."[839]

636. In view of the considerable number and variety of difficulties presented by Witness AA's testimony the Chamber is unable to accept any of its elements unless they are strongly corroborated by other sources. No other witness stated that Kayishema and the Accused consulted in the proximity of the courthouse during the early stages of the attack. Witness A testified to seeing the Accused at the Stadium prior to the commencement of the attack. Witness G alleged that she saw the Accused and Kayishema standing together on Gatwaro Hill at around the start of the attack. These testimonies do not corroborate that of Witness AA.

637. Consequently, the Chamber does not find that on 17 April the Accused was in Kibuye and on 18 April 1994 at the Stadium on the basis of Witness AA's testimony.

Witness A

638. Witness A testified that he saw the Accused with Semanza and policemen in a vehicle on the morning of 18 April 1994, before the attack on the Stadium. According

[837] Defence Exhibit No. 66.
[838] Defence Exhibit No. 114.
[839] Ibid.

to the witness, the Accused left when he heard the refugees shouting, and the witness did not see him again during the attack. Consequently, this testimony offers no basis for finding the Accused present *during* the attack.

639. Regarding the Accused's alleged presence *before* the attack, the Chamber notes that Witness A's testimony was very brief. He simply stated that he and others ran to the top of the larger stand in order to look, and that the Accused left when he heard the refugees shouting. No other information about the Accused's brief visit was provided. Moreover, in an apparent reference to the Accused, Dr. Léonard and Semanza, he said that between 13 and 18 April 1994 "they came back to say that we could go home, we could go back home because peace had been restored".[840] In his written statement dated 29 June 1999 the witness was more specific:

> "On 18 April, Bagilishema came back with the doctor [Dr. Léonard] and his deputy and asked us to go home, claiming that calm had been restored. We refused to leave and shortly thereafter, in the presence of these officials, the assailants launched an attack. The attack which started around 2 p.m., did not end until around 6:30 p.m. As was the case for most people, all my family members were killed there; I am the only survivor. I left the stadium at night when the attack stopped. I hid in a forest and remained there for a week. At a distance, I could see the *commune* vehicle moving around but could not recognise the people in it."[841]

640. This element of information given by Witness A is difficult to interpret. On the one hand, such an "invitation" to go home may be seen as an expression of concern on behalf of the Accused. This would go against a finding that there was criminal intent behind the Accused's alleged presence at the Stadium. On the other hand, the refugees seem to have rejected the Accused's suggestion and refused to leave. The alleged invitation is also difficult to reconcile with the information that a semblance of peace in Mabanza was not restored much before 25 April 1994 according to the Accused.[842] Further confusion is added by the fact that according to Witnesses AB and J, the announcement that "peace has been restored" was a ruse practised at that time to lure

[840] Transcripts of 17 November 1999 pp. 23-24.
[841] Defence Exhibit No. 7.
[842] See transcripts of 6 June 2000 pp. 96-97 and 6 September 2000 pp. 13-14.

Tutsi out of hiding in order to kill them.[843] On the other hand, this explanation does not apply to the circumstances of the Stadium. It is indeed difficult to see why representatives of Mabanza *commune* should use this method against an already detained group of refugees who were about to be killed in a major offensive. Therefore, the alleged remark by the Accused, irrespective of the date on which it was made to the refugees, casts some doubt over the Prosecution's case that the Accused was complicit in crimes committed against the refugees at the Stadium.

641. Consequently, the Chamber finds that the evidence provided by Witness A about the presence of the Accused at the Stadium before the attack is unclear.

Witness G

642. The key passage from Witness G's testimony reads:

> "[Q.] Madam, can you briefly describe that attack which took place on the 18th?
>
> [A.] Yes, on the 18th of April ... around 2 a.m there were many attackers who came carrying different weapons, machetes, spears and different other kinds of weapons including guns. So these assailants came and they circled the stadium at the entrance and even towards the Gatwaro hillside there were many assailants and with them was Kayishema who was the Kibuye Prefect as well as our leader Bagilishema was also with them. When they arrived, each one took his position and the prefect started the attack, launched the attack and the others followed by doing the job they had come to do and they shot their guns.
>
> [Q.] Madam Witness, where was Mr. Bagilishema before the attack started?
>
> [A.] He was together with the prefect.
>
> [Q.] Madam Witness, were they inside the stadium or outside the stadium?
>
> [A.] They were on Gatwaro hill.
>
> [Q.] Madam Witness, what was the distance, the approximate distance between you and Mr. Bagilishema before the attack started?
>
> [A.] I cannot give you the exact distance in metres but the distance was not great.
>
> [Q.] Madam Witness, was Mr. Bagilishema still there at the time the attack started.
>
> [A.] Yes, he was still there at the beginning of the attack.
>
> [Q.] Madam Witness, did you notice Mr Bagilishema do anything during that period?

[843] See transcripts of 15 November 1999 pp. 111-12 (for Witness AB) and 31 January 2000 p. 16 (closed session) (for Witness J).

[A.] He was standing."[844]

643. Witness G testified that the Accused was together with Kayishema before the attack and also after the attack had started. She said: "He was next to Kayishema, quite close to Kayishema."[845] No other witness observed the Accused with the Prefect on Gatwaro Hill before or during the attack.[846]

644. The Chamber will first consider certain points that go to the reliability of Witness G's testimony. She stated incorrectly that the refugees went to Kibuye town on 11 - not 13 - April 1994.[847] While the transfer of the refugees to the Stadium was a significant event, and therefore likely to be remembered, it does not follow that the date of the event will be remembered with precision after a lapse of more than six years. Therefore, the Chamber attaches no weight to this discrepancy.

645. Witness G testified that the Accused's attitude towards the Tutsi changed after the commencement of the war in October 1990:

> "I was saying that after 1990, he did not like the tutsis any more. He hated them. He threw people into prison and called them – referred to them as accomplices of the Inkotanyi".[848]

646. Asked to clarify her position, Witness G explained that the Accused, accompanied by the police or assistants, searched houses for weapons early in the morning (about 6 a.m.) of an unspecified day after the beginning of the war in October 1990, and that people were arrested even if weapons were not found. She testified that he targetted, in particular, "intellectuals". The witness stated that her uncle was arrested, and that her own home had also been searched.[849] Documentary evidence supports Witness G's testimony about searches for weapons, although not about arrests

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[844] Transcripts of 26 January 2000 pp. 15-16. The English version incorrectly referred to assailants arriving already from 9 a.m. This has been corrected.
[845] Ibid. p. 8 (closed session).
[846] Witness G's earlier statement of 19 June 1999 is even more categorical: "I would like to underscore the fact that during the attack of 18 April, *Bourgmestre* Bagilishema was with *Préfet* Kayishema on Gatwaro hill."
[847] Transcripts of 26 January 2000 p. 11-12.
[848] Transcripts of 26 January 2000 pp. 14-15 (closed session).
[849] Ibid. pp. 15-17.

(see IV.2). The Chamber observes that two of her close relatives were affected by the measures adopted in 1990.[850]

647. During cross-examination, the Defence tried to cast doubts upon the testimony of Witness G. She was questioned in connection with certain parts (which were hearsay) in her written statement and also about her testimony that the Accused carried a gun at the *bureau communal*.[851] The Chamber finds no reason to go into these issues, but will instead consider her observations at the Stadium on 18 April 1994.

648. Using a photograph, Witness G marked her own (pre-attack) position within the Stadium, as well as the location of Kayishema and the Accused on the side of Gatwaro Hill.[852] The witness indicated that she was standing on the first step of the smaller of the two spectator stands. As explained above (see V.3.2.3), the eastern stand is a low-roofed colonnaded building with a six-metre long porch projecting two metres out midway along the structure. The western edge of the main roof forms a downward-sloping overhang, the porch's own roof continuing on this downward slope. As a matter of appearance rather than function, the smaller stand is best described as a 25-metre long, four-metre wide shed. A person standing inside is afforded good protection from the elements but rather poor visibility of the surrounding areas. Witness G's position was inside the main covered area of the stand, close to the corner formed by the stand's western edge and the southern side of the protruding porch (that is, the corner furthest from Gatwaro Hill).

649. In looking towards Gatwaro Hill and the alleged location of the Accused and Kayishema, Witness G's line of sight would have had to travel at a gentle upward angle through the low-roofed and presumably crowded porch and its supporting columns, out over a 50-metre stretch of equally crowded field, before it reached the steep verdant (and thus dark-coloured) backdrop of Gatwaro, 55 to 65 metres away, where hundreds of attackers were said to have assembled. Although under favourable conditions of observation, a familiar face may be easily recognisable, albeit not necessarily

[850] Prosecution Exhibits Nos. 90 and 91.
[851] Transcripts of 26 January pp. 44-47.
[852] Prosecution Exhibit No. 65.

distinctive, the Chamber is concerned as to how the witness was able to specifically identify the Accused and Kayishema amongst the attackers over this distance.

650. According to Witness G, she knew the Accused well prior to the events in question.[853] The Chamber accepts that he was familiar to the witness. The same cannot be said about Kayishema. The Prosecution adduced no evidence about the witness's prior knowledge of the Prefect.

651. As to the conditions of observation, Witness G said that the attack began at around 2 p.m., at which time the light may be assumed to have been favourable. The witness asserted that the distance between her and her subjects "was not great", and in an important sense that was true. The refugees were fully exposed and within easy reach of the rifles and grenades of the hillside attackers; Witness G, though under the cover of the shed, must have felt acutely vulnerable.

652. The Prosecution did not adduce any further information about observational conditions at the time. Basic questions, rendered essential by the particular circumstances, such as whether other persons or structural components of the stand were interposed between Witness G and her subjects, whether the Accused faced Witness G or was looking in another direction, whether the presence of thousands of terrified refugees would have obstructed her view and questions about the time-period and frequency of visual contact, were not asked. It was incumbent upon the Prosecution to dispel reasonable doubt in relation, first, to the specific conditions of observation, which grow in relevance the greater the distance between observer and observed, and, second, to Witness G's ability to recognise Kayishema. The witness may have been able to recognise the Accused in characteristic signs of conduct or attire, but again these matters were explored barely or not at all. "He was standing" is not a behaviour that would help distinguish the Accused.

653. No other witness observed the Accused alone or with the Prefect on Gatwaro Hill before or during the attack, so Witness G's allegation is uncorroborated. Her observation was made over a long distance and the description of what she saw lacked

detail. Therefore, the Chamber does not find beyond reasonable doubt, on the basis of her testimony, that on 18 April 1994 the Accused was on Gatwaro Hill, in the company of Kayishema, at around the time when the attack on the Stadium was launched.

(iii) Conclusion

654. Having assessed the testimonies of Witnesses AA, A, and G, the Chamber does not find beyond reasonable doubt that the Accused was present at the Stadium on 18 April 1994.

3.4.4 Conclusions

(i) Cumulative effect of evidence

655. In an earlier section (V.3.2.7), the Chamber concluded that there was doubt also as to whether the Accused visited the Stadium on 13 and 14 April 1994. These conclusions were based not on a finding that the Accused was elsewhere at the material times, but rather on the paucity of evidence led by the Prosecution in relation to each and every alleged sighting of the Accused.

656. It is clear that two sketchy accounts may gain in strength where there is mutual corroboration. The Chamber has already considered this possibility in relation to each of the pairs of sightings on 13, 14 and 18 April 1994. The question remains whether a series of inconclusive sightings of the Accused, over a number of days, whose only common element is the presence of the Accused at the Stadium, can be combined to prove the proposition that the Accused must have been at the Stadium at some time during the relevant period.

657. In the Chamber's view, this cannot be done. By definition, an inconclusive sighting cannot gain support from another inconclusive sighting unless one

[853] The reasons are indicated in the transcripts of 26 January 2000 pp. 14 (closed session).

corroborates the other. The proposition that the Accused must have been at the Stadium "at some time" necessarily must be understood as presence on one or more of the times alleged by the witnesses. No *other* times form part of the Prosecution's case. The Chamber has already shown that the alleged sightings are individually inconclusive and mutually non-corroborative. Therefore their combination is also inconclusive. Consequently, the evidence led by the Prosecution, even when considered as a whole, does not support a finding that the Accused was present at the Stadium during the period 13 to 18 April 1994.

(ii) Summary of findings in relation to paragraphs 4.21-4.28 of the Indictment

658. In these concluding paragraphs of section 3.2, the Chamber first takes stock of the Prosecution's allegations in the Indictment pertaining to attacks against Tutsi detained in Kibuye town between 13 and 19 April 1994.

659. The Prosecution has not proved that the Accused gathered "at his request" Tutsi inhabitants of Mabanza *commune* at the communal office and then "ordered" them to go to Gatwaro Stadium (4.21). It has not proved that upon arrival in Kibuye town the Accused, "acting in concert" with others, divided the refugees into two groups, sending one group to the Complex and the other to the Stadium (4.22). It has not proved that "persons under [the Accused's] control" surrounded the two locations, causing the detention and suffering of the refugees (4.24). The Prosecution also has not proved that the Accused "acting in concert" with others, "brought" armed groups to the Stadium and "directed" them to attack the refugees (4.26). Nor has it proved that the Accused "personally attacked and killed" refugees at the Stadium (4.27).

660. The only remaining allegation in this category is that the Accused, "in ordering" the refugees to the Complex and the Stadium, "knew or had reason to know that attacks at these locations [were] imminent" (4.28). This too must be set aside as unproved.

(iii) Further grounds of liability

1561

Presence of other Mabanza commune officials at the Stadium

661. Two allegations made by Witness AC did not directly implicate the Accused, although they could form a basis for possible liability of the Accused under Articles 6(1) or 6(3) of the Statute. The first allegation was Witness AC's sighting on "Saturday" (16 April 1994) of the Mabanza communal vehicle (see V.3.2.4). It arrived at the Stadium transporting three policemen and armed Hutu civilians including five or six *Interahamwe*.[854] The incident was recounted by the witness with extreme brevity. The Prosecution did not press for details. Nor was the witness asked whether she had recognised any of the policemen. The visitors shortly departed, "towards Mabanza".[855]

662. From the evidence of Witness AC, it is unclear exactly who were the persons aboard the vehicle. The policemen were not identified as being from Mabanza, or under the control and authority of the Accused. Hutu civilians and *Interahamwe* are non-specific individuals, and no evidence was presented regarding any relationship they may have had with the Accused. Moreover, it has not been shown whether the Accused knew or should have known of the use and whereabouts of the communal vehicle, or whether he later came to know that the communal vehicle was so used. Consequently, there is insufficient evidence to link the Accused to this incident.

663. Witness AC's second allegation relates to the day of the attack on the Stadium. According to the witness, it was a Sunday.[856] She testified that she saw Semanza aboard the communal vehicle and that he was transporting the *Interahamwe* coming from Mabanza.[857] However, again, it has not been shown whether the Accused knew or should have known of the alleged presence of Semanza at the Stadium, or whether he later came to know of such presence. Consequently, the Accused cannot incur criminal responsibility on the basis of this allegation by Witness AC.

[854] Transcripts of 18 November 1999 pp. 46-48.
[855] Ibid. p. 48.
[856] Transcripts of 18 November 1999 p. 49.

664. In relation to evidence concerning alleged presence of other subordinates or collaborators of the Accused at the Stadium, the Chamber recalls that communal staff cannot be regarded as subordinates under Article 6(3) of the Statute. Regarding Article 6(1), the Chamber has already given its reasons for finding that the evidence led in relation to these allegations is insufficient to establish the criminal responsibility of the Accused.

Could the Accused have done more?

665. Questions remain about the conduct of the Accused vis-à-vis the inhumane acts and massacres which occurred at the stadium in Kibuye. The fact that the Prosecution has failed to make a case for the direct responsibility of the Accused for crimes committed at the Complex and the Stadium does not exclude the possibility that the Accused's conduct over the relevant period encouraged those crimes or made him an accomplice thereto. Firstly, it is arguable that the Accused was responsible for the security and well being of the Mabanza refugees he sent to Kibuye, and, as they were inhumanely treated and subsequently killed, he failed in his duty towards them. Secondly, it could be contended that by not taking the necessary follow up actions, including investigations and condemnation of the killings, on finding out about the massacres at the Stadium, the Accused failed in his duty as a local government representative.

666. There is no specific charge in the indictment relating to the Accused' purported failure to fulfil his responsibilities at the time of the events. Liability could be incurred on the basis of paragraph 4.13 of the Indictment, which is general in its content. According to this paragraph, throughout April, May and June 1994, the Accused "encouraged others to capture, torture and kill Tutsi men, women and children seeking refuge from attacks within the area of ... Kibuye Prefecture". Encouragement could include voluntary and public inaction in circumstances where there is a duty to act. Such encouragement may represent a form of aiding and abetting if the necessary requirements are met. The Prosecution did not specifically raise this issue during the

[857] Ibid. p. 50 ("il était à bord de ce véhicule").

trial or in its closing arguments. In its closing arguments the Prosecution only stated that as the Accused "did ensure that all these people who were gathered in the Kibuye stadium, they [were] all at the Home St. John, after the 12th of April, where they were subsequently massacred. The genocide, the massacre contributing to the genocide being the ultimate crime".[858]

667. A possible argument is that the Accused acted in extreme carelessness, in other words was negligent, by sending the refugees to Kibuye, and for not following up on their well-being. During the trial, the Chamber asked a number of questions about the Accused's behaviour in this regard. The Chamber notes that even if such negligence were to be demonstrated, it would not suffice to meet the *mens rea* requirements for liability as a principal for genocide and crimes against humanity. Rather, it would go to establishing that the Accused is liable as an accomplice, under Article 6(1) of the Statute, to the inhumane treatment and massacres at the Stadium.

- Responsibility for the refugees

668. As the Prosecution has not shown that the Accused was at the Complex or at the Stadium at the time of the attacks, the question of him stopping those attacks does not arise. Likewise, it has not been established that the Accused ought to have known that the refugees he sent to Kibuye were going to be inhumanely treated and eventually killed. The Prosecution also has not shown that the Accused was put on notice that the attacks were imminent and, therefore, potentially preventable by his intervention. The issue, then, is to what extent the Accused was responsible for the well-being of the refugees once they had left Kibuye. The Defence did not specifically address this issue but rather stated generally that the Accused did all in his power at the time of the events to prevent massacres.

669. It has been demonstrated that between 1,000 and 1,500 refugees arrived of their own volition at the Mabanza communal office between 8 and 12 April 1994. Due to the number of refugees, the sanitation and the food situation worsened. According to the Accused, he struggled to cope and sought help from the local community. On the

[858] Transcripts of 18 October 2000 p. 41.

morning of 13 April the Accused, in his capacity as *bourgmestre*, instructed the refugees to go to Kibuye town. He assigned two policemen to escort them mid-way.

670. It is clear that the Accused was responsible for the refugees whilst they were at the *bureau communal*. The fact that the Accused assigned two policemen to accompany them part of the way also gives rise to a duty of care during this part of the refugees' journey. The remaining question is whether the Accused was also responsible for the refugees once they had left Mabanza *commune* and arrived in Gitesi *commune*, specifically in Kibuye town. From the testimony of the Accused, it would appear that he believed that he handed over the responsibility for the security of the refugees to the Prefect. The Accused was asked in cross-examination whether officials from Gitesi *commune* were meant to assume responsibility for the safety of the refugees once the police escort from Mabanza withdrew. The following exchange occurred:

> "[A.] I requested our Préfet to ensure the security of these refugees.
>
> [Q.] And did you follow-up, that is through the officers that you detached for this task, did you follow-up to find out whether the security was insured by relay team that came from Gitesi?
>
> [A.] Yes, I did say that in the afternoon the commander of the gendarmerie came to Mabanza and reassured me that the people arrived in Kibuye."[859]

671. As such, by his own account, even though the meeting with Major Jabo was a chance encounter, the Accused was reassured that the refugees reached their destination safely. It might be argued that the Accused should have verified himself and that he should have ensured that the Prefect was indeed assuming the responsibility for their security. However, the evidence of the Prosecution on this issue is insufficient. It does not refute the testimony of the Accused that the Prefect, his direct hierarchical superior, was going to assume responsibility for the refugees, or that the Accused should not have assumed so. The Chamber also notes that outside the boundaries of Mabanza *commune*, the Accused had no formal powers. In Gitesi *commune*, these powers fell to the *bourgmestre* of Gitesi and to the Prefect of Kibuye. Consequently, the Chamber cannot find that the Accused was responsible for the refugees once they had reached Gitesi *commune,* specifically Kibuye town.

[859] Transcripts of 8 June 2000 p. 34.

672. It could also be contended that the Accused should have visited the refugees in Kibuye town, as many of them were from Mabanza *commune*. During the trial, the Accused was asked why, according to his account, he had not visited Kibuye town between 13 and 17 April 1994 in order to see what could be done for the security of civilians displaced from his *commune*. The Accused replied:

> "During this time, I was confronted with attacks from the Abakiga who were threatening the commune everyday. They were looting and attacking ... So I was dealing with those who were left in Mabanza, but in Kibuye, I was sure that the prefet and other prefectural officials would deal with the security issue ...". [860]

673. The Accused stated that on every day of the relevant period the *commune* came under attack by the *Abakiga*. He did not specifically assert that *Abakiga* carried out attacks in Mabanza *commune* on 15, 16 or 17 April 1994, but the evidence suggests a reasonable likelihood that attacks over that period continued. Witness AS testified:

> "[Q.] How many days did these attacks last?
>
> [A.] It is difficult to determine the number of days, but I do recall that they lasted for some time.
>
> [Q.] Were you, yourself, attacked, Witness AS?
>
> [A.] I was the victim of attacks on several occasions.
>
> [Q.] When you say on several occasions, several days, is that what you mean?
>
> [A.] Yes, indeed. In fact, it was for several days."[861]

674. The Prosecution has not refuted the Accused's contention that from 13 April to 18 April 1994 he was preoccupied with the *Abakiga* and other pressing matters in the *commune* and that, for these reasons, he was unable to render any assistance to the refugees in Kibuye town. The Prosecution also has not shown that the Accused was notified or should have known about the inhumane conditions at the Stadium, or about the attack on the Complex, or about the imminent attack on the Stadium. Under these circumstances, the explanation of the Accused cannot be rejected as implausible.

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[860] Transcripts of 5 June 2000 p. 42.
[861] Ibid. p. 9.

- The Accused's duty on finding out about the massacres

1556

675. Another question is whether the Accused acquiesced to the massacres by not taking necessary follow-up actions in his capacity as *bourgmestre*. Liability would come under Article 6(1), whereby acquiescence by a senior public official to crimes which he or she has a duty to punish could constitute a form of aiding and abetting if the standard elements – namely, the *actus reus* of substantial contribution to the crimes, and the *mens rea* of knowing support for the acts of the principals, even ex post facto, – could be demonstrated. The *actus reus* may be a positive act or an act of omission, such as an intentional decision not to perform a legal duty.

676. Asked about the attack on the Stadium, the Accused said that he found it "strange" that not only *Abakiga* but also *gendarmes* had attacked the refugees. He was asked if he had tried to find out why this was so. After all, a large number of people whose security originally fell to the Accused were attacked and killed.[862] The Accused answered:

> "I realized that the superior authorities had been informed and they came to visit Kibuye. And I thought that they were going to take the necessary measures at their level. That is what I expected. ... I thought it was up to the superior, my superiors to take the initiative to follow up on what happened in the prefecture. That was not the first time that such atrocities had occurred, but not on that scale. On each occasion, there were ... decisions to investigate and follow up; and I thought that was exactly what was going to be done, and that I was also going to testify in the matter, because part of the information on what happened was within my knowledge."[863]

677. The Accused added: "I denounced what happened, in the meetings that were held after that."[864] He said that on 25 April 1994 he attended a meeting at the Prefecture of Kibuye.[865] More than two weeks had elapsed, by his account, since his last visit to the Prefecture.[866] Asked whether the killings at the Stadium had been a subject of discussion at the prefectural meeting, he responded: "During that meeting, we really deplored what happened and we made recommendations intended to inform the

[862] Transcripts of 5 June 2000 pp. 60-61.
[863] Ibid. pp. 61-63.
[864] Ibid. p. 64.
[865] Transcripts of 6 June 2000 pp. 100-101.

superior authorities to avert such situations in the future."[867]

15'55-

678. The Accused was also asked if the Prefect had explained why *gendarmes* had participated in the attack on the Stadium.[868] He replied that the meeting was brief (less than one hour) because there was tension between the Prefect and the *bourgmestre* of Gitesi. Each *bourgmestre* gave a security status report on his own *commune*. Then, when the *bourgmestres* inquired about what had happened in Kibuye town in the period 17 to 19 April 1994, the Prefect told them that the attacks at the Stadium had been carried out by *gendarmes*, *Abakiga* and delinquents from Kibuye:

> "The Prefect explained to us that the local Commander went to the battlefield on 15 April and that after his departure there was a meeting within the ranks of the gendarmes and that he himself was threatened".[869]

679. The Accused added that he "did not have any authority over the people of Kibuye, and I had no authority over the *bourgmestre* of Gitesi Commune. I only denounced what ... was happening there [in Gitesi]".[870] Asked if he enquired about the number of people killed, the Accused replied: "We didn't ask for the exact number. ... We understood that it was horrible and no one mentioned any figures".[871] About Kayishema the Accused said:

> "[He] was saying that he was going to be responsible for what happened in his prefecture and that is why he had problems with the Burgomaster of Gitesi, he was asking him what happened, exactly what happened, then he had problems explaining what happened."[872]

680. On 3 May 1994, the Accused went to Kibuye town to attend a meeting with the Prime Minister of Rwanda's interim government, Jean Kambanda.[873] The Accused maintained that he pursued the matter at the meeting with the Prime Minister:

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[866] Ibid. p. 101.
[867] Transcripts of 5 June 2000 p. 69.
[868] Transcripts of 6 June 2000 p. 102.
[869] Ibid. p. 103; and 8 June 2000 p. 254.
[870] Transcripts of 8 June 2000 p. 252.
[871] Ibid. p. 256.
[872] Ibid. p. 104.
[873] Transcripts of 9 June 2000 p. 60.

"I spoke about what should be done, what needs to be done for the people of Kibuye who were victims of the atrocities perpetrated in the region. ... [T]he prime minister replied by saying he was going to do everything possible to punish the perpetrators of the acts, and that such acts should stop, forthwith."[874]

681. The Accused stated that he "expected" his superiors to follow up on what had happened. It could be argued that the Accused could not have reasonably believed that his duty, at least to call for an investigation into the crimes committed against the former inhabitants of Mabanza *commune*, was discharged in the course of his conversation with the Prime Minister.

682. The Prosecution has not discredited these elements of the Accused's defence. Although the defence, it could be argued, may appear somewhat questionable, the Prosecution has not refuted them. Additionally, the Prosecution has presented no arguments as to what further actions the Accused could have taken in the circumstances in the fulfilment of his duty. As such, his testimony regarding the meetings of 25 April and 3 May 1994, casts some doubt on the proposition that he did not do enough following the massacres. In particular, the Prosecution has not demonstrated that the Accused's inaction amounted to an acquiescence positively contributing to the commission of these or later crimes. Accordingly, it has not been shown that the Accused had the *mens rea* of an aider and abettor.

683. In light of the above, and considering that these issues were not addressed by the parties, the Chamber is not prepared to make an adverse finding against the Accused for not having done enough to punish crimes committed against refugees in Kibuye town between 13 and 19 April 1994.

[874] Transcripts of 5 June 2000 pp. 66-67.

4. Events in Mabanza Commune from 13 April to July 1994

4.1 Killing of Karungu

The Indictment

684. The killing of Karungu, a Tutsi, is alleged to have taken place in Mabanza *commune* around the middle of April 1994.[875] The Prosecution brings this event under paragraphs 4.12 and 4.13 of the Indictment:

> "4.12 In addition, Ignace Bagilishema personally attacked and killed persons residing or seeking refuge in Mabanza commune.
>
> 4.13 Throughout April, May and June 1994, Ignace Bagilishema, in concert with others, committed acts of Murder and encouraged others to capture, torture and kill Tutsi men, women and children, seeking refuge from attacks within the area of Mabanza, Gitesi, Gishyita and Gisovu communes, Kibuye Prefecture."

Submissions of the Parties

685. According to the Prosecution, the Accused was involved in an attack over two days against Karungu. Taking part, in addition to the Accused, were Mabanza *commune* officials Nsengimana (an assistant *bourgmestre*), Nzanana (the communal accountant), Nshimyimana (the communal driver), a communal policeman, *Interahamwe*, *Abakiga* and others. Karungu was killed during the attack and his house was destroyed. The Prosecution alleges that the Accused was an armed participant in the attack.

686. In response to the Accused's contention that he was engaged with other matters on the days of the attack, the Prosecution argues that, if that is so, the Accused at least knew about the attack which occurred on 13 April 1994 but took no measures to protect Karungu on the following day.

687. The Prosecution asserts that all persons who took part in the attack either were civilians answerable to the Accused in his capacity as *bourgmestre* or were his

subordinates. The Prosecution charges the Accused with genocide, complicity in genocide and crimes against humanity in relation to this event.[876]

688. The Defence challenges the credibility of Prosecution Witnesses AB, H and O on the ground that their testimonies were inaccurate and inconsistent. The Defence alleges, for example, that the witnesses gave different accounts about the manner in which the Accused accompanied the attackers to Karungu's house. Furthermore, none of the three Prosecution witnesses actually saw the attack on the house.

689. In relation to the additional allegation that the Accused failed to provide protection, the Defence replies that the Prosecution has led no evidence to show, first, that the Accused knew that Karungu needed assistance on the first day of the attack, or that he knew that the attackers would return the next day; second, there is no evidence that the Accused had the necessary means and was in a position to provide Karungu with protection, or, having the means, that the Accused refused or failed to do so.[877]

Deliberations

690. The Chamber will consider the testimonies of Prosecution Witnesses AB, H and O, followed by that of the Accused.

Witness AB

691. In direct examination, Witness AB testified that on 13 April 1994, from her hiding place in the area of Gitikinini, she saw the Accused, together with *Interahamwe* and policemen, aboard the *commune* vehicle inciting people to attack Karungu. The vehicle, driven by Nshimyimana, the communal driver, passed close by where the witness was hiding, on the way to Karungu's house. A megaphone was held by a policeman, Munyandamutsa, who was calling out that Karungu was a very important

[875] The first name of the alleged victim is not in evidence before the Chamber.

[876] Prosecution's written Closing Remarks p. 11 para. 75, p. 13 paras. 88-89, p. 53 para. 310, pp. 63-64 paras. 351-353, p. 88 para. 59, p. 92 para. 86, p. 103 para. 150, p. 108 para. 195, p. 115 para. 259 and p. 118 para. 278.

Inkotanyi. By this, according to the witness, he meant a dangerous Tutsi.[878]

692. Witness AB maintained that upon hearing these exhortations the *Interahamwe* rushed to Karungu's house. Her hiding place was not close to his house; nevertheless, from where she was, at an elevated part of a sorghum field, she "could see all those going to the house".[879] The attackers were not able to kill Karungu on that day. The witness heard about this from her hiding place, for the *Interahamwe* on their way back from Karungu's house were talking amongst themselves, saying that they had been prevented from killing Karungu by his neighbours.

693. Witness AB testified that on 14 April 1994 she was still in hiding, now alongside the road going towards Gisenyi, at a place called Kuibagiro.[880] Drums were beaten in the course of the night to summon people. Everyone, according to the witness, including children, hurried to the house of Karungu. The witness said: "I witnessed the attack that was launched at Karungu's house."[881] She also testified that the Accused had "invited all these people", that he "launched the attack", and that he "played a role in the attack".[882] However, later in examination-in-chief, the witness said that she did not see the Accused take part in the attack itself: "I only saw him on the vehicle that was transporting the *Interahamwe*."[883] Within hearing distance of her hiding place, the Accused allegedly met the *Abakiga* and asked them to assist him.

694. Witness AB then described the attack of 14 April 1994. It lasted "the whole day", from 9 a.m. to 5 p.m.[884] Many persons took part. They were armed with all sorts of weapons, and some wore banana leaves. Whistles were blown and drums were beaten in the course of the attack. The witness did not see the actual attack. She did not witness Karungu being killed, although, once again, she was able to overhear those

[877] See, for instance, Defence Closing Brief pp. 33-36 paras. 223-266.
[878] Transcripts of 15 November 1999 p. 75.
[879] Ibid. p. 78.
[880] Ibid. p. 84.
[881] Ibid. p. 81.
[882] Ibid. pp. 80-82.
[883] Ibid. p. 83.
[884] Ibid. p. 85.

returning from the attack in their vehicles boasting about what they had done. Karungu's house was destroyed. The *Abakiga*, on their way back from the attack, destroyed other houses along the way and killed whoever was in the neighbourhood. Witness AB admitted that there was a "big distance" between her hiding place and the place of the attack, but stated that after the attack she could see that Karungu's house was in ruins.[885]

695. According to the witness, *Interahamwe* killed Karungu, burning his house with him inside. His family and two Hutu, who were defending him, were also killed. The same evening, Prefect Kayishema gave those who had participated in the attack vehicles requisitioned from the Chinese road construction company. The jubilant attackers drove the vehicles away from the scene of the attack, singing.[886]

696. In cross-examination Witness AB testified that she could not see Karungu's house from her hiding place on 13 April 1994. Asked how she knew that the persons going past intended to stop at the house, she claimed that they had said so themselves. The witness added that by 14 April 1994, she had changed her hiding place, moving a little further up from Kuibagiro. From there she was still unable to see Karungu's house.[887] The witness appeared to hesitate to answer the question whether she had seen the Accused at the house in the course of the attack, eventually acknowledging that she was not a witness to it.[888] She also explained that she had not seen Kayishema at Karungu's house but rather saw him in his vehicle driving past her hiding place. He was being thanked by the *Interahamwe* for giving them a vehicle to go home in.[889]

697. Already the Chamber has expressed its doubts about the reliability of Witness AB's testimony.[890] Her testimony on the killing of Karungu adds to those doubts. First, the witness gave conflicting accounts, claiming to have witnessed the attacks against

[885] Ibid. p. 86.
[886] Ibid. p. 90.
[887] Transcripts of 16 November 1999 pp. 69-71.
[888] Ibid. pp. 72-73.
[889] Ibid. pp. 79-80.

Karungu, then denying this in cross-examination. Second, the witness could not see Karungu's house from either of her hiding places. Third, while at first the witness testified that the Accused launched the attack, she then asserted that she had seen him only pass by on the road in the direction of Karungu's house. Her description of the actual attack on 14 April 1994 made no reference to the Accused.

698. The Chamber does not overlook the possibility that Witness AB could have reconciled or further elucidated elements of her account of this event. However, her testimony left the impression that she wished to convey more than she had witnessed. The Chamber doubts, for example, that the witness could have become privy to such a remarkable amount of information concerning the attack simply by overhearing the conversations of those passing by her hiding place. It cannot be said that the witness was well placed to overhear distant utterances spoken above the din of a large group of attackers. Yet, according to the witness, she obtained information in this manner on at least five separate occasions.

699. In view of the doubts raised by Witness AB's testimony, the Chamber has compared it with her earlier statements to Prosecution investigators. In the first such statement, of 1 February 1996, the witness named sixteen victims and the places at which they were killed.[891] Karungu was not among them. The witness mentioned the Accused only in relation to the meeting with Kayishema on 12 April 1994 and the departure of the refugees for Kibuye (V.2.6 and 3.1). In her next statement, of 22 June 1999, which was focused on actions of the Accused, the witness discussed the attack on Karungu in detail.[892] This version is generally in accord with her testimony, although the witness stated that the Accused and Prefect Kayishema "were present when Karungu was attacked and murdered".

700. The Chamber is mindful that Witness AB did not see the actual attacks on Karungu. Her statements that the Accused "played a role" and "launched an attack" are

[890] See V.2.5 and V.2.6. See also V.3.1, where on one point Witness AB's testimony differs from that of all other witnesses.
[891] Defence Exhibit No. 2.

of a general nature. Her testimony is marked by internal variations and elements of speculation and hearsay that cast doubt on her credibility as an eyewitness to the events she described. Her view, hidden as she was in a field and concerned not to be seen by those she was observing, was much less than ideal, and this must be taken into account by the Chamber when assessing her ability to identify passers-by.

Witness H

701. Witness H testified that immediately following the departure of refugees on 13 April 1994, *Abakiga* arrived in Mabanza *commune* and proceeded to Karungu's house. The witness was standing on a hill. He testified that he "did not see much. I only saw people there".[893] The attackers were unable to find Karungu on the first day but were successful on the second, when they torched his house, burning him alive. Witness H could hear the attackers shouting, and singing "let us exterminate them".[894]

702. At this point in the examination, Witness H's timing of the Karungu episode became unclear. The Prosecution referred the witness to his statement of 14 July 1999.[895] There he stated that the refugees left Mabanza *commune* on 13 April 1994. The statement continued:

> "After they left, a group of killers referred to as Abakiga arrived from Rutsiro and Gisenyi. ... That same day, I saw Bagilishema go to Karungu's house twice in a vehicle. The Abakiga only found Karungu one week later and killed him.[896] Two of the Hutus hiding him ... were also killed for conspiring with the enemy."

703. Asked to comment on the date of the killing, Witness H reiterated that Karungu was found and killed in the week following the departure of the refugees. Asked again, he gave the same answer. Four rounds of questioning were necessary before the witness indicated that what he meant was that the attack on Karungu's house occurred on the

[892] Defence Exhibit No. 3.
[893] Transcripts of 19 November 1999 p. 18.
[894] Ibid. p. 19.
[895] Defence Exhibit No. 10.

day of the refugees' departure for Kibuye town. The witness finally said that Karungu was killed on the next day, a Thursday.[897] The Chamber notes that in his written statement of 14 July 1999, Witness H declared without ambiguity that Karungu was found hiding with Hutu *one week after* the witness had seen the Accused on the way to Karungu's house, namely, one week after the day of the refugees' departure.

704. Witness H confirmed that he saw the Accused on the first day of the attack.[898] He was following the *Abakiga* in the communal vehicle, which was driven by the communal driver, Nshimyimana. There was a communal policeman on board and more than ten *Interahamwe*. During cross-examination, the witness explained that he saw the *Abakiga* pass at around 6 a.m., whereas the Accused came after them ("les suivait") some time after 8 a.m.[899] The witness testified that he saw the Accused travel in the direction of Karungu's house also on the second day of the attack. The Accused was in the same car, accompanied by the same persons.[900] The witness did not provide any more details about the second day of the attack.

705. Witness H said that although Karungu's house could not be seen from where the witness was living, he knew of a location from where he could view the house. It was from this location that he witnessed the first day of the attack. He said that he saw the *Abakiga* pass in front of his house, which was by the roadside. From there, he moved to his observation point to see what was happening at Karungu's house.

706. On the second day, he saw the same scene from his house, namely a large number of *Abakiga*, together with local Hutu, walking past on the way to Karungu's house. They were singing. Behind them came the communal vehicle driven by Nshimyimana.[901]

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[896] French version: "Les Abakiga n'ont trouvé et tué Karungu qu'au bout d'une semaine."
[897] Transcripts of 19 November 1999 pp. 31-36 and 40.
[898] Ibid. p. 37.
[899] Transcripts of 22 November 1999 pp. 8-9.
[900] Transcripts of 19 November 1999 pp. 40 and 84-86.
[901] Transcripts of 19 November 1999 pp. 85-86.

707. It has been established that Witness H was not a close eye-witness to the attacks on Karungu's house. His testimony did not contain any details about the attacks, except for the torching of the house. Even if the Chamber accepts that Witness H observed the attacks from his vantage point on the hill, the witness could not confirm that the Accused was present at the site of the attacks on Karungu. In relation to the first attack, the witness testified that the Accused followed in the path of the *Abakiga* only two hours later. Despite seeing "persons" at the site, he did not see the Accused. This creates doubt as to whether the Accused actually followed the *Abakiga* to Karungu's house. Regarding the second attack, the witness only saw the Accused travel "in the direction of Karungu's house". This, in itself, is inconclusive.

Witness O

708. Witness O testified that sometime between 15 and 18 April 1994, at 10 a.m., an attack was mounted from Gitikinini to kill Karungu, a Tutsi. The witness, who was hiding in a sorghum field, saw the Accused among a crowd of people moving towards Nyarugenge *secteur*, singing "let us exterminate them". Present with the Accused were assistant *bourgmestres* Semanza and Nsengimana, and the communal accountant Nzanana. The Accused was carrying a gun.[902] During cross-examination, Witness O testified that the crowd numbered approximately one hundred. The Accused was following the crowd, on foot. The witness did not explain how she came to know that this group of people was on its way to kill Karungu.[903]

709. The Chamber has already found reason to doubt the reliability of Witness O's testimony in relation to the alleged meeting on 12 April 1994 between the Accused and Kayishema (V.2.6). In this connection, the Chamber notes that the witness's first written statement, of 17 October 1995, did not explicitly refer to Karungu.[904] The episode described there is of the Accused, armed with a gun, in the company of three assistants – Nzanana, Nsengimana and Anthere – armed with cudgels. They were

[902] Transcripts of 24 November 1999 pp. 44-46.
[903] Ibid. pp. 115-116.

"looking for people".

710. The witness referred to the killing of Karungu only in her second interview with Prosecution investigators on 23 and 24 February 1998.[905] (In some respects this account resembles the episode mentioned in her first statement; in others it is similar to her testimony.) The witness declared in her second statement that sometime between 15 and 18 April 1994, from her hiding place in a sorghum field, she saw the Accused and a crowd of between fifty and one hundred attackers come from Gitikinini. She did not see any communal policemen. The Accused carried a gun, but so did Semanza. Nsengimana had a club. The witness did not mention Nzanana or Anthere. She said that upon their return, the group (her declaration does not clarify whether it included the Accused) was singing that Karungu had been killed.[906]

The Accused

711. The Accused testified that on 13 April 1994, having overseen the departure of the refugees from the *bureau communal*, he turned his mind to the expected attack by the *Abakiga*. After visiting Pastor Cyuma for advice, the Accused saw a large number of people armed with traditional weapons.[907] These assailants, finding no one at the communal office, dispersed, some of them going to look for Karungu, others heading to the house of the Accused. The Accused testified that he heard explosions from the direction of Karungu's house, at a time that he himself was under threat by the *Abakiga*. The Accused later received information from the *conseiller* of the *secteur* where Karungu lived that Karungu had defended himself remarkably well; he had even

[904] Defence Exhibit No. 11.
[905] Prosecution Exhibit No. 62.
[906] Witness O's statement of February 1998 contains the following sentence: "Another person who could testify about Bagilishema's actions during that period is named [Witness AB] ... We were not together during those events, but I believe she would be willing to testify." As indicated above, by this date (1998) Witness AB had already made a general statement (February 1996) in which she made no reference to the Karungu episode. Karungu first appeared in her statement of June 1999, that is, subsequent to Witness O's second statement. It has not escaped the Chamber's notice that there is a possibility of collusion between the two witnesses.
[907] Transcripts of 5 June 2000 pp. 47-48.

used a grenade during the attack against him.[908]

712. Once the assailants had left, the Accused returned to the *bureau communal* to see what had occurred there. He tried to contact people in Mushubati to see how they were coping. The Accused testified that he did not visit Karungu, although he had learned of the attack later on the same day. He testified that "to the contrary, I went to see people who were still under threat, who were not in Karungu's house. ... I went towards the north, just following the *Abakiga* who were going to their own homes, who were going away".[909] The Accused said about Karungu that he was known to the *Abakiga*, who had branded him "an accomplice of the *Inkotanyi*".[910]

713. The Accused testified that he did not expect the *Abakiga* to return to Karungu's house on 14 April 1994. He was told that Karungu was not at home when they arrived on the second day – he had gone into hiding. He was also told that the *Abakiga* proceeded to search the houses in Kabuga *secteur*, until Karungu ran back to his house saying that his day had come. The Accused testified that he was informed that Karungu had committed suicide by setting his house on fire and that subsequently, the *Abakiga* attacked Karungu's neighbours.[911]

714. In cross-examination the Accused was asked about the steps he had taken to ensure that Karungu would be protected from a follow-up attack. The Accused replied that he did not know that the *Abakiga* were going to return the next day; that Karungu had defended himself well, so the Accused did not see the need to visit him; and that there were more urgent matters to attend to in the *commune*.[912] The Prosecution also asked the Accused to explain why he had provided police protection to Witness RA and Pastor Eliphas on 14 April 1994 but none to Karungu, considering that he was the one who had been attacked. The Accused did not provide a direct answer to this question.[913]

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[908] Ibid. pp. 48, 106-107, 112-113; and transcripts of 8 June 2000 p. 215.
[909] Transcripts of 5 June 2000 p. 49.
[910] Ibid. p. 123.
[911] Ibid.
[912] Transcripts of 8 June 2000 pp. 215-218.
[913] Ibid. p. 224.

Findings

715. From the above summary it is evident that none of the three witness saw the Accused participate in the physical attack on Karungu's house. Each witness claimed to have seen the Accused go in the direction of the house, but none reported seeing him return (Witness AB testified to seeing *Kayishema* return). The absence of this detail is significant in the present context, where witnesses occupied vantage points along the route to the site of the attacks but were not present at the site itself.

716. An additional source of doubt relates to the reliability of the testimonies of Witnesses AB and O. The underlying reasons were set out above and also in sections V.2.5 and 2.6. This doubt necessarily implies that in the absence of corroborating detail the Chamber will be unable to accept an assertion made by either witness. The Chamber does not find that the testimonies of Witnesses AB and O are strongly mutually corroborative, and both differ significantly from that of Witness H.

717. Only limited evidence was led on the role of possible collaborators or subordinates of the Accused. The witnesses did not identify the same set of persons seeking Karungu. While Witnesses AB and H mentioned the communal driver and policemen, Witness O saw the Accused walking in the company of two assistant *bourgmestres* and the communal accountant, and, in her second statement, the witness explicitly declared that she had *not* seen communal policemen. Thus the identity of any subordinates of the Accused who participated in attacks against Karungu remains in doubt. The evidence on their roles leading up to the attacks was even more sparse than that concerning the Accused. Again, no witness saw these persons participate in the physical attacks against Karungu – they were seen only en route, allegedly to the site of the attacks.

718. Furthermore, as explained under IV.4.6 and 4.7, unless the evidence in the particular instance indicates otherwise, the Chamber will not be in a position to find

that persons referred to as *Abakiga* and *Interahamwe* were subordinates of the Accused. The evidence here is insufficient to deviate from this point of departure. Nor does the evidence support the notion that *Abakiga* or *Interahamwe* attacked Karungu as collaborators of the Accused.

719. Therefore the Chamber cannot find beyond reasonable doubt, on the basis of the testimonies of Witnesses AB, H and O, that the Accused organised, led, participated in or is otherwise liable for the attacks resulting in Karungu's death.

720. In its final written submissions the Prosecution adopted a two-pronged approach to the Accused's liability. On the one hand, as discussed above, it alleged that the Accused physically took part in the attacks against Karungu.[914] On the other hand, it argued that the Accused knew or had reason to know about the attack on 14 April 1994, but took no measures to protect Karungu. Instead, he provided police protection to Witness RA and Pastor Eliphas. In the Prosecution's view, the Accused was unable to explain the basis of this action when questioned during testimony.[915]

721. The essence of the second submission of the Prosecution is that the Accused remained passive when he should have been active in his duty to protect the civilian population of Mabanza *commune*. This suggests that the Accused, by omitting to act to help Karungu, or by committing his limited resources to people in lesser need of protection, effectively helped Karungu's attackers. This argument is of course diametrically opposed to the first submission of the Prosecution, namely that the Accused was a principal participant, present and active in the course of the attack leading to Karungu's death. The evidence adduced by the Prosecution from its witnesses related to this first submission. The second argument, by contrast, rests on the Accused's own admissions, that he was informed about the 13 April 1994 attack and took no measures to protect Karungu from an attack the next day.

[914] Prosecution's written Closing Remarks, for instance, p. 88 paras. 58-59 and p. 95 para. 108.
[915] Ibid. pp. 63-64 paras. 351-353.

722. Leaving aside the difficulty of reconciling the two approaches adopted by the Prosecution, there is no evidence in the case that the Accused was actually informed, on 14 April 1994, that a second attack was taking place against Karungu. The question, therefore, is whether the 13 April 1994 attack should have alerted the Accused to the likelihood of a further attack on the next day, and, if so, whether the Accused failed to take necessary and reasonable measures to prevent the attack or otherwise protect Karungu.

723. The criminal responsibility of the Accused must be assessed in view of the particular circumstances of Mabanza *commune* in April 1994, when a large number of Tutsi were being threatened or killed. The Chamber is mindful of the danger of retrospectively apportioning blame to the Accused for his apparent neglect of Karungu in a situation where he had the duty – but few resources – to protect a large number of persons.

724. The Accused testified that Karungu's successful self-defence during the first attack led the Accused to believe that the *Abakiga* would not return. At any rate, there were more urgent matters for the *bourgmestre* to attend to in the *commune*. This explanation is not, in itself, implausible. But even if the Accused was forewarned of the repeat attack, the Prosecution would still need to show that he deliberately utilised the resources available to him on 14 April 1994 in such a way as to expose Karungu to an unacceptable risk, or that he withheld protection in order to ensure that Karungu would be killed. There is evidence to support the Prosecution's contention that the Accused on 14 April 1994 assigned a policeman to protect Witness RA and Pastor Eliphas. However, according to Witness RA, this was in response to a threat by the *Abakiga* to kill a community of about 40 persons, including Hutu and Tutsi.[916] There is no evidence that this was a case of selective protection.

[916] Transcripts of 2 May 2000 p. 46.

Conclusion

725. Consequently, the Prosecution's first and second submissions in relation to the killing of Karungu have not been proved beyond reasonable doubt.

4.2 Killing of Pastor Muganga

The Indictment

726. The Prosecution implicates the Accused in the killing of Pastor Albert Muganga, which allegedly occurred on 14 or 15 April 1994 at a football field not far from the *bureau communal*.[917] Paragraph 4.15 of the Indictment reads:

> "Ignace Bagilishema between 9 April and 30 June 1994 detained over 100 Tutsi refugees at the commune office jailhouse at Mabanza. On or about 15 April 1994, Ignace Bagilishema allowed Interahamwe militiamen, access to the said jailhouse, following which several Tutsi refugees detained therein, were tortured and killed."

Submissions of the Parties

727. The Prosecution made reference to the testimonies of Witnesses AB, O and Z. According to the first witness, the Accused removed three persons, including Pastor Muganga, from the communal jailhouse, from where they were led away to be killed. The second witness testified that the Accused ordered a communal policeman to guard Muganga while he went towards the Trafipro roadblock, from where he returned with six *Interahamwe* militiamen. The witness saw the men take Muganga away towards the football field while the Accused followed in a vehicle. According to Witness Z, the

[917] Prosecution's written Closing Remarks pp. 22-23 paras. 134-142.

Accused ordered the killing of Muganga. The witness and his associates went to the communal jail where a policeman handed over the Pastor. He was taken by the group to a football field and killed.

728. The Defence relies on Witnesses AS and RB, according to whom the Accused maintained good relations with Pastor Muganga and his wife. One night, a few days following the death of President Habyarimana, Muganga's wife and children took refuge in the Accused's residence. On 14 April 1994 the Accused helped Muganga's wife and children to flee from Mabanza *commune*. According to the Defence, it is difficult to accept that the Accused could, on the one hand, assist Muganga's wife and children, and, on the other hand, send the Pastor to his death. The Defence points out a number of inconsistencies in the testimonies of witnesses called by the Prosecution and claims that there is much imprecision in the Accused's alleged responsibility for the offence against Muganga.[918]

Deliberations

Witness AB

729. Prosecution Witness AB testified that on 15 April 1994 she witnessed an attack on Tutsi detained at the *bureau communal*. The persons were locked up in the IGA building and elsewhere on the grounds of the communal office. The perpetrators consisted of the Accused, communal policemen and *Abakiga*. From behind a red metal door of a room in the IGA building they let out Pastor Muganga, Hitimana and a third person (a girl). According to the witness, the Accused facilitated the release of the three persons.[919] During cross-examination, the witness stated that she saw the Accused actually unlock the door of the holding room.[920] The prisoners were taken away and killed near the Mabanza *commune* football field. The witness did not say who took them away. She observed the incidents she described from her hiding place in a nearby

[918] See, for instance, the Defence Brief pp. 57-58 paras. 471-483.
[919] Transcripts of 15 November 1999 pp. 91-93; and 16 November 1999 pp. 88-89.
[920] Transcripts of 16 November 1999 p. 95.

sorghum field. She did not see the prisoners being killed.[921]

730. The Chamber has noted that Witness AB's testimony is not generally reliable.[922] In relation to the present incident, Witness AB's first statement to investigators dated 1 February 1996 made detailed reference to several incidents that allegedly occurred in April 1994. Despite the fact that the Accused's name was mentioned in connection with some of these incidents, there was no reference to the killing of Pastor Muganga.[923]

731. In her subsequent statement of 22 June 1999, which dealt specifically with the Accused, the witness made reference to Muganga. The statement reveals only that she heard from the communal driver that the Accused opened the jail door and gave the *Interahamwe* access to the prisoners. This is in contrast with her testimony, referred to above, according to which she herself saw the Accused let out Muganga. Furthermore, the second statement made no mention of communal policemen or *Abakiga*.[924]

Witness Z

732. Prosecution Witness Z testified that on the morning of 14 April 1994 a communal policeman delivered a message to Semanza from the Accused to the effect that the Accused did "not want to see" Muganga when he returned to his office.[925] Thereafter Semanza came upon Witness Z and others in the neighbourhood of Gitikinini, where he repeated the Accused's instructions and asked them to take their weapons and accompany him. At the *bureau communal* the group found a policeman. Semanza asked him to open the prison door, and Muganga and other detainees were let out (see also V.4.2). Semanza handed the prisoners over to the group with the instruction "to work on them".[926] The group took Muganga to a football field where about twenty bodies lay. A member of the group struck Muganga with a sword.

[921] Transcripts of 15 November 1999 pp. 92-93.
[922] See V.2.5, 2.6, 3.1 and 4.1.
[923] Defence Exhibit No. 2.
[924] Defence Exhibit No. 3.
[925] Transcripts of 8 February 2000 p. 45.

According to Witness Z, "[w]e then followed his example and we finished him up with clubs and then left him there, dead".[927]

733. In cross-examination, Witness Z said that Muganga had gone to the Accused's house to seek protection. From there he was led to the *bureau communal* and detained. The witness explained that he had not himself seen this happen and that he was not present when the Accused allegedly gave the message to the policeman. However, the witness claimed that he *was* present when the Accused's message was conveyed to Semanza. This is in contrast with his account in direct examination, where he said that Semanza found him in Gitikinini and conveyed the message to him.[928]

734. The witness added that Pastor Muganga was taken from the *bureau communal* barefoot but otherwise fully clothed. He was wearing a pair of trousers, a shirt and a jacket. Witness Z said: "After we killed Albert Muganga we did not undress him ourselves but the Abakiga did so. ... In our group, in other words the group which had left Gitikinini, in that group nobody took part in the undressing of Muganga".[929] (The significance of this statement will become apparent with Witnesses O and B, below.)

735. The Chamber notes that the role of Semanza is confirmed in Witness Z's statement to investigators of 18 September 1999. Witness Z said that: "Bagilishema asked his deputy, Semanza, to look into Albert Muganga's case. Semanza came to Gitikinini and asked us (the three people named above and myself) to accompany him to ... Muganga at the *commune* office."[930]

Witness O

736. Following the departure of refugees for Kibuye town on 13 April 1994,

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[926] Ibid. p. 46.

[927] Transcripts of 8 February 2000. The witness named the members of the group as Ntirugiribambe (or Ntirugiribamze), Samuel, Ezekiel Kubwimana, Amza Gatsatsi (or Gatsatsa) and Hamda Mkobori.

[928] See transcripts of 9 February 2000 p. 72 and 8 February 2000 p. 45, respectively.

[929] Transcripts of 9 February 2000 pp. 94-95.

[930] Defence Exhibit No. 65. In this version there is no intermediary messenger (i.e. the policeman).

Prosecution Witness O hid in fields. She testified that she returned to the *commune* office "about two weeks" later, after which she witnessed the killing of Pastor Muganga.[931] (The aforementioned witnesses gave a much earlier date for the incident: 14 to 15 April 1994.)

737. Witness O testified that she returned to the *bureau communal* with a male relative, and at first sought refuge in a nearby sorghum field. The relative convinced a policeman to open one of the communal offices for them, where they gained temporary shelter. The following morning Witness O left the building. Her relative remained.[932]

738. Next time the witness saw her relative, from her hiding place in a field, he was in the communal jailhouse. On this day the witness saw the Accused at the door of the prison with a policeman. Her relative and Pastor Muganga emerged from the door. The witness testified that her relative was wearing a jacket she recognised. The Pastor was wearing a black jacket. At this point the Accused left the *bureau communal* and went towards the Trafipro roadblock. The two detainees remained with the policeman. The witness saw a conversation take place between the Accused and the people at the roadblock. The Accused returned with six armed *Interahamwe*, who led the witness's relative and Muganga to a football field. The Accused followed them in the communal vehicle. The witness was not able to see what happened at the football field. In due course, the *Interahamwe* returned to the roadblock in a vehicle, whereupon the witness noticed that two of the men were wearing the jackets of her relative and Muganga.[933]

739. In her statement to investigators of 23-24 February 1998, Witness O declared that after the prisoners were taken away by the *Interahamwe*, the Accused "returned to his office". She further stated: "I saw the same *Interahamwe* returning from the soccer field. ... Later, I saw Bagilishema taking the *Interahamwe* back to the roadblock in the

[931] Transcripts of 24 November 1999 p. 35.
[932] Ibid. pp. 35-37.
[933] Ibid. pp. 37-43. The members of the group, as recalled by the witness, were Athere (or Intare), Gilbert, Rushimba (or Lushimba), Lukanosi (or Rukanuse), Sanane (or Sanani) and Finish.

blue *commune* Hilux."[934] Witness O did not mention the incident with Muganga in her earlier statement of 17 October 1995.

Other Prosecution Witnesses

740. For the sake of completeness, the Chamber will mention the other Prosecution witnesses who referred to the killing of Muganga, even though the Prosecution did not rely on their testimony in its closing arguments.

741. Witness B said in cross-examination that she saw Pastor Muganga, wearing only a brief, and a girl named Esperance being escorted away from the Gitikinini roadblock (V.5.8). The witness said: "He was undressed and was taken towards the *commune*. Later on, they went to kill him on the football field."[935]

742. Witness J, also in cross-examination, was asked whether she was present when, as alleged in her written statement of 8 July 1999, the Accused brought Muganga to the *bureau communal*, supposedly to protect him, but instead allowed the communal policemen to hand Muganga over to his killers.[936] The witness replied: "Even if I were not present, what happened was known subsequently", suggesting that the evidence in her statement was hearsay. About Muganga's death the witness said: "He left his hiding place and he was pursued by the assistant Semanza. ... Those who were chasing him, the *Interahamwe* who were accompanying Semanza, took him to the burgomaster."[937]

743. Witness A testified that he saw the body of Pastor Muganga in the football field of Mabanza *commune*. The witness left the *commune* on 13 April 1994 with the mass of refugees. He was a survivor of the attack on Gatwaro Stadium on 18 April 1994. By the witness's own account, about a week after the attack he returned to Mabanza *commune*. He saw Muganga's body "as soon as I returned from Kibuye". He explained

[934] Prosecution Exhibit No. 62.
[935] Transcripts of 24 January 2000 p. 94.
[936] Defence Exhibit No. 63.
[937] Transcripts of 31 January 2000 p. 36 and pp. 38-39.

that this was around 24 to 25 April 1994.[938]

Defence Witnesses

744. Witness AS testified to the assistance provided by the Accused to the wife of Pastor Muganga. The witness said that for some time Muganga's children were in hiding in his (AS's) house, while Muganga's wife hid in the neighbouring house of Pastor Eliphas. The witness at the time did not know the whereabouts of Muganga. Following a spate of attacks on himself and his neighbours, he went to the Accused to ask for his help with Muganga's family. The Accused visited the Pastor's wife and children and was able to find them a vehicle in which they escaped. The witness recalled seeing the vehicle but was not able to identify the driver or provide other details. He said that two years later he again saw Muganga's wife.[939]

745. Witness RB did not testify but the Chamber accepted her written statement of 26 March 2000 as evidence in the trial.[940] There she affirmed that Muganga had good relations with the Accused and his wife.[941] She stated that on a certain night in April 1994, soon after the death of Habyarimana, Muganga's wife and her children hid in the residence of the Accused. On another night they hid in the home of Pastor Eliphas. On the day following the departure of the refugees for Kibuye town, Muganga's wife met the Accused accompanied by two soldiers in a vehicle. Witness RB said that the soldiers took the Pastor's wife and children to a *commune* in Gitarama prefecture. In the event, the soldiers robbed them and abandoned them on the roadside. From there the Pastor's family was able to reach the refugee camp at Kabgayi.

[938] Transcripts of 17 November 1999 p. 112.
[939] Transcripts of 26 April 2000 pp. 20-24.
[940] Oral decision of 8 June 2000 (see transcripts of same date, pp. 132-136). The Chamber stated that in accordance with Rule 89, any relevant evidence having probative value may be admitted into evidence provided this is consonant with the requirements of a fair trial. Hearsay evidence, such as the statement in question, is not inadmissible per se, but must be considered with caution.
[941] Defence Exhibit No. 109.

The Accused

746. In the course of his testimony, the Accused said that Pastor Muganga was his friend and that Muganga's wife was the teacher of the son of the Accused. He stated that during the period 7-13 April 1994, Muganga's wife had taken refuge in his house. At this time the Accused did not know the whereabouts of Muganga. He testified that he came to know of the Pastor's death on 14 or 15 April 1994. The Accused added: "It was horrible because he was a friend and I would have saved him, helped him if I had found him but unfortunately I did not find him."[942] According to the Accused, Muganga and seven others persons in hiding were discovered by the *Abakiga* upon their return to the *commune* on 14 April 1994. They were taken to the football field and killed.[943]

Findings

747. While the Chamber accepts that Pastor Muganga was taken from the communal office area to the communal football field and killed, the events leading up to his death are unclear. The only purported eye-witness to the killing was Witness Z, whose testimony the Chamber has found to be unreliable in relation to allegations tending to incriminate the Accused (see, in particular, V.5.5 and 5.6).

748. Witness Z admitted to killing Muganga, and the Chamber sees no reason to doubt this claim. However, other aspects of Witness Z's evidence do not seem reliable. According to his confession to the Rwandan authorities, Muganga sought refuge at the house of the Accused.[944] At the direction of Semanza, *Abakiga* arrived at the house. The Accused became frightened by the disturbances and took Muganga to the communal jail. This account seems to portray the Accused as a person to whom Muganga would go for protection. In his testimony, by contrast, Witness Z did not

[942] Transcripts of 5 June 2000 p. 17.
[943] Ibid. pp. 125-126.
[944] Defence Exhibit No. 112.

mention that Muganga sought refuge at the Accused's house. He stated only that the Accused did "not want to see" Muganga when he (the Accused) returned to his office. (As the confessional statement was obtained by the Chamber on a date subsequent to Witness Z's testimony, there was no opportunity to question the witness on this matter.)

749. Moreover, according to Witness Z's testimony, Semanza received an order from the Accused to kill Muganga. The witness was not present when the Accused allegedly gave this order. But the witness gave two versions as to how he found out about it. First, he said that Semanza came to Gitikinini, where the witness was, and repeated the order of the Accused. In the second version, the witness was present with Semanza when a policeman conveyed the Accused's order. This shift in accounts between direct examination and cross-examination gives the impression of an attempt by the witness to claim that his knowledge of the order allegedly issued by the Accused was more immediate than it in fact was. This effort could stem from a desire to incriminate the Accused more decisively, although, of course, the hearsay nature of the allegation remains the same. Witness Z's testimony on this point is not corroborated. It cannot be accepted without corroboration. Thus the Chamber finds that it does not demonstrate that the witness killed Muganga pursuant to an order of the Accused.

750. As illustrated above, the testimonies of Witnesses AB and O, although similar in broad outline, do not coincide in detail. The credibility of both witnesses has been questioned.[945] Neither witness saw Muganga being killed. They testified to his being released from different buildings in the communal compound. They located the Accused at the *bureau communal*, alleging that he handed over Muganga to the persons who eventually killed him, in contrast with Witness Z who strongly implied that the Accused was not present at the *bureau communal*. The Chamber also observes that the names of the members of the group that killed Muganga, as recalled by Witnesses Z and O, are different, although there is a possibility that Witness Z was among the persons named by Witness O.

751. The testimonies of Prosecution Witnesses B, J and A are sketchy. The former two witnesses claimed to have seen certain events leading up to the killing of Muganga, but their accounts are quite different. Witness A saw the Pastor's body at the football field, but the date he gave for this sighting, 24-25 April 1994, is much later than that given by Witnesses AB and Z. Assuming that Witness A saw the body and was mistaken about the dates his testimony does not implicate the Accused in relation to this event.

752. The lack of mutual corroboration among Prosecution witnesses may be contrasted with the coincidence in the evidence led by the Defence. The assertion of Witness AS, about the support extended by the Accused to Muganga's family is, in the Chamber's opinion, corroborated by the written statement of Witness RB, who was a close relation of the Pastor.[946] The latter witness stated that Muganga and his wife "had good relations" with the Accused and his wife. Soon after the attacks on Tutsi commenced in early April 1994, Muganga's wife hid with her children at the residence of the Accused. Even if it was not uncommon during the events of 1994 for Tutsi to be selectively spared, it is doubtful that the Accused would have ordered Muganga killed and simultaneously have taken active steps to save his family.

753. The Prosecution argued in the alternative that the Accused failed to prevent or punish wrongful acts, including the killing of Muganga.[947] This allegation suggests that a subordinate of the Accused killed Muganga in circumstances that would make the Accused responsible as a superior under Article 6(3). There are three possible subordinates of the Accused in the present context: Witness Z, assistant *bourgmestre* Semanza, and the unnamed communal policeman (according to Z and O) or policemen (AB).

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[945] See, in particular, V.2.5, 2.6, 3.1 and 4.1.

[946] Defence Exhibit No. 109.

754. The Chamber accepts that Witness Z was a subordinate of the Accused for the periods during which he staffed the Trafipro roadblock (V.5.4). As explained below, the evidence concerning that roadblock's date of establishment is conflicting. Witness Z testified that he was ordered by the Accused to set it up on 14 April 1994, and that he staffed it thereon.[948] The Chamber has found that this has not been proved (V.5.4.1). At any rate, according to Witness Z's account, Semanza came to find him and his co-perpetrators at Gitikinini and not at the site of the Trafipro roadblock, which was proximate to the *bureau communal*. The Prosecution has not led evidence of a superior-subordinate relationship subsisting between Witness Z and the Accused prior to the establishment of the roadblock at Trafipro.

755. As for Semanza, the Chamber recalls its discussion in IV.4.2 that the fact that he was an employee of the communal administration under the authority of the Accused is not sufficient to ground a superior-subordinate relationship between the two men. More is needed to demonstrate the legal relationship envisaged by Article 6(3). Moreover – and this goes also to the likelihood that the Accused and Semanza were acting in concert, such as to be jointly liable under Article 6(1) – there is evidence to suggest that a strained relationship existed between the two men over this period (IV.6).

756. Be that as it may, for the Accused to be liable for Semanza's actions under Article 6(3) he would have to have had knowledge of Semanza's leading role (according to the uncorroborated testimony of Witness Z) in the killing of Muganga. There is no evidence that Semanza himself informed the Accused. It could be argued that, under normal circumstances, the Accused must have found out that his deputy removed Muganga from the communal jail, from where he was taken away and killed. But the circumstances were far from normal. On 14 April 1994 (which is Witness Z's date for the incident) there were attacks by *Abakiga* in the neighbourhood of the *bureau communal* (V.4.3). There is evidence to suggest that a number of refugees in and around the communal office were discovered and killed by *Abakiga*. The Accused

[947] Prosecution's written Closing Remarks p. 97 para. 101 (genocide) and p. 116 para. 270 (crimes against humanity).
[948] Transcripts of 8 February 2000 pp. 38-39.

testified that he believed that Muganga was among their victims. His claim is plausible and has not been refuted by the Prosecution.

757. That being said, the Chamber is not prepared to find that Semanza played a role in the killing of Muganga. Witness Z's allegation to this effect is not only uncorroborated but is contradicted by Witnesses AB and O, who did not place Semanza at the *bureau communal* at the time when Muganga was handed over to his killers.

758. Finally, Witnesses AB, Z and O testified to the involvement of one or more policemen in the events leading up to Muganga's death. There is no doubt that communal policemen were true subordinates of the Accused (IV.4.3).

759. The Chamber notes that no witness claimed that a policeman was among those who escorted Muganga to the football field, much less that a policeman killed the Pastor. It may be thought that the offence for which the Accused may be liable as a superior under Article 6(3) is that a policeman collaborated in the murder of Muganga by agreeing to release the prisoner knowing that he was to killed. The problem with this line of reasoning is that the Prosecution's case is that the policeman surrendered Muganga to none other than the Accused or, alternatively, Semanza. Superior liability would arise only in the latter case (in the former case the Accused would be liable as a principal under Article 6(1)). But for the reasons given above, the Chamber cannot accept that Semanza played the role in this incident ascribed to him by Witness Z.

760. The Chamber wishes, in conclusion, to emphasise that in relation to the facts leading up to the death of Muganga, the Prosecution has only proved that sometime in mid-April 1994, Muganga, after a brief stay on the premises of the *bureau communal*, was taken away and killed by a group of people possibly including Witness Z, his body then left at a football field. The accounts given by the Prosecution's witnesses differ significantly one from the other, and in the final analysis the Chamber, presented with an array of incompatible stories, cannot find sufficient evidence to conclude that the Accused is criminally responsible for the death of Muganga.

761. The Chamber therefore finds that the Prosecution's charges of genocide and crimes against humanity in relation to this event are unsubstantiated.

4.3 Killing of Refugees at Communal Office; Burial in Mass Grave

The Indictment

762. Paragraph 4.15 of the Indictment covers events alleged to have taken place at or around Mabanza's *bureau communal* following the departure of the main group of refugees for Kibuye town on 13 April 1994:

> "4.15 Ignace Bagilishema between 9 April and 30 June 1994 detained over 100 Tutsi refugees at the commune office jailhouse at Mabanza. On or about 15 April 1994, Bagilishema allowed Interahamwe militiamen, access to the said jailhouse, following which several Tutsi refugees detained therein were tortured and killed."

763. Paragraphs 4.16 and 4.17 of the Indictment allege that the Accused oversaw the digging of a mass grave, on the grounds of the *bureau communal*, where he interred the bodies of Tutsi refugees killed during attacks:

> "4.16 Ignace Bagilishema between 9 April and 30 June 1994 ordered Interahamwe militiamen to dig a mass grave within the precinct of the commune office in Mabanza.
>
> 4.17 The remains of several Tutsi refugees killed during attacks at both the commune office and elsewhere within Mabanza commune, were between 9 April and 30 June 1994, with the knowledge, consent and acquiescence of Ignace Bagilishema, buried in a mass grave within the precinct of the commune office in Mabanza."

Submissions of the Parties

764. According to the Prosecution, after the refugees departed on 13 April 1994 for Kibuye town, other Tutsi refugees arrived at the *bureau communal*. They were locked up in the IGA building and other rooms. The Prosecution alleges, first, that the Accused was responsible for the killing of these refugees, and second that he supervised the

digging of a mass grave in front of the *bureau communal* into which several of the victims were buried. The Prosecution charges the Accused with genocide, complicity in genocide and crimes against humanity in relation to these events.[949]

765. The Defence submits that refugees were sheltered in various buildings of the *bureau communal*, but were not locked up in the jail, and in any case denies that the Accused allowed *Interahamwe* access to the jail. Regarding the mass grave, the Defence argues that no charge may be leveled against the Accused. In burying victims of the *Abakiga* he was merely performing his duty.[950]

Deliberations

Witness AB

766. Prosecution Witness AB testified that the refugees that arrived after the main group left for Kibuye town were not allowed to stay in the courtyard of the *bureau communal* but were locked up in various rooms, including an office of the IGA building. The witness described two incidents involving those who were locked up. The first, on 15 April 1994, was discussed above (V.4.2). The witness saw armed policemen, the Accused and *Abakiga* release and lead away Pastor Muganga, Hitimana and a girl. They were taken to a football field and killed.[951]

767. Witness AB added that at some point between 15 and 17 April 1994 the Accused and policemen allowed attackers access to the rooms within which refugees were being held. She was able to witness the door of a particular room of the IGA building being opened and the refugees let out. The witness testified that she did not know if the door

[949] See Prosecution's written Closing Remarks pp. 22-23 paras. 138-141, pp. 23-24 paras. 144-149, pp. 88-89 paras. 60-61, p. 93 para. 97, p. 96 para. 109, p. 99 para. 116, p. 105 para. 168, p. 108 para. 198 and p. 115 para. 260; Rebuttal p. 15 para. 50 and p. 16 para. 54.
[950] See Defence Closing Brief p. 56 paras. 463-470, pp. 29-30 paras. 200-208 and pp. 58-59 paras 484-493; Rejoinder pp. 22-23 paras. 223-227.
[951] Transcripts of 15 November 1999 pp. 91-93.

was locked with a key or a padlock.[952] She did not see any killings from where she was hiding but heard gunshots from the *bureau communal*. It is not clear when she heard the shots. She estimated that about one hundred persons were killed, and later saw bodies being put into a mass grave in front of the communal office. [953]

768. According to the witness, a bulldozer belonging to the Chinese was used to dig a hole in front of the communal office (by the avocado trees). About thirty *Interahamwe*, wearing dried banana leaves, placed bodies into the hole. The witness was asked why she thought that some of those bodies were of people killed at the *bureau communal*. The witness answered: "I am saying that because there was a day when we heard sustained gunshots, and clearly these gunshots must have come from the communal office." The witness added that the people carrying the bodies came from behind the communal office (her hiding place was in front of it). [954]

769. The witness explained that after the war she was told that "with respect to those who were at the *bureau communal* ... it was Bagilishema who ordered that the room in which they were locked up be opened".[955] The witness confirmed that she had heard gunshots but that it was two days later that she saw bodies being buried.

770. Witness AB's written statement to investigators of 22 June 1999 supplements her testimony. There she declared that on 15 April 1994:

> "... I saw the *Interahamwe* arrive at the *commune* office and going up to the jail. Two days thereafter, I saw people digging a ditch using the excavator belonging to the Chinese ... Thereafter, I saw the *Interahamwe* throw the bodies of the people who had been locked in the jail into the ditch. There were approximately 100 people in the jail; they were all exterminated. It was reported that it was the *Bourgmestre* Bagilishema who opened the jail and enabled the *Interahamwe* to commit their heinous crime. I got that information from a man named Nshimyimana, who was the *Bourgmestre*'s driver at the time."[956]

[952] Transcripts of 16 November 1999 p. 95.
[953] Transcripts of 15 November 1999 pp. 94-97; and 16 November 1999 pp. 94-95.
[954] Transcripts of 15 November 1999 pp. 97-100.
[955] Transcripts of 16 November 1999 pp. 98-100.
[956] Defence Exhibit No. 3.

Witness H

771. Prosecution Witness H testified that the refugees that arrived after the departure of the main group expected that "in the *bureau communal* they could be able to find security". These refugees, all Tutsi, continued to arrive "within that same month" in "dribs and drabs".[957] They numbered fifty in total.

772. The witness added that the refugees were killed at a playing field. The Accused must have known about these killings for the *bureau communal* continued to operate and "nothing can happen or take place within the *commune* without the *bourgmestre* being aware".[958] The refugees were killed with bladed weapons.[959] The witness explained that he had witnessed the event from a place close to a mosque which had a good view of the playing field.[960]

Witness Z

773. Prosecution Witness Z testified that on the morning of 13 April 1994, killings began around the Gitikinini area. *Abakiga* from Mushubati and Gihara "came chasing the Tutsis and killing all Tutsis they met on their way. They even chased them into the bush and into sorghum fields and along the road they killed a lot of people, particularly near the parish and Communal office of Rubengera ... ."[961] The witness claimed to have seen between forty and sixty bodies on the road between Rubengera church and the *commune*.

774. The witness testified that in the afternoon of the same day the Accused came to Gitikinini. On seeing the many bodies, he sent policemen to the Chinese camp to collect a machine to bury them. The witness explained that the machine arrived a few

[957] Transcripts of 19 November 1999 p. 43.
[958] Ibid. p. 44.
[959] Ibid. p. 91.
[960] Ibid. p. 90.
[961] Transcripts of 8 February 2000 p. 21.

minutes later and a hole was dug in front of the *commune*, by the flagpole and avocado trees.[962] The witness testified that all passers-by were ordered to place the bodies into the hole, after which it was covered over. The bodies were collected from the area between Gitikinini and the communal office. Witness Z was unable to estimate the number of bodies.[963] In his written statement to investigators of 18 September 1999, the witness declared that the Accused instructed the population to bury the victims of the *Abakiga* but that no mass grave had been dug.[964]

775. As stated above (V.4.2), Witness Z testified that on 14 April 1994, he and others took Pastor Muganga from the *commune* jail to kill him at the football field. They found twenty bodies there, some of which had been undressed. The witness did not know where these bodies had come from.[965]

Witness AS

776. Defence Witness AS testified that he and others collected the body of Pastor Muganga at night from a football field. He estimated that there were another ten corpses in the vicinity.[966]

Witness AA

777. Without giving an exact date, Prosecution Witness AA testified that he saw bodies of people of all ages not far from the Trafipro roadblock. In his opinion the bodies were those of refugees "who were not able to go to Kibuye and who came late and were therefore killed there".[967] He did not count the bodies "but I saw some on the

[962] Ibid. p. 27.
[963] Ibid. p. 28.
[964] Defence Exhibit No. 65.
[965] Transcripts of 8 February 2000 pp. 46-47; and 9 February 2000 p. 92.
[966] Transcripts of 26 April 2000 pp. 22-23 and 84-90.
[967] Transcripts of 10 February 2000 p. 58.

road and where they were gathered that is, close to the *bureau communal*".[968] He saw "people carrying these dead bodies to a ... mass grave that was dug close to the football pitch".[969] He estimated that during the time that the Trafipro roadblock was in operation, he saw thirty or so bodies close to the *bureau communal*. The witness stated that he did not see any actual killings.

The Accused

778. The Accused denied that persons were locked in the communal jail. He stated that, to the contrary, he was looking to protect people: "[W]e had tried to shelter the refugees everywhere where we could, we had opened all our doors, we didn't put them in prison at all".[970] He also testified that no prisoners whatsoever were present at the *bureau communal* during this time because all persons arrested prior to the disturbances had been transferred directly to Kibuye town.[971]

779. According to the Accused, on 13 and 14 April 1994, a number of persons who had been in hiding were found and killed by *Abakiga*. After the departure of the *Abakiga* on 13 April 1994, the Accused came across seven or eight bodies at the *bureau communal*. He sent a driver to the "Chinese camp" with a request for a bulldozer to help bury the bodies which were "beginning to decompose".[972] A mass grave was dug in front of the *bureau communal* between two avocado trees. The Accused claimed that this location was chosen because "we were not able to touch the property belonging to individuals" and "because it was the only place which belonged to the *commune*".[973]

780. The Accused also testified that on 14 April 1994 more people who had been in hiding were found by the *Abakiga*. The refugees tried to flee towards Kibilizi market but "they were surprised from the side of the football field and there eight people were

[968] Ibid. p. 60.
[969] Ibid. p. 59.
[970] Transcripts of 5 June 2000 p. 130.
[971] Transcripts of 8 June 2000 p. 225.
[972] Transcripts of 5 June 2000 p. 131.

killed, including Muganga".[974] After the *Abakiga* had left the Accused asked people to claim the bodies of their relatives. He testified that he did not have the courage to identify the victims, so he asked policemen and members of the *cellule* committee to help bury the bodies. Unclaimed bodies were buried close to the football field.[975]

Investigator Allagouma

781. The Prosecution investigator identified locations of mass graves around Mabanza *commune*. His knowledge of the locations was based on information he received during interviews rather than from excavations or exhumations. The investigator stated that there was a mass grave at each of the following places: in front of the communal office, under the newly built police complex to one side of the *bureau communal*, by the Rubengera football pitch and in a septic tank on land belonging to a certain Hitimana.[976] A number of exhibits were filed by the Prosecution to show the location of mass graves from the period, including the one at the communal office.[977] The Chamber notes that paragraphs 4.16 and 4.17 refer only to "a mass grave" within the precinct of the *bureau communal*.

Findings

782. Witness AB is the only witness to have referred to one hundred refugees (the figure in paragraph 4.15 of the Indictment) being killed at the *bureau communal* following the departure of the main group. Witness H testified that a total of fifty persons arrived at the *bureau communal* on 13 April 1994 or after. According to the Accused, eight people were found and killed in the proximity of the *bureau communal* on 13 April 1994 and another eight on the following day.

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[973] Ibid. pp. 130-131.
[974] Ibid. pp. 125-126.
[975] Ibid. pp. 132-133.
[976] Transcripts of 28 October 1999 pp. 96-114.
[977] Including Prosecution Exhibits Nos. 13, 38(b), 38(c), 38(d), 39(c), 39(d), 39(e), 41(a), 41(b), 41(c), 42(b), 42(c), 43(a), 43(b) and 43(c).

783. Although these versions differ, it seems that a number of refugees continued to stream into the *bureau communal* after the departure of the main group in the early morning of 13 April 1994.

784. The Accused admitted that some people were sheltered in the main hall of the communal office and in the IGA building but that all the doors were unlocked. By contrast, Witness AB maintained that refugees were locked up in rooms of the IGA building. In cross-examination, however, the witness admitted that she did not know if the room from which she saw certain refugees come out was locked.

785. The only other evidence about persons being under lock at the *bureau communal* relates to the killing of Pastor Muganga (V.4.2). However, even here the testimonies of the Prosecution witnesses are not consistent. Witness AB testified that Muganga was taken out from a room of the IGA building whereas Witnesses O and Z maintained that he was being held in the communal jail.

786. Witness AB was the only witness to testify to seeing the Accused and policemen facilitate attackers' access to the rooms of the IGA building within which Tutsi were held. However, cross-examination revealed that the witness did not herself see the Accused open the door but rather that she obtained this information from the Accused's driver. Her hearsay evidence is not corroborated. The Chamber recalls that the credibility of Witness AB has been called into question.[978] The allegation in the Indictment that the Accused allowed *Interahamwe* militiamen access to buildings of the *bureau communal* has not been established beyond reasonable doubt. The related allegation that *Interahamwe* militiamen tortured and killed Tutsi refugees hiding therein also remains unproved.

787. As for the allegation that persons were killed in or around the *bureau communal*, the evidence does not implicate the Accused. No witness saw the Accused there during the killings. Neither Witness AB nor Witness AA claimed to have seen killings at or

around the communal office between 15 and 17 April 1994. Witness Z was alone in associating the Accused with the above events. He explained that the Accused arrived in the afternoon on 13 April 1994, apparently *after* the killings had ended.

788. The evidence as to the identity of the killers is scant. Witness Z and the Accused testified that the refugees were killed by *Abakiga*. There is no evidence that the Accused or any of his subordinates was among those committing the killings.

789. It has been established that the Accused organized the digging of a mass grave outside the *bureau communal*. At least eight bodies, possibly more, found between the communal office and Gitikinini were interred in the grave. The Chamber observes that interring persons in a mass grave does not in itself establish criminal liability. However, according to Witness AB, *Interahamwe* wearing banana leaves (possibly *Abakiga*) participated in the mass burial ordered by the Accused. This would indicate that the Accused exerted control over a group of possible assailants. Again, this observation by Witness AB gives cause for doubt. It does not coincide with the account given by Witness Z, who in his testimony spoke of passers-by assisting in the burial and in his previous written statement referred to the "people of Gitikinini" performing the task.[979] There is also reason to doubt that Witness AB actually observed the mass burial in question. She claimed that it took place two days after the date on which she heard gunshots from the direction of the communal office, more than four days after the date advanced by the Accused and Witness Z. Consequently, the Chamber cannot find that the allegations in paragraphs 4.16 and 4.17 of the Indictment have been proved.

790. The question whether the Accused, as *bourgmestre*, took necessary and reasonable action to protect the refugees who arrived after the departure of the main group has not been argued by the Prosecution. The Chamber nevertheless makes reference to evidence considered in various parts of this Chapter that suggests that Mabanza *commune* was besieged by *Abakiga* on or before 13 and 14 April 1994.[980]

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[978] See, in particular, V.2.5, 2.6, 3.1 and 4.1.
[979] Defence Exhibit No. 65.
[980] See, in particular, IV.4.7 and 5.2; and 3.1-3.4.

This evidence adds up to a reasonable possibility, at least, that the Accused was not in full control of the security situation in Mabanza *commune* during the time in question. The Prosecution also has not addressed the question whether the Accused should have attempted to find the perpetrators and take measures against them.

791. For the above reasons, the Chamber finds that the charges of genocide, complicity in genocide and crimes against humanity in relation to the events referred to in paragraphs 4.15 to 4.17 of the Indictment must be dismissed.

4.4 Attacks at Bisesero

The Indictment

792. According to the Prosecution, by late April 1994, many Tutsi had taken refuge in the hills of Bisesero, where they were subsequently attacked. It is alleged that the Accused supported attacks on the refugees at Bisesero, as a result of which thousands lost their lives. Paragraph 4.30 of the Indictment reads:

> "Throughout April, May and June 1994, Ignace Bagilishema acting in concert with others, including Clement Kayishema, Semanza Celestin, Nsengimana Apollinaire, Nzanana Emile and Munyampundu brought to the area of Bisesero armed individuals, including members of the Gendarmerie Nationale, communal policemen and Interahamwe militiamen and directed them to attack the people seeking refuge there. In addition, Ignace Bagilishema personally attacked and killed persons seeking refuge on Gitwa hill in the area of Bisesero."

Submissions of the Parties

793. Referring to testimonies, the Prosecution alleges that the Mabanza *commune* driver transported attackers to Bisesero to kill the refugees there. It was also alleged that the Accused was present at a meeting during which all able-bodied young men were encouraged to go to Bisesero to attack refugees. Another witness said that at the end of April 1994, she heard *Interahamwe* militiamen bragging about what they had done at Bisesero. The Prosecution also contends that when the *Abakiga* began stealing

cattle from Hutu in Mabanza, the Accused instructed them to go to Bisesero to assist those fighting the Tutsi there. Furthermore, reference is made to one witness who saw two bus loads of attackers drive past his *secteur*, and subsequently learned that these vehicles had gone to Bisesero. Finally, the Prosecution alleges that arms and ammunition were distributed, under the supervision of the Accused, to *Abakiga*, *Interahamwe*, members of the security forces and other Hutu civilians preparing to go to Bisesero to take part in the attacks. The Prosecution charges the Accused with genocide, complicity in genocide and crimes against humanity.[981]

794. The Defence argues that none of the Prosecution witnesses was an eyewitness to the events at Bisesero. The witnesses who referred to Bisesero either heard the *Interahamwe* boasting about having committed crimes there, saw buses transporting the *Interahamwe* toward Bisesero or heard the Accused exhorting the *Abakiga* or the population to go to Bisesero. However, according to the Defence, the Prosecution provided no evidence to show that any of these persons actually went to Bisesero, or what they may have personally done there. It has not been proved that any crimes were committed there. Therefore, the allegations with respect to Bisesero must be discarded for lack of evidence.[982]

Deliberations

Witnesses

795. Witness H, a Hutu, testified that after the departure of the refugees for Kibuye (V.3.1) and the subsequent attack against Karungu (V.4.1), the *Abakiga* left Mabanza *commune*. The witness added:

[981] See, for instance, Prosecution's written Closing Remarks p. 12 para. 83, pp. 37-38 paras. 232-238, p. 94 para. 94, p. 100 para. 97, p. 103 paras. 143-145, p. 106 para. 177 and p. 103 para. 246; Rebuttal paras. 12 and 17.

[982] See, for instance, Defence Brief p. 26 paras. 172-174; Rejoinder paras. 121-126.

"The *Abakiga* left Mabanza commune because bourgmestre Bagilishema had held a meeting in Rubengera sector and he had told the *Abakiga* to continue and to go onwards to Bisesero to assist the Hutus who were fighting the Tutsis. But the true reason for which he was sending these *Abakiga* there was because these *Abakiga* had started to eat the Hutu livestock. The Hutu in Mabanza started to complain and so the bourgmestre asked them to leave his *commune*."[983]

The witness said that he had attended this meeting.

796. On 13 April 1994, Witness A, who was then 16 years old, left the *bureau communal* for Kibuye with the other refugees. He was present among the refugees during the attack at Kibuye Stadium on 18 April 1994, from where he escaped. After spending some days hiding in the forest on Gatwaro Hill, the witness returned to Mabanza *commune*, where he sought shelter at the house of Nshimyimana, the communal driver, who gave the witness some food but refused to hide him. Nshimyimana said that "he was going to carry people who were going to kill other people in Bisesero." The witness left immediately. Later the same day, from his hiding place in a forest, the witness saw the communal vehicle transporting *Interahamwe*: "The vehicle was on the Kibuye road and it is the same road that leads to Bisesero."[984]

797. Witness O sought refuge at the communal office on 9 April 1994 and later went into hiding in sorghum fields in Mabanza *commune*. One day in April, at 9 a.m., there was a public meeting held at a place called Mukunyenyi. The witness did not attend or observe it, but she was able to hear what was being said. The meeting was led by the Accused's assistant, Semanza, who, using a megaphone, introduced the *bourgmestre* to those present. The witness recalled the Accused saying: "The Tutsis who intended to kill the Hutus had been discovered, and that wherever the enemy was, he was going to be killed." Following this, Munyampundu, who was introduced as a Member of Parliament, exhorted those present to look everywhere for Tutsi and kill them. He then stated that "all able-bodied young men should meet in the morning at the *commune*

[983] Transcripts of 19 November 1999 p. 41. Some obvious mistakes in the English transcripts have been rectified. French version: "Mais ... la vraie raison pour laquelle il envoyait ces *Abakiga* là-bas, c'est parce que ces *Abakiga* avaient commencé à manger le bétail des Hutus, leur congénaire, les Hutus de la commune de Mabanza et ceux-ci avaient commencé à se plaindre. Alors, le bourgmestre lui a demandé de quitter sa commune (p. 51).

office to move on to Bisesero."[985] The next day, Witness O saw men gather at the *bureau communal*. As they walked past the field in which she was hiding, she overheard them talk about their intended destination, Bisesero.[986]

798. The Chamber notes that in her earlier statement to investigators on 23-24 February 1998, Witness O explained what had happened on the morning after the meeting:

> "The next morning, I saw a large crowd go by, singing ... 'Let us exterminate them.' These people came from Ramba and Rutsiro and were heading for the Mabanza *commune* office, where I could see a large number of vehicles. ... I knew the vehicles were from Kibuye. Some of them were also shouting that Munyampundu had asked them to come. *I do not know what these people assembled at the commune office did.*"[987] (Emphasis added.)

799. Witness Z testified that when he was at the Trafipro roadblock in May 1994, Eliezer Niyitegeka and Cyprien Munyampundu at certain times passed by on their way to the *bourgmestre*'s office.[988] The witness said that on one occasion Niyitegeka brought with him a number of weapons in a vehicle. The Accused ordered those present, including Witness Z, to offload the weapons, which included a box of grenades, and to place them in his office. The next day, the Accused together with his assistant Célestin Semanza, who at the time provided housing to many of the attackers, began to distribute the weapons to the *Abakiga*. Witness Z said he was present at the distribution and received three grenades, which he took with him to the roadblock, even though the *bourgmestre* had ordered that any person receiving weapons was to go directly to Bisesero to kill the Tutsi gathered there. The witness was unable to confirm that the Accused himself went to Bisesero at the time.[989]

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[984] Transcripts of 17 November 1999 p. 54.
[985] Transcripts of 24 November 1999 p. 49 and p. 50, respectively.
[986] Ibid. p.120.
[987] Prosecution Exhibit No. 62.
[988] The witness believed that Niyitegeka was the Minister of Information, whereas Munyampundu was a secretary of the National Assembly.
[989] Transcripts of 8 February 2000.

800. In his statement to investigators of 18 September 1999, the witness identified the persons distributing weapons to the *Abakiga* as the Accused, *Conseiller* Daniel, deputy *bourgmestre* Apollinaire, and one Ntirugaya. The Chamber notes the absence from this account of his assistant Semanza, but the witness was not asked to account for the apparent omission.[990]

801. Three other witnesses made minor contributions on the subject of Bisesero. Witness AB said that while in hiding close to a road at the end of the month of April she overheard *Interahamwe* "bragging about what they did in Bisesero ...".[991] Defence Witness BE said that around 13 April 1994 he heard that two full buses passing through Mabanza *commune* from the direction of Gisenyi were headed for Bisesero. As far as he knew, they did not stop at the communal office. He did not see the Accused on board them.[992] Witness AC made passing reference to the "battle of Bisesero", to which she was an eyewitness, but gave no evidence relating to this event.[993]

The Accused

802. In his testimony, the Accused denied that he had gone to Bisesero during the period in question. His referred to his diary and the register of incoming and outgoing mail. According to the Accused, no mention was made there of travel to that location. As for Gitwa Hill in Bisesero, referred to in paragraph 4.30 of the Indictment (see above), he said that he had never been there and did not even know the place. He challenged all allegations relating to the part he played at Bisesero. He indicated that, on the contrary, he had attempted to prevent attackers passing through Mabanza and to protect the population of his *commune*. In this connection the Accused testified that on 23 June 1994, a bus full of *Interahamwe* from Gisenyi passed through Mabanza on their way to Bisesero, stopping to commit "some atrocities" in Mabanza itself. He

[990] Defence Exhibit No. 65.
[991] Transcripts of 15 November 1999 p. 103.
[992] Transcripts of 27 April 2000.
[993] Transcripts of 18 November 1999 p. 58.

claimed that he had written to the Prefect on 24 June 1994 requesting him to stop "these acts of barbarism being carried out by the *Interahamwe* in Mabanza.[994]

803. In relation to the allegation that he distributed weapons which he had received from Munyampundu and Niyitegeka, the Accused said he believed that Munyampundu was not in the country at the relevant time. If Niyitegeka, a member of the MDR party, had brought weapons to Mabanza, "he wouldn't give them to me, his opponent. He would give them to another person who was from the same party ... Semanza".[995] The Accused did, however, recall having lent two weapons to the parishes of Mushubati and Rubengera, to be used by reservists to protect the population there.

Findings

804. The Chamber notes that previous case law has established that a large number of Tutsi were attacked and killed at Bisesero in 1994. Reference is made to the *Kayishema and Ruzindana* Judgement paras. 405-472 and the *Musema* Judgement paras. 362-497 and 649-796. This is not in dispute between the parties. Accordingly, the question at issue in the present case is the role of the Accused, if any, in relation to those attacks.

805. According to the last sentence of paragraph 4.30 in the Indictment, the Accused personally attacked and killed persons seeking refuge on Gitwa Hill in the area of Bisesero. None of the witnesses who testified before the Chamber had seen the Accused in that area of Bisesero or knew that he had been there. As the Prosecution has not led any evidence for this allegation, the Accused must be acquitted on this point.

806. In the first sentence of paragraph 4.30 it is alleged that the Accused, in concert with others, including five named persons, brought armed individuals to Bisesero and directed them to attack the refugees there. There is no evidence that the Accused

[994] Transcripts of 7 June 2000 p. 92.
[995] Ibid. p. 171.

himself brought anyone to Bisesero.

807. However, the Prosecution has offered evidence to the effect that the Accused instructed persons to go to Bisesero and attack the refugees. Specifically, Witnesses H, O and Z gave evidence that the Accused ordered or was present when Hutu were instructed to go to Bisesero. Witness H referred to a meeting he attended in Rubengera sector, at which the Accused ordered the *Abakiga* to go to Kibuye. Witness O testified to a meeting that she overheard at Mukunyenyi, involving the Accused, Semanza and Munyampundu. Witness Z explained that the Accused distributed weapons and ordered that Tutsi be killed in Bisesero.

808. These witnesses described different episodes. If the Accused is to be convicted pursuant to paragraph 4.30 of the Indictment, the Prosecution must show that Tutsi were attacked at Bisesero by persons who had been ordered to do so by the Accused. In this connection, the Chamber notes that the Prosecution has not charged the Accused with direct and public incitement to commit genocide but with genocide and complicity in genocide. The wording of the Indictment is that the Accused "brought" persons to Bisesero and "directed" them to attack. The Prosecution has not led sufficient evidence in this respect.

809. Witness O testified that she was privy to a meeting during which the Accused called for the enemy to be sought out. She stated that she also heard Munyampundu instruct young, able-bodied men to gather at the *bureau communal* the next day. However, the witness did not actually see or observe this meeting. She only heard it, and was able to identify the speakers as they were introduced before addressing the crowd. It is not mentioned in her testimony whether Semanza was introduced to the crowd. It is therefore doubtful that the witness was able to identify him. In the opinion of the Chamber, unless the witness was completely familiar with his voice, it is questionable that she could identify Semanza so assuredly without having actually seen or observed the meeting. Witness O also testified that the day after the meeting, she overheard men who were gathering at the *bureau communal* talk about Bisesero as their intended destination. Yet, in her 1998 statement she made no mention of Bisesero. To

the contrary, she indicated that she did know why they were gathering at the *bureau communal*. However, there is no evidence that these men actually went to Bisesero. Her testimony is therefore inconclusive.

810. Witness H testified that although the Accused had told the *Abakiga* to go to Bisesero to assist Hutu fighting the Tutsi, the real motive of the Accused was to have the *Abakiga* leave the *commune*, as people in Mabanza were unhappy with them for appropriating and eating their livestock. Again, there is no evidence that any of the *Abakiga* who participated in that meeting actually went to Bisesero. Witness H's testimony is therefore inconclusive.

811. Witness A testified that the communal driver, Nshimyimana, said that he was going to transport attackers to Bisesero. No mention is made of the Accused in this regard. The fact that the communal vehicle was later seen by Witness A transporting *Interahamwe* on the road leading to Bisesero is not conclusive, as that road also led to Kibuye. There is no further evidence that this vehicle or the people aboard did in fact go to Bisesero.

812. While Witness Z testified as to weapons distributed by the Accused with instructions to those in receipt to go to Bisesero, there is no evidence that anyone followed these instructions. To the contrary, Witness Z, who stated that he received three grenades during this distribution, stayed in Mabanza. Regarding Witnesses AB, AC and BE, there is insufficient evidence to conclude that persons allegedly receiving instructions from the Accused committed crimes at Bisesero. Moreover, Witness AC, who alone witnessed the "battle of Bisesero", did not mention any participants coming from Mabanza.

Conclusion

813. For the above reasons, the Chamber cannot find beyond reasonable doubt that the Accused committed crimes under the Statute in connection with the attacks against refugees in Bisesero.

4.5 Killing of Kanyabugosi

814. Kanyabugosi was a Tutsi, who was killed in Mabanza in May 1994.[996] The Prosecution brings this event under paragraphs 4.12 and 4.13 of the Indictment, reproduced above (V.4.1).

Submissions of the Parties

815. The Prosecution refers to the testimony of Witness H, who described how Kanyabugosi was taken to the Accused by two communal officers, *conseiller* Nkiriyumwami and the accountant Nzanana. They claimed that Kanyabugosi was an *Inkotanyi*. The Accused handed him back to his two subordinates, who killed him. As they had referred to the victim as an *Inkotanyi*, which, according to the Prosecution, meant "collaborator with the RPF", and in view of the context of widespread massacres of Tutsi in Mabanza *commune*, the Accused knew or should have known that his subordinates would proceed to kill Kanyabugosi. The Prosecution charges the Accused with genocide and violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[997]

816. The Defence notes that only Witness H testified about Kanyabugosi. His testimony is unreliable as a whole and should be set aside. At any rate, the Prosecution has not proved beyond reasonable doubt that a crime was committed against Kanyabugosi. The witness testified that the Accused merely handed Kanyabugosi over to the *conseiller* and the accountant. The witness did not see the actual killing or the body. There is not sufficient proof of command responsibility. According to the Defence, the preponderance of the evidence reveals that the Accused took action against illegal conduct of communal employees, even for minor offences such as stealing. It follows that he could not have condoned the alleged killing of

[996] The victim's surname is also spelt "Kanyabugoyi" in the transcript. The Chamber has not been informed about his first name. In the present case, he has been described as the driver of General Romeo Dallaire, Commander of the UNAMIR peace keeping force, see below.

Kanyabugosi.[998]

Deliberations

817. Prosecution Witness H testified that General Dallaire's driver, Kanyabugosi, was a Tutsi and a Muslim from Gacaca sector, Mabanza *commune*. He sought refuge at a mosque in Mabanza sometime in May 1994. The witness and others looked after the refugee, but near the end of May he fell ill. According to the witness, after prayers one evening, Kanyabugosi said that Dallaire had telephoned him to inform him that Kanyabugosi's money was at the *bureau communal* and that he should go there to collect it. The witness thought that Kanyabugosi must have been delirious as there was no telephone at the mosque. The Chamber notes that according to his statement of 14 July 1999 given to investigators, Kanyabugosi went to the *bureau communal* as he "got tired of remaining in hiding and went to the *commune* office to seek help from the *Bourgmestre*."[999] There was no mention of a telephone call from Dallaire or the money said to be at the *bureau communal*.

818. Witness H testified that the next morning Kanyabugosi went to the *bureau communal* and found the Accused. When the witness learnt about this, he followed him to the communal office. In his testimony, the witness stated:

> "He arrived at the Mabanza *bureau communal* and he found the *bourgmestre* there. The *bourgmestre* saw him, they didn't do anything else. They only said that they had found a major *Inkotanyi*. They went to see who this *Inkotanyi* was, the conseiller [Nkiriyumwami] ... was present as well as staff of the *commune*. The *bourgmestre* did nothing else. He simply gave [him] back to the *conseiller* as well as to the accountant of Mabanza *commune*. They took him away and killed him. The name of the accountant was Nzanana. They took him away and killed him. ... We left immediately because we could do nothing further."[1000]

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[997] Prosecution's written Closing Remarks p. 11 para. 76, p. 89 para. 63 and p. 116 para. 272; Rebuttal para. 29.

[998] Defence Closing Brief p. 39 paras. 290-293 and p. 119 paras. 61-62; Rejoinder p. 17 paras. 170-172.

[999] Defence Exhibit No. 10.

[1000] Transcripts of 19 November 1999 pp. 48-49. The Chamber notes, in particular, the following sentences in the French translation: "Le bourgmestre n'a rien fait d'autre, il a simplement promis au conseiller ainsi qu'au comptable de la commune de Mabanza, ils l'ont amené et l'ont tué. Et, le nom du

819. Witness H said that he did not go to look at the body. He also said that he did not see Kanyabugosi again.

Findings

820. Witness H, the only witness in the matter of Kanyabugosi's death, provided no details about the killing. During his testimony, the witness first explained that the *conseiller* and the accountant "took him away and killed him". The Prosecution then asked whether he saw the body. The witness responded that he "didn't go to look at his body". Subsequently, the Prosecution asked whether he had seen Kanyabugosi again since that day. The witness answered that he did not see him again. These answers gave the impression that he did not actually see the killing. The Bench then sought to clarify matters by asking the witness whether he had seen the events he just had described. He answered yes, but no further information was provided, either during examination-in-chief or cross-examination.

821. According to Witness H's statement to investigators of 14 July 1999, the two municipal officers killed Kanyabugosi "behind the *commune* office with small hoes, and the fatal blow was given by Nzanana in the presence of the *conseiller* of Gacaca".[1001] As mentioned above, the Prosecution did not follow this up before the Chamber, for instance by clarifying whether the version in the statement reflected events actually seen by the witness or was hearsay. During the oral closing arguments, the Prosecution was asked why it did not lead detailed evidence about the killing. After several evasive answers it was finally clarified that the witness did not see the killing, but that the information in the statement was purely hearsay as the person was not there.[1002]

coupable était Nzanana. Ils l'ont amené et l'ont tué. Nous sommes tout de suite partis parce que nous ne pouvions rien faire d'autre."

[1001] Defence Exhibit No. 10.

[1002] Transcripts of 18 October 2000 pp. 149-158.

822. Assuming that the events unfolded in the manner described by the witness, it does not follow clearly from his testimony that it was the *conseiller* and the accountant who called Kanyabugosi an Inkotanyi, as alleged by the Prosecution. It is also unclear for what purpose Kanyabugosi was "handed over" by the Accused to the two communal officials, and whether he was killed pursuant to an instruction given by the Accused or with his knowledge and acquiescence. The evidence submitted in court did not clearly establish that Kanyabugosi was killed by communal officers, or that he was killed at all. No further evidence was provided by the Prosecution, which did not even address the issue of the killing of Kanyabugosi during its cross-examination of the Accused. The Chamber's doubt about the role of the Accused is increased by the fact that Witness H in relation to other events seemed to implicate the Accused to a larger extent than that based on his actual observations.[1003]

Conclusion

823. Consequently, the Chamber must conclude that the Prosecution has not shown beyond reasonable doubt that the Accused committed crimes under the Statute in connection with the killing of Kanyabugosi.

4.6 Killing of the Sons of Witness B

824. Witness B, a Tutsi, described how her three sons were killed in Mabanza *commune*. The Prosecution brings this event under paragraph 4.13 of the Indictment, reproduced above (V.4.1). According to the Prosecution, towards the end of May 1994, Witness B and her five children were in hiding in a field in Mabanza *commune*. From this location the witness observed several meetings hosted by the Accused at his residence. Attacks on Tutsi would intensify following each meeting. The witness returned to her house with her children in the hope that they would be killed by her neighbours without being tortured. When the Accused was informed of this he ordered that the witness's three sons be killed. They were murdered in his presence. The Prosecution charges the Accused with genocide, complicity in genocide and crimes

[1003] See V.4.1 and 4.3.

against humanity in relation to this event.[1004]

Submissions of the Parties

825. The Defence maintains that Witness B's testimony is vague and inaccurate. It is not possible to determine who was present when the children were taken away to be killed, or who the perpetrators of the alleged crimes were. The witness confirmed that she was unable to hear what was being said at the alleged meetings at the Accused's house. She conceded that she had not actually seen those participating but was told about them by somebody else. She also testified that the meetings had taken place every evening from mid-April to early July, even though, on her account, she had hid in the field only until the end of May. No other witnesses corroborated these events. [1005]

Deliberations

826. Around 7 April 1994, when other Tutsi of Mabanza *commune* had begun to seek refuge at the *bureau communal*, Witness B together with her five children and her husband went to hide in the Muslim quarter.[1006]

827. About a week later, and shortly after the refugees at the communal office left for Kibuye town, Witness B's hosts, returning from a meeting in the *commune*, informed her that the Accused had told them that "all the tutsis had to die" and that all protectors of Tutsi would be killed along with the Tutsi people.[1007] She was thereby forced to leave this hiding place. Her intention was to take her family to Kibuye town to find security there. However, on the road close to the *bureau communal* she came across the Accused. He was in a vehicle calling upon Hutu to arm themselves and to kill Tutsi. He

[1004] Prosecution's written Closing Remarks p. 14 paras. 91-94, p. 89 para. 64, p. 93 para. 90, p. 96 para. 112, p. 99 para 117, p. 109 para. 200, p. 113 para. 237 and p. 115 para. 261; Rebuttal para. 30.
[1005] See, for instance, Defence Closing Brief p. 39 paras. 294-299 and pp. 45-46 paras. 347-363; Rejoinder paras. 173-174.
[1006] Transcripts of 24 January 2000 pp. 56-57.
[1007] Ibid. p. 58.

was using a megaphone.[1008] The witness added:

> "It was the market day and everybody was in the market and the bourgmestre had just addressed the people in the market and the hutus who were there left the place very angry ... They were in a hurry to go back home, look for their weapons and seek the tutsis' houses and kill them."[1009]

828. In cross-examination the witness qualified her earlier account:

> "I do not really remember whether it was a market day or not because I was ... undergoing difficult situations ... I did not even get to the market but when I saw him speaking to the people, it was on the road leading from the market and he was then talking to people who could not get to the market".[1010]

829. Witness B testified there were more than six *gendarmes* in the vehicle with the Accused. She stated that the *gendarmes* were "insulting us. They were pointing their fists at us and they were saying that they were going to exterminate us". She maintained that they were *gendarmes* and not communal policemen.[1011]

830. Instead of going to Kibuye town, Witness B and her family again went into hiding, in a field close to their former residence. From there the witness and her children found shelter in the house of the *conseiller* Nkiryumwami. (Witness B's husband was chased and killed before reaching this house.) When the councillor, out of fear, asked them to leave his place, they again took refuge in a field. The councillor's wife continued to assist them. Witness B testified that she and her children remained hiding in the field "for a long time", until the end of May.[1012] During this last phase of hiding, Witness B allegedly observed numerous meetings take place at the Accused's house:

> "The consellier's wife continued encouraging me and each evening she took me to a place where we could see people going for meetings with Bagilishema and she told me that they were going for a meeting and that the bourgmestre would tell them to stop killing and then she and her husband could help them. We realised that after each meeting things became

[1008] Ibid. pp. 58-59.
[1009] Ibid. pp. 59 and 87.
[1010] Ibid. pp. 86-87.
[1011] Ibid. p. 84.
[1012] Ibid. p. 62.

worse and anyone who was found was killed in a very wicked manner and a search continued everywhere in any place where anyone could hide."[1013]

831. In cross-examination the witness testified that these meetings would normally commence at 6 p.m. and end between 9 and 10 p.m. She could not hear what was being discussed, but the *conseiller*'s wife gave her regular reports.[1014] In attendance were the two assistant *bourgmestres* Nsengimana and Semanza, the *conseiller* Nkiryumwami (in whose house she had sought shelter), and other "leaders of the attackers".[1015] "It is possible that they went to report on their activities or to draw up a new programme but in any case, every evening they went there."[1016] The witness asserted that the meetings continued until July 1994, well after she had left this particular hiding place.

832. At the end of May 1994, not being able to bear the situation any longer, Witness B decided to take her children back to her former residence because she thought that at least there she could arrange for all of them to be killed without being tortured.[1017] She found her neighbours and asked them to kill her and her children in a humane manner. Her neighbours, according to the witness, took pity on them, but nonetheless informed the Accused. The witness continued:

"The bourgmestre did not send people to kill me. Instead, he held a meeting with his assistant who was the chief of the Interahamwe. His name was Appolinaire Nsengimana ... and he was saying that they should not pity the males. The people asked that they should have compassion on me and the baby I was carrying on my back but they said this was not possible because Paul Kagame who was the chief of the Inkotanyi was a baby when he left ... They therefore took my boys, my sons, they took them to the ruins of our house and killed them there."[1018]

833. This is the full extent of the witness's testimony on the killing of her three sons. The Prosecution did not invite the witness to supply further details, not even essential

[1013] Ibid. The French version of the last part of the second sentence reads: "Et cette femme du conseiller me disait «Peut-être comme ils vont en réunion, le bourgmestre va leur dire d'arrêter de tuer et ainsi, moi et mon mari nous pourrons vous cacher, vous aider»" (p. 63).
[1014] Ibid. pp. 89-90.
[1015] Ibid. p. 89.
[1016] Ibid. p. 91.
[1017] Ibid. p. 62.
[1018] Ibid. pp. 63-64. The translation has been improved with reference to the French transcripts.

information such as who "they" were. The inexactness of the evidence is apparent also in the following passage (again it is not clear who "they" denotes), where Witness B explained how she herself was spared:

> "I implored them to kill me too but they refused. Bagilishema as well as the chief of the Interahamwe, told the people that if they did not kill me it would be on their heads because they could leave me and I would become mad. I continued wandering about, looking for somebody who could have pity on me and kill me but they refused because they were told not to kill me because they thought that I would become mad, and that is how come I survived."[1019]

834. The Chamber is unclear also as to the sequence of events compressed into these excerpts from Witness B's testimony. One possible sequence is the following: First, the witness's neighbours approached the Accused. This allegedly was followed by a meeting between the Accused, his deputy and the "people" (the neighbours?), at which Nsengimana said that no male Tutsi should be spared. The people's call for compassion was to no avail and Witness B's sons were taken away and killed. The witness then pleaded for her own death. The Accused at this point gave the people the option of not killing her, warning them, however, that she would go mad if she were spared.

835. In cross-examination, the witness testified that she had heard the Accused speak at an open-air gathering of a large number of people. His words were to the effect that it did not matter if Witness B were not killed because she would go mad anyway. He did not specifically refer to her sons. The meeting was held at a place called Rupango and the speakers used a megaphone.[1020] The witness did not say who the other speakers were or who else was present. At the time she was with her children, standing on a road, looking for someone to kill her. It is not clear if her three sons were still alive at this stage. The meeting touched on a number of topics:

> "It was very close to where I was. I knew that we were the objects of that meeting so I was curious to know the decisions that were going to be taken at that meeting. ... People asked a lot of questions particularly regarding Hutu women who were married to Tutsi men. The answer was that they should kill the husbands even if they should pity them, that they should destroy the houses and also kill the children leaving the girls and even if a woman

[1019] Ibid. p. 64 ("J'ai supplié..." in French version).
[1020] Ibid. pp. 97-98.

were pregnant and they did not know the sex of the unborn child, then they should open up the belly of the woman."[1021]

836. It is not obvious to the Chamber how to reconcile the versions presented in direct examination and in cross-examination should be reconciled. For example, in the latter case the witness testified to having overheard the proceedings of a meeting apparently at some distance away. In the former case she "implored them to kill me too but they refused".

Findings

837. The issue for the Chamber is whether the Prosecution has led sufficient evidence to demonstrate that the Accused ordered, incited, participated in, or is in some other way responsible as principal or superior for the alleged killings of the sons of Witness B.

838. The Chamber observes that in relation to this most horrific of blows allegedly suffered by Witness B, the Prosecution led what amounts to seven lines of evidence, as reproduced above.

839. Witness B's account of the murder of her sons is scant and uncorroborated. The Chamber cannot find from the evidence that the Accused himself participated in or was present during the killing of the children. In Witness B's opinion, as surmised from her testimony, the Accused was at the very least responsible for *ordering* the killing of her sons. But the witness did not indicate how she came to know of the alledged role played, according to her, by the Accused in the crime. In cross-examination the witness testified that she overheard a public gathering at which the Accused addressed the question whether she should be killed. She did not state clearly that this was also the meeting at which the fate of her sons was determined. She did not assert that she herself heard the Accused issue an order that her sons were to be killed. If the witness was not

[1021] Ibid. pp. 97-98. The translation has been improved with reference to the French transcripts.

present when the Accused ordered the killing of her sons, her contention is based at most on hearsay. Given moreover that it is not clear that the Accused was present at the site of the killings at around the time when they occurred, or that a subordinate of the Accused committed the offences, the liability of the Accused has not been proved.

840. The Chamber would also point to another source of doubt. Witness B claimed that the Accused publicly called for the death of all Tutsi. "He was saying that all hutus should all stand up, take up arms and seek out the enemy. He also said that the enemy was not far and the enemy was in fact their neighbour."[1022] She claimed that the Accused convoked nightly sessions at his house whose effect was to fortify the will of the attackers, because any Tutsi found after such sessions were cruelly killed. The sessions ran, apparently without interruption, from mid-April to July 1994. In addition, "there were often meetings between the burgomaster and the leader of the Interahamwe ... they would spend the day looking for people who had been in hiding".[1023]

841. These statements must be assessed in light of the fact that no other witness testified to seeing or hearing about nightly sessions at the house of the Accused from mid-April to July 1994. This is remarkable especially since, according to Witness B, such meetings involved "all leaders", including the Accused and assistant *bourgmestres*. The house of the Accused, where the daily evening meetings allegedly took place, was situated in an area frequented by many of the witnesses in this case. Accordingly, the Chamber would expect other witnesses to testify about such meetings. Moreover, Witness B's testimony that the meetings continued for two months after she had left her hiding place in the neighbourhood of the Accused raises further doubts about her reliability. More generally, the Chamber holds (IV.5) that the evidence in this case does not support the conclusion that the Accused publicly incited the killing of all Tutsi.

Conclusion

[1022] Ibid. p. 82.
[1023] Ibid. p. 66.

842. In conclusion, the Chamber is not convinced that the Accused participated in the killing of the children of Witness B. The extent and quality of the evidence led cannot support such a finding. The Prosecutor's charges of genocide and crimes against humanity in relation to this event therefore must fail.

4.7 Killing of Tutsi concealed at the House of Habayo

843. The Prosecution brings this event under paragraphs 4.12 and 4.13 of the Indictment, cited above (V.4.1).

Submissions of the Parties

844. According to the Prosecution, on the morning of 16 June 1994, an attack was launched on the Muslim quarter of Mabanza *commune*. The attackers discovered and arrested several Tutsi civilians, including some hiding in the house of Selemani Habayo. Soon thereafter the Tutsi from Habayo's house were killed in the presence of the Accused. The Prosecution contends that the exact number and the names of the people killed is not material because the Accused admitted that the Tutsi who were found in the Muslim quarter were killed. The Prosecution charges the Accused with genocide and complicity in genocide in relation to this event.[1024]

845. According to the Defence, some people in Mabanza *commune* believed Habayo to be an RPF accomplice. They searched his house and found Tutsi hiding there. The Tutsi were killed and Habayo was taken to the *bureau communal*. The Accused neither played a part in the searches, nor was he present when the Tutsi refugees were discovered and killed. The Defence contends that Witnesses H and O generally are not credible and that their testimonies should be discounted. The Defence argues that the testimonies of witnesses H and O are incompatible in relation both to the number of Tutsi killed and to the names of the victims and their assailants.[1025]

[1024] Prosecution's written Closing Remarks pp. 11-13 paras. 77-87.
[1025] Defence Closing Brief pp. 36-38 paras. 267-289.

Deliberations

Witness H

846. Witness H testified that on 16 June 1994, the Muslim quarter was attacked by a group led by the *conseiller* of Gacaca *secteur*, Nkiriyumwami. The attack included the brigadier of the *commune*, the *secrétaire* Hakizimana, and others.[1026] The attackers encircled the quarter and began searching for Tutsi. From the witness's own house the attackers took away his wife, a Tutsi, although she managed to escape during the commotion ensuing from the subsequent searches. Witness H followed the attackers, who went on to search the house of Selemani Habayo. There they found four Tutsi hiding in elaborately concealed holes. People who gathered to watch this event said that hiding Tutsi in this manner was a military tactic.

847. The witness named the four Tutsi found at Habayo's as Matabaro, Ntaganira, Mazimpaka, and a young girl, Uza Mukunda. "In this crowd, there were also Nhawita Kamabada as well as the people who were found in his house."[1027] The attackers also searched the house of one Hamada Ntawuhiganumugabo where they found his two Tutsi brothers-in-law. The witness said that all those found hiding were taken away together with Hamada and Habayo. The Tutsi were killed on the same day, though the witness did not claim to have seen the killings take place. In his written statement of 14 July 1999, Witness H declared that the four Tutsi concealed by Habayo were killed near the house of Matabaro's father in Kamuvunyi *secteur*.[1028]

Witness O

848. Witness O testified to an event she witnessed at the end of June 1994, from her hiding place in Gacaca *cellule*, Kamuvunyi *secteur*, near "Kinihira" – "a place ... where

[1026] Transcripts of 19 November 1999 p. 54.
[1027] Ibid. p. 55.
[1028] Defence Exhibit No. 10.

they normally killed people".[1029] The witness said that she saw five Tutsi and a Hutu being led to Kinihira from the Muslim quarter by a large number of people, including the Accused, who was carrying a gun, his assistants Semanza and Nsengimana, and *conseiller* Nkiriyumwami. She named the Tutsi detainees as Eugene, Matabaro, Ntagenira, Mukasine, and Ramazani, and the Hutu as Habayo. The witness testified to seeing some of these people being killed. She said that Nsengimana had carried out one of the murders, but she did not further implicate the Accused. She testified that the militiaman Ntare killed Matabaro. Asked whether the Accused had punished anybody for taking part in any attack in the April-June period, the witness answered: "He punished nobody. How could he do that when he himself was with them?"[1030]

849. Witness O, whose testimony must be treated with caution (V.2.6), gave a more detailed account of this event in her statement to investigators dated 23-24 February 1998.[1031] Here the detainee Mukasine is described variously as "daughter of Ntaganira" and "Mukasine's daughter". The five Tutsi and Habayo were taken to a septic tank "at Kinihira", into which the Tutsi were thrown as they were being killed. The *bourgmestre* was present, together with some armed *gendarmes*; these men did not kill any of the victims. Nsengimana struck Eugene with a large stick. Ntare attacked his victims with a club studded with nails. The witness saw the militiaman Sanane cutting Matabaro to pieces. The girl was killed by one Musabyimana, who used a machete.

850. In her earlier statement of 17 October 1995, Witness O did not mention the Tutsi hiding at Habayo's house, or their subsequent killing. On being asked whether she ever saw the Accused, she declared that she saw him once in April with three assistants.[1032]

Witness B

[1029] Transcripts of 24 November 1999 p. 51. Evidence in this case suggests that "Kinihira" was the name not of a particular place in Mabanza *commune* but rather of places where Tutsi were killed and buried. See ibid. pp. 54-55 and also transcripts of 15 November 1999 p. 112 (Witness AB); 28 October 1999 pp. 108-109 (Allagouma); 25 January 2000 p. 60 (Witness K); and 9 June 2000 pp. 82-83 (the Accused).
[1030] Transcripts of 24 November 1999 p. 59.
[1031] Prosecution Exhibit No. 62.
[1032] Defence Exhibit No. 11.

851. The extent of Witness B's testimony on this matter is that she knew a Muslim man named Habayo who, in June 1994, was found to be hiding five male Tutsi. The witness said that Habayo was killed together with the people he had been hiding.[1033] In the previous section (V.4.6), the Chamber expressed its concern about the reliability of Witness B's testimony. In her written statement of 23 June 1999, the witness declared that she was present when *commune* staff, sent by the Accused, came to Habayo's house where they discovered four Tutsi boys and their sister. The brothers were taken to the *bureau communal* where they were killed; the girl was spared on the Accused's instructions but later was killed by an *Interahamwe*.[1034]

The Accused

852. The Accused testified that Habayo was accused by the people ("par la population") of being an accomplice of the RPF, and that the people searched his house and found Tutsi hiding there as well as a certain letter.[1035] The Accused said that the Tutsi were killed and, once again, "the people" took Habayo to the *bureau communal*. The Accused "tried to convince the people that Habayo should remain at home ... but they [insisted] that they kill him in front of me".[1036]

853. In cross-examination, the Accused was asked if he had investigated the killings of the Tutsi taken from Habayo's house in order to find the perpetrators of the crimes. The Accused answered that an investigation had indeed been conducted. He described its outcome in these words:

> "The Moslems tried to help as much as possible the people around the commune, but unfortunately they killed somebody in the Rubengera sector, so subsequently, the family of this person ... tried to revenge [the killing] by looking for accomplices in the Moslem quarters. That is when the Rubengera people mounted an assault on Habayo's house".[1037]

854. The Accused's answer is in the form of an explanation of why certain aggrieved

[1033] Transcripts of 24 January 2000 p. 70.
[1034] Prosecution Exhibit No. 63.
[1035] Transcripts of 7 June 2000 p. 83.
[1036] Ibid.

Hutu broke into the houses of Hutu living in the Muslim quarter. The Chamber notes that the Accused did not answer the second part of the Prosecution's question, namely whether he sought those responsible for the murder of the Tutsi.

Findings

855. The Chamber finds that on or around 16 June 1994, a number of Tutsi were taken from Habayo's house and other houses in the Muslim quarter of Mabanza commune by a group of assailants. Soon thereafter some of these Tutsi were killed.

856. The evidence of the two main witnesses diverges in other respects. To some extent this is understandable given that Witness H was an eye-witness to the attack on the Muslim quarter but not to the killing of the Tutsi, whereas Witness O claimed to have seen the killing of the Tutsi but not the attack.

857. However, whereas Witness O placed the Accused among the killers at Kinihira, in Witness H's account the Accused was not among them at the Muslim quarter. Witness H declared in his statement of 14 July 1999 that Habayo was taken *to* the Accused. This is in conformity with the Accused's contention that Habayo was brought to him at the *bureau communal*.

858. Moreover, Witness H named the brigadier of the *commune* and Hakizimana as being among the attackers who came to the Muslim quarters. Witness O did not mention either name, but instead identified Semanza as being present at the site of the killings. She did not testify to seeing Hamada or Nhawita (the third Muslim Hutu mentioned by Witness H) being brought to Kinihira. She saw only Habayo and five Tutsi. Yet according to Witness H, not only were Habayo, Hamada and Nhawita all taken away by the assailants but so were at least *eight* Tutsi (four from Habayo's house, Hamada's two brothers-in-law, and at least two persons found hiding at Nhawita's house).

[1037] Transcripts of 9 June 2000 pp. 80-81.

859. The above inconsistencies, coupled with the Chamber's concern about the reliability of the testimony of Witness O (V.2.6), render doubtful Witness O's claim that she was present at "Kinihira" when the Tutsi from Habayo's house were killed, and, more so her allegation that the Accused was also present at the scene.

860. The Chamber takes this opportunity to note that Witness O, while in hiding or otherwise concealed, surrepticiously was able to observe or overhear a significant number of key events implicating the Accused (among them the meeting with Kayishema, the killing of Karungu, the killing of Muganga, and the preparations for the expedition to Bisesero). This is also true of Prosecution Witness AB. The Chamber is naturally heedful of witnesses who, while purportedly in hiding and in fear of their lives, nonetheless are able to move around from one crime scene to the next, gathering intelligence along the way. This is not physically impossible, of course, but the Prosecution when leading such an opportune witness must be especially careful to rub out grey areas of her testimony. Not only was this not done in this case (the Prosecution hurried Witness O through her evidence about the attack on Habayo, insisting on "very brief" or "very quick" answers[1038]), but another Prosecution witness, Witness H, gave evidence that was not consistent with that of Witness O.

Conclusion

861. In light of the above, the Prosecution's charge of genocide pursuant to Article 6(1) must fail because the Chamber cannot find that the Accused was present when the Tutsi detained during the attack were killed. The same conclusion is inevitable for liability under Article 6(3). The possible subordinates of the Accused mentioned by Witness O as participating in the killing of the Tutsi cannot be considered because her testimony on this point cannot be considered reliable. As to the authorities identified by Witnesses H, such as *conseiller* Nkiriyumwami or the communal secretary, they have not been shown, in Witness H's testimony, to have committed any crime. Their arrest

[1038] Transcripts of 24 November 1999 pp. 52-53.

of Tutsi on suspicion that they were accomplices of the RPF is not initself actionable in this context.

862. The remaining question is whether the Accused, as *bourgmestre*, took sufficient measures to identify or punish the persons who killed the Tutsi detained during the attack on the Muslim quarter. It is reasonable to assume that the killers would have been among the "Rubengera people" who (in the account of Witness H and the Accused himself) delivered Habayo to the Accused at the *bureau communal*. At the very least, the killers would have been *known* to them. But if the Accused learnt or made an effort to learn the identity of the killers, or if he punished or took measures to punish the perpetrators, no evidence about this was brought before the Chamber. The Accused's one-sided answer to the question whether he investigated the killings was not followed up by the Prosecution.

4.8 The Detention and Fate of Habayo

863. The Prosecution brings this event under paragraphs 4.12 and 4.13 of the Indictment. These paragraphs were reproduced earlier in this section (V.4.1).

Submissions of the Parties

864. As discussed above (see V.4.7), the Prosecution contends that in the morning of 16 June 1994, an attack was launched on the Muslim quarter of Mabanza *commune*. At the house of Habayo, several Tutsi were found hiding and were killed soon thereafter. Habayo, a Hutu, was detained and driven to Kibuye in the communal vehicle by the communal driver, Nshimyimana, accompanied by the Accused, *gendarmes* and a communal policeman. The Prosecution contends that the Accused received no guarantees that Habayo would be safe in Kibuye. Habayo has not been seen since. The Accused thus failed to protect a Hutu found to be hiding Tutsi. Far from protecting Habayo, the Accused sent him to certain death. The Prosecution argues that because Habayo was a prominent Muslim, the Accused could not allow for him to be killed in

Mabanza. Doing so would have jeopardized the continuation of the genocide within the *commune*.[1039]

865. The Defence emphasises that only Witness H provided details on the fate of Habayo. In relation to the witness's assertions that the policeman escorting Habayo to Kibuye was wearing a uniform, that the driver was driving the communal vehicle, and that this event took place during office hours, the Defence refers to certain exhibits purportedly establishing that on the date in question the two named communal officers had been suspended from duty, and thus could not be in uniform or driving the communal vehicle. The Defence also contends that the Accused's treatment of Habayo was entirely proper. Habayo was accused by the people of being an RPF accomplice. Tutsi were found hiding in his house. They were killed and the assailants brought Habayo to the *bureau communal*, indicating that they wanted to kill him too. In response to this threat, the Accused sent Habayo to the commander of the *gendarmerie* in Kibuye for investigation of the allegations of complicity. This investigation was continuing when the Accused left for Zaïre. The Defence adds that the Prosecution failed to adduce any evidence to establish the circumstances under which Habayo's alleged murder occurred, such as the location and time of his death, and the person or persons by whom allegedly he was killed.[1040]

Deliberations

Witness H

866. In his testimony before the Chamber, Witness H referred to three persons, Selemani Habayo, Hamada and Nhawita as having been detained on 16 June 1994, the day of the attack on the Muslim quarter.[1041] Both Hamada and Habayo were "asked" (the witness did not say by whom) to pay a ransom for their release. The price to free Habayo was set at thirty thousand francs. Witness H said he paid half that amount, which "they" took. *Conseiller* Nkiriyumwani then said that he would have to consult

[1039] Prosecution's written Closing Remarks pp. 11-13 paras. 77-87.
[1040] Defence Closing Brief pp. 36-38 paras. 267-289.

the Accused about Habayo being freed. [1042]

867. However, Habayo was not freed. The witness was given to understand (again, it is not clear by whom) that Habayo had to be sent to Kibuye because he had hidden Tutsi in a "military manner". The witness said he then went to the *bureau communal*, saw the Accused, and requested him to collect the receipt for the part-payment of the ransom, which was in the possession of the *conseiller*. But the witness was neither given his receipt, nor was he returned his money. The witness added: "I even didn't see Habayo because he was sent to Kibuye ... aboard a vehicle ... the communal vehicle."[1043]

868. Later on, during examination-in-chief, the witness claimed to have been *present* when Habayo was being taken to Kibuye. On 17 June 1994, according to the witness, he saw the communal vehicle driven by Nshimyimana, containing Habayo, the Accused, *gendarmes*, and the policeman Munyandamutsa. The Chamber notes the different dating of this event given by Witness H in his statement to investigators of 14 July 1999. [1044] There he said that the Accused took Habayo to Kibuye "one Monday". The Monday following the attack on Habayo's house was not 17 June but 20 June. The latter date is closer to that given by the Accused, namely 21 June. In any case, there is uncertainty as to the date.

869. In cross-examination the witness added that the policeman was in uniform.[1045] Confronted by the Defence with letters purporting to show that the policeman and the driver had been suspended from duty during the relevant period, Witness H said that in time of war suspended workers could return to work.

[1041] Transcripts of 19 November 1999 pp. 55-56.
[1042] Ibid. pp. 56-57.
[1043] Ibid. p. 57.
[1044] Defence Exhibit No. 10.

The Accused

870. The Accused testified that on 20 June 1994, Habayo was brought to the *bureau communal*. The Accused said he tried to convince "the people" that Habayo should be returned to his home, but his captors insisted that they would kill him there and then. That, according to the Accused, was why he had Habayo transferred to Kibuye the next day, so that the offences he allegedly committed (complicity with RPF) would be investigated by the competent authorities. In this connection, the Defence referred to the *commune*'s register of outgoing mail which indicates that a letter dated 21 June 1994 was sent by the Accused to the commander of the *gendarmerie* in Kibuye, regarding Habayo's transfer.[1046]

871. The Accused stated that it was his practice to address matters relating to the war against the RPF to the commander of the *gendarmerie* in Kibuye town. He indicated that he had dealt with this officer before, and knew him not to be corrupt.

872. The Accused further testified that the policeman undertaking the transfer of a detainee in such a situation would return with the communal register which would show (by way of the recipient authority's mark) that the detainee had been transferred. However, Kibuye authorities did not always inform the Accused of the progress or outcome of matters referred to them from Mabanza *commune*, especially not during the period in question. The Accused testified that at the time when he fled to Zaïre in July 1994 he believed that Habayo was still under investigation.

Findings

873. The Chamber finds it established that the Accused sent Habayo to Kibuye to be investigated in connection with allegations by unspecified persons that he was an RPF accomplice. The Accused claimed that he transferred Habayo to the commander of the

[1045] Testimony of 22 November 1999.

gendarmerie in compliance with standard procedure and for his own protection. The Prosecution has not led evidence that seriously calls this explanation into question. The arguments of the Prosecution that the *commune* register may have been "doctored" has not been supported by any evidence.

874. There is no evidence before the Chamber as to what became of Habayo after his transfer to Kibuye town. For the Accused to be found liable for the killing of Habayo, it must be proved beyond reasonable doubt that Habayo was killed by those who took him into custody in Kibuye. However, there is no evidence before the Chamber that Habayo was thus killed.

875. There being no evidence of death, let alone murder, it is unnecessary for the Chamber to consider whether the Accused knew, when he decided the transfer, of the risk that Habayo would be killed. The Prosecution would have to prove that the Accused proceeded with the transfer in reckless disregard of Habayo's welfare, knowing that in the prevailing circumstances a person accused of concealing Tutsi would most probably be killed by members of the *gendarmerie*. In the absence of *actus reus*, this *mens rea*, even if demonstrable, does not in itself amount to a crime.

876. Consequently, the Prosecution's charges of Crime Against Humanity and Violation of Common Article 3 and of Additional Protocol II, in relation to the Accused's alleged participation in the killing of Habayo, cannot be sustained.

[1046] Defence Exhibit No. 18 at 0351. The French reads: "Envoyer Habayo pour expliquer le contenu de la lettre qu'on lui a addressé et selon laquelle les tutsis seront tués."

5. Roadblocks in Mabanza *Commune*

5.1 Introduction

877. It is alleged by the Prosecution that roadblocks operated in Mabanza *commune* throughout the relevant period in 1994. The legal and factual issues raised by this allegation are most effectively addressed together, under a separate heading, rather than in the chronological sequence of events followed thus far.

The Indictment

878. Only one paragraph of the Indictment explicitly refers to the existence of roadblocks in Mabanza *commune*. Paragraph 4.14 reads:

> "In particular, Ignace Bagilishema acting in concert with others including Clement Kayishema, Semanza Celestin, Nsengimana Apollinaire, Nzanana Emile and Munyampundu, between 9 April and 30 June 1994 permitted and encouraged Interahamwe militiamen to set up roadblocks at strategic locations in and around Mabanza commune. The primary purpose of the said roadblocks was to screen individuals in order to identify and single out Tutsis. Between 9 April and 30 June 1994 Ignace Bagilishema ordered the detention of several Tutsis at the various roadblocks within Mabanza. Such detainees were handed over to Ignace Bagilishema and were subsequently killed by the communal police, the Gendarmerie Nationale, Interahamwe and armed civilians under his authority and control."

Submissions of the Parties

879. The Prosecution submits that roadblocks in Mabanza *commune* were set up to screen out and kill Tutsi; that the Accused knew of the existence of many of these roadblocks; and that he set them up or acquiesced to their setting up. It rejects the Defence's contention that there was a difference between "official" and "unofficial" roadblocks, alleging that all roadblocks were officially sanctioned. It charges the Accused with genocide, complicity in genocide and crimes against humanity in relation to the establishment and operation of the roadblocks, and in particular in relation to the killings of two persons, Bigirimana and Judith.[1047]

[1047] See, in particular, Prosecution's written Closing Remarks pp. 19-21 paras. 114-132, pp. 71-78 paras. 382-410, p. 87 para. 52, pp. 91-92 paras. 77-85, p. 93 para. 93, p. 97 paras. 117-120, pp. 102-103

880. The Prosecution, in its oral closing arguments, summed up its position in the following way:

> "We have not led any evidence ... that indicates that the Accused himself was standing at any of these roadblocks manning them personally. We say that his responsibility lies in the fact that in furtherance of a plan and in the execution of this plan, or in aiding and abetting in the execution of this plan, or the planning thereof, he, at some stage, [in] April 1994, agreed to set up these roadblocks. In doing so, he got civilians who took instructions from him to man the roadblock. ... the evidence indicates that it is these civilians that are responsible for many of the atrocities that took place at the roadblock acting on his instructions. That poses two types of responsibility ... 6(1) and 6(3)."[1048]

881. The Defence does not dispute the claim that roadblocks were set up in Mabanza *commune* during the events in question. The Accused admitted that he ordered one "official" roadblock, known as Trafipro, to be erected in April 1994. The Accused denied that he encouraged or was aware of crimes committed by those staffing the Trafipro roadblock.[1049]

882. The Accused also denied having ordered the setting up of any other roadblocks. Whenever he received information about the existence of "unofficial" roadblocks erected here and there by "recalcitrants" he took prompt action against them.[1050] The Accused testified to a letter he wrote, dated 12 July 1994, and recorded in the communal register as reference 0376,[1051] to two persons named Rukara and Ngango, asking them to remove roadblocks erected unofficially.

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paras. 138-142, p. 105 paras. 163-164, p. 110 paras. 213-214, p. 112 paras. 232-233, pp. 113-114 paras. 246 and 252-253, p. 115 paras. 257-258, p. 116 paras. 268-269, and p. 117 para. 275; Rebuttal paras. 41-49.

[1048] Transcripts of 18 October 2000 p. 99.

[1049] See, in particular, Defence Closing Brief pp. 8-9 paras. 27-29, pp. 23-24 para. 158, pp. 47-56 paras. 375-462, and p. 120 paras. 66-74; Rejoinder paras. 194-206.

[1050] Transcripts of 7 June 2000 pp. 132-133.

[1051] Defence Exhibit No. 18.

5.2 General Observations on Roadblocks

5.2.1 Roadblocks and the Civil Defence Program

883. In early 1994, the Rwandan Government instituted a system of "civil defence". As part of this system, subordinate authorities were instructed to set up roadblocks in an effort to prevent infiltration by members of the Rwandan Patriotic Front.[1052] This much is evident, in particular, from the Prime Minister's circular of 27 April 1994, entitled "Instructions to restore security in the country", which was addressed to all Prefects. Paragraphs 3 and 4 of that letter read:

> "3. The enemy which attacked Rwanda is known: it is the RPF-INKONTANYI. You are therefore requested to explain to the citizens that they have to avoid everything that could lead to discord between them, on the pretext of ethnicity, regions, religions, political parties, hatred etc., because such problems within the population provides opportunities for the enemy. Nevertheless, the population must remain vigilant in order to discover the enemy and his accomplices and to deliver him to the authorities, and to be assisted by the national army wherever possible. The communal authorities, *secteurs* and *cellules*, assisted by the national army where possible, are asked to determine sites where officially sanctioned roadblocks may be erected and to decide how night patrols can continue to effectively operate so that the enemy does not find opportunities for infiltration. At these roadblocks and during night patrols citizens must avoid taking any action against innocent persons.
>
> 4. Acts of aggression against innocent persons, pillage and other criminal acts must cease immediately. This is why the national army, the prosecutor and other judicial authorities must punish severely anyone who will be found guilty of such acts. Every time it is necessary, you may receive assistance from the national army and the judicial authorities in order to suppress problems, to fight against crime and pillage and to teach citizens to maintain the good tradition of reciprocal support and self-defence." [1053]

884. On 30 April 1994, Prefect Kayishema transmitted the Prime Minister's letter

[1052] Roadblocks were also set up when the Rwandan Patriotic Army invaded Rwanda from Uganda, in October 1990. See the Accused's testimony, transcripts of 7 June 2000 p. 142.
[1053] Prosecution Exhibit No. 77b.

to the *bourgmestres* of his prefecture, including the Accused. The Prefect's covering letter stated, *inter alia*: "You are requested to communicate them [the Prime Minister's instructions] to the population in a meeting as it has been suggested during the meeting we held together on 25/04/94."[1054]

885. In a second letter dated 30 April 1994, entitled "Protection of the civilian population", also addressed to all *bourgmestres*, the Prefect wrote:

> "In view of the prevailing security situation in the country, the Rwandan Government has decided to set up a system of civil defence for the population.
>
> This civil defence will be carried out by the population itself in the *cellules* and in the *secteurs* and will assist, in particular, to:
>
> – organise and control night patrols and roadblocks;
>
> – be particularly vigilant against *Inkotanyi* infiltration through regular control of secret passageways.
>
> Consequently, as a matter of urgency, you are asked to recruit persons to be trained. This recruitment shall above all relate to persons:
>
> – in good physical and moral condition
>
> – of good character
>
> – with a certain credibility within the population.
>
> Regarding training, it shall be ensured by reservists selected from the commune. It is expected that following recruitment there will be meetings to explain the operation of the civil defence system."[1055]

886. These documents from the end of April 1994 should not be taken to imply that roadblocks did not exist in Mabanza *commune* prior to this date. Rather, evidence suggests that roadblocks had been in operation in Mabanza *commune* at various times since October 1990, and that following the events of 6 April 1994 roadblocks were again established.[1056] The Accused testified that "following the directives of the prime minister ... generally speaking these roadblocks were made official".[1057]

[1054] Ibid.
[1055] Prosecution Exhibit No. 77a.
[1056] See also footnote 1052.
[1057] Transcripts of 9 June 2000 p. 41.

5.2.2 Roadblocks Sighted in Mabanza Commune

887. Evidence has been adduced that a number of roadblocks existed in Mabanza *commune* during the events in question. Prosecution Witnesses A, AA, AB, B, Y and Z, as well as Defence Witnesses KA, KC, RA, RJ, ZD and the Accused gave testimony regarding these roadblocks.

888. Some roadblocks were referred to by multiple witnesses. Witnesses AA, AB, KA, RA, Y, Z, and the Accused testified in relation to the "Trafipro" roadblock, which was close to the *bureau communal*. Witnesses AA, B, RA, Z and ZD gave evidence concerning a roadblock at Gitikinini, near the Gitikinini market. The Accused explained that he tried to set up a roadblock at Muregeya, and Witnesses Z and ZD testified to knowing of a roadblock at this site. Witnesses AB and Z referred to a roadblock at the Rubengeri Clinic. Witness RJ saw a roadblock at Gashyushya, and Witness Z said that he had heard of a roadblock at that site.

889. Other roadblockswas referred to but without apparent overlap in the witnesses' testimonies. Witness A mentioned a roadblock at Gacaca, close to the house of the Accused; at Kibirizi; in front of the house of Rwagama; at Kunyenyeri in Gihara; at Mukabuga; at Mushubati; and at Kiuri, at the Kiuri river. Witness AB saw roadblocks at Gisenyi close to Rubengera Church; on the road going towards the Presbyterian Church; on the road leading to Gisenyi; and on the Butare-Kigali road. Witness Z testified to roadblocks at Nyanyirakabano and at the Nyanza crossroads, about five kilometres from the *bureau communal*. Witness AA testified to a roadblock at Kukabuga, close to the Chinese camp. Witness KC stated that he passed a roadblock on the border between Mabanza and Kivumu *communes*.

890. The Chamber acknowledges that two witnesses may have in fact referred to one and the same roadblock using different names or landmarks to describe its location.

891. Having considered the evidence, the Chamber finds that there is only *prima facie* evidence that killings occurred at or in connection with three roadblocks in Mabanza - the roadblock at Trafipro, at Gitikinini, and at Gacaca. The Chamber will

address these three roadblocks below on the basis of all available evidence concerning their establishment and operation and decide whether the Accused is liable under one or more of the three forms of liability. This will allow the Chamber to conclude whether the Accused "permitted and encouraged" *Interahamwe* militiamen to set up roadblocks, as alleged in the Indictment, and whether the purpose was to "screen individuals in order to single out and identify Tutsi". The Chamber will also decide whether there is evidence that he "ordered the detention of several Tutsi at the various roadblocks", that they were "handed over" to him and "subsequently killed" by persons under his authority and control (below V.5.11).

5.3 Liability for Roadblock-Related Crimes

892. Under certain conditions considered in detail below, the Accused may be found liable for crimes committed in connection with roadblocks. The Prosecution's charges – genocide and crimes against humanity – limit relevant crimes in this context to murder or the infliction of serious mental or physical suffering on Tutsi civilians.

5.3.1 Liability under Articles 6(1) and 6(3) of the Statute

893. In relation to any specified roadblock in Mabanza *commune*, the Prosecution must prove the following elements of criminal liability. *First*, that one or more crimes of the relevant kind were committed in connection with that roadblock. This does not mean that a crime must have been committed *at* the roadblock. It is sufficient that the crime was committed by persons staffing the roadblock in the course of, and pursuant to their usual operation of the roadblock.[1058]

[1058] To elaborate this point, if the purpose of a roadblock included the screening out and killing of "the enemy", a Tutsi civilian refugee who was captured and brought to the roadblock from a neighbouring field and later taken away by roadblock staff and killed at some distance from the roadblock will be considered by the Chamber to have been the victim of a crime committed in connection with the roadblock. Conversely, if there is doubt that the crime was committed pursuant to the usual operation of the roadblock, that is, if it is reasonably probable that the crime was committed for a purpose entirely unrelated to the purposes of the roadblock, or for purely personal motives *only*, then the crime cannot have been committed in connection with the roadblock.

894. The *second* element that the Prosecution must prove is that the Accused was "responsible" for the operation of the roadblock in question, and thus responsible for crimes committed in connection with it. Two primary forms of responsibility are relevant here, corresponding respectively to Articles 6(1) and 6(3) of the Statute.

895. Under Article 6(1), the Accused will be responsible for crimes committed in connection with a roadblock if, in the first place, he was instrumental in the roadblock's establishment, or – should the roadblock have been set up by others – he endorsed or acquiesced to its continuing operation, notwithstanding his power to have the roadblock discontinued. The Prosecution must show, secondly, that the Accused knew that the roadblock had a criminal purpose (even if this purpose were not its sole purpose), that is, knew that it was established expressly to murder Tutsi civilians or knew that it operated *in fact* as if that were its purpose. These two elements would suffice to show that the Accused, in establishing or perpetuating the roadblock, intended that Tutsi civilians be killed there or acted with reckless indifference to that outcome.

896. In the second case, under Article 6(3), the Accused will be responsible for crimes committed in connection with a roadblock if persons staffing and committing crimes at that roadblock were his subordinates. The Prosecution must prove the standard three elements of superior responsibility; namely, in addition to the existence of a superior-subordinate relationship, knowledge of the imminent or completed crimes and failure to prevent or to punish them. In accordance with the discussion above (III.1.2.2), the knowledge element of superior responsibility will be fulfilled if the Accused actually knew of one or more crimes committed or about to be committed in connection with a roadblock, or alternatively was put on notice and failed to inquire further.

897. A third basis of liability in this context is gross negligence. This is a species of liability by omission, omission here taking the form of criminal dereliction of a public duty. It would be available in the present case if the Prosecution were to show that the Accused had been grossly negligent in his administration of one or more

roadblocks under his control, such negligence causing the murder of Tutsi civilians (by roadblock staff). Had the Accused, as *bourgmestre*, an obligation to maintain order and security in Mabanza *commune*, it would have been a gross breach of this duty for him to have established roadblocks and then failed properly to supervise their operations at a time when there was a high risk that Tutsi civilians would be murdered in connection with them. The Chamber observes that this form of liability has not been elaborated or applied in previous judgements of this Tribunal. Only one judgement of the ICTY touches on the matter; and there is some guidance in the *Tokyo* judgement of the International Military Tribunal for the Far East (IMTFE). This jurisprudence will be discussed below (V.5.10).

5.3.2 Distinction between "Official" and "Unofficial" Roadblocks

898. As mentioned above, the Defence distinguished between official and unofficial roadblocks. The distinction was emphasised by the Accused in his testimony:

> "There were unofficial road-blocks all over the place and which we were fighting against as soon as we were told about them. ... The people took the initiative to erect road-blocks in front of houses on various roads of the Sector."[1059]
>
> "[D]uring this period of crisis, the people were erecting roadblocks all over the place to extort money from people. And I did say that there were unofficial roadblocks, and that I was against that."[1060]

899. The Prosecution does not accept that there were, in fact, two kinds of roadblock in Mabanza *commune*. It submits that the distinction is an invention and in any case immaterial to the responsibility of the Accused. The Accused as *bourgmestre* exercised general control and authority in Mabanza *commune*. In this sense, every roadblock in the *commune* could be labelled "official".[1061]

[1059] Transcripts of 7 June 2000 pp. 141-142.

[1060] Transcripts of 9 June 2000 p. 28 and also p. 25.

[1061] Transcripts of 18 October 2000 p. 108. According to the Prosecution: "There is no distinction as to what is an official roadblock or unofficial roadblock. ... As bourgmestre, he had the control and authority over everything that went on in Mabanza *commune* and I do not accept for one minute that there was a single roadblock mounted based on a frolic ..." (ibid.).

900. Defence Witness RA was the only witness in this case to distinguish between government-erected and *ad hoc* roadblocks:

> "There were roadblocks erected by government officials, and there were instructions to the effect that they should check identification documents, and to check if ... those who went through carried weapons. There were other roadblocks that the people erected, particularly at night and these are the roadblocks that were more dangerous than the others, than the official roadblocks."[1062]

901. The Chamber notes that none of the judgements delivered by the Tribunal to date has distinguished between official and unofficial roadblocks.[1063] Moreover, there is no documentation in the present case that explicitly distinguishes between official and unofficial roadblocks. The Prime Minister's directive referred to roadblocks that were "officially recognised" (V.5.2.1). This formulation allows for the possibility that there were roadblocks in Mabanza *commune* that were not officially recognised. At the same time, however, the testimony of the Accused at one point appears to suggest that the effect of the Prime Minister's letter was to make existing roadblocks "official".[1064]

902. Notwithstanding the designation of a roadblock as "official" or "unofficial", the Accused cannot be held responsible for crimes committed in connection with the roadblock if he did not personally set it up, if he did not lend it his substantial support, or if he did not acquiesce (despite his powers of termination) to its continuing operation. The Prosecution must prove at least one of these conditions.

5.4 Trafipro Roadblock – Establishment and Purpose

903. The Trafipro roadblock was erected close to the *bureau communal* on the Kigali-Kibuye road. Prosecution Witnesses AA, AB, Y and Z, and Defence Witnesses KA, RA and the Accused gave evidence in this regard.

[1062] Transcripts of 2 May 2000 p. 55.

[1063] See, for instance, *Rutaganda* paras. 202-261; and *Kayishema and Ruzindana* paras. 294 and 295.

[1064] Transcripts of 9 June 2000 p. 41.

5.4.1 Setting up and Staffing of Trafipro Roadblock

Deliberations

904. Prosecution Witness Z testified that on the evening of 13 April 1994, *conseiller* Nkiriymwami told him that the *bourgmestre* had given instructions according to which the witness should look for other people with whom to erect a roadblock at the location of Trafipro.[1065] Wanting more details, the witness went to the Accused's home. The Accused asked him to find other people including a certain Rushimba (whose real name was Fidel Cyakubwirwa) and to set up the roadblock very early the next morning in order to apprehend the "enemies" who were escaping.[1066] In his prior statement of 18 September 1999, the witness indicated that both he and Rushimba went to see the Accused on the evening of 13 April 1994.[1067]

905. Prosecution Witness Y testified that in April 1994 two men named Rushimba and Saidi Rukanos asked him to help them staff the Trafipro roadblock, which he did. He explained that the two men had said that it was the *bourgmestre* who had given them the order.[1068] The witness was at the Trafipro roadblock from April until July 1994.[1069] He did not specify when in April it was erected.

906. The Accused testified that the Trafipro roadblock dated back to the beginning of the war, in October 1990, when soldiers set it up. It was subsequently removed during the negotiation period of the Arusha Accords. The Accused said that he ordered the Trafipro roadblock to be erected again around 27 April 1994.[1070]

907. The Accused further explained that the objective of the Trafipro roadblock was to check for RPF infiltration, pursuant to the instruction of the Prime Minister (V.5.2.1), and that he and the Communal Council decided who should staff it.[1071] The Accused referred to documentary evidence in support of his assertion that the

[1065] Transcripts of 8 February 2000 p. 38.
[1066] Ibid. pp. 38-39.
[1067] Defence Exhibit No. 65.
[1068] Transcripts of 7 February 2000 pp. 27 and 32.
[1069] Ibid. pp. 32-33.
[1070] Transcripts of 7 June 2000 p. 142.

roadblock was "official".[1072] He testified that it was the only roadblock that the Communal Council established and for which it issued instructions. The Accused added:

> "The road-block was set up because I told you that the Mabanza *commune* was at the cross roads of several roads. So, we believed that this cross road was a necessary passage way, for anybody going to Kibuye or to Gisenyi or Nyanza, that is why we thought we should check this ... cross-road keeping in mind the ... directives issued to the people who were supposed to man the road-block contrary to what was happening in other areas, we did not want to make the same mistakes as what was happening in the other regions which passersby were telling us about."[1073]

908. The Accused testified that those who staffed the roadblock were selected on the basis of their conduct, and also their "good character, level of training, that they had completed at least primary school or post-primary level of education and so on".[1074] He stated that oral instructions were given to the staff at the roadblock.

909. According to the Defence, the instructions given orally in April 1994, when the Trafipro roadblock was re-established, were later confirmed in writing.[1075] The Defence produced a letter entitled "Attestation", addressed to five persons, dated 3 June 1994 and signed by the Accused. It reads:

> "[Five addressees ...]
>
> I am writing to authorise you to man the Trafipro roadblock. Consequently, no other person has the right to keep guard there and to lead it without permission.
>
> During the checks you are required to conduct, you are kindly requested not to ill-treat passers-by, as some have already done. It is precisely for this reason that a five man commission has been set up to verify whether or not passers-by have been maltreated and whether the enemy has infiltrated through this passageway. The said commission is also required to offer you advice which will enable you to perform your task successfully."[1076]

[1071] Ibid. pp. 142-143.
[1072] See Prosecution Exhibits Nos. 92 and 94 as well as Defence Exhibit No. 62. These documents are discussed below.
[1073] Transcripts of 7 June 2000 pp. 150-151.
[1074] Transcripts of 9 June 2000 p. 30.
[1075] Defence Closing Brief p. 121 para. 69.
[1076] Prosecution Exhibit No. 94.

910. A second document, entitled "Certification", also dated 3 June 1994 and signed by the Accused, authorised a commission composed of five persons to supervise those who had been placed in charge of the Trafipro roadblock. The Certification states:

> "I would hereby like to ... authorise you to check whether people in charge of Trafipro roadblock do their work well; whether anyone is unjustly treated and observe anything which prevent[s] the roadblock from accomplishing its work. You will inform the assistant burgomaster (...Affaires Sociales et Coopératives) Nsengimana Appolinaire and the counsellor Nkiliyumwami D. of what you will have achieved so that you can look together for [a] solution. You have to give me a report. This means that it would be good for you to select among yourselves a leader ... who will make a plan of work. The following persons are in charge of roadblocks: [... five names.]
>
> N.B. No one else must appear at the roadblock without certification."[1077]

911. Witness Y was specifically named in the Certification as one of the five persons "in charge of" the roadblock. Neither the name of Witness Z nor of Rushimba appears in the document. However, during his testimony, the Accused did not exclude the possibility that one of the five persons listed as being in charge of the roadblock – Fidele Kubwimana – could be the same person as Rushimba (Fidel Cyakubwirwa):

> "[A.] The Fidele mentioned here is Kubwimana. I don't know whether there was a confusion with Cyakubwirwa, but...
>
> [Q.] Who was the one who was authorized to act as leader?
>
> [A.] If it was Cyakubwirwa, that maybe is the one who was known as Rushimba, maybe. Otherwise, I wouldn't know very well. Fidele Cyakubwirwa, Fidele Cyakubwirwa, but here we have Fidele Kubwimana. I don't know whether we are dealing with the same person."[1078]

912. The Accused testified that the five named persons staffed the Trafipro roadblock from the time it was first established in April 1994. No member of the five-man supervising commission testified at trial and, apart from Witness Y, no other person named in the Attestation appeared before the Chamber.

[1077] Defence Exhibit No. 62. The English translation has been improved.
[1078] Transcripts of 9 June 2000 pp. 45-46.

Findings

913. It is not clear from the evidence when the Trafipro roadblock was re-established by the Accused. The Chamber notes that no other witness corroborated the testimony of Witness Z that the roadblock was erected on 14 April 1994. Witness Y dated it to the month of April, without being specific. Defence Witness RA, who visited the Accused at the *bureau communal* on 17 April 1994, testified that the Trafipro roadblock had not been erected at that stage.[1079] The testimony of this witness would suggest that Trafipro was established sometime in the second half of April 1994.

914. As to the staffing of the Trafipro roadblock, the Chamber notes that the presence of Witness Y is uncontested. According to his own and the Accused's testimony, he was given oral instructions in April 1994 to staff the roadblock. The Attestation of 3 June 1994, issued by the Accused, confirms that the witness had this task also in June of that year. The Chamber therefore accepts that Witness Y was present at the roadblock from April 1994, and also on or after 3 June 1994.

915. The status of Witness Z and Rushimba is not so certain. The Prosecution's evidence suggests that both were present at the Trafipro roadblock at certain times during the events. On the other hand, the Accused denied that he had authorised Witness Z or Rushimba to staff the roadblock.[1080]

916. Witness Z's confession of 22 June 1998 to the Rwandan authorities raises a question about the credibility of his claim, referred to above, that the Accused ordered him to establish the Trafipro roadblock with others. In that confession the witness stated that a roadblock (almost certainly referring to Trafipro) was set up by Witness Y and Rushimba. Witness Z did not name himself as one of those directly involved in its setting up, and he made no mention of the Accused. He simply stated that "many of us mounted guard" at the roadblock.[1081]

[1079] Transcripts of 2 May 2000 pp. 52-53.
[1080] Transcripts of 8 June 2000 p. 229 and 9 June 2000 pp. 35-36.
[1081] Defence Exhibit No. 112.

917. Regarding the regularity of Witness Z's presence at the Trafipro roadblock, the witness testified to staffing it from 14 April 1994 "throughout the period" until July 1994, but also that he "would move about for one reason or another". He "wasn't there throughout".[1082] The witness stated that "[f]rom what people observed or said, it was thought that I myself was the leader but in fact, it was Rushimba who was in charge of manning the roadblock".[1083] In his statement of 18 September 1999 he contended that from 14 April 1994 he "only left that place to go for a beer, get something to eat or take a nap in the Trafipro building"; and that the roadblock was staffed by several people, Rushimba, Witness Y and himself being the ones "most regularly on duty there".[1084]

918. It follows from the testimonies of Witnesses Y and Z that Witness Z was present at the Trafipro roadblock during the incidents relating to Judith and Bigirimana (V.5.5 and 5.6). Witness Y did not provide evidence with regard to the regularity or duration of Witness Z's presence there. In his statement of 17 September 1999, Witness Y did not assert that Witness Z had summoned him to the roadblock or was in charge of it. However, he did state that Witness Z was "also manning the roadblock that day" when Bigirimana was killed.[1085] In his subsequent confession of 24 March 2000 to the Rwandan authorities, Witness Y was asked to identify those "[w]ho mounted guard" at the Trafipro roadblock. He answered that they "were many" and that he remembered, among others, Witness Z.[1086]

919. Witnesses O and AA also testified that Witness Z was at the Trafipro roadblock. Witness O said that Witness Z, Witness Y and Rushimba formed part of the group of *Interahamwe* taken from the Trafipro roadblock by the Accused to kill Pastor Muganga (IV.4.2).[1087] It is also apparent from Witness AA's testimony and

[1082] Transcripts of 8 February 2000 p. 75.
[1083] Ibid. p. 59.
[1084] Defence Exhibit No. 65.
[1085] Defence Exhibit No. 64.
[1086] Defence Exhibit No. 113.
[1087] Transcripts of 24 November 1999 p. 40.

witness statement that Witness Z staffed the Trafipro roadblock.[1088]

920. Regarding the presence of Rushimba, Witnesses Z and Y testified that he was at the Trafipro roadblock at the time of the killings of Bigirimana and Judith.[1089] According to the testimony of Witness Z, cited above, Rushimba was the leader of the Trafipro roadblock. This is in conformity with Witness Z's confession to the Rwandan authorities, in which he gave Rushimba and Witness Y central roles at the roadblock. It follows from Witness Y's statement to investigators that it was Rushimba who asked him to be part of the group and that Rushimba was the leader: "Rushimba, an ordinary peasant, was in charge of the roadblock."[1090] As mentioned, Witness O also identified Rushimba as being at the Trafipro roadblock.

921. Thus the testimonies referred to above, supported by witness statements and confessions, suggest that Witness Z and Rushimba were regularly present at the Trafipro roadblock.

922. As for other Trafipro attendants, the Chamber recalls that Witness Y testified that Rushimba invited Saidi Rukanos to join the staff.[1091] He also referred to teachers and gendarmes as being present.[1092] In his confessional statement, responding to a question about the identify of those at Trafipro, Witness Y answered that they were many, but that he only remembered Witness Z, Rushimba, Rukamosi Sayiie, Musabyimana Jean d'Amour, Nshimyimana Athanase and gendarmes.[1093] This is in accord with Witness Z's testimony, that "there were many people" at the roadblock;[1094] and according to his confession, "many of us mounted guard at this roadblock, particularly me, ... as well as many other people, since there was a tavern

[1088] Transcripts of 10 February 2000 p. 57 and Defence Exhibit No. 66 (statement of 22 and 23 September 1999).
[1089] Transcripts of 8 February 2000 p. 61 and 7 February 2000 p. 36, respectively.
[1090] Defence Exhibit No. 64. Rushimba was in charge of the roadblock also according to Witness Y's confession of 24 March 2000 (Defence Exhibit No. 113).
[1091] Transcripts of 7 February 2000 p. 28.
[1092] Ibid. p. 29.
[1093] Defence Exhibit No. 113.
[1094] Transcripts of 8 February 2000 p. 58.

at the spot".[1095]

923. As indicated below, in connection with the killings of Bigirimana and Judith, François Mugishi (or Semushegi) and Alexis Mutiganda also attended the Trafipro roadblock at various times (V.5.5 and 5.6).

924. On the basis of the available evidence, the Chamber cannot accept the Accused's contention that the Attestation gives a complete picture of those who regularly were present at the Trafirpo roadblock prior to 3 June 1994. Of the five persons listed in the Attestation of that date, only Witness Y was identified by witnesses as being present at the roadblock. This does not exclude the possibility that the other four staffed the roadblock at various times before or after 3 June 1994. But while there may have been a core of persons who had been mandated to staff Trafipro, the evidence indicates that a number of other persons were also in regular attendance.

925. In conclusion, even though it has not been possible to establish the dates of the presence at Trafipro of Rushimba and Witness Z, the Chamber finds that they were at the roadblock with considerable regularity. Moreover, the Chamber does not accept that the Accused was unaware that persons other than the five in question were regularly present at the roadblock. The close proximity of the roadblock to the *bureau communal* must be taken into account when assessing the knowledge of the Accused.

5.4.2 Purpose of Trafipro Roadblock

Submissions of the Parties

926. In its closing oral arguments, the Prosecution alleged:

> "In order to ensure that no Tutsi remained alive, be it those from within or outside the commune, the Accused set up road blocks within Mabanza to help screen those fleeing from as far away as Gitarama and Kigali."[1096]

[1095] Defence Exhibit No. 112.

927. The Accused, asked about the purpose of the Trafipro roadblock, replied:

> "Following the directives of the Prime Minister, we needed to check infiltration of the RPF, particularly try and identify or find out vehicles which are being used to transport ammunitions and grenades – and weapons".[1097]

Deliberations

928. As mentioned above, Witness Z alleged that on 13 April 1994, the Accused told him that a roadblock was needed to apprehend the "enemies" who were escaping.[1098] He was instructed also to check the papers of those who came to the roadblock. Witness Z explained what he understood the Accused to have meant by "enemy":

> "He didn't need to explain anything to me because we had been made to understand over a long time that the enemy was the tutsis and he in fact used the [term] *Inyenzi* and at that point in time, *Inyenzi* referred either to tutsis or a member of the RPF or a sympathiser thereof."[1099]

929. According to Witness Y, Trafipro was set up for wartime security purposes. Vehicle documents and identity cards were checked. Asked whether he was searching for Tutsi at the roadblock, the witness answered:

> "At that point in time anyone whose identity papers were not in order, if they did not have a photograph, whoever that person was, was sent to the bureau communal. ... The Tutsis at that time didn't want to be seen because they were the ones who were sought."[1100]

930. The point that anyone who did not have an identification could be sent to the *bureau communal* also follows from Witness Y's written statement of 17 September 1999:

> "We were not given any particular instructions as regards ethnic backgrounds. All those with proper identification cards, regardless of whether they were Hutu, Tutsi or Twa had no problem whatsoever."[1101]

[1096] Transcripts of 4 September 2000 p. 49.
[1097] Transcripts of 7 June 2000 pp. 142-143.
[1098] Transcripts of 8 February 2000 pp. 38-39.
[1099] Ibid. pp. 40-41.
[1100] Transcripts of 7 February 2000 pp. 34-36.

931. Prosecution Witness AA testified that the Accused had "roadblocks set up to control the movement of the *Inkotanyi* who were trying to infiltrate the *commune* by using vehicles".[1102]

932. Defence Witness KA testified that he passed through the Trafipro roadblock on several occasions "during our crisis time". He said that "the roadblock was on the road itself but by the roadside there was place where people on foot would pass". According to the witness, a vehicle would be stopped and the "normal documents" would be checked, after which it could pass.[1103]

933. Defence Witness KC, a Hutu, testified that he passed through the Trafipro roadblock on 23 May 1994 on his way to see the Accused about *laissez-passers*. The witness did not recognize anyone at the roadblock. He stated that no one asked him for his identity card and that he "just went through, normally".[1104] The witness did not see those staffing the roadblock checking the identity cards of other people. The witness thought "they were checking vehicles that were going through".[1105]

934. Of relevance also is a document entitled "Instructions on how to maintain security", dated 9 June 1994 and signed by the Accused. It relates to roadblocks generally; it does not specifically mention the Trafipro roadblock. It explains very succinctly how vehicles and drivers at a roadblock should be checked. It states that papers, such as the identity card, mission order and licence of the driver, as well as vehicle registration, tax and insurance forms, should be examined; the vehicle itself should be carefully searched, "because they hide there guns and cartridges".[1106]

[1101] Defence Exhibit No. 64.
[1102] Transcripts of 10 February 2000 p. 56.
[1103] Transcripts of 22 May 2000 pp. 91-93.
[1104] Transcripts of 28 April 2000 p. 47.
[1105] Ibid. pp. 46-47.
[1106] Prosecution Exhibit No. 92. French version: "Les Réglements concernant la protection de la sécurité".

Findings

935. To start with the Prosecution's documentary evidence on roadblocks, which is scant, the text of the Prime Minister's directive of 27 April 1994 (V.5.2.1) does not support a finding that the official purpose of roadblocks was criminal. Indeed, the letter admonishes against victimisation of innocent persons.[1107] The wording of the Prefect's letter of 30 April 1994 to the Accused and other *bourgmestres* (V.5.2.1) also seems to be limited to legitimate security concerns.[1108]

936. Of the documentation attributed to the Accused, neither the Attestation and Certification of 3 June 1994, nor the "Instructions" of 9 June 1994, support a finding that the purpose of roadblocks in Mabanza *commune* was criminal. On the contrary, the Certification purports to create a safeguard against unjust treatment, namely the five-man commission. The Attestation explains that the purpose of the commission is "to verify ... whether the enemy has infiltrated through this passageway".[1109]

937. The two Prosecution witnesses who regularly attended the Trafipro roadblock gave differing accounts of its purpose. Witness Z testified that the Accused asked him to erect a roadblock "because the enemies are escaping".[1110] The witness understood the Accused to be referring to Tutsi in general, as well as to members of the RPF and RPF-sympathisers. Witness Y, on the other hand, said that anyone with proper identification, whether Tutsi, Hutu or Twa, could pass through the roadblock without experiencing problems. He explained that Rushimba and Rukanos had given him relevant instructions, which they said had come from the Accused. Witness AA, who was not a staff member at the Trafipro roadblock, testified that the Accused had set up roadblocks to control the movements of *Inkotanyi* attempting to infiltrate the *commune*.

[1107] Prosecution Exhibit No. 77b.

[1108] Prosecution Exhibit No. 77a.

[1109] The Chamber has noted that the Kinyarwandan word for "enemy" here is "mwanzi" and not the derogatory "Inyenzi" or "Inkontanyi"; see transcripts of 9 June 2000 pp. 46f.

[1110] Transcripts of 8 February 2000 p. 39

938. The Chamber is, of course, aware that the true purpose of Trafipro or any other roadblock in Mabanza *commune* is best sought not in documentation or recalled oral instructions pertaining to its operations but rather in the operations themselves. The evidence of killings allegedly committed at the *commune*'s roadblocks is examined in detail in the coming sections. All that can be said at this point is that the Prosecution has not shown beyond reasonable doubt that the aim of the Accused, when he set up the Trafipro roadblock, was to screen out and kill Tutsi civilians.

5.5 Trafipro Roadblock – Accused's Complicity in Killing of Bigirimana

Submissions of the Parties

939. According to the Prosecution, a man named François Bigirimana was apprehended at the Trafipro roadblock.[1111] He was then taken some distance away and killed by Rushimba and Witnesses Z and Y. The perpetrators were not punished or suspended by the Accused.[1112]

940. As mentioned earlier, in relation to this alleged killing and that of Judith, the Prosecution charges the Accused with genocide, complicity in genocide and crimes against humanity, pursuant to Articles 6(1) and 6(3) of the Statute.

941. The Defence challenges the allegation that Bigirimana was in fact arrested and murdered in Mabanza *commune*. In its view, Bigirimana was murdered at Bisesero, as stated in the trial of Kayishema and Ruzindana.[1113] Alternatively, the Defence submits that the Accused was not present during the arrest of Bigirimana, that he was not aware of his murder, and that the testimonies of Witnesses Y and Z are inconsistent.[1114]

[1111] Bigirimana's name occasionally has been recorded as "Bigilimana". It appears that he was a driver, either of a bus (Witness Z – transcripts of 8 February 2000 p. 56) or at OCIR Café, Kibuye (Witness Z's Rwandan confessional statement of 22 June 1998, Defence Exhibit No. 112), or perhaps both.

[1112] See, in particular, Prosecution's written Closing Remarks p. 18 para. 120, p. 77 para. 403, p. 78 para. 410, p. 91 para. 78, p. 93 para. 93, p. 97 para. 117, p. 102 para. 139, p. 105 para. 163, p. 107 para. 191, p. 110 para. 213 and p. 116 para. 267; Rebuttal paras. 46-48.

[1113] Transcripts (Kayishema and Ruzindana trial) of 24 April 1997 p. 65.

[1114] See, in particular, Defence Closing Brief pp. 54-56 paras. 446-462 and p. 122 paras. 73-74; Rejoinder paras. 207-211.

Deliberations

942. Prosecution Witness Z testified that one evening Bigirimana came in a pick-up vehicle from Kigali, accompanied by his wife, and was stopped at Trafipro. A certain Alexis Mutiganda said to Witness Z that he knew Bigirimana, that he "was a Tutsi and he was working together with the Inyenzi".[1115] Witness Z found that Bigirimana had two identity cards, one indicating that he was a Hutu, the other that he was a Tutsi. Bigirimana's wife pleaded on her husband's behalf with the Accused, who was then passing by the roadblock on his way home from the communal office. The Accused responded that "it was a matter which was up to the persons manning the roadblock with whom she should speak".[1116] Witness Z testified that "when the woman came back to us, we chased her away telling her that if she continued we were going to kill her as we were going to do with her husband".[1117]

943. Later, according to Witness Z, he, Witness Y and Rushimba took Bigirimana to a place close to the Trafipro roadblock where they killed him with machetes. Witness Z struck the first blow.[1118] The witness testified that Bigirimana was killed because he was a Tutsi and an accomplice, and because a certain François Mugishi (or Mugeshi) had given them some money to kill him. The witness explained that in order to retain a large part of the money, he chose only two other people for the killing. But he added that even without the money he and his accomplices still would have killed Bigirimana.[1119]

944. Prosecution Witness Y testified that Bigirimana was stopped at the Trafipro roadblock and, in variance with the testimony of Witness Z, was found to have *no* documents. A man named François Semugeshi said that Bigirimana was an enemy of the country, an *Inyenzi*. "He asked us to go and deal with him and that he was going

[1115] Transcripts of 8 February 2000 pp. 56 and 58.
[1116] Ibid. p. 57.
[1117] Ibid.
[1118] Ibid. p. 60.
[1119] Ibid. pp. 59-60. Witness Z, in his confessional statement of 22 June 1998, noted that after the murder of Judith, Mutiganda had said "I am leaving but there is one person still remaining for me to have peace"; the statement then goes on to address the murder of Bigirimana.

to buy us tea."[1120] Bigirimana was taken 150 meters from the roadblock and killed by Witnesses Z and Y (Witness Y did not mention Rushimba in connection with this incident). Witness Z struck the first blow. Witness Y testified that he participated in the killing because Semugeshi had promised to pay him.[1121] In contradiction to the evidence presented by Witness Z, Witness Y testified that the Accused had *not* been present at the roadblock when Bigirimana was arrested.[1122]

945. The Accused testified that he had no knowledge of the killing in Mabanza *commune* of a person named Bigirimana.[1123]

Findings

946. The Chamber does not accept the Defence assertion that this is a case of mistaken identity. The two confessed perpetrators (Witnesses Y and Z) consistently have maintained that they killed François Bigirimana. This follows from their written statements, confessions and testimonies. The Defence has not demonstrated a sufficient connection between the Bigirimana referred to in the *Kayishema and Ruzindana* case and the Bigirimana in the present case.

947. The only evidence of the Accused's direct involvement in the killing of Bigirimana is the testimony of Witness Z, according to which the Accused was present during the incident and spoke with Bigirimana's wife without intervening to prevent her husband's death. This testimony incriminates the Accused, for it suggests that he was an accomplice to the commission of the crime;[1124] alternatively, that he is liable as a superior for not averting his subordinates from commission of the offence.[1125]

948. The Chamber has already expressed doubts about the reliability of Witness Z

[1120] Transcripts of 7 February 2000 p 37. Witness Y testified: "Regarding the first person I participated in killing him because I was promised some financial reward, it was Mugeshi who promised to pay us" (ibid. p. 40).
[1121] Ibid. p. 38.
[1122] Ibid. pp. 48-49.
[1123] Transcripts of 7 June pp. 167-68.
[1124] Prosecution's written Closing Remarks p. 103 para. 139, p. 105 para. 163 and p. 110 para. 213.
[1125] Ibid. p. 116 para. 267.

(V.5.4.1) In the present instance, the only other witness to testify about the killing of Bigirimana is Witness Y, who, in direct contrast to the testimony of Witness Z, stated that he did not see the Accused at the Trafirpro roadblock when Bigirimana was arrested.[1126] Witness Y's assertion that the Accused was not present at the roadblock is consistent with his statement to investigators of 17 September 1999.[1127] This is significant insofar as the investigators, in the introduction to the statement, indicate a specific interest in information pertaining to the Accused. The witness mentioned the Accused in connection with the Trafipro roadblock in general, and with the killing of Judith in particular, but not in connection with the killing of Bigirimana. Where the only other direct witness to the killing of Bigirimana presents a version of events at variance with that of Witness Z, a doubt is cast upon the latter's testimony implicating the Accused in the events leading up to the killing of Bigirimana. There are also inconsistencies between Witness Z's testimony and his written statement in relation to Bigirimana.

Conclusion

949. The Chamber concludes that the testimony of Witness Z is uncorroborated. Therefore a serious doubt subsists regarding the involvement of the Accused leading up to the killing of Bigirimana. The Accused is therefore not liable under Article 6(1). His liability as a superior will be considered below (V.5.7).

5.6 Trafipro Roadblock – Accused's Complicity in Killing of Judith

Submissions of the Parties

950. According to the Prosecution, a woman named Judith, who was well known in Mabanza *commune*, was murdered in the ruins of her house by Rushimba and Witness Y, having been led there by the two men from the Trafipro roadblock, past the *bureau communal*, with Witness Z trailing five to ten metres behind. The Prosecution submits that the Accused saw the killers leading Judith away, knew that

[1126] Transcripts of 7 February 2000 pp. 48-49.
[1127] Defence Exhibit No. 64.

Judith was about to be killed, and encouraged or acquiesced in her murder. The perpetrators were not punished or suspended by the Accused.[1128]

951. The Accused denied that he knew that Judith was about to be killed, or that he found out about her murder after the event. The Defence argues that the Prosecution has failed to specify the role of the Accused in the killing of Judith. It also challenges the evidence of Witnesses Z, Y and AB as internally incoherent, mutually inconsistent and unreliable. According to the Defence, the claim that Judith was well known in Mabanza *commune* is incorrect.[1129]

Deliberations

952. Prosecution Witness Z testified that Judith had been found by Alexis Mutiganda, apparently in a banana plantation, and that she was dragged to the Trafipro roadblock by Rushimba. In his confessional statement of 22 June 1998, the witness stated:

> "Since I knew her, I interceded on her behalf but the driver [Mutiganda] refused under the pretext that Judith had refused him to get married to her daughter when his wife died, and she had insulted him by saying, a he-goat can never mate with a sheep. ... [He] instructed Rushimba and [Witness Y] to kill her immediately, promising to buy them drinks."[1130]

953. Judith's captors decided to take her to her plot and kill her there. Witness Z explained how he trailed five to ten meters behind Rushimba and Witness Y as they walked with Judith, without holding her, past the communal office.[1131] Witness Z said that, at that point, the Accused came out of his office and asked him, "Where did you find that one?". The witness replied that they found her in a banana plantation and that they "were going to work on her". According to the witness, the Accused

[1128] See, in particular, Prosecution's written Closing Remarks p. 16 para. 101, pp. 19-20 paras. 121 and 124, p. 53 para. 309, p. 77 paras. 404-405, p. 78 para. 410, p. 92 para. 84, p. 97 para. 120, p. 103 para. 142, p. 105 para. 164, p. 110 para. 214 and p. 115 paras. 256-8; Rebuttal paras. 46-48.
[1129] See, in particular, Defence Closing Brief pp 50-54 paras. 408-445; Rejoinder paras. 203-206.
[1130] Defence Exhibit No. 112.
[1131] Transcripts of 8 February 2000 p. 67.

said, "That's fine, go on".[1132] The Accused then went back to his office. On arriving at Judith's plot, Witness Z found that she had already been killed by Rushimba and Witness Y. "They covered her with earth and then we left."[1133]

954. Witness Z testified that he did not "recall the day or the date" of the killing.[1134] However, in his Rwandan confessional statement of 22 June 1998, he indicated that the incident occurred "by the end of April".[1135]

955. Prosecution Witness Y admitted that he, together with Rushimba, had killed Judith. The witness testified that Judith was brought to the Trafipro roadblock by Rushimba after being found somewhere along the road to Gitikinini.[1136] He stated that Rushimba decided that Judith was to be killed and forced Witness Y to take part: "Rushimba told me that if I did not participate he was going to kill me and he was capable of doing it because he was even carrying a gun."[1137]

956. Witness Y testified that he and Rushimba had walked past the front of the *bureau communal* with Judith, very close to the building, and that through the window he saw the Accused in his office. Although the witness testified in response to a question from the Bench that the Accused saw them pass, in cross-examination he said:

> "[Q.] Therefore, you didn't meet him on your way?
> [A.] I mean that where he was we could see him.
> [Q.] Could he see you?
> [A.] The office had glass windows, I can therefore not state certainly whether he saw us or not but we could see him. ... Since we passed in front of him without speaking to him I cannot tell you that he knew what we were going to do."[1138]

957. Witness Y explained that the killing took place about one hundred metres from the rear enclosure of the *bureau communal*.

[1132] Ibid. p. 64.
[1133] Ibid.
[1134] Ibid. p. 62.
[1135] Defence Exhibit No. 112.
[1136] Transcripts of 7 February 2000 pp. 36-37.
[1137] Ibid. pp. 40-41.
[1138] Ibid. p. 53.

958. Prosecution Witness AB testified that the roadblocks, including Trafipro, were set up to identify Tutsi. She stated that "[w]hen Tutsis were found, they were killed or if you had a face that looked like a Tutsi's face, you were killed."[1139] As an example of this, Judith, who had been hiding with her, had been arrested at a roadblock, taken to the *bureau communal* to see the Accused, and subsequently to "Kinihira". The witness later heard those who came back bragging that they had killed her.[1140]

Findings

959. Once again, the only evidence of the Accused's direct involvement in the killing of Judith is the testimony of Witness Z. He claimed to have had a conversation with the Accused in front of the *bureau communal*, just after Judith was escorted past.

960. The Chamber accepts that Witness Z was involved in the killing of Judith. (According to Witness Y's statement of 17 September 1999, Witness Z, Rushimba and he led Judith to her house, where she was killed by Rushimba.[1141]) However, the Chamber cannot rely on other aspects of Witness Z's account of the incident.

961. In his confession of 22 June 1998, Witness Z admitted his involvement in the murder of Judith but said nothing about an encounter with the Accused, in spite of mentioning him in relation to the killing of Pastor Muganga.[1142] He first referred to meeting the Accused in his statement of 18 September 1999, where he declared: "He asked us where we had found Judith, and *before we could answer*, he went on to say: 'That's okay.'"[1143] This is in contradiction with his testimony (as excerpted above), according to which the witness had the opportunity to reply to the Accused's question before being told, "That's fine". Other inconsistencies are apparent but need not be

[1139] Transcripts of 15 November 1999 pp. 109-111.
[1140] Ibid. pp. 111-112.
[1141] Defence Exhibit No. 64.
[1142] Defence Exhibit No. 112.
[1143] Defence Exhibit No. 65, emphasis added.

entered into here.[1144] The point is that the supposed conversation between Witness Z and the Accused is not corroborated. Witness Y who, according to Witness Z, was only some meters ahead did not refer to any conversation between Witness Z and the Accused. It is possible, of course, that the Accused who was, according to Witness Y, in his office when Judith was taken past, took notice and came out to the entrance where he met Witness Z. However, this mere possibility cannot fortify the account of a witness whose unreliability is questionable (V.5.4.1 and 5.5).

962. It is arguable that if the Accused had seen the group pass before his window he would have appreciated the likelihood of an imminent offence. It may well be true, as Witness Z testified in reference to Judith, that she was not being held.[1145] But even if Judith was not being led as if she were a prisoner, the sight of two roadblock attendants – at least one of whom (Witness Y) was formally appointed by the Accused – following closely behind a lone woman, in the circumstances of the time, should have alerted the Accused to the danger. However, in the absence of any evidence that the Accused noticed the procession, this line of argumentation leads nowhere.

963. It is also arguable that the Accused's complicity in the murder of Judith may be found in the very fact that she was taken past the *bureau communal* with no apparent attempt to conceal this act from the eyes of the Accused. Witness Y was asked why he had chosen this particular route to Judith's plot, along which an encounter with the *bourgmestre* was probable. The witness replied that "[a]t that point in time I would say that people had lost their heads. Reasoning was not a common commodity and no one really thought about that."[1146] Thus the Prosecution's own witness, effectively invited to allude to a tolerance for criminal conduct in the proximity of the *bureau communal*, spoke instead of his own and others' unreasoned conduct at the time.

[1144] For example, Witness Z did not mention that he was with anyone when he met the Accused. But according to his confessional statement, Witness Z was with Mutiganda when he followed Witness Y and Rushimba to the home of Judith: "They [Rushimba and Witness Y] took her to her house in ruins and killed her there. Mutiganda asked me to accompany him to the spot in order to make sure. We went and found that they had just killed her with bludgeons and machetes."

[1145] Transcripts of 9 February 2000 p. 86.

[1146] Transcripts of 7 February 2000 p. 59.

964. The testimony of Witness AB, that Judith was taken to meet the Accused before being killed, appears to be speculation – the witness did not see such a meeting.[1147] The witness's testimony is on this point at variance with that of the confessed killer, Witness Y, and, for that matter, of Witness Z. Her evidence can be given no weight here.

965. For the above reasons, the Chamber is not convinced that the Accused was involved in the events resulting in the murder of Judith. The Prosecution has failed to prove that the Accused was an accomplice to the offence. Therefore he is not liable under Article 6(1). The question of superior responsibility is considered next.

5.7 Killings of Bigirimana and Judith – Accused's Responsibility as Superior

966. As mentioned, the Accused denied that he knew that either Judith or Bigirimana was to be killed or had been killed in connection with any roadblock.

Deliberations

967. The Chamber has discussed the elements of superior responsibility in Chapter III. "Knowledge" is an indispensable element of this form of liability, meaning that the liability of a superior for crimes of his or her subordinates is not strict. The mental element of knowledge must be demonstrated beyond reasonable doubt. If there is no *direct* evidence of a superior's knowledge of offences committed by subordinates, it may be possible, however, to establish that he or she knew of the illegal acts by way of circumstantial evidence.

968. The *Celebici* Trial Chamber declared that in determining whether a superior, despite pleas to the contrary, in fact must have possessed the requisite knowledge of offences, the following indicia, *inter alia*, are relevant:[1148]

[1147] See transcripts of 15 November 1999 p. 112.
[1148] *Celebici*, 16 November 1998, para. 386.

"(a) The number of illegal acts;

(b) The type of illegal acts;

(c) The scope of illegal acts;

(d) The time during which the illegal acts occurred;

(e) The number and type of troops involved;

(f) The logistics involved, if any;

(g) The geographical location of the acts;

(h) The widespread occurrence of the acts;

(i) The tactical tempo of operations;

(j) The *modus operandi* of similar illegal acts;

(k) The officers and staff involved;

(l) The location of the commander at the time."

969. The Trial Chamber in *Celebici* weighed up some of these indicia in the course of inferring the intentional state of the accused commander of the Celebici prison camp:

> "There is a plethora of evidence of the knowledge on the part of Zdravko Mucic that the guards under his command were committing crimes... The crimes committed in the Celebici prison-camp were so frequent and notorious that there is no way that Mr. Mucic could not have known or heard about them. Despite this, he did not institute any monitoring and reporting system whereby violations committed in the prison-camp would be reported to him, notwithstanding his knowledge that Hazim Delic, his deputy, had a penchant and proclivity for mistreating detainees. There is no doubt that Mr. Mucic was fully aware of the fact that the guards at the Celebici prison-camp were engaged in violations of international humanitarian law."[1149]

970. The Trial Chamber in the *Aleksovski* case, in reference to the list of knowledge-indicia presented in *Celebici*, stated:

> "The Trial Chamber deems however that an individual's superior position *per se* is a significant indicium that he had knowledge of the crimes committed by his subordinates. The weight to be given to that indicium however depends *inter alia* on the geographical and temporal circumstances. This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them. Conversely, *the commission of a crime in the immediate proximity of the place where the superior ordinarily carried out his duties*

[1149] Ibid. paras. 769-770.

would suffice to establish a significant indicium that he had knowledge of the crime, *a fortiori* if the crimes were repeatedly committed."[1150]

971. A significant indicium need not, of course, be a sufficient indicium. The final clause of the above excerpt indicates that other indicia (such as the *number* of illegal acts committed at the given location) may be necessary for the mental element to be established with sufficient certainty. This is confirmed by the Trial Chamber's explanation of its findings in relation to *Aleksovski*. The accused was the commander of Kaonik prison in Bosnia-Herzegovina. He lived inside the closed and controlled environment of the prison. The indicium of proximity to the scene of the crimes consequently weighed heavily with the Trial Chamber.[1151] But that was not the only indicium the Chamber relied on to infer the knowledge of the accused in relation to crimes committed by his subordinates:

"The accused himself admitted ... that some guards whose brothers had been killed at the front tended to take revenge on the detainees. This was further attested to by Witness I's account of having been beaten one evening by an HVO soldier and summoned the following day by the accused for questioning about the cause of his injuries. Five witnesses moreover stated that the accused had witnessed their being abused first-hand ... The Trial Chamber therefore finds on the basis of the evidence tendered at trial that the accused knew that crimes were being committed in Kaonik prison."[1152]

972. The *Celibici* and *Aleksovski* judgements concern repeated offences committed in prison camps. This is not the situation in the present case. Nevertheless, on the specific question of a superior's knowledge, the Chamber finds that the legal reasoning of the two judgements applies *mutatis mutandis*.

Findings

973. In relation to killings committed in connection with the Trafipro roadblock, only the circumstances surrounding the murders of Bigirimana and Judith, committed by at least one true subordinate of the Accused (Witness Y), are known to the

[1150] *Aleksovski*, 25 June 1999, para. 80, emphasis added. The Appeals Chamber of the ICTY, in its Judgement on Appeal in the *Aleksovski* case, noted that "the Appellant does not challenge the Trial Chamber's interpretation of the elements of command responsibility, the application of which by the Trial Chamber has not been shown to be unreasonable" (24 March 2000, para. 77).
[1151] Ibid. para. 114.
[1152] Ibid.

Chamber in any detail. As indicated below, uncertainty surrounds other alleged killings.

974. Witness Z testified to the effect that the Accused was put on notice about the impending murders, and may even have encouraged their commission. In the case of Bigirimana, and for the reasons given earlier, the Chamber cannot accept Witness Z's testimony about the presence of the Accused at the Trafipro roadblock shortly before Bigirimana was taken away and killed; nor is the Chamber convinced that the Accused was notified of the imminent offence by Bigirimana's wife. In the case of Judith, Witness Z claimed to have conversed with the Accused moments after Witness Y and Rushimba led Judith past the window of the Accused's office. However, for the reasons given above, the Chamber has decided to disregard his evidence.

975. There being no other direct evidence as to the Accused's knowledge of the two offences, the Chamber will consider the circumstantial evidence, guided by the list of indicia set down in the *Celebici* case.

976. Bigirimana and Judith evidently were killed in close proximity to Mabanza's *bureau communal*; that is, in the words of *Aleksovski*, near the place where the Accused ordinarily carried out his duties as *bourgmestre*.

977. It must be said in connection with the indicium of proximity that the killings of Bigirimana and Judith occurred on dates unknown to the Chamber – the only testimony, by Witness Z, indicating that they "took place in April 1994".[1153] Thus, in the case of Bigirimana, it is not possible for the Chamber to look to other known facts in an effort to determine whether the Accused was at his office or at the *bureau communal*, or at any rate close by, when the offence was committed. As the Accused's location is unknown for the date on which Bigirimana was killed, the corresponding indicium of knowledge does not enter into the Chamber's calculations.

[1153] Transcripts of 9 February 2000 pp. 15-16.

978. By contrast, in the case of Judith, Witness Y testified that the Accused was in his office at the time the victim walked past. The Chamber has no reason to doubt this.

979. Of additional significance are the indicia of geographical location, time and *modus operandi*. The fact that the two offences were committed in the immediate neighbourhood of the *bureau communal*, combined with the fact that they were committed more or less openly, certainly without secrecy, in daytime, and with the direct or indirect participation of three or more persons at a time, goes some way to show that the Accused knew or found out about the offences.

980. However, in the Chamber's opinion, the above-mentioned indicia do not go far enough in the present case. If the murders of Judith and Bigirimana were instances of a larger number of victims of the Trafipro roadblock, the inference that the Accused knew about the offences might have been plausible. But there is no evidence to show that the two killings were not just isolated or exceptional incidents, rather than illustrations of a routine of which the Accused could not plausibly have remained unaware.

981. The record is, at the very least, unclear about other killings having occurred in connection with the Trafipro roadblock. Witness Y testified that he and his companions killed *three* people during the massacres. It is not known to the Chamber who the third victim was, although possibly Witness Y meant to refer to Pastor Muganga (V.4.2). At any rate the identity of the third victim and the circumstances of his or her death, including whether the offence was in connection with any roadblock, were not explored by the Prosecution (Muganga does not appear to have been a victim of Trafipro).[1154]

982. Witness Z testified that in the period during which he staffed the roadblock approximately 1,000 people passed through it each day. According to the witness "... [T]hey were hutus, as tutsis could not pass by the roadblock as they were in hiding.

[1154] Transcripts of 7 February 2000 pp. 23-24.

So at that point in time it was only the hutus that were passing at the roadblock."[1155] He stated that besides Bigirimana and Judith he "didn't see any other Tutsis because the Tutsis already knew that the roadblock was in place and therefore they were afraid to pass by it."[1156]

983. On the other hand, Prosecution Witness AA claimed to have seen bodies close to the Trafipro roadblock. He testified:

> "There were dead bodies also close to the communal office but in fact the instructions or the orders that were given were that the refugees should be killed at Kibuye. So these dead bodies at the roadblocks or in the communal office were refugees who were not able to go to Kibuye and who came late and were therefore killed there."[1157]

984. Witness AA was asked for more information regarding the location of the bodies. He said that they were "close to that roadblock which is not far from the communal office. It's like a distance from where I'm sitting to where the prosecutor is standing."[1158] Asked whether the bodies he saw were at the Trafipro roadblock, the witness answered that they were gathered close to the *bureau communal*.[1159]

985. The Chamber is not persuaded that the bodies seen by Witness AA were victims of the Trafipro roadblock. It is reasonably possible that the remaining refugees were victims of attacks in and around the communal office, possibly by *Abakiga* (V.4.3). Such attacks are known to have begun shortly after the main group of refugees was dispatched to Kibuye town on 13 April 1994. Even if Witness AA meant to link the bodies he saw to the operations of the Trafipro roadblock, this would not be in conformity with the testimonies of Witnesses Y and Z, who staffed the roadblock and testified that only two Tutsi were killed in connection with it.

986. The Prosecution alleged that even if the Accused did not know of the murder of Judith at the time of the offence, he would have found out about it later, and, upon being informed of the crime should have initiated an investigation to identify and

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[1155] Transcripts of 8 February 2000 pp. 55-56.
[1156] Ibid. pp. 75-76.
[1157] Transcripts of 10 February 2000 p. 58.
[1158] Ibid. p. 59.
[1159] Ibid. p. 60.

punish the perpetrators. But the Chamber believes that the claim that Judith's murder was public knowledge in Mabanza *commune* lacks sufficient foundation. The record reveals only that Witness Z said that Judith was the wife of a "medical doctor" at the Rubengera medical centre.[1160] Witness Y testified that Judith and her husband were family friends. The husband helped the witness when his children became ill.[1161] In his statement to investigators the witness said that Judith's husband was a "medical assistant".[1162]

987. Moreover, Witness Y testified that "I did not speak with [the Accused] about this matter [the two killings] because his level was not the same as mine and there was no chain of communication between himself and myself."[1163]

988. In summary, the indicium of the Accused's contemporaneous presence in the vicinity of the crime in the case of Judith, together with the indicia of geographical location, time and *modus operandi* in relation to the killings of both Bigirimana and Judith, combined with the fact that no more than two people were killed in a period when attacks on civilians were alleged to be common – telling though these indicia may seem when taken in combination – are in the Chamber's assessment nevertheless not sufficient to prove that the Accused had the requisite *mens rea*. The findings in *Celebici* and *Aleksovski* were made on a much firmer foundation.

989. It follows that the Prosecution has failed to prove beyond reasonable doubt that the Accused is responsible as a superior for killings committed in connection with the Trafipro roadblock by Rushimba and Witnesses Y and Z. Therefore the Accused is not liable under Article 6(3) for the murders of Bigirimana and Judith.

[1160] Transcripts of 8 February 2000 p. 66.
[1161] Transcripts of 7 February p. 41.
[1162] Defence Exhibit No. 64.
[1163] Transcripts of 7 February 2000 p. 60.

5.8 Gitikinini Roadblock

990. The roadblock at Gitikinini was situated near the Gitikinini market, not far from the *bureau communal*. Five witnesses provided testimony about this roadblock.

Deliberations

991. Prosecution Witness B testified that she saw roadblocks at Gitikinini and Trafipro. They were staffed (she did not distinguish between the two) by local citizens, communal police, the assistant *bourgmestres* Nsengimana and Semanza, and Witness Y. She never saw the Accused work at the roadblocks, although according to her he passed by or through them on his way back and forth between the communal office and his home.[1164] The witness stated that persons staffing the roadblocks specialised in certain tasks:

> "When someone passed by and they did not recognise the person, they would ask for their identity card and when they realised that the person was a Tutsi, the person was passed to another person responsible for undressing the person. Here on this roadblock people were killed after being undressed. So there were some who had the responsibility for undressing the people, others who had the responsibility of killing them."[1165]

992. Witness B testified that no one was killed at roadblocks: "People were rather threatened, beaten and they were killed next to a mass grave." She added that when she saw people being killed, they had been apprehended at the barrier and taken elsewhere. Dead bodies were not wanted around the roadblocks.[1166]

993. Witness B did not indicate which if any of the persons mentioned above were responsible for undressing and killing Tutsi detained at the roadblocks, and in particular at Gitikinini. During cross-examination, the witness explained that she had witnessed only two detained persons, Pastor Muganga and a girl named Esperance. She testified that she had seen Esperance led away, having first been undressed, by "those who manned the roadblock" at Gitikinini. The witness did not claim to have

[1164] Transcripts of 24 January 2000 pp. 66-67.
[1165] Ibid. p. 68.

seen Esperance killed and provided no evidence that she was in fact killed. She said that "apart from these two occasions other persons were telling us that this is how it happened".[1167]

994. In relation to Pastor Muganga, Witness B said:

> "[A.] ... I saw him. He was escorted. He was undressed and taken towards the commune. Later on they went to kill him on the football field.
>
> [Q.] You say he was undressed at the roadblock, is that correct?
>
> [A.] No, I did not see him at the roadblock but I saw him walking from the roadblock accompanied by people who kept that roadblock so I drew the conclusion that those were the people who undressed him."
>
> ...
>
> [Q.] So you didn't see him killed at the roadblock. Is that correct?
>
> [A.] No, no one was ever killed at the roadblock."[1168]

995. Witness Z, one of the admitted killers of Muganga (V.4.2), stated that "Muganga died before [Gitikinini] roadblock was mounted and all those people who accompanied me, none of them was with me at the roadblock".[1169] Asked more generally about the Gitikinini roadblock, Witness Z answered that "there was a roadblock at Gitikinini in the early days, but that didn't last and at a given point in time, it was dismantled".[1170]

996. Prosecution Witness AA mentioned three roadblocks: at Kukabuga; in front of the communal office; and at Gitikinini. He testified that the Accused had them set up to prevent infiltration by *Inkontanyi*;[1171] he added that "a young man who mounted a roadblock said that it was Bagilishema who set them up".[1172] Witness AA declared in his statement of September 1999 that Witness Z told him that the Accused had

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[1166] Ibid. p 96 and p. 101.
[1167] Ibid. pp. 93-94, 96 and 101-102.
[1168] Ibid. pp. 94 and 101.
[1169] Transcripts of 8 February 2000 pp. 49-50.
[1170] Ibid. p. 78.
[1171] Transcripts of 10 February 2000 p. 56.
[1172] Ibid. pp. 56-57.

ordered the roadblocks at Trafipro, Gitikinini and Kukabuga to be set up.[1173] The witness did not claim to have seen any killings or bodies in the proximity of the Gitikinini roadblock.

997. The Accused denied that he had set up any roadblock other than Trafipro.[1174] Defence Witness ZD testified that when he passed through Gitikinini around 17 April 1994, there was no roadblock there.[1175] Defence Witness RA claimed in relation to the Gitikinini roadblock that "there was no rule governing when it was erected and when it was not, but in any case, it was not permanent."[1176] The witness passed through the roadblock once and testified that civilians who staffed the roadblock did not check the witness or the people who were with her. Witness RA did not mention seeing any officials at the Gitikinini roadblock.

Findings

998. Witness AA claimed that he was told that the Accused had ordered the establishment of Gitikini roadblock, among others. This is hearsay evidence and must be treated with caution. Witness Z, who seems to have been Witness AA's source on this point, mentioned Gitikinini as a roadblock in the early period, which was dismantled at an unspecified time. He did not mention the Accused in this connection, although he stated that the Accused "was aware of the existence of these roadblocks" because they were not far from the communal office.[1177]

999. Witness B's testimony does not allow the conclusion that Pastor Muganga was apprehended, undressed or killed at the Gitikinini roadblock. This witness is at any rate contradicted by Witness Z, who said that Muganga died before the roadblock at Gitikinini was erected. Other witnesses who testified about Muganga (Witnesses O and AB) did not mention Gitikinini roadblock in connection with his death. They located the incident within the compound of the *bureau communal* and at the football

[1173] Defence Exhibit No. 66.
[1174] Transcripts of 7 June 2000 p. 141.
[1175] Transcripts of 3 May 2000 p. 21.
[1176] Transcripts of 2 May 2000 p. 96

stadium (V.4.2). Consequently, the Chamber cannot conclude that the killing of Muganga was related to the operation of the Gitikinini roadblock.

1000. Witness B was the only witness to refer to Esperance. She testified that she saw Esperance being led away, but the evidence adduced on this point lacks detail and is incomplete. The Prosecution did not establish the identity of those who allegedly led the girl away from the roadblock, in particular whether they were ordinary civilians or persons accountable to the Accused. Nor is it clear what happened to Esperance. There is no clear evidence that she was killed.

1001. For these reasons, the Chamber finds that the Prosecution has failed to prove that relevant offences were committed against Pastor Muganga or Esperance, or against any other persons, in connection with the Gitikinini roadblock. The Prosecution has also failed to demonstrate that the Accused was responsible for setting up, or acquiescing to the continuing operation of, the roadblock in the period covered by the Indictment.

5.9 Gacaca Roadblock

Deliberations

1002. Only Witness A referred to this roadblock, "at the junction of the road that leads to Gacaca Sector and the other road that leads to Bagilishema's house". He said that the roadblock was close to the official residence of the Accused during the war. In April 1994, policemen and *Interahamwe* staffed the roadblock at Gacaca. The witness identified one roadblock attendant as Sanani, an *Interahamwe*. He further testified to seeing people being killed at Gacaca. His answer to the question whether he could identify any of the victims was unclear: "People came down from secteurs that were further up and I was towards the bottom and everyday I saw bodies which were brought down ... and eaten by dogs."[1178] No other witness located a roadblock at

[1177] Transcripts of 8 February 2000 p. 78.

[1178] Transcripts of 17 November 1999 pp. 56-58, at p. 57. The original English translation has been improved with reference to the French transcript, at p. 77: "Des gens descendaient des secteurs qui

Gacaca or described a roadblock in terms similar to that of Witness A. The Accused denied having ordered a roadblock at Gacaca to be set up.[1179]

Findings

1003. Witness A testified to having seen bodies at Gacaca roadblock but did not provide clear or detailed evidence on this point. When asked whether he was able to recognise any of those killed, his response appeared to suggest that the bodies were brought to the roadblock after the victims had been killed elsewhere. The witness supplied no further details about the *Interahamwe* called Sanani, "who came to that roadblock quite often".[1180] Nor did he name or describe the policemen he claimed to have seen there. The witness did not testify that the Accused was in any way linked to the Gacaca roadblock. For these reasons, the Chamber is unable to find that the Accused is responsible for criminal activities alleged in apparent connection with the Gacaca roadblock.

5.10 Roadblocks Generally – Accused's Responsibility in Negligence

1004. There is no doubt that a roadblock set up during the period in question carried a high risk for Tutsi civilians. The Accused would have known this. He testified, with reference to the warning contained in the Attestation he addressed to five staff of the Trafipro roadblock (V.5.4), that "contrary to what was happening in other areas, we did not want to make the same mistakes".[1181] Defence Witness RA testified that on 17 April 1994, she went with others to see the Accused regarding the security of Tutsi Sisters. The Accused advised them not to go to Kibuye as roadblocks had been set up along the way (it is not clear whether the roadblocks referred to were within

étaient un peu plus hauts et chaque jour moi j'étais caché plus bas et chaque jour je voyais des corps, des cadavres qui étaient trainés et emportés par des chiens."

[1179] Transcripts of 7 June 2000 p. 141.

[1180] Sanani was also mentioned by Witness O in connection with the killing of Pastor Muganga.

[1181] Transcripts of 7 June 2000 p. 151.

the boundaries of Mabanza *commune*) and the Sisters would be killed.[1182]

Deliberations

1005. As indicated earlier (V.5.3), the Accused may be found responsible for crimes committed in connection with roadblocks in Mabanza *commune* if he (as the *commune*'s official in charge of order and security) established or permitted the establishment of a system of roadblocks without adequately supervising its operations. A conviction would lie in criminal negligence.

1006. This basis for criminal responsibility was not argued explicitly by the Prosecution in its written and oral submissions.[1183] However, para. 4.14 of the Indictment alleges that the Accused "permitted" the operation of roadblocks. Moreover, questions as to what the Accused should have done were generally raised by the Chamber during the proceedings.

1007. In the case law of this Tribunal, *Akayesu* contains only passing reference to the level of negligence that must be proven for liability in relation to a statutory crime:

> "The Chamber holds that it is necessary to recall that criminal intent is the moral element required for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person accused of crimes falling within the jurisdiction of the Chamber, such as genocide, crimes against humanity and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent."[1184]

1008. From the ICTY, to date only the *Blaskic* case has touched upon criminal negligence. The Trial Chamber in that case was concerned, *inter alia*, with three Bosnian villages which came under attack by troops under the control of General

[1182] Transcripts of 2 May 2000 pp. 49-50. The French version reads: "Il nous a fait déconseillé d'aller à Kibuye, à cause qu'on avait mis des barrières sur la route, vers Kibuye. Il nous a dit: 'Si vous y rendrez là, [les] soeurs seront tuées à la barrière.'" See p. 57.

[1183] In its written Closing Remarks concerning complicity in genocide, the Prosecution argued that the Accused "must have been aware" of the roadblocks and "ought to have known" that the principal offender intended the destruction of the Tutsi group (paras. 190-193). The arguments relating to Article 6 (3) of the Statute did not specifically address the issue (p. 97 para. 101).

Blaskic. The Chamber accepted that the villages were of military interest such as to justify their being attacked. However, the attacks led to destruction, pillage and forcible transfer of civilians. The Trial Chamber found that the accused used forces which he knew were difficult to control, at the very time when they were being called into question for the perpetration of earlier crimes. The Chamber concluded that Blaskic "is responsible for the crimes committed in the three villages on the basis of his negligence, in other words for having ordered acts which he could only reasonably have anticipated would lead to crimes".[1185]

1009. The present Chamber has also considered the *Tokyo* Judgement of the IMTFE, which found a number of accused guilty of war crimes arising from their negligent administration of prisoner-of-war camps and construction projects utilising camp labour, leading to the death of prisoners of war.[1186] In relation to one of the accused, Heitaro Kimura, who was Commander-in-Chief of the Burma Area Army and who approved the employment of prisoners of war on the construction of the Burma-Siam railway, the Tribunal held that an Army commander's duty in such circumstances:

> "... is not discharged by the mere issue of routine orders, if indeed such orders were issued. His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out. This he did not do. Thus he deliberately disregarded his legal duty to take adequate steps to prevent breaches of the laws of war."[1187]

1010. In testing for negligence, the ordinary principles of the law of negligence apply to determine whether an accused person was in breach of a duty of care towards his or her victim. The next question is whether the breach caused the death of the victim and, if so, whether it should be characterised as so serious as to constitute a crime.

[1184] *Akayesu* para. 489.

[1185] *Blaskic* paras. 560-562.

[1186] See the Tribunal's majority Judgement, as reprinted in *The Tokyo Judgment*, Röling and Rüter (ed.) (Amsterdam: University Press of Amsterdam, 1977), vol. 1.

[1187] Ibid. p. 452; see also the decisions on Tojo (pp. 462-63), Shigemitsu (p. 458) and Hata (p. 446).

1011. For the Prosecution in the present case to establish criminal negligence in relation to roadblock operations it would have to prove the following four elements, in addition to the Accused's public duty in matters of security:

(i) that one or more crimes were committed in connection with identified roadblocks;

(ii) that the Accused was responsible for the administration of those roadblocks because he was involved in their establishment, acquiesced to their continuing existence, or more generally because they came under his control as *bourgmestre*;

(iii) that measures, if any, taken by the Accused to detect and prevent crimes in connection with the stated roadblocks were clearly inadequate in the circumstances;

(iv) and that the crimes in question would have been detected or prevented had the Accused administered the roadblocks with reasonable diligence; or, in other words, that the crimes flowed from the breach of duty at (iii).

1012. If the Prosecution fails to prove any of these elements beyond reasonable doubt, the Accused falls to be acquitted on this ground. It is for the Chamber to decide whether, in all the circumstances, and having regard to the risk of death involved, the Accused's conduct in relation to the roadblocks was grossly negligent.[1188]

1013. Six Prosecution witnesses had something of substance to say about criminal activity or evidence of crimes in the vicinity of roadblocks in Mabanza *commune*. This evidence was considered in full detail above.

In summary:

Witnesses Y and Z testified to the killings of two named individuals (Judith and Bigirimana) in connection with the Trafipro roadblock. Witness Y claimed also to have killed a third person.

Witness AA testified to seeing bodies lying close to the Trafipro roadblock and the *bureau communal*.

Witness B described a method by which Tutsi detained at roadblocks were processed and killed; she named two persons (Muganga and Esperance), whom

[1188] In *R. v. Adomako* [1994] 3 W.L.R. 288, Lord Mackay said that, in Common Law jurisdictions, "[t]he essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission" (pp. 295-296).

she believed were victims of that method, being led away from the Gitikinini roadblock.

Witness AB asserted the general proposition that Tutsi were killed at roadblocks; from her experience she was able to name only one such victim (Judith).

Witness A, in an apparent reference to the Gacaca roadblock, said that every day he saw bodies brought down by people from the *secteurs*.

Findings

1014. On closer inspection, the trial record reveals that only two killings – those of Bigirimana and Judith – can be ascribed with certainty to a roadblock in Mabanza *commune*. For reasons given earlier, the Chamber is not convinced by Witness B's testimony that Muganga and Esperance were killed by persons staffing the Gitikinini roadblock. Nor can it find that the corpses seen by Witnesses AA and A were linked to the functions of the roadblocks at Trafipro and Gacaca, respectively. The Chamber has given its reasons for being unable to find the Accused guilty either of aiding and abetting or of having command responsibility for the killings of Bigirimana and Judith.

1015. The question that remains is whether the Accused is nonetheless liable in negligence for the two deaths. The evidence does not justify this conclusion. In the first place, given that the Prosecution has made out only two roadblock-related deaths in Mabanza *commune* in the whole April-to-July period of 1994, it is difficult for the Chamber to find that the system of roadblocks purportedly erected by the Accused was poorly supervised.

1016. Second, the Chamber is bound also to consider the documentary evidence which demonstrates that the Accused took the apparently reasonable measure, albeit in the first week of June 1994, of setting up a commission to monitor the conduct of staff assigned to Trafipro. The Accused said in this connection:

"Amongst the people with whom I was working, there were those who would go beyond what they were supposed to do and we wanted to bring them back to order, and you will see that in my letter concerning the committee for restoring peace. We tried to deal with this issue. I do not think that [it is] surprising if there is one person amongst this team

who made mistakes. But, they knew that they could be punished. This is why I set up this verification commission so that they could direct and supervise these people."[1189]

1017. However, the Chamber also observes that when the Accused was asked to recount the oral instructions he gave to the Trafipro appointees in late April or early May, he answered as follows:

"[Q.] Did you give any instruction before this end of April, beginning of May to people manning the roadblocks, and in this context the TRAFIPRO roadblock? ...

[A.] I issued instructions according to indications [in the Prime Minister's circular dated 27 April 1994]. I was implementing what instructions I had been issued by the prime minister through the préfet. ...

[Q.] Mr. Bagilishema, did you issue any instruction to any roadblocks, in particular TRAFIPRO, around the start of [May]?

[A.] Yes, Mr. President.

[Q.] Orally or in writing?

[A.] Verbally.

[Q.] What was your wording when you did that? ...

[A.] I spoke with the communal council ... because we had talked about this during the meeting of the communal council we determined the criteria for recruitment, and furthermore, I relayed the directives to all the conseillers, and it was during that meeting that we invited people who were supposed to man the roadblock and we were telling them what their functions would be."[1190]

1018. Even if the indirectness of this reply is taken to mean that clearly formulated instructions (in addition to a formal reporting system) were lacking prior to 3 June 1994, the lack of such standard elements of a prudently run system might have been offset by frequent monitoring of the roadblock by the Accused himself. The Accused's office was only a short distance from Trafipro, and in coming and going from the office he should have had daily contact with Trafipro staff. Needless to say this arrangement did not suffice to repress illicit conduct at the roadblock, but it does inhibit the conclusion that the Accused set up a danger-fraught system to which he simply turned a blind eye.

[1189] Transcripts of 9 June 2000 p. 50.
[1190] Ibid. pp. 42-43.

1019. Third, any assessment of the Accused's culpability for dereliction of duty must be informed by the state of affairs in Mabanza *commune* at the time of the alleged breach, including the resources available to the Accused. The Chamber has already discussed evidence to the effect that in the second half of April 1994 the *commune* was at various times overrun by *Abakiga* (IV.4.7). Without knowledge of when Bigirimana and Judith were killed the Chamber cannot exclude the possibility that their deaths occurred on days when it would have been unreasonable to expect the Accused to have been fully in control of his administration's operations, the Trafipro roadblock included.

1020. Finally, some evidence cited above suggests that Bigirimana and Judith were killed for personal reasons, at the bidding of Mugishi and Mutiganda. It is clear that the existence of personal motives is not sufficient to change the nature of the crime from genocide to the lesser crime of murder, nor is it sufficient to absolve the Accused.[1191] It was foreseeable to the Accused at the time that an inadequately supervised roadblock might have been staffed by persons interested in settling personal scores. Nonetheless, doubt remains as to whether Bigirimana and Judith would have survived but for the Accused's alleged negligence. The Prosecution must demonstrate not only dereliction but also that the offences flowed from it.

1021. In view of the above, the Chamber finds that the Prosecution has failed to prove beyond reasonable doubt the Accused's wanton disregard for high-risk activities at roadblocks. In particular, the Prosecution has failed to prove that having established the Trafipro roadblock, the Accused neglected to regulate the conduct of those staffing it, thus causing the deaths of Bigirimana and Judith.

5.11 Conclusions

1022. The Chamber recalls the basic elements of paragraph 4.14 of the Indictment, whose opening sentence reads:

> "Ignace Bagilishema acting in concert with others including Clement Kayishema, Semanza Celestin, Nsengimana Apollinaire, Nzanana Emile and Munyampundu, between

[1191] See *Tadic* (AC) paras. 238ff.

9 April and 30 June 1994 permitted and encouraged Interahamwe militiamen to set up roadblocks at strategic locations in and around Mabanza commune."

1023. This proposition is partially supported by documentary evidence, in the form of a letter from Prefect Kayishema to the Accused, dated 30 April 1994, instructing him to set up and staff roadblocks.[1192] The Prosecution has not shown that the other alleged accomplices of the Accused were associated with the establishment of Trafipro or any other roadblock. The Chamber is prepared to infer that the Accused "permitted" the setting up of roadblocks at Gitikinini and Gacaca, but there is no evidence that he actively "encouraged" their establishment or continuing operation. The meaning of "*Interahamwe*" has been discussed above (IV.4.6). There is no clear evidence that roadblocks in Mabanza *commune* were staffed by members of the MRND youth wing or its militia. Taking the term in its broader sense, of "armed Hutu civilians", it could be inferred that Trafipro and other roadblocks were indeed staffed by "*Interahamwe*", but then the incriminating connotations of the term would be muted.

1024. The next element of paragraph 4.14 states:

"The primary purpose of the said roadblocks was to screen individuals in order to identify and single out Tutsis."

1025. The Accused testified that the purpose of the Trafipro roadblock was to block the infiltration of RPF personnel and weapons.[1193] It was a feature of language employed at the time of the events in Rwanda that a statement apparently referring to members of the RPF could also be understood to connote Tutsi persons in general. Witness Z asserted that the Accused intended this broader reference when he told him that the roadblock at Trafipro was needed to apprehend "enemies".[1194] However, for reasons given already, the Chamber is not convinced by Witness Z's incriminations of the Accused. It has not been established that the Accused actually gave instructions to screen and kill Tutsi, and the evidence concerning the activities at the Trafipro, Gitikinini and Gacaca roadblocks does not demonstrate that this was the

[1192] Prosecution Exhibit No. 77a.
[1193] Transcripts of 7 June 2000 pp. 142-143.

purpose sought.

1026. Paragraph 4.14 further states:

> "Between 9 April and 30 June 1994 Ignace Bagilishema ordered the detention of several Tutsis at the various roadblocks within Mabanza."

1027. The Prosecution has not adduced any evidence apart from that of Witness Z that the Accused ordered the detention of "several" Tutsi civilians at roadblocks. The testimony of Witness Y does not give support for this view.[1195] In the cases of Bigirimana and Judith, there is no evidence that the Accused ordered their detention.

1028. Paragraph 4.14 concludes:

> "Such detainees were handed over to Ignace Bagilishema and were subsequently killed by the communal police, the Gendarmerie Nationale, *Interahamwe* and armed civilians under his authority and control."

1029. The Prosecution has led no evidence in support of this allegation. The only relevant evidence comes from the Accused himself who testified about a person having been brought to him from an unspecified roadblock. The captive was found to have "anti-personnel mines":

> "We handed him over to the gendarmerie which was based at the Chinese camp ... because in June and the beginning of July, the gendarmes were at the Chinese camp. He was supposed to be questioned and he was considered as a prisoner of war."[1196]

1030. The record contains no further information about this person or his fate.

1031. The Prosecution's original claim was that it would link the Accused with "death traps ... in the form of roadblocks ... erected at or near all junctions to screen identity cards for the purpose of netting Tutsis".[1197] In the final analysis, the Prosecution was able to show that only one roadblock in Mabanza *commune*,

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[1194] Transcripts of 8 February 2000 pp. 38-40.
[1195] Defence Exhibit No. 64.
[1196] Transcripts of 9 June 2000 p. 120.

Trafipro, became a trap and the cause of death of two persons. The Chamber has explored the relevant bases of liability in Articles 6(1) and 6(3) of the Statute and is not convinced that the Prosecution's charges are supported by sufficient evidence.

[1197] Transcripts of 27 October 1999 p. 33.

VI. VERDICT

FOR THE FOREGOING REASONS, having considered all the evidence and the arguments of the Parties, the Trial Chamber finds the Accused, Ignace Bagilishema:

Unanimously,

Count 1: Not Guilty of Genocide

Count 6: Not Guilty of Serious Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4 (a) of the Statute)

Count 7: Not Guilty of Serious Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4 (e) of the Statute)

By a majority, Judge Güney dissenting,

Count 2: Not Guilty of Complicity in Genocide

Count 3: Not Guilty of Crimes against Humanity (Murder)

Count 4: Not Guilty of Crimes against Humanity (Extermination)

Count 5: Not Guilty of Crimes against Humanity (Other Inhumane Acts)

Accordingly, the Accused Ignace Bagilishema is acquitted on all counts in the Indictment.

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

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

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

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

Arusha 7 June 2001

Erik Møse	Asoka de Z. Gunawardana	Mehmet Güney
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

Trial Chamber I

1440

ORIGINAL: ENGLISH

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

Registry: Mr Adama Dieng

Delivered on: 7 June 2001

THE PROSECUTOR
Versus
IGNACE BAGILISHEMA

ICTR-95-1A-T

Separate Opinion of Judge Asoka de Z. Gunawardana

The Office of Prosecutor:

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

Counsel for the Defence:

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

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SEPARATE OPINION OF JUDGE ASOKA DE Z. GUNAWARDANA

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1. I agree with the Judgment of Judge Møse that, for the reasons stated therein, the Prosecution has failed to prove its case against the Accused beyond reasonable doubt, and therefore the Accused is entitled to an acquittal on all the charges contained in the indictment.

PART I

The Accused's Plea of Inadequacy of Resources

1. The Factual Statement of the Plea

2. In addition to the defence taken up by the Accused that, the Prosecution has failed to prove its case beyond reasonable doubt, the Defence has also raised a plea that the Accused lacked the necessary means and the resources, to prevent the alleged commission of the atrocities, in Mabanza *commune,* and that he acted to maintain law and order, with the means available to him. This plea was taken up in the Defence Rejoinder at paragraph 248, in the following terms,

> [The] defence is still that he did not participate in the alleged crimes and that he lacked adequate means to prevent such crimes.[1]

This plea was further buttressed by the contention of the Defence Counsel in his closing arguments by stating that,

> But there is also another dimension, that is important to underscore because that highlights an aspect of our argument in relation to the innocence of Mr. Bagilishema, and that is that he did what he could within the limits of the means [and] resources available to him . . . .[2]

[1] Defence Rejoinder brief, 29 September 2000, at paragraph 248
[2] Transcripts 4 September 2000 at page 184

3. However, the Prosecution alleged that the Accused had control over the Hutu assailants, and that he failed to maintain law and order or to protect the Tutsi population, from the attacks.[3]

4. In my view, it is appropriate to treat this plea as an independent challenge to the Prosecution case, in the facts and circumstances of this case.

2. The Legal Position of the Plea

5. This being a plea that involves the adducing of evidence, akin to a plea of alibi or accident, the Accused is required in the first place, to adduce sufficient evidence to put the matter in issue. In common law terms what is described as an evidential burden is cast on the Accused. This burden may be discharged by the Accused, by relying on the evidence coming from the Prosecution witnesses or by calling evidence on his behalf or by a combination of both, and thereby placing sufficient material before court, to make the plea a live issue, fit for consideration by court. When the plea has been properly raised, the onus is on the Prosecution to disprove it, beyond a reasonable doubt.[4] A failure to do so would raise a reasonable doubt in the Prosecution case.

6. In common law jurisdictions it is settled that, in relation to this type of plea, while the evidential 'burden' rests on the Accused, it remains at all times for the Prosecution

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[3] Counsel for the Prosecution stated "Your Honour, the issue here is not as to whether or not the Accused had power to act to stop this. The issue is that he never tried. The fact is that he never tried, and there is enough evidence to prove this beyond reasonable doubt. There is also evidence to prove that he actually encouraged and took part in the attacks that took place in Mabanza *commune* and also was present during the attack at the Kibuye Stadium." Prosecutor's Closing Arguments, 18 October 2000 at page 219

[4] See Stuart, Canadian Criminal Law, 3rd Ed., (1995): "In the case of general justifications or excuses it is consistently held that the only burden on the accused is the evidential one of pointing to evidence putting the defence in issue. There is no departure from the general rule that the Crown must prove guilt beyond a reasonable doubt and therefore no reversal of the onus of proof which would be subject to Charter review. The Crown must negative a justification or excuse. Where the defence is not put in issue by the Crown case, the accused has a duty of adducing some evidence although this does not mean he has to prove anything or to testify." (pages 425-436). See also the English Court of Appeal in *Gill* (1963), 2 All E.R. 688 (C.C.A): "The accused, either by the cross-examination of the prosecution witnesses or by evidence called on his behalf, or by a combination of the two, must place before the court such material as makes duress a live issue fit and proper to be left to the jury. But, once he has succeeded in doing this, it is then for the Crown to destroy that defence in such a manner as to leave in the jury's minds no reasonable doubt that the accused cannot be absolved on the grounds of the alleged compulsion." (page 691).

to prove its case beyond reasonable doubt (that is, the persuasive burden remains with the Prosecution).[5] This principle was articulated in the House of Lords by Viscount Sankey L.C., in the English case of *Woolmington v. DPP* (1935), in a passage that has been quoted with approval in common law jurisdictions:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.[6]

7. In English law, the principle that the accused only bears an evidential burden applies in defences such as self-defence,[7] duress,[8] alibi,[9] automatism,[10] and provocation,[11] *et cetera.* Exceptionally, a higher burden is placed on an accused, in the case of the defence of insanity, and other statutory defences, where the accused is required to adduce sufficient evidence to establish such a defence, on a balance of probability.[12] In Canada, according to Stuart, "[i]n the case of general justifications or excuses it is consistently held that the only burden on the accused is the evidential one . . ."[13]; see for example, self-defence and provocation,[14] alibi,[15] duress,[16] and

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[5] Civil law systems, applying the principle *dubio pro reo,* also operate to give the benefit of the doubt in the prosecution's case to the accused. For example, in French law the prosecutor must adduce sufficient evidence - *preuve suffisante* – to convince the court of the guilt of the accused. Under the German code of criminal procedural law the judge, functioning in an inquisitorial capacity, is required to consider any defence that may arise from the evidence in the case, and the burden of proving the case rests upon the prosecution, no matter which defence has been raised.

[6] *Woolmington v. DPP* (1935) A.C. 462, (HL), at pp. 481-482

[7] See e.g., *R v Folley* [1978] Crim.L.R.556; *R v Abraham* [1973] 1 W.L.R. 1270

[8] See e.g., *R v Gill* [1963] 47 Cr.App.R. 166; *R v Bone* [1968] 52 Cr.App.R. 546

[9] See e.g., *R.v Denney* [1963] Crim.L.R.191; *R. v Wood* [1968] 52 Cr.App.R. 74

[10] See e.g., *R v Dervish* [1868] Crim.L.R. 37; *R v Stripp* [1978] 69 Cr.App.R. 318

[11] See e.g., *Chan Kau v R* [1955] A.C. 206; *R v Wheeler* [1968] Crim.App.R. 28

[12] See Cross and Tapper on Evidence, 8th ed., 1995, (Butterworths), at page 131

[13] Stuart, Canadian Criminal Law, 3rd Ed., (1995) at page 425. Stuart further noted that any requirement that an accused must prove his plea on the balance of probabilities has been specifically rejected in Canada. In the case of *Whyte* (1988) 64 C.R. (3d) 123 (S.C.C.), Chief Justice Dickson remarked: "The exact characterisation of a factor as an essential element, a collateral factor, an excuse, or a defence

necessity.[17] With regard to the law in Sri Lanka, it is stated that; "In the case of defences like accident and alibi which destroy essential elements of the prosecution case, all that the accused need do is to raise a reasonable doubt in the minds of the jury as to the applicability of one of these defences. This may require the leading of some evidence, but it does not involve the obligation to establish any fact."[18] This Tribunal, in the cases of *Prosecutor vs Kayishema and Ruzindana* and *Prosecutor vs Alfred Musema*, has also followed the above approach.[19]

8. In a case before a jury, it is for the judge to determine whether, on the basis of the evidence, there is a live issue fit and proper to be left to the jury for its consideration. If the case is tried by professional judges, the judges will nevertheless consider whether there is sufficient evidence to raise the plea to a level that requires consideration by the court.

9. Once the court is satisfied that there is sufficient evidence to consider the plea, the court will then evaluate the evidence relied on by the Defence in support, and by the Prosecution to negative the plea, in order to ascertain whether a reasonable doubt has been created in the Prosecution case.

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should not affect the analysis of the presumption of innocence. [...] If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."

[14] See e.g., *Latour* [1951] S.C.R. 19; *Linney* [1977] 32 C.C.C. 294

[15] See e.g., *R. v Lizotte* [1951] S.C.R. 115; *R. v Lanigan* [1984] 53 N.B.R. 388 (CA)

[16] See e.g., *Bergstrom* [1980] 13 C.R. (3d) 342

[17] See e.g., *Perka* [1984] 42 C.R. (3d) 113 at 137

[18] G.L. Peiris, The Law of Evidence in Sri Lanka, (1974), at page 429

[19] In these cases the burden placed upon an accused has been addressed only in relation to the plea of alibi. In *Prosecutor vs Kayishema and Ruzindana*, Trial Chamber II stated: "The burden of proof rests upon the Prosecution to prove its case beyond a reasonable doubt in all aspects notwithstanding that the Defence raised alibi . . . . The accused is only required to raise the defence of alibi . . . ." (*Prosecutor vs Kayishema and Ruzindana*, (ICTR-95-1-T) Judgment, 21 May 1999, at paragraph 234). Similarly, in *Prosecutor vs Alfred Musema*, Trial Chamber I held: "The onus is on the Prosecution to prove beyond a reasonable doubt the guilt of the Accused. In establishing its case, when an alibi is introduced, the Prosecution must prove, beyond a reasonable doubt, that the Accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence. The alibi does not carry a separate burden of proof. If the defence is reasonably possibly true, it must be successful." (*Prosecutor vs Alfred Musema*, (ICTR-96-13-T), Judgement, 27 January 2000 at paragraph 108). This approach is supported implicitly by the Statute and Rules of the Tribunal, whereby the Accused is presumed innocent until proven guilty (Article 20(3)), and where a finding of guilt may be reached "only when the majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt" (Rule 87 (A)).

10. In the instant case, what the Accused is seeking to do by raising the said plea is to show the absence of *mens rea* in respect of the acts and/or omissions alleged against him. As stated by Counsel for the Defence in his closing arguments:

> We are asserting . . .that the Prosecution never ever demonstrated that there was a voluntary attitude on the part of Ignace Bagilishema, more so, in [regard to] the intent to commit genocide, there is no evidence. [...] Our evidence shows to the contrary, that he did everything within his powers given the means at his disposal.[20]

11. It is to be observed that a failure on the part of the Prosecution to prove *mens rea,* which is an ingredient of the offenses preferred against the Accused, would negative any liability on the part of the Accused.

12. I will now proceed to analyse the evidence in the case, to determine whether there is sufficient evidence to sustain the plea raised by the Accused, and thereby create a reasonable doubt in the Prosecution case.

PART II

The Conduct of the Accused Prior to the Events in 1994

13. In order to understand the matters relating to the plea raised by the Accused in this case, it would be appropriate to begin by considering the conduct of the Accused prior to April 1994, in regard to the manner in which he acted to enforce law and order in Mabanza *commune* in general, and to protect the Tutsi population in particular.

14. The Defence asserted that Bagilishema was always a man of good character both before and after the events of 1994. The Accused consistently acted in good faith for the protection of the law abiding Tutsis and Hutus alike.

15. The stand taken by the Prosecution in regard to the prior conduct of the Accused varied at different times. At one stage the Prosecution rejected a request by the Defence to make a formal admission as to the good character of the Accused prior to

April 1994.[21] However, at another stage, the Counsel for the Prosecution stated that the Prosecution did not challenge the, "impeccable character [of the Accused] prior to the events in the indictment."[22] Furthermore, the Prosecution did not seek to cross-examine the evidence of Defence witnesses in regard to the character of the Accused.[23] In addition, some of the Prosecution witnesses themselves testified to the good conduct of the Accused prior to 1994.

16. In this context, it is pertinent to recall the remark made by Counsel for the Prosecution that, the Accused acted in good faith prior to 12 April 1994, "We accept that more likely than not, up until that time [12 April 1994], he did that in good faith. We make no bones about that. And I want that to be crystal clear. There is no evidence to suggest otherwise."[24]

1. The Prior Conduct of the Accused as Testified to by Witnesses

17. The Defence Witness BE said of the Accused, "I can mention some of his achievements. The first is that unity was installed in his *commune*. Secondly there was development in the community, thirdly, there was no discrimination on ethnic grounds in that *commune*."[25] Defence Witness TP, in describing the Accused's performance of his duties, stated: "Ignace Bagilishema was a devoted man who carried out his work with a sense of commitment and fairness. Someone who was listened to, who had good reputation in his *commune*."[26] According to Defence Witness RA, the Accused was a tolerant man and Mabanza was a *commune* where Hutus and Tutsis had lived together in peace. Defence Witnesses AS, KC and ZD

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[20] Transcripts 19 October 2000 at page 144
[21] When this matter was raised during the testimony of a Defence witness, the Counsel for the Prosecution gave the following response: "We propose to make no admissions. [...] The admission referred to in this document are already referred to in the court record, and my learned friend can refer to those transcripts in his closing arguments and consider them as admitted, if he needs to; . . . . " Transcripts 2 June 2000 at page 7
[22] Transcripts 2 May 2000 at pages 12-13
[23] See e.g. in relation to Mr. Francois Roux, an expert witness for he Defence, Counsel for the Prosecution stated: "I propose on behalf of the Office of the Prosecutor that this statement can simply be admitted in evidence as an exhibit. We do not propose to cross-examine this witness if it is solely character evidence . . . . We can move on to other matters this morning, if it is established of course that he is not a witness of fact in relation to events between April and June 1994." Transcripts 4 May 2000 at page 7
[24] Transcripts of closing arguments, 18 October 2000 at page 65
[25] Transcripts 27 April 2000 at page 35
[26] *Ibid* at page 133

gave similar accounts of the good relationship of the Accused with the entire population of Mabanza.

18. Prosecution witnesses also testified to Bagilishema's good conduct prior to the events in 1994. When asked how the Accused was perceived by the general population, Prosecution Witness I testified:

> Bagilishema was someone who was loved by all the people both Hutus and Tutsis. When they had problems they would go to him for advice and he would provide such advice. And during the war when in 1994 houses started to be destroyed people fled towards the *bureau communal* in large numbers. This means that he was loved by a lot of people and nobody thought that any harm would come to himself in the presence of Bagilishema.[27]

19. Prosecution Witness K, in his written statement of 10 July 1999, [28] stated that Bagilishema "was on good terms with all the peoples, i.e. until the President's death."[29]

20. That the Tutsi members of the population trusted the Accused is borne out by their conduct; when the attacks on Tutsis and their property started around 7 April

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[27] Transcripts 23 November 1999 at page 25
[28] Defence exhibit 14
[29] A minority of witnesses held a different view. Witness G stated that the Accused "stopped loving" the Tutsis in 1990, after the outbreak of the war. However, Witness G appears to have based her view on a personal experience relating to her father and uncle which, on examination of relevant documentation, appears to be objectively unjustified. (See, Chapter V (3.4) of the Judgment of the majority). Prosecution Witness J spoke of ethnic discrimination in Mabanza, particularly in the area of education, but documentary evidence suggests that, if there was ethnic discrimination in Mabanza, it was not on the part of the Accused. See for example, in 1992, the issue of ethnic discrimination in education arose in connection with the Director of the school in Mushubati *secteur,* Mabanza *commune.* In that instance, Hakizimana, the Communal Secretary, wanted to remove the Director claiming that he had allegedly been favouring Tutsis in the school. The issue was addressed by a Commission chaired by the Accused. It is clear from the Commission's report, dated 21 September 1992 and signed by the Accused, that Bagilishema had (unsuccessfully) attempted to reconcile the differences between the Director and Hakizimana without further investigation, having given both parties an opportunity to present their case. There is no indication that the Accused sided with Hakizimana notwithstanding that he was the Communal Secretary and had alleged that the Director was "favouring one of the ethnic groups in Mushubati to such an extent that, practically, all people found there were Tutsi." Following a hearing, the Commission's findings were as follows: "Our wish has been to lighten the issue and to reconcile you, but we note that neither of you has the will to be reconciled with each other. Consequently, since you do not want us to help you reconcile, we are going to refer this matter to the courts, since it is beyond our powers. It will then be up to them to resolve it and punish the person at fault." Thus, having exhausted his efforts to reconcile the parties, the Accused properly referred the matter to the courts.

1994, many of the Tutsis who had fled from these attacks, gathered at the Mabanza *bureau communal* for safety.

21. The evidence of expert witnesses suggests that Bagilishema had been one of the most successful *bourgmestres* in the area of development. Prosecution expert Professor Guichaoua testified that, in his assessment, the Accused ranked as the second most efficient *bourgmestre* in regard to the handling of development issues in the *communes*.[30] Defence expert François Clément confirmed that the Accused had made a positive contribution to development of his *commune*. Defence witness Jean François Roux who, up to April 1994, had been a project leader on a development project in Kibuye Prefecture opined that the Accused was a 'good *bourgmestre*' and followed development projects very closely. The witness did not notice any discrimination on ethnic grounds.[31] He added that the Accused had managed to maintain calm during the turbulent times between 1992 and April 1994, when other *communes* were troubled by ethnic conflict.[32]

2. The Response of the Accused to the Threat of RPF Infiltration

22. Documentary evidence tendered by the Prosecution itself shows that, on several occasions, the Accused investigated persons suspected of illegal possession of firearms or of collaborating with the RPF. In a letter, dated 9 October 1990, written by the Accused to the *préfet* of Kibuye, the Accused sent a 'Report of People Suspected of Holding Rifles Illegally' and attached a list of such persons.[33] The list included predominantly 'intellectuals' but the ethnic group of many was not indicated. In the introduction to the letter, it was stated as follows: "Given the current situation, I write to you this letter in order to give you a list of people who are suspected of having rifles." And concluded by stating that, "A search of rifles has been carried out in almost all their houses but no single rifle has been found. We are still investigating but it is not easy to find rifles with those people. The population have confirmed that they (those people) might possess rifles."

[30] Transcripts 14 February 2000 at page 43
[31] Transcripts 4 May 2000 at page 23
[32] *Ibid* at page 27

23. In a second letter, dated 20 October 1990,[34] the Accused sent a list of "persons who are suspected by the population," to the President of the security council of Kibuye. Again, the list was predominantly made up of 'intellectuals' and, although some were described as Tutsis, the ethnic group of others was uncertain. The letter ended by stating, "I send them [the names] to you following what people say and know about them but I do not confirm for sure that what they are charged with is really true."

24. The Prosecution produced four further letters, written by the Accused to the *préfet* of Kibuye, attaching lists of persons suspected of joining the Inkontanyi; dated 23 October 1992, 30 December 1992, 14 January 1993, and 12 March 1993.[35] The opening paragraph of the first letter, dated 23 October 1992 noted as follows:-

> With reference to the prevailing rumors that some young men join the Inkontanyi, I would like to let you know that I assigned the "*conseillers*" to follow up this issue and they submitted to me the attached list.

25. It is apparent that by 'Inkontanyi', the Accused was referring to those persons who collaborated with the RPF, rather than Tutsi persons in general. Indeed, in the list attached to the letter dated 23 October 1992, which was the only list to indicate the ethnic group of the suspects, two of the five suspects were recorded as 'Hutu'.

26. When questioned about the above letters, the Accused explained that members of the Hutu population had suspected certain Tutsis of being RPF collaborators and of possessing weapons, and therefore wanted to attack them. The Accused successfully diffused this situation by setting up a verification committee, to search the premises of suspected collaborators for weapons.[36] He added that the higher authorities in Kibuye had urgently required the lists of persons suspected of collaborating with the RPF, and that is was his duty as *bourgmestre* to report such matters to his superiors.[37] This is evidenced by a letter, dated 14 April 1992, from the intelligence service of Kibuye Prefecture to all the *bourgmestres,* requiring the *bourgmestres* to provide a list of

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[33] Prosecution exhibit 91
[34] Prosecution exhibit 90
[35] Prosecution exhibits 80, 81, 82 and 83 respectively
[36] Transcripts 8 June 2000 pages 43 - 50

persons who had gone into neighbouring countries shortly before or during the war, and who had returned. The said letter required the *bourgmestres* to furnish details of such persons including the name, age, ethnic group, the place of origin, the present location, and whether there were suspicions that any of them had undergone military training with the RPF.[38]

27. It is important to note that the two letters dating 9th and 20th October 1990 were written in the weeks immediately following the invasion of Rwanda, in October 1990, by the RPF. The four letters dating from October 1992 to March 1993 were sent in a period of continuing high tension and ongoing conflict with the RPF.

28. I am of the view that the Accused took reasonable and proper measures when responding to threats, whether perceived or real, of RPF infiltration. The Accused properly pointed out that, when there was no evidence to confirm the suspicions of the population, he did not confirm the truth of the information. The lists do not indicate an ethnic bias on the part of the Accused. It may be noted that the Accused was merely performing the official duties of the office he held under the functioning government of the day, in Rwanda.

3. The Action Taken by the Accused Regarding the Attacks on Tutsis by Hutu Groups

29. The security issues facing the Accused in the years leading up to 1994 were not limited to the threat of RPF infiltration. He was also confronted with the problem of individual attacks on Tutsi persons and property by Hutu assailants. In a letter, dated 7 January 1993, from Bagilishema to *préfet* Kayishema, the Accused outlined the specific attacks by the Hutus on Tutsi persons and/or their properties, and requested the assistance of the *préfet* to restore security. The letter stated as follows:-

> . . . I regret to inform you, once more, that in the night of 4/1/1993, Hutus again attacked the home of a Tutsi, GAFARANGA, breaking the door of his house.

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[37] Transcripts 1 June 2000 page 147
[38] Defence exhibit 88

> In the night of 6/1/1993, in spite of your promise to provide us soldiers, no soldiers came. I left with three policemen and one IPJ and we laid ambush at a place called MUGOTE, Kabili cellule; we were able to apprehend . . . [named persons] who were armed with clubs, bludgeons and hoes. They were heading for an attack. We arrested them at 12:00 midnight. We deplored the fact that on reaching another hill, we noticed that the Hutu had attacked the house of SEKABUNDI . . . . These attacks are perpetrated while the Tutsi have left their homes and are afraid to call for help, for fear of being located and killed. This does not allow security officers to come to their assistance, since they are not well informed of the sites of the attacks and also because the sector is immense.
>
> In the night of 6 to 7/1993, the police, assisted by soldiers, tried to ensure security in MUBUGA cellule, BUHINGA sector. They were attacked and had to fire into the air. On account of their limited number, in KAGANO cellule, KIGEYO sector, a man called SEBACOGOZA was attacked; his house was destroyed and his cattle were stolen . . .
>
> I thank you for the assistance we hope you will continue to afford us in order to restore security.[39]

30. The above letter provides a picture of the security situation that the Accused had to face in early 1993. It is apparent from the contents of the letter that the Accused attempted to use the available security resources to protect the Tutsi population from attacks by Hutus, indeed, he personally searched for and arrested Hutu attackers.

31. Thus on an analysis of the above evidence it is clear that the Accused performed the functions of his office prior to 1994, without any ethnic discrimination, to prevent the attacks on the Tutsi population by the Hutus.

4. The Significance of the Previous Conduct of the Accused

32. It may be noted that, by the nature of crimes that may be committed during a national or international emergency, persons with no prior convictions or history of

[39] Defence exhibit 90

violence may commit such crimes.[40] However, the probative value of the evidence relating to prior conduct will depend on the circumstances of the individual case. In the present case, the evidence shows more than mere prior good character or lack of previous disposition by the Accused to commit such crimes. It indicates that, prior to the events in 1994, the Accused had consistently conducted himself in a manner that is completely at odds with the conduct alleged by the Prosecution during the events in 1994.

33. In addition it may be observed that the Prosecution did not adduce any evidence of the conduct of the Accused, prior to April 1994, upon which the Prosecution can rely to show that the Accused had a propensity to commit the crimes with which he is charged. Thus it becomes all the more important, for the Prosecution to prove that the Accused formed or manifested the requisite *mens rea,* as well as committed the requisite criminal acts, at least during the events in 1994.

PART III
The Conduct of the Accused During the Events in 1994

1. The Alleged Change of Conduct of the Accused

34. In relation to the *mens rea* of the Accused, the Counsel for the Prosecution submitted that it was at the alleged meeting of 12 April 1994, between the Accused and *préfet* Kayishema, at the Mabanza *bureau communal*, that the Accused changed from having a *bone fide* intent to protect the Tutsis, to a genocidal intent to exterminate the Tutsi population on ethnic grounds. It is significant to note that the Counsel for the Prosecution in his closing arguments stated as follows:

> You see, I think that my learned friend [for the Defence] seems to get the impression that we [...] are saying that the witnesses were deliberately gathered at the Mabanza *Commune* office as a scheme to eliminate them. We don't say that. We accept that more likely than not, up until that time, he did that in good faith. We make no bones about that. And I want that to be crystal clear. There is no evidence to suggest otherwise. No evidence to suggest

[40] See "Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*", of 17 February 1999, in the case of *Kupreskic et al*, ICTY.

that up until that time, he was gathering people there with a view to, you know -- no, no, no, no. We say that everything changed at that time, after that meeting [of the 12 April 1994], and everything that happens flows on from there. We make that clear distinction. So when they come and say well, he is a man of good character, [...] I make no bones about that.[41]

35. Inherent in the above assertion of the Prosecuting Counsel, are several weaknesses. In the first place, is it realistic for such a drastic change of attitude to occur in such a short and impromptu meeting? There is no evidence to show that it was a pre-planned meeting. And the meeting is alleged to have lasted only for a few minutes. There was no suggestion of a significant persuasive effort by Kayishema to change the previously held disposition of the Accused towards the Tutsis.

36. Secondly, there is no clear proof that such a meeting ever took place. In fact the finding made in regard to the meeting in the Judgment of the majority is that there is no credible evidence that such a meeting took place.[42]

37. Thirdly, the conduct of the Accused does not bear out that he had a change of attitude. The Prosecution sought to interpret the sending of the refugees, by the Accused, to Kibuye town, to suggest a change of conduct. However, this action has been clearly explained and dealt with in the Judgment of the majority, where a finding is made that directing the refugees to Kibuye town does not entail any liability on the part of the Accused, and that it was done for other reasons.[43]

38. Fourthly, the alleged manifestation of a genocidal intent, and the existence of a conspiracy to commit genocide, is negated by the evidence of Prosecution Witness A who stated that, when he was in Kibuye Stadium in April 1994, the Accused had invited the refugees to go back to Mabanza, since peace had been restored. Witness A testified,

[41] Transcripts of closing arguments, 18 October 2000 at pages 65 – 66
[42] See, Judgment of the majority, Chapter V
[43] See, Judgment of the majority, Chapter V

> Following that, between the 13th and the 18th, they [the Accused, Semanza and Dr Leonard] came back to say that we could go home, we could go back home because peace had been restored.[44]

39. In this context, it is also to be noted that Witness A, in his written statement to investigators, dated 29 June 1999, makes mention of the request by Bagilishema for the refugees to come home to Mabanza.[45]

40. To say the least, it is inconsistent for a person who has joined in a conspiracy with Kayishema to take the refugees to Kibuye Stadium and Home St. Jean to exterminate them, thereafter to invite the refugees back, before the objective of exterminating them has been achieved.

2. The Use of the Security Resources by the Accused

2.1 The Security Resources Available to the Accused in April to July 1994

41. The Defence argued that the Accused could not control the events due to the inadequacy of resources. The Defence has submitted that,

> Because of the scant means at his disposal Bagilishema was not able to reestablish security in his *commune* for all the time that the Abakiga were there, i.e. until about 25 April 1994. After that date, the situation in the *commune* was a bit less chaotic and Bagilishema did all he could to resume his activities as *bourgmestre* despite the difficulties and threats still made against him.[46]

42. The Prosecution argued that the Accused did not even attempt to control the situation but, rather, encouraged and took part in the attacks in Mabanza *commune*.

43. The available resources must be considered in light of the geographical size and population of Mabanza *commune*. Mabanza *commune* was 160 square kilometers in

[44] Transcripts 17 November 1999 at page
[45] Defence exhibit 7
[46] Defence Closing Brief at page 114

extent.[47] It had a mixed population of Hutus, Tutsis and Twas. According to the statistics available for 1988, the population was around 49,250.[48] This number would have increased considerably due to the influx of refugees from April 1994.

44. It is not in dispute that, at the time of the events, there were only six communal police officers, a brigadier and an assistant brigadier, stationed in Mabanza. According to the Accused there should have been, at least, one communal police officer per *secteur*; Mabanza commune having fourteen *secteurs*. It is also worth noting that, Article 107 of the *Loi Sur Organisation Communale*, dated 23 November 1963, contemplates having one communal police officer per one thousand of the population. The said Article further provides for that number to be increased or decreased, in exceptional circumstances, with the authorization of the interior minister.[49] Hence, the legal requirement would be about fifty communal police officers for Mabanza *commune,* with the possibility of this number being increased in exceptional circumstances. However, at the relevant time the Accused only had about one-tenth of this figure, despite the added need for security personnel due to the influx of the refugees in April 1994. Thus it is apparent that the Accused was thoroughly handicapped by the lack of personnel to maintain law and order.

45. There was no specific evidence led at the trial with regard to the arms and ammunition available to the security forces in Mabanza *commune* at the time. The position taken up by the Accused was that the arms and ammunition were thoroughly inadequate to control the situation. According to the Accused, the Brigadier had about twelve Enfield rifles. And the evidence indicates that there were only one or two vehicles belonging to Mabanza communal office, and that the police did not have a vehicle.[50] Hence it is clear that with regard to availability of arms, ammunitions and the vehicles, the situation was equally vulnerable.

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[47] Defence exhibit 80 is a map of Mabanza *commune*
[48] Defence exhibit 85
[49] The *Loi Sur Organisation Communale*, dated 23 November 1963 is one of the main legal texts updating those of the first Republic. See Expert Report by Professor Guichaoua "Local Government in Rwanda", dated August 1998, at page 8. Prosecution exhibit 71.
[50] See e.g., Francois Clement, transcripts 29 May 2000 at page 22

46. It is evident from the letter mentioned earlier, dated 7 January 1993, from Bagilishema to *préfet* Kayishema,[51] that when the Mabanza *commune* experienced ethnic strife in 1993, although less serious than that encountered in 1994, the security resources available even at that time were insufficient to effectively maintain law and order. This was because the enormity of the size of the area to be covered ("the sector is immense"); the fact that Tutsis were afraid to call for help ("for fear of being located and killed"); and, the lack of security personnel ("on account of their limited number"). In January 1993, the Accused had requested, from *préfet* Kayishema, soldiers to help provide security from the Hutu attacks. Apparently, these reinforcements were never supplied, "in spite of your promise to provide us soldiers, no soldiers came."

2.1.1 The Request by the Accused for More Resources

47. In the wake of the deterioration of the law and order during the events in 1994, the Accused had specifically asked for reinforcements from his immediate superior, Clement Kayishema, the *préfet* of Kibuye. It may be noted that the *préfet* is the proper authority from whom such assistance had to be requested according to the administrative hierarchy.

48. The Defence pointed out that the power to call for assistance from the armed forces, according to the *Décret-Loi* dated 11 March 1975, is clearly vested with the *préfet,* and that the *bourgmestre* did not have such power.[52] The Defence added that, at that time, there was a war in Rwanda, and the Army was engaged in the fight against the Rwandan Patriotic Front's army on the front line. Hence the Accused could not call for assistance directly from the armed forces.

49. The Accused testified that he made his first request for reinforcements on 9 April 1994, during a security meeting chaired by *préfet* Kayishema, and attended by

[51] Defence exhibit 90
[52] See Article 11 of the *décret-loi* of 1975, which addresses the requisition power of the armed forces by the *préfet*. Article 103 of the *Loi sur l'organisation communale* of 1963 states that the *préfet* can put at the disposal of the *bourgmestre,* elements of the *gendarmerie nationale*. Article 7 of the *décret-loi portant création de la gendarmerie nationale* of 1974 states that any commander of *gendarmes* may, if faced with insufficient resources, require the assistance of detachments of the Rwandan army.

members of UNAMIR.[53] He had requested the allocation of sufficient means to fend off the attacks. However, because all the *bourgmestres* requested reinforcements, the security council had allocated only a limited number of *gendarmes* amongst the *communes*. Therefore, although the Accused insisted on being assigned a large number of *gendarmes* immediately, the Accused was provided with only five *gendarmes* to help secure the situation in the whole of Mabanza.[54] Further, the five *gendarmes* were only provided for four or five days, and were subsequently withdrawn on 13 April 1994.

50. The Accused decided to ensure the security at the *bureau communal* with the six policemen, who were to take their turn on day and night shifts, guarding the *bureau communal* and the refugees who had gathered in large numbers. The Accused had wanted the *gendarmes* also to be placed at the *bureau communal,* but the *gendarmes* had preferred to be at Mushubati because of the security problems in that *secteur* and due to the availability of accommodation. On Saturday, 9 April, he had worked together with *gendarmes* in Kibingo, Rukagarata and Nyagatovu *secteurs* where refugees came through from Kavoye *secteur*. On Sunday, 10 April, the Buhinga and Mushubati *secteurs* were attacked; the Accused posted two *gendarmes* and one policeman there. The Accused testified that he and the security forces "worked continuously day and night so as to go round these sectors but we were not able to diffuse the situation."[55]

51. The Accused added that, on no less than three consecutive days *viz,* the 10th, 11th and 12th April 1994, he had requested reinforcements from the *préfet's* office in Kibuye, but that "every time I called . . . the prefecture I was told that they were sent to other places."[56] On Sunday 10 April, he called during the day and in the evening gave a security report to *préfet* Kayishema by phone; at that time he specifically stated that a large number of *gendarmes* were required. On Monday 11 April, he spoke to Gashongore, the *sub préfet* on two occasions. When asked if these were the only occasions that he phoned the Accused replied, "I phoned them up always and then in the evening I had to make a report on the phone. I could call two or three times a day

[53] It is not in dispute that the Accused attended the said meeting.
[54] Transcripts 2 June 2000 at page 74
[55] *Ibid* at page 82

when I came back to the communal office from the various *secteurs*." [57] That security reports were provided is evidenced by a letter dated 10 April 1994, from *préfet* Kayishema to the Minister of the Interior, wherein the *préfet* provided an account of the reports from all *bourgmestre*s in Kibuye Prefecture, during the period from 6 April to 10 April 1994.[58] The Accused testified that he was consistently informed that there were no more *gendarmes* available.

52. After 13 April, the Accused had given up asking for reinforcements, particularly since the *gendarmes* who were already assigned to him on 9 April 1994, had been re-called. The Accused stated that he had posted the *gendarmes* at strategic points in the *commune* but they were ineffective as they were clearly out numbered by the attackers, and also because they did not have their own transport.

53. The Accused again requested reinforcements from the *préfet* by way of a letter, dated 24 June 1994.[59] In that letter he had informed the *préfet* of impending attacks from Hutus from Kayove and Rutsiro *communes*, and had requested urgent assistance from the *préfet* in order to prevent the attack. He testified that he received no assistance.

54. It is apparent that the resources that were available to the Accused in mid April 1994 were far from adequate, to bring about peace in Mabanza or to maintain law and order on any significant level. However, from 25 April to late June 1994, after the Abakiga attacks had subsided, the available resources were utilised to maintain law and order to some degree. The security measures implemented by the Accused during this period are examined below. However, even during this period of relative calm, the limited resources were not sufficient to police the entire *commune.* It is evident from the letter dated 24 June 1994, that the Accused considered his resources inadequate to prevent the imminent attacks by Hutus from Kayove and Rutsiro *communes*. It is seen from the efforts made by the Accused as referred to above, that the Accused had exhausted all the options available to him to obtain reinforcements, but without success.

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[56] *Ibid* at page 86
[57] *Ibid* at page 88
[58] Prosecution exhibit 76

2.2 The Situation that the Accused had to Contend With

55. In order to get a clear picture of the situation that prevailed in Mabanza *commune*, during the period from April to July 1994, it is appropriate to review the events that took place during that period, as they unfolded.

56. That massive attacks by Hutus began in Mabanza from about mid April 1994 is not in dispute. While the Defence argued that Mabanza was overrun by an uncontrollable mass of invaders known as the Abakiga, the Prosecution contended that the Abakiga did not overwhelm the *commune*. However, the stand taken by the Prosecution regarding this issue varied at different times.[60]

2.2.1 The Conditions that Prevailed in Mabanza Commune from 6 to12 April 1994

57. The Prosecution and Defence witnesses testified that following the crash of the President's plane on 6 April 1994, Tutsi civilians were attacked and their properties destroyed, in Mabanza *commune*. Due to these attacks thousands of men, women and children, predominantly Tutsis sought refuge in, amongst other places, Mabanza *bureau communal*. These facts are not in dispute.

58. The Accused described the situation during this period in the following way, "[t]he people [of Mabanza] organised by facing up to the attackers who came from the

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[59] Prosecution exhibit 84

[60] For example, when responding to questions in relation to the 'invasion' on 13 April 1994, the Counsel for the Prosecution provided a confusing response: "Well, first of all, we have to accept that both he [the Accused] and his colleague [the former *bourgmestre* of Rutsiro] lacked the necessary control over these Abakiga, that is if they ever existed, anyway. I don't accept that they did. And even if they did, . . . I take the view, rather, that there is nothing that was done in Mabanza that Mr Bagilishema was not in control of. I don't accept that he was overwhelmed by the Abakiga or anything. [...] There were no Abakiga coming to overwhelm anyone anywhere. There was plan in place, there was no need for any Abakiga to go anywhere. " Transcripts of closing arguments, 18 October 2000 at pages 45-46. Thus the Counsel for the Prosecution asserted that the Accused lacked the necessary control over the Abakiga and then immediately contradicted himself by stating that he did not accept that the Abakiga overwhelmed the Accused. The Prosecution's contention that the Abakiga did not 'exist' was made for the first time in the Prosecutor's closing arguments, and is contrary to the Prosecution's own witnesses who speak of Abakiga attacking Tutsis, in Mabanza *commune*. Notwithstanding the above assertion by the Prosecution, it presented no evidence that the Accused solicited the presence of the Abakiga during the events.

river . . . In any event, the people tried Sunday, Monday and Tuesday but up to Tuesday evening [12 April], the whole *commune* was on fire."[61]

2.2.2 The Invasion of the Abakiga; 13 to 24 April 1994

59. The evidence indicates that the Abakiga invaded Mabanza *commune* on 13 April 1994 and thereafter. Prosecution and Defence witnesses described how hordes of Hutu attackers from the northern region, identified as Abakiga, beset the *commune.* The attackers were distinctively dressed in banana leaves, and carried traditional weapons. Prosecution Witness I described the Abakiga as "people who come from the highlands . . . . These are the people who came to our *commune*, who . . launched an attack. They looted and killed."[62] Asked if he had an opportunity to see the Abakiga come down from the hills into Mabanza, Witness I replied that he saw the attackers come down from the hills in groups of no less than two hundred.[63] Asked if the arrival of the Abakiga had any connection with the death of the President, Witness I replied,

> Yes, the arrival of the Abakiga had some kind of relation to the death of the president because they were saying that the president was killed by the Inkotanyi so the Abakiga came down to fight the Inkotanyi. There was a war and they wanted to revenge the death of their president at the hands of the Inkotanyi.[64]

60. Defence Witness RA, who agreed that it seemed like an invasion, described the event in similar terms:

> From our home we can see a hill that faces north, and at a point in time we saw people coming down and we were wondering what was going on there, and yes, this is how I came to know that it was the Abakiga who were coming. There were many. [O]n the next day they came very early and this continued almost . . . every morning . . . . They were no longer people. They were wild animals . . . . They were shouting, they were carrying machetes and traditional weapons.[65]

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[61] Transcripts 2 June 2000 at page 86
[62] Transcripts 23 November 1999 at pages 31-32
[63] *Ibid* at 33-34
[64] *Ibid* at 35-36
[65] Transcripts 2 May 2000 at pages 42-43

61. Defence witnesses RA, BE, ZJ and TP confirmed that, around 12 April 1994, there were rumours of an imminent attack on the refugees at the *bureau communal* in Mabanza, by the Abakiga, who were coming from Rutsiro. The Accused testified that in the morning of 13 April 1994, he received a phone call from the *bourgmestre* of Rutsiro, informing him of the advance of the Abakiga to Mabanza *commune,* and it was on that basis that he had asked the refugees to go south, to Kibuye town, for protection.

62. The evidence shows that, following the invasion of the Abakiga, they proceeded to kill Tutsis and loot properties in Mabanza and neighboring Gitesi *commune*. Prosecution and Defence witnesses testified to the Abakiga attacking the refugees at the *bureau communal* on 13 and 14 April 1994. They killed Pastor Muganga and attacked Karungu's house on 13 and 14 April 1994. They laid siege on the religious community of nuns on 14 and 16 April. In Gitesi *commune*, the Abakiga participated in attacks at the Home St. Jean Complex on 17 April 1994, and the attack on the Stadium on 18 April. In all events, witnesses identified the Abakiga by their distinctive dress and testified that they attacked in large numbers, often in the hundreds.

63. According to the evidence, local bandits, and those sometimes described as *interahamwe*, joined the Abakiga in their attacks on the Tutsis and the looting.

64. Thus, from an analysis of the evidence, it appears that Mabanza *commune* was overrun, on the 13 April 1994 and on subsequent dates, by murderous hordes of Hutu men from the north, known as the Abakiga, and their collaborators. As a consequence, Mabanza *commune* sank into a confused and chaotic state.

2.2.3 The Conditions that Prevailed in Mabanza Commune from 25 April 1994 to July 1994

65. With the easing of the Abakiga attacks in the area, around 25 April 1994, a period of relative calm ensued. This is evidenced by the communal Register of

Outgoing Mail,[66] which shows an increase in the administrative activities of the *communal* office from 25 April 1994, compared to a lull in such activity during the period 13 to 25 April 1994. It was during this period that, according to the Accused, he managed to restore some order and arrest certain persons involved in criminal activities.

66. However, during May and June 1994, Mabanza still suffered from isolated attacks by local Hutu militia. This is apparent from the evidence led by the Prosecution in relation to the killings of Kanyabugosi, the sons of Witness B, and of Tutsis concealed in Habayo's house, along with the arrest of Habayo. The Accused testified to threats of further incursions into Mabanza, by groups of Hutus, from neighboring *communes*, in June 1994. His evidence is supported by a letter, dated 24 June 1994, from him to the *préfet*, which stated,

> According to the information at our disposal, the preparations of a series of attacks are reportedly under way in ZONE MURUNDA and ZONE RUTSIRO (Northern Rutsiro) of Rutsiro *commune*; the attacks target MABANZA *commune* between 1st and 5th July 1994, under the pretext that accomplices are still hidden in Mabanza.[67]

67. It is important to note that, according to the evidence, by late April 1994, the bulk of the Tutsi population in Mabanza had fled the area or had gone into hiding.

2.3 The Use of the Available Resources by the Accused

68. The Defence submitted that, the fact that the Accused had used the available security resources, to the maximum, to maintain law and order, shows his *bone fides*. In particular, the Accused had used civilians to maintain law and order as night patrols and to man the roadblock. He also had held a number of pacification meetings throughout Mabanza *commune*. On numerous occasions the Accused had used the available resources to protect persons and property, by preventing crime and taking action to punish the perpetrators of crime.

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[66] Defence exhibit 18
[67] Prosecution exhibit 84

69. Contrary to the Defence, the Prosecution alleged that the Accused held meetings whereby he encouraged the attacks. Although the Prosecution accepted that the Accused assisted certain Tutsis during the events, it argued that the Accused acted selectively.[68]

2.3.1 Using Civilians for Security

70. In the wake of the attacks, the Accused supported the formation of cross-ethnic night patrol groups and organised civilian defence measures in Mabanza *commune,* initially from 7 to 12 April. The night patrols were set up to protect the population, irrespective of ethnicity, in the *commune*. The evidence suggests that the night patrols did not continue after 12 April 1994, due to the imminent attacks by the Abakiga. Defence Witness BE stated:

> [B]ecause it was from that day, people from Rutsiro, that's the Abakiga, started saying that the refugees who were at Mabanza communal office, including Hutus who were not helping the Abakiga, were going to be killed. It was on that day [12 April] that there was a major attack carried out by the Abakiga who came down from the hills and people were afraid and the groups collapsed and people ran away.[69]

71. Asked about specific measures that had been taken to strengthen the security after 25 April, the Accused testified that, at that point in time, they had tried to elect in each *cellule,* people who would be added to the five members of the *cellule* committee. Then the *cellules* would have fifteen people in all, responsible for the maintenance of law and order to face up to attacks from the Abakiga, if they were to come back.

72. The Accused also made use of civilian volunteers to man the Trafipro roadblock that was located close to the *bureau communal.* The Accused admitted having set up the Trafipro roadblock, and authorising civilians to operate it. The Prosecution alleged that this roadblock had been set up on 14 April 1994, however, according to the Accused, this measure was not taken until the end of April 1994. This measure was in line with the Prime Minister's request to *préfets,* in a letter dated 27 April 1994,

[68] Prosecutor's Closing Brief at pages 49 - 54

referred by *préfet* Kayishema, to the *bourgmestre* on 30 April, in which the Prime Minister had requested, *inter alia*, that official roadblocks should be set up to prevent infiltration by members of the RPF.[70]

2.3.2 Holding Pacification Meetings

73. The Chamber has already analysed in length the Prosecution and Defence evidence relating to the meetings held in Mabanza during the events.[71] Therefore, only a brief reference to the evidence of pacification meetings, in the context of this plea, would be appropriate.

74. The Accused testified to holding pacification meetings in May and June 1994, after the major attacks of Abakiga had stopped around 25 April 1994. In particular, the Accused explained that he had written to the *conseiller* of Kibilizi *secteur,* asking him to organise in Kamusanganya *cellule*, a meeting on 5 May 1994, for the election of a committee to restore peace.[72] Another meeting on 6 May 1994 with representatives of the Churches and political parties followed. In his testimony the Accused stated as follows:-

> I wanted first of all to put myself together with the political party representatives so that we can speak the same language before the next meeting of all these other people.[...] the intent was to ensure security within the *commune* and also to face up to the possible attacks that would come from outside. You should not forget the fact that the country was at war. We wanted to keep away the infiltration by the RPF.[73]

75. In accord with the testimony of the Accused in respect of the above meeting, Defence Witness ZJ testified that he attended a meeting chaired by the *bourgmestre* at the beginning of May. He explained that members of all the political parties were present and that the meeting took place at the *bureau communal.* The subject at that meeting was how to restore security and peace in the *commune.* The Witness ZJ stated that,

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[69] Transcripts 27 April 2000 at page 48
[70] Prosecution exhibit 77
[71] See Judgment of the majority, Chapter V
[72] Defence exhibit 18, correspondence no. 0303

> [t]he *Bourgmestre* explained the situation which was prevailing within the *commune*, and he said that since everybody had seen this and was aware, the security had been disturbed by those who came from outside the *commune*, and he insisted that people come together, and they should no longer fight one against the other . . . . He said that those who had not been killed, and who were in hiding should be kept well, and he said that he no longer wanted to hear of any killings. He spoke of a project which would involve setting up committees in sectors and cellules in order to safeguard the property of these people.[74]

76. A number of witnesses testified that they heard the Accused make public speeches on similar lines, in April to June 1994. Witness AS was with the Accused on about 13 April 1994, when the Accused addressed a group of Abakiga and exhorted them to stop looting. Witness WE testified that, towards the end of April, he attended a meeting held by the Accused at which he was urging the audience to distinguish between the RPF, the real enemy of the people, and the Tutsis. At that meeting the Accused told the people not to listen to the propaganda from the Abakiga and the *interahamwe*, who came to kill and loot.[75] Witness ZD attended two meetings, in May or June 1994, where the Accused implored the people to stop pursuing Tutsis. Witness KA spoke about a meeting in Gihara *secteur* at the end of May or early June, at which the Accused encouraged the people to do everything possible to prevent the Abakiga from killing and looting.[76] Witness KC had attended two meetings in June, where the Accused had urged the people to ignore the Abakiga who were trying to divide them, and affirmed that the only enemy was the RPF.[77]

77. The Prosecution Witness Q, a Tutsi woman married to a Hutu man, stated that she survived attacks after seeking help from the Accused. She explained that the Accused had held a meeting at the *bureau communal* where he stated that Tutsi women married to Hutu men should not be killed. The Accused later gave the husband of Witness Q two letters to be read out to the assailants, which stated that

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[73] Transcripts 6 June 2000 at page 119
[74] Transcripts 3 May 2000 at pages 80-81
[75] *Ibid* at page 41
[76] *Ibid* at page 58
[77] Transcripts 28 April 2000 at page 27

they should no longer participate in the killings and that those who searched for Tutsis to be killed would have to answer for their actions.

78. The above witnesses are consistent with regard to the message that Bagilishema sought to deliver to his people. It is apparent that the Accused, in holding such meetings, advocated solidarity amongst the people of Mabanza in two main aspects. First, that the people should stop attacking the Tutsis. And second that the people should recognise that the real enemy is the RPF and not the Tutsis generally. This is consistent with the position taken up by the Accused at the trial.

2.3.3 Providing Assistance in the Face of Attacks

79. The Accused testified to the assistance that he had given to a religious community of nuns, in April 1994. Witness RA, who is a senior nun in a religious community, corroborated the Accused and further explained that, in the afternoon of 14 April 1994, the religious community was provided with the assistance of a policeman, by the Accused. On that day, the Abakiga had left, after the religious community had given them money. The witness testified that, on the morning of 16 April 1994, the Abakigas returned in their hundreds. On this occasion also, the religious community had again given money to the Abakigas, and the policemen had fired in the air to disperse them. In the afternoon of 16 April, the Abakiga had come again and said that, if on the following day the Tutsi sisters were still there, then the entire religious community would be wiped out. Witness RA explained that on 17 April 1994 she, along with five other Tutsi sisters, went to the *bourgmestre* for help. The Accused provided a false Hutu ID card for one of the sisters at their request, and offered them a place to hide in the IGA building of the *bureau communal*. The Prosecution does not dispute these matters.[78]

80. The Accused had also requested civil officials of Mabanza *commune* to provide protection for Tutsis, their property, or those who had assisted Tutsis. For example, on 5 May 1994, the Accused sent a letter to the *conseiller* of Mushubati *secteur*, urging

[78] Prosecutor's Closing Brief, Part I at paragraphs 298-300

him to provide special protection for a family who had hidden a Tutsi in their home.[79] On 9 May 1994, he wrote to the *conseiller* of Buhinga *secteur,* asking him to protect a Tutsi woman who had been threatened.[80] And on 19 and 20 May 1994, he sent letters to the *conseiller* of Gihera *secteur,* and to a committee that had been set up to recover property, requesting them to ensure that the property abandoned by displaced Tutsis, was not misappropriated.[81]

2.3.4 Hiding Tutsis in His Home

81. The Accused also testified to hiding Tutsis in his home, including Witness RJ and her two children, a girl named Chantal, two orphans, and Pastor Muganga's wife and children. Defence witnesses RJ, AS, and RB corroborated his evidence. Witness RJ, a Tutsi, described how she had sought refuge in the *bourgmestre's* house and was hidden by the Accused for about a month, along with her two children and a Tutsi girl named Chantal. Eventually the Accused issued Witness RJ with a false ID card, and Chantal with a *laissez-passer*, both documents stating that the holder was a Hutu, thus enabling them to travel. Defence Witness AS confirmed that, around mid April 1994, he had seen Chantal, a Tutsi, hiding in the home of the Accused.

82. According to Witness AS, who was a Pastor himself, the Accused had helped Pastor Muganga, and had assisted Pastor Muganga's wife and children to escape. In her written statement, Defence Witness RB stated that in April 1994, immediately after the death of President Habyarimana, Pastor Muganga's wife and her children hid in the residence of the Accused. And that the Accused ultimately helped Pastor Muganga's wife and her children to escape.

83. The Rwandan confessional statement of Prosecution Witness Z shows that Pastor Muganga had hidden in Bagilishema's home.[82]

[79] Defence exhibit 18, correspondence no. 0291
[80] Defence exhibit 18, correspondence no. 0294
[81] Defence exhibit 18, correspondence nos. 0308 and 0311, respectively

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2.3.5 Issuing False Identification Documentation

84. The Accused testified that he had issued false Hutu ID cards to Tutsis from Mabanza and *laissez-passers* to Tutsis from outside Mabanza. He explained that this was done deliberately by certifying Tutsi persons as Hutus, in order to save lives. He had issued about 100 such documents during the events.[83] The Prosecution did not dispute that the Accused issued false ID cards and *laissez-passers* but contended that this demonstrates how he used his power and authority, selectively.[84]

85. Defence Witness WE testified that the Accused gave him a Hutu ID card to be given to a certain lady, and ten other blank ID cards, signed by the *bourgmestre*, to be filled in by Tutsis from Mabanza who were, at the time, resident in Kigali. The act of issuing ten blank ID cards goes contrary to the assertion by the Prosecution that the Accused acted selectively. Witness KC testified that the Abakiga had laid siege on a house where he had been staying, looking for the Tutsis who were there. The witness explained that, fearing the return of the Abakiga, he had gone to see the *bourgmestre,* who had issued "Hutu" *laissez-passers* for four persons, who later escaped to Zaire. Witness RA testified that the Accused provided a false ID card to one of the Tutsi sisters from the religious community.

86. In this context it may be noted that the Prosecution adduced no evidence to indicate that the Accused acted on a selective basis and refused to issue identification documentation to a Tutsi person, describing him as a Hutu, upon such a request being made.

87. The Accused also testified to ordering false entries in the *Registre des Residents*,[85] in regard to the ethnicity of the Tutsi refugees, who had to obtain resident's permits from the *bureau communal.* He explained that a person from another *commune,* who remained in Mabanza *commune* for more than three days, had to be recorded in the *Registre des Residents* in order to obtain a resident's permit. The resident's permit indicated the ethnic group of the holder. The Accused stated that he

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[82] Defence exhibit 112
[83] Transcripts 6 June 2000 at page 59
[84] Prosecutor's Closing Brief Part I at paragraphs 294-298

had authorised entries in the *Registre des Residents* and had issued resident's permits, which indicated that the persons were Hutus, whereas in fact they were Tutsis, in order to save lives. According to the Accused, up to 60% of the ethnic identities recorded in the *Registre des Residents* had been falsified, upon his instruction. He added that all the Tutsis who had been issued resident's permits during the events in 1994, in Mabanza, were issued resident's permits, which indicated that they were 'Hutus'.[86]

2.3.6 Punishing the Perpetrators of Crimes

88. According to the Accused, after around 25 April 1994, he had re-gained enough control in his *commune* to arrest and transfer to the Prosecutor in Kibuye, those persons suspected of murder or other crimes against Tutsis. Notwithstanding the inadequacy of security personnel, the Accused testified that, between May and June 1994, he had transferred sixteen people to the Public Prosecutor in Kibuye, for alleged crimes.

89. Evidence of these transfers is contained in the communal Register of Outgoing Mail. For example, the Accused referred to a letter sent on 27 April 1994, to the Prosecutor of the Republic, which is recorded in the communal Register of Outgoing Mail,[87] concerning the transfer of the suspects in respect of the murders of Biziyaremye and Bampunirineza. Further, in a letter of 3 May 1994, to the Prosecutor of the Republic,[88] the Accused stated that he is transferring five named persons accused of killing a certain Kangabe, on ethnic grounds. Numerous other arrests and transfers are documented in the Register of Outgoing Mail, which indicates that letters of transfer, dating from 24 May through to 12 July 1994, were sent by the Accused to the Prosecutor, in Kibuye.[89]

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[85] Defence exhibit 93
[86] It is apparent that all those who had been recorded in the *Registre des Residents,* in Mabanza, during 1994, were recorded as being from the 'Hutu' ethnic group. See Defence exhibit 93
[87] Defence exhibit 18, correspondence no. 0279
[88] Defence exhibit 18, correspondence no. 0286
[89] See e.g., Defence exhibit 18, correspondence nos. 0135, 0320, 0332, 0340, 0341, 0353, 0367, and 0368

90. The Accused further pointed out that, by letters dated 2 May 1994, he had suspended his own communal driver, Ephraim Nshimyimana, and a communal policeman, Anastase Munyandamutsa, because they had stolen the engine from the car of a Tutsi refugee.[90] The Accused had placed them at the disposal of the Office of the Public Prosecutor, in Kibuye, and had requested an investigation.

91. The Prosecution accepted that sixteen people were arrested and transferred to the Prosecutor in Kibuye, but pointed out that no such transfers were recorded from 8 to 25 April 1994.[91] In this regard, the Accused testified that during that period, the administrative activities of the *commune* were paralysed. He added that, from about 13 to 25 April 1994, there were thousands of attackers coming from the North, who could not be identified, but after that period it was much easier to identify those who had committed the crimes.[92] This explanation of the Accused is consistent with the evidence relating to the invasion of Mabanza *commune* by the Abakiga, from about 13 April 1994, and the level of violence that ensued, thereafter.

2.3.7 Appealing to Higher Authorities

92. The Accused testified that, on 25 April 1994, he attended a meeting in Kibuye town, with *préfet* Kayishema and the other *bourgmestres*[93] where he deplored the massacres that had occurred in Kibuye town, and had requested the superior authorities to avert such situations in the future.[94] Soon thereafter, on 3 May 1994, the Accused went to Kibuye town again to attend a meeting with Jean Kambanda, the Prime Minister.[95] At that meeting the Accused asserted that, he raised the issue of the massacres with the Prime Minister and, in particular, the requirement to attend to the needs of the victims of the atrocities, committed in the region.[96]

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[90] Defence exhibit 94 and 95 are letters, dated 2 May 1994, from the Accused to the said driver and to the communal policeman, respectively
[91] Prosecutor's Closing Brief Part I at paragraph 276
[92] Transcripts 6 June 2000 at pages 116-117
[93] *Ibid* at pages 100 -101
[94] Transcripts 5 June 2000 at page 69
[95] Transcripts 9 June 2000 at page 60.
[96] Transcripts 5 June 2000 at pages 66-67

93. There is no independent evidence to support the above testimony of the Accused, however the Prosecution has not proved otherwise. If it were to be accepted that the Accused made these appeals to higher authorities, it would reflect his *bone fide* intention to help the refugees. However, whether such entreaties would have borne fruit, has to be assessed in the light of the reality of the situation that prevailed in Kibuye Prefecture at that time. According to the Prosecution, the civil authorities of Kibuye and the Gendarmerie National played a central role in the massacres in Kibuye town. Indeed, the *préfet* of Kibuye, Kayishema, who is the hierarchical superior of the Accused, has been convicted by this Tribunal for leading the massacres at the Kibuye Stadium and Home St Jean.[97] The Prime Minister, Jean Kambanda, has confessed to his role in supporting the genocide.[98] This would have obviously limited the ability of the Accused to seek punishment for those involved in the massacres in Gitesi *commune,* where the Kibuye Stadium and the Home St. Jean are situated. Although the appeals made by the Accused to the *préfet* of Kibuye and to the Prime Minister were the appropriate steps to take, according to the administrative set up that existed at that time, however the matter of favourable response was outside his control.

2.4 Some Additional Factors that Impaired the Ability of the Accused to Use the Resources

94. In addition to the inadequate resources available to the Accused during the events, the Defence adduced evidence of several other factors, which affected the ability of the Accused to protect the Tutsis and to maintain law and order.

2.4.1 The Attacks on the Accused by the Abakiga

95. The Accused testified that, on 13 April 1994, the Abakiga came even to his house in order to seek out Tutsis that he was hiding there. He explained, the Abakiga "threatened me, telling me I am an Inyenzi, an Inkotanyi", and they asked where I had hidden the Tutsis at the communal office. He added, "seeing how ferocious they were,

[97] See *Prosecutor vs Clement Kayishema and Obed Ruzindana,* (ICTR-95-1-T), Judgment, 21 May 1998
[98] See *Prosecutor vs Jean Kambanda,* (ICTR-97-23-S), Judgment and Sentence, 4 September 1998

I gave them 10.000 Francs for them to leave my house and they left. . . ." The evidence of Witness RJ appears to corroborate this event. Witness RJ, a Tutsi, testified that, from 8 April 1994, she had sought refuge in the *bourgmestre's* house. She was hidden by the Accused in the servants' quarters, along with a Tutsi girl named Chantal. The witness testified that the Accused "came to see us once because the Abakiga were coming to attack and he wanted to warn us. He advised us to close the door, and that's what we did. [. . .] We heard the noise that they were making during the attacks, and we would also hear the whistles they were blowing. . . ."[99]

96. Further support for this incident is contained in the Rwandan confessional statement of Prosecution Witness Z, dated 22 June 1998, wherein he stated,

> On 14/4/94 . . .the former assistant *bourgmestre* [Semanza] ordered those who were with him (the Abakiga he was lodging) to bring along the Tutsi[s] who had taken refuge at the *Bourgmestre's* house. Immediately, they all went to the *Bourgmestre's* home where they caused disturbances, which frightened the *Bourgmestre*.[100]

97. Witness KA testified in court that, he had been told, by two people, about an attack on the *bourgmestre's* house.

98. This is the first example of the direct challenge to the authority of the Accused by the Abakiga.

99. A second confrontation occurred a few days later. The Accused stated that, on 18 April 1994 at about at 8 a.m. he, escorted by two policemen, and accompanied by some Pastors and *conseillers* of the neighbourhood, confronted the Abakiga, at the Rubengera Parish. He addressed the group of about 100-200 Abakiga and asked them "never to come back again to Mabanza" and added "[y]ou are looking for enemies, and there are no enemies in Mabanza." However, the Abakiga disregarded his plea. The Accused was humiliated and, according to him, felt that he was "nothing in front of [his] people."[101] Witness RA, corroborating the Accused, testified in court that

[99] Transcripts 23 May 2000 at page 15 (in camera)
[100] Defence exhibit 112
[101] Transcripts 5 June 2000 at pages 140-141

Pastor Eliphase, who had been with the Accused at the time, had informed her of this incident.

100. Prosecution Witness Z testified to a similar confrontation between the Accused and the Abakiga, although it is unclear whether he was referring to the confrontation on 18 April 1994. He stated that one morning before killings at the Gatwaro Stadium, the Accused held a meeting at Rubengera Parish where he addressed the Abakiga. The Accused had told the Abakiga that he had "had enough of their killings and that they should stop the killings [...]".[102]

101. As well as the above confrontations that he had experienced with the Abakiga, the Accused further testified that, on 14 April 1994, the Abakiga looted the home of his parents. He added that the Abakiga took "everything, the sofas, the chairs, food, everything."[103]

102. Thus, the evidence from both Prosecution and Defence witnesses shows that the Accused had been threatened by the Abakiga in his own home and had been confronted by them on other occasions, in Mabanza. These incidents illustrate that the Abakiga did not respect the authority of the Accused and were not amenable to the commands of the Accused.

2.4.2 The Accused Considered as an Accomplice of the RPF

103. The Accused testified that he was considered to be an accomplice of the RPF by some of the Hutu attackers. He denied that he was in fact an accomplice, and stated that he always tried to defend his *commune* against the RPF infiltration and invasion. In the letter, dated 24 June 1994, from Bagilishema to *préfet* Kayishema, the Accused referred to a series of imminent attacks on Mabanza, from Rutsiro *commune*, and emphasised that "they have also dared to include myself among the accomplices stating that I am married to a Tutsi woman."[104] He explained in his testimony in court that, "there were several reasons [why I was suspected to be an accomplice] I

[102] Transcripts 8 February 2000 at pages 21-23
[103] Transcripts 5 June 2000 at page 125
[104] Prosecution exhibit 84

mentioned that of having been congratulated on Radio Muhabura, there was also the fact that I was married to a Tutsi woman . . . ." In response to a question from the Bench, "your position that the people in the North suspected you as an accomplice is stated in this letter clearly . . . . That is your position even today here?"[105] The Accused answered in the affirmative. In my view, this letter, written during the events, lends strong support to the assertion by the Accused that he himself was considered, by the attackers from the North, as an accomplice of the RPF.

104. According to the Accused, a further reason why he was considered as an accomplice was because of the announcements on the Radio Muhabura, which was a radio station that supported the RPF. Witness BE testified to hearing an announcement, just before the refugees were sent to Kibuye on 13 April 1994, which congratulated the Accused by stating that, "all other *bourgmestres* should follow the example of the *bourgmestre* of Mabanza." Witness ZD testified to hearing on Radio Muhabura, between 11 and 17 April, an announcement, which stated that, "they were grateful for . . . how Ignace behaved in order to contain the situation and also to protect his people."[106] This evidence is consistent with the position of the Accused that Radio Muhabura had made positive announcements, in mid April 1994, concerning him. This also confirms the Prosecution admission that, the Accused acted in good faith, prior to 12 April 1994.

105. There can be little doubt that a *bourgmestre* supporting the genocide was likely to wield more influence over the attackers and therefore be able to control them, than a *bourgmestre* who was seen as neutral or opposed to the genocide. Thus the evidence seems to indicate that the Accused, as a *bourgmestre* falling into the latter category, would not have been able to influence or control the Abakiga.

2.4.3 The Relationship of the Accused with Semanza

106. The Defence submitted that before and during the events, Bagilishema had lost control over his assistant *bourgmestre,* Célestin Semanza, due to political power that

[105] Transcripts 7 June 2000 at pages 110-111
[106] The Defence stated in its oral closing arguments that it had requested these transcripts from Radio Muhabura, which request was denied.

Semanza had built for himself and his association with the Abakiga.[107] In addition, Semanza was planning and plotting to get rid of the Accused from his position, so that Semanza could become the *bourgmestre.* This struggle persisted until the departure of the Accused in July 1994, when Semanza achieved his objective, and succeeded the Accused as *bourgemestre* of Mabanza. The Defence argued that this further undermined the ability of the Accused to maintain law and order.

107. The Prosecution argued that the Accused had deliberately created the impression that he had problems with Semanza, in order to distance himself from the atrocities committed by Semanza, for which he is responsible.[108]

108. The Accused testified that, prior to 1994, he wanted to send Semanza back to the Ministry of Interior:

> Mr. Semanza Celestin became unmanageable. I tried to manage him, so I had suggested that he be sent back to the Ministry, the civil service but the *préfet* did not, yes the *préfet* did not comply with my request. He did not want to support my proposal which I had sent in.[109]

The Accused gave as reasons that Semanza had embezzled money,[110] attended work only whenever he wanted, become ill disciplined, and was uncontrollable.

109. Evidence of this fractious relationship can be found in letters written even before 1994; the substance of which was not disputed by the Prosecution.[111] A letter dated 16 December 1992,[112] from Bagilishema to Semanza, and the reply thereto, dated 17 December 1992,[113] concerned Semanza's absence from work. The letters indicate that the two men had a relationship of distrust; in the said reply, Semanza

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[107] Defence Closing Brief at pages 102-108
[108] Prosecutor's Closing Brief Part I at paragraph 278
[109] Transcripts 1 June 2000 at pages 72-73
[110] In a document entitled 'Evaluation Sheet Covering Period 1 April 1993 to May 1994', signed by Bagilishema, reference is made to the misappropriation of communal funds by Semanza. See, Defence exhibit 20
[111] Prosecution Counsel stated, "all these documents concerning Semanza taking over are not disputed." See Transcripts 1 June 2000
[112] Defence exhibit 24
[113] Defence exhibit 23

stated "if you were not setting a trap for me, it would be incomprehensible that you should be denying that you actually gave me permission yourself."

110. In another letter, dated 19 December 1992, from Bagilishema to Semanza, Bagilishema wrote:

> I am sorry to inform you that it is not good to lie and especially to lie in order to incriminate your superior. [...] Since you have always tried to outsmart your superior and shy away from other important, official duties, I am forced to send you back at the disposal of the supervisory ministries which employed you.[114]

The Accused testified that it was not within his power to dismiss the assistant *bourgmestres*. Therefore, he had sent this letter to the Ministry of Interior with a view to having Semanza sent back, but he had not received a response. The Accused explained that, following the refusal of his superiors to remove Semanza, Semanza felt "untouchable and did whatever pleased him."[115] The evidence of the Accused is in accord with the opinion of Prosecution expert witness Andre Guichaoua, who opined that, a *bourgmestre*'s powers were proportional to the influence that he wielded with the higher government officials, at the national level.

111. The evidence indicates that the political rivalry between the Accused and Semanza began in 1992 and continued right up to the events in 1994. According to the Accused, it was following the introduction of multipartyism in 1992 that his relationship with Semanza, who was the secretary of the rival *Mouvement Démocratique Républicain (MDR)* Party, deteriorated. Each of the political parties wanted to have a representative in the *commune*. Witness ZD, who was at the time of the events a senior official of an opposition political party, stated that in 1994 most of the people in Mabanza belonged to the MDR party. He added that the strategy of the opposition parties was to replace Bagilishema (the MRND candidate) with the MDR candidate, Semanza, and that Semanza had the support of the top MDR party official. Witness ZD agreed that Semanza was acting "in an irreverent manner, particularly in

[114] Defence exhibit 22
[115] Transcripts 1 June 2000 at page 85

1994."[116] Defence Witness KA testified that in mid April, it was Semanza who was in control of the *commune* "during that period the MDR was stronger because the MDR members were the majority [. . .] Semanza was, therefore, the favourite of the people, so to speak, and had an eye on the position of *bourgmestre*."[117] He added that, during the MDR meetings, the members used to sing that the *bourgmestre* should resign. Expert witness Jean-Francois Roux who, up to April 1994, had been a project leader on a development project in Kibuye Prefecture, also confirmed that there had been a conflict between Bagilishema and Semanza. He added that he had personally received a letter from Semanza, wherein Semanza questioned the authority of Bagilishema.

112. The assertion by the Accused that his fractious relationship with Semanza continued throughout the events, until July 1994, is evident in a letter dated 24 June 1994, from Bagilishema to *préfet* Kayishema.[118] Therein, the Accused referred to his problems with his political rivals: "I would like to inform you that this rumour is spread, by my political opponents, whose intention is to take my place." He explained in testimony that he had in mind, amongst others, Semanza. In response to a question from the Bench "[a]nd that is the position that you are taking up in this court even today, that Semanza was designing or planning to take over from you?" the Accused answered in the affirmative.

113. The Prosecution did not dispute that Semanza ultimately achieved his objective of becoming the *bourgmestre* of Mabanza, for he succeeded the Accused as *bourgmestre,* in which post he remained until his arrest in November 1994.[119]

2.4.4 The Relationship of Semanza with the Abakiga

114. Prosecution and Defence witnesses testified that, during the events, Semanza had been closely associated with the Abakiga. The Accused and Witness KA stated that Semanza came from the same region as the Abakiga. The Prosecution did not

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[116] Transcripts 3 May 2000 at page 29 (in camera)
[117] Transcripts 22 May 2000 at page 105
[118] Prosecution exhibit 84
[119] In this regard the Accused asserted that Semanza had appointed himself as *bourgmestre*, whereas the law provided that, in such circumstances, the *bourgmestre* should be replaced by a *conseiller*.

dispute these assertions. Indeed, it was part of the Prosecution case that Semanza was acting in concert with the Abakiga and other attackers.

115. Witness KA testified that, in mid April 1994, he had observed a meeting outside the Rubengera School where Semanza was addressing a group of Abakiga and others. Semanza exhorted the other young men from Mabanza to help the Abakiga kill the Tutsis and to loot. According to the said witness, Semanza was acting as a political leader of the Abakiga.

116. Evidence also suggests that Semanza had been lodging Abakiga in his home, during the events. Witness Z, in the Rwandan confessional statement, dated 22 June 1998, stated "[o]n 14/4/94 . . .the former assistant *bourgmestre* ordered those who were with him *(the Abakiga he was lodging)* to bring along the Tutsi who had taken refuge at the *bourgmestre*'s house."[120] (Emphasis added)

117. It is apparent from the above analysis that the relationship of the Accused with his assistant *bourgmestre* Semanza was one of distrust and rivalry. Therefore, it is reasonable to infer that, during the events, the Accused had no significant control over Semanza, which debilitated his authority.

PART IV
Documentary Evidence that Corroborates the Position Taken Up by the Accused

118. It is to be observed that several aspects of the position taken up by the Accused are corroborated by independent documentary evidence. In that regard two of the documents already mentioned, deserve further analysis, since they lend support to the defence case as a whole: *viz.,* the letter from Bagilishema to *préfet* Kayishema, dated 24 June 1994, and the confessional statement of Prosecution Witness Z, dated 22 June 1998.

[120] Defence exhibit 112

1. The Letter Dated 24 June 1994 (Prosecution exhibit 84) 1399

119. The letter sent by the Accused to the *préfet* Kayishema, dated 24 June 1994, bears such significance to the defence taken up in this case, that it requires careful consideration. It is important to note that, although this letter was written in June 1994, it lends corroboration to the defence the Accused has taken up in this trial, almost six years later. The Accused certainly could not have envisaged facing a trial of this nature at the time that he wrote the letter. Hence it enhances the credibility of the matters urged therein. The Accused had written this letter on 24 June 1994, to Kayishema, who was the *préfet* of Kibuye Prefecture, stating that he was considered to be an accomplice, by the Hutu attackers from the north, because he was married to a Tutsi woman. The matters arising from this letter were clarified, when the Accused gave evidence in court, on 7 June 2000.

120. The Accused had asserted in the said letter that the rumor that he is an accomplice had been spread by his political opponents, whose intention it was to take his place. On being questioned by the Bench he explained as follows;

> Q. In that letter in the first paragraph, the last sentence, you have asserted that that the-- they have also [dared] to include myself among the accomplices stating that I am married to a Tutsi woman. You have stated that.
> A. Yes, Your Honour.
> Q. That is exactly the position you are stating in this Court today also, that you were suspected as an accomplice?
> A. There were, there were several reasons, I mentioned that of having been congratulated on Radio Muhabura, there was also the fact that I was married to a Tutsi woman and so on and so forth. But it was supposed that my wife was Tutsi. But as I have said my wife, my wife's mother was Tutsi and her father is Hutu.
> Q. That is clear. But your position that the people in the north suspected you as an accomplice is stated in this letter clearly, isn't that what you have stated in? That is your position even today, here?
> A. Yes.

Q. Then the second sentence in the second paragraph, we do not want to be considered as defeated so that people from Kayove and Rutsiro *communes* need to come to loot at any time. What do you mean by defeated, there?

A. I wanted to say that we were under siege by this population who came under the pretext of looking for accomplices and they came and they looted in any manner that they wish.

Q. What, what do you understand by the term accomplice? What did you really mean to convey?

A. In my understanding, this is someone who was working with the RPF-- for the RPF.

Q. So, that is what you intended to convey when you used the word accomplice in the letter?

A. Yes, indeed, Your Honour.

Q. Then on the third paragraph you have explained the problem about your wife, and you go on to assert that you are [accused of being] an accomplice because they think that you support the Hutu who are married to Tutsi women, that is one reason. The second reason is that you are supporting the Tutsi population?

A. Yes, that is so, Your Honour.

121. The Accused pointed out that there were imminent attacks from the north. It is to be observed that the main complaint in the said letter was the imminent attacks from zone Murunda and zone Rutsiro (Northern Rutsiro). He specifically requested the *préfet* to do his, "utmost to stop these attacks . . ." and stated ". . . that is why your assistance is urgently solicited." The Accused in his evidence explained the situation in the following terms;

Q. Then in the final paragraph, therefore, I would like the honourable *préfet* to request so and so. And you are then in the final paragraph, second sentence, you have taken up a particular position that should be prevented, that is which can result in confrontation between Hutus, you are referring to the Hutus in the north, then Hutus in Mabanza *commune*. And in that context you have stated that what we presently need, the most is, the unity to face the Inyenzi/Inkotanyi. What did you mean by that?

A. What I meant was that if these people from the north were to attack Mabanza *commune* in particular, if they were to attack me in person, I had

my family, I had my family and my friends, we could be involved in killings and then there were people who were on the other side in Gitarama, they could use this to kill all of us. So, I was thinking that it would be a good idea that we come together because together we stand, so that we can face up to the RPF Inkotanyi attack.

Q. So . . . was it your intention to point out the common enemy?

A. Yes, that's quite so.

Q. And the common enemy you have identified in this letter to be the Inkotanyi and the Inyenzi?

A. Yes, Your Honour, you are right.

Q. And that is the position you are taking up in this Court even today, that not the Tutsi population but the Inkotanyi and Inyenzi are the enemies of the people?

A. Yes, it's still the same position and I'm saying that if people from inside had come together we wouldn't have had to leave our country.

122. Although the said request was made for urgent help in earnest, it was the evidence of the Accused that no such assistance was given;

Q. Now, was there any action taken by the prefect of the Kibuye in consequence of this letter?

A. I gave him this report but he never gave me any reply.

Q. In other words, he didn't give you any support or pursue the complaint, [or] take any suitable action in pursuance of your request?

A. He didn't take any measures but as far as I am concerned, I was to give him a warning in case something happen, in case I die so that people are aware of the conditions under which I was killed. That was my aim.

Q. Have you made similar representation to any other authority at about that time?

A. No, this is the only letter that I wrote, and the nearest authority to me was the *préfet,* the others, it wasn't easy for me to reach them.

123. It is discernible from the above analysis of the said letter as testified to by the Accused, that the position he takes up in court now in regard to the following matters is the same.

1. The fact that the resources available to him in June 1994 were inadequate.
2. That there was an imminent attack from the North at that time.
3. That he believed that he was considered an accomplice by the Hutu attackers.
4. That his communal employees undermined him.

124. The Prosecution interpreted the letter differently. According to the Prosecution, the Accused wrote the letter to Kayishema to inform him that additional Hutu attackers were no longer necessary in Mabanza *commune*.[121] The interpretation placed by the Prosecution is unsupported, and does not bear scrutiny.

125. The Prosecution further argued that the statements contained in the letter that Mabanza was "self-sufficient" and would "defend itself" indicated that the Accused had control over the events.[122] However, the statement by the Accused that Mabanza was "self-sufficient" may be interpreted to mean that the people of Mabanza were able to check for RPF accomplices, rather than having the ability to fight the Hutu attackers from other regions. And, the statement that Mabanza would "defend itself", appeared to predict an unwanted confrontation between Hutus at a time when the available resources are needed to defend against the RPF threat. It is clear that the main purpose of writing the said letter was to outline the problems in regard to security in Mabanza, and to request urgent help from the Kibuye authorities. If Bagilishema had been in control of the situation, there would have been no reason to make such an urgent request to the *préfet*.

126. Thus the position of the Accused taken up in court is corroborated by the contents of the said letter which was written as far back as June 1994. Although the said letter was written in June 1994, it appears to mirror the situation in Mabanza *commune*, during the period April to July 1994. And it may properly be deduced that the security problems faced by the Accused in April 1994 were even greater, than those faced in late June 1994, when the said letter was written.

[121] Prosecutor's Closing Brief at paragraph 72
[122] Prosecutor's closing argument, transcripts 18 October 2000 at pages 220 - 239

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2. The Confessional Statement of Prosecution Witness Z (Defence exhibit 112)

127. Corroboration of the Defence case is also found in the confessional statement of Prosecution Witness Z.[123] Witness Z made this confession to the Rwandan authorities, on 22 June 1998, long before his first witness statement to Tribunal investigators on 18 September 1999, and his testimony before this Chamber on 8 February 2000. At no point in his confessional statement did Witness Z directly implicate the Accused. It is reasonable to assume that at the time when Witness Z made his confessional statement to the Rwandan authorities, he did not know that he would be testifying against the Accused. In the course of his confession, in relation to his role in the killing of Pastor Muganga, Witness Z stated the following:

> On 14/04/94, at about 9am, he came out of the Rubengera school complex where he worked and sought refuge in the home of *Bourgmestre* Bagilishema Ignace; but before he arrived there, he was first stopped by a man named Semanza, then Bourgmestre Assistant . . . ; and later, he was saved by a man named Gafurafura Isaie. From there, he went to the *Bourgmestre's* house. At about one hour later, the former assistant *Bourgmestre* [Semanza] ordered those who were with him (the Abakiga he was lodging) to bring along the Tutsi[s] who had taken refuge at the *Bourgmestre's* house. Immediately they all went to the *Bourgmestre's* home where they caused disturbances, which frightened the *Bourgmestre*. [...]

128. The above statement by Witness Z, a Prosecution witness, lends independent corroboration to the position of the Accused in relation to the following;

1. That a Tutsi had taken refuge in the Accused's home.
2. That Abakiga were lodging in assistant *bourgmestre* Semanza's home and they obeyed his orders.
3. That Abakiga caused disturbances at the Accused's home on 14 April 1994.
4. That Abakiga frightened the Accused.

[123] Defence exhibit 112

129. Further, it is implicit in the act of Semanza ordering the Abakiga to bring the Tutsi hiding in the *bourgmestre's* house that Semanza defied the authority of the Accused and that they were at cross purposes. This incident highlights the animosity that prevailed between the Accused and Semanza. The fact that Semanza had the audacity to order the Abakiga to trespass upon the home of the Accused to seize the Tutsi refugee who had sheltered there, shows that Semanza had little or no respect for the authority of the Accused.

Conclusion

130. It is clear from the above analysis of the evidence in this case, that the Accused has established the plea set up by him, that the resources which were available to him were inadequate to prevent the massacres of the scale that took place in Mabanza *commune,* from April 1994, and that he acted to maintain law and order in the *commune*, with the means available to him. Moreover, the Prosecution has failed to disprove this position. Thus, the Accused has negatived one of the ingredients of the offences that he is charged with *viz.*, *mens rea*. Thereby, a reasonable doubt has been raised in the Prosecution case, which should enure to the benefit of the Accused, resulting in the Accused being entitled to an acquittal, on this ground too.

131. Accordingly, I hereby acquit the Accused Ignace Bagilishema, of all the charges, contained in the indictment.

Done at Arusha
On this seventh day of June 2001

Asoka de Z. Gunawardana
Judge
International Criminal Tribunal for Rwanda

Seal of the Tribunal

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

ENGLISH
ORIGINAL: FRENCH

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

Registry: Mr Adama Dieng

Opinion of: 7 June 2001

THE PROSECUTOR
versus
IGNACE BAGILISHEMA

ICTR-95-1A-T

SEPARATE AND DISSENTING OPINION OF JUDGE MEHMET GÜNEY

Office of the Prosecutor:
Ms Jane Anywar Adong
Mr Wallace Kapaya
Mr Charles Adeogun-Phillips
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1. I agree with the findings in the Judgement, regarding the acquittal of the Accused on certain counts, but I beg to differ with the findings in the majority opinion (hereinafter "the majority") that there is insufficient evidence of the involvement of the Accused as an accomplice in the crimes committed against Tutsi civilians in connection with the activities at Trafipro roadblock in Mabanza *commune* (para. 4.14 of the Indictment), and in the massacres committed against thousands of Tutsi civilians in Kibuye, of whom nearly 1000 to 1500 were natives of Mabanza, as testified to by the Accused [1] (paras. 4.21 to 4.28 and 4.31 of the Indictment).

2. With respect to the activities carried out at the Trafipro roadblock, I find that it has been proved that the Accused had full responsibility for the operation of the roadblock right from the time it was set up, that he had the duty and power to control the operation thereof and possibly to have the said activities discontinued. While I concur with the finding that the evidence tendered does not support a finding that the roadblock was set up for criminal purposes, I am satisfied with the evidence adduced to show that the Accused had sufficient reason to know that the screening system instituted at the roadblock entailed possible risks for the Tutsi civilian population. Consequently, I am of the view that the Accused's responsibility must be assessed on the basis of negligence on his part with regard to the setting up and running of the roadblock. I find that such willful negligence renders him an accomplice to the crimes against humanity committed through the killing of Judith and Bigirimana.

3. With respect to the attacks on and massacre of Tutsi civilians at Gatwaro stadium, Kibuye, I am satisfied that there is sufficient evidence to establish the presence of the Accused at the stadium on several occasions between 13 and 18 April 1994, before and during the attack. This stands in contrast to the testimony of the Accused who denied having gone to Kibuye during the period from 9 to 25 April 1994. Consequently, it is my view that, by such presence and given that he was an official, the Accused, who had a well-established reputation in Kibuye after a 14-year mandate as *Bourgmestre*, aided and abetted the commission of crimes against humanity (extermination and other inhumane

[1] Transcript of the hearing of 5 June 2000, p. 43.

acts), and thereby incurred responsibility as an accomplice to the genocide perpetrated at Gatwaro Stadium, by providing moral support to the assailants.

I. Preliminary comments on some points of law

4. For each of the above-mentioned counts, it appears, from the evidence presented at trial in support of the Prosecutor's allegations, that the Accused is liable under Article 6(1), not so much because of his direct participation as a principal or co-perpetrator, as by reason of his contribution to crimes committed by others, as an accomplice.

A. Violation of the principle of due diligence, or culpable negligence

5. In my opinion, it has been proved that the Accused was negligent by setting up an intrinsically dangerous system, to wit, the Trafipro roadblock. It is appropriate to discuss the extent of such negligence in light of a duty to act, reflected by the continuing duty of the Accused from the erection of the roadblock to the organization of its operation. The Accused failed to provide the control system with such safeguards and guarantees against any form of recklessness (See the notions of *dolus eventualis* in Civil Law and "recklessness" in Common Law [2]), as dictated by his public and administrative prerogatives. I therefore find that the criminal liability of the Accused arises out of negligence for deliberately failing to address the risks associated with the erection of a roadblock in the prevailing context of the period under consideration.

6. Although the Prosecutor did not specifically address this particular kind of responsibility at trial, I am of the opinion that gross negligence may be considered to be one of the numerous forms of individual criminal responsibility provided for by Article 6(1) of the Statute of the Tribunal.

7. The principle of criminal negligence by which an accused may incur responsibility for crimes committed by others was applied in the *Blaskic* Judgement,

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[2] *The Prosecutor v. Blaskic*, ICTY, Judgement of 3 March 2000, para. 267.

after the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that General Blaskic used forces under his control which he knew, at least in part, were difficult to control, and that having issued orders for certain acts, he could reasonably have foreseen that the said acts would lead to the commission of crimes. [3]

8. The above principle on the various grounds for assigning individual criminal responsibility was illustrated in *Prosecutor v. Tadic*, where the Trial Chamber of ICTY affirmed that:

> "(..) aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or an unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it." [4]

9. The ICTY Chamber affirmed further, after reviewing the relevant case-law, that actual physical presence at the time the crime is committed is not necessary, since an accused can be considered to have participated in the commission of a crime, on the basis of the precedent set by the Nürnberg war crimes trials, if he is to be found to be "concerned with the killing". In the same case, the Appeals Chamber recalled that the Statute of the Tribunal did not limit its jurisdiction to the prosecution of persons who allegedly participated directly in crimes or who, in some other way, personally aided or abetted their commission. The Chamber pointed out that it is apparent from the wording of Article 7(1) of the Statute and the provision setting forth the crimes over which the Tribunal has jurisdiction that such responsibility for serious violations of international humanitarian law is not simply limited to those who actually carry out the *actus reus* of the crimes enumerated, but also extends to other offenders, including those who order them to do so or are accomplices thereto.[5]

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3 *The Prosecutor v. Blaskic,* Judgement of 3 March 2000, para. 560 to 562.
4 *Prosecutor v. Tadic*, Judgement of 7 May 1997, para. 689.
5 *Prosecutor v. Tadic*, ICTY Appeals Chamber Judgement of 15 July 1999, paras. 189 and 190.

10. Thus, it was pointed out in the *Akayesu* Judgement that *mens rea* or the criminal intent of the perpetrator of a crime may be in the form of "negligence that is so serious as to be tantamount to acquiescence." [6]

11. In French criminal law, the general principle on complicity presupposes the performance of an affirmative act, and excludes, *a priori*, complicity by failure to act. However, case-law provides a broader notion of complicity which could allow for the existence of *actus reus* or *mens rea*, on condition that mere presence [7] or omission is construed as assistance, moral support or encouragement. It is no longer a question of mere failure to act, but of accomplice liability. Such was the case of an officer who did a round, thus allowing a colleague to steal one of the objects over which he had a duty to watch. [8] Belgian case-law makes a distinction between deliberate failure to act and a form of "*abstention dans l'action*" where, in the performance of a duty, willful failure to take the necessary steps to prevent harm is equated to an affirmative act of participation. [9]

12. In Common Law, the exception to the principle whereby no criminal responsibility shall arise from an omission has been developed in successive cases in relation to the notion of duty to act. The assessment of a duty of care or due diligence in the context of criminal responsibility was considered by the House of Lords (criminal section of the Appeal Chamber) in *Regina v. Adomako,* [10] where a qualified medical employee was charged with homicide for failure to act. In that case, Lord Mackay stated as follows:

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6 *The Prosecutor v. Akayesu*, Judgement of 2 September 1998, paras. 486 to 489.

7 Thus, it was held that a passive spectator who had an affirmative legal duty to intervene to prevent the offence which he witnessed passively - in silence – committed an offence construed as complicity by giving moral support.

8 *Tribunal correctionnel Aix,* 14 January 1947, D. 1947. Somm. 19, Rev. science crim. 1947, 5 81.J.C. P. 1947.II 3465

9 *Cass. Belge*, 23 October 1950 and 24 September 1951, *rev. dr. pén. Et criminologie*, 1951-952.774 [1947.II, 3465.

10 [1995]1 Appeals Court 71. *171.

> "....in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the Defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterized as gross negligence and therefore is a crime. This will depend on the seriousness of the breach of duty committed by the Defendant in all the circumstances which the Defendant was placed when it occurred."

13. The above case highlights the criteria the jury must consider in ascertaining whether or not there is a breach of duty which may be regarded as gross negligence, and thus be considered a crime.

14. In the instant case, I deem it appropriate to assess the status and functions of the Accused which define the nature and extent of his duties under Rwandan Law. Prosecution Expert Witness, André Guichaoua, referred to the Law of 23 November 1963 on communal organization, [11] which was in force in Rwanda at the time of the events. That Law provides that the *Bourgmestre* is the representative of the central authority in the *commune* and the embodiment of communal authority (Article 56 of the Law). As a representative of the executive power, the *Bourgmestre* is responsible for the enforcement of laws and regulations (Article 57 of the Law). Administration of the *commune* is under the direct authority of the *Bourgmestre* (Article 60 of the Law) who, in particular, has the power to recruit, suspend and dismiss communal staff after consultation with the *conseil communal* (communal council) (Article 93 of the Law). Such power also extends to communal police officers, over whom the *Bourgmestre* has sole authority, except in exceptional circumstances (Article 104 of the Law). Article 109 of the Law defines the functions of communal police officers placed under the authority of the *Bourgmestre* and, in particular, the duty imposed on the *Bourgmestre* to contribute to maintaining or restoring law and order, to order the arrest of troublemakers or offenders and to bring them before the competent authorities.

15. The decision by the Accused to set up the roadblock, on the one hand, and to have it manned by civilians, on the other hand, entails, to my mind, various types of criminal

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[11] Prosecution Exhibit No. 71, footnote 3 of the report by André Guichaoua on "*L'autorité communale et les prérogatives du bourgmestre.*" This law is also cited in Article 8 of the Presidential Order of 25 November 1975 on the status of communal personnel, Defence Exhibit No. 97.

responsibility. Besides the responsibility incurred for setting up the roadblock itself, the Accused should have known that, under such circumstances as recounted by the witnesses, continuing that activity would entail risks, especially considering the conduct of the untrained civilians who were posted there. Hence, the culpable negligence connected with the setting up of the roadblock becomes continued and aggravated if the Accused knows or has reason to know that crimes were committed after it was set up. In that case, the phrase "he knew or has reason to know" used as a condition for assigning superior responsibility under Article 6(3) of the Statute, could be useful in assessing the continuous nature of that crime. Such knowledge can be ascertained from direct evidence or by inference. In *Aleksovski*, the Trial Chamber of ICTY laid down certain indicia:

> "This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them. Conversely, the commission of a crime in the immediate proximity of the place where the superior ordinarily carried out his duties would suffice to establish a significant indicium that he had knowledge of the crime, *a fortiori*, if the crimes were repeatedly committed" (Emphasis added). [12]

16. Within the context of the operation of the Trafipro roadblock, the Prosecution alleged that the Accused incurred responsibility by reason of his position as the hierarchical superior of the persons manning the roadblock. However, I note that in the *Kordic and Cerkez* Judgement, the ICTY Chamber pointed out that the distinction between liability under Article 7(1), on the one hand, and under Article 7(3) on the other hand, (equivalent to Articles 6(1) and 6(3) of the Statute of ICTR), depends on the evidence presented. In the instant case, if the superior was not simply informed that his subordinates had committed crimes, but, in the exercise of his powers, he had otherwise aided or abetted in any manner whatsoever the preparation or execution of those crimes, "(...) the type of criminal responsibility incurred may be better characterised by Article 7(1). Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under

[12] *The Prosecutor v. Aleksovski*, ICTY Judgement of 25 June 1999, para. 80.

Article 7 (1)."[13] It is my opinion, in light of the evidence produced in the instant case, that the type of criminal responsibility incurred by the Accused is better defined under Article 6(1) of the Statute because the ingredients for accomplice liability have, to my mind, been established.

B. Presence of a respected authority at the scene of the crime - form of complicity by encouragement.

17. This form of indirect participation in the crimes alleged in the Indictment raises some questions as to the assessment of the requisite link between the presence of the Accused and the crimes, which assessment, to date, has hardly been considered by the courts, but which, in my opinion, must be applied to the events that occurred at Gatwaro stadium.

18. In Common Law, the laid down principle is that mere presence of a person at the scene of the crime is not sufficient to entail his criminal responsibility. However, in *Regina v. Coney,* the High Court (Divisional Court of the Queen's Bench) [14] found that the presence of a spectator at an unlawful prize-fight constituted a sign of encouragement by the accused persons who were among the crowd of spectators, even though they did not directly participate in the crime, or verbally encourage it. The Court, accordingly, held that, even if presence in itself was not sufficient, it was evidence of aiding and abetting because, without these spectators, there would have been no incitement to fight. In that case, Judge Hawkins [15] made the following statement, which became a leading opinion in Common Law jurisdictions :

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13 *The Prosecutor v. Kordic and Cerkez*, ICTY Judgement of 26 February 200, para. 371.
14 [1882] 8 Queen's Bench Division 534.
15 Per Hawkins, J. at 557.

> "In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expression, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposefully present witnessing the commission of a crime, and offered no opposition to it, although he might reasonably be expected to prevent it and had the power so to do, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not."

19. In guiding the jury, Judge Hawkins underscored the requirements for accomplice liability: a person voluntarily present at the scene of the crime and, with full knowledge of the facts, witnessed the commission of a crime and offered no opposition to it, although he might reasonably be expected to prevent it, because he had the power to do so, or at least the possibility to express his disapproval in the face of the prevailing events.

20. In the *Blaskic* Judgement, the Trial Chamber stated as follows:

> "The *actus reus* of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea.* In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime." [16]

21. In the *Aleksovski* Judgement, the Trial Chamber stated that participation need not be manifested through physical assistance, but could be moral support or encouragement expressed in words, "or even by mere presence at the site of the crime" if such presence had a significant effect on the commission of the crime and that the person present had the required *mens rea.* [17] Moreover, the *mens rea* may be deduced from the circumstances, and "the position of authority constitutes one of the circumstances which

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[16] *The Prosecutor v. Blaskic,* Judgement of 3 March 2000, para. 284.
[17] *The Prosecutor v. Zlatko Alesksovski,* Judgement of 25 June 1999, para. 63 and following.

can be considered when establishing that the person against whom the claim is directed knew that his presence would be interpreted by the perpetrators of the wrongful act as a sign of support or encouragement." [18]

22. In the *Synagogue* case [19] (mentioned in the *Furundzija* Judgement, [20]) the German Supreme Court found one of the accused guilty of a crime against humanity for providing moral support to those who perpetrated the criminal acts. The Court pointed out that although the Accused had not physically taken part in the devastation of the synagogue with the others, nor planned or ordered it, his occasional presence at the crime scene, his status as a long-time respected militant of the Nazi party and his knowledge of the criminal enterprise, were deemed sufficient by the Court to convict him. The Court held, in respect of the *actus reus*, that his entire conduct constituted support and encouragement in the commission of the crimes even if it was not shown that such support covered each of the crimes committed by others. Regarding the occasional presence of the Accused, the Court held that such presence could not be considered as a form of curiosity shown by a person unconcerned about the events taking place. With respect to the *mens rea*, the Court held that the Accused had in fact wished that the acts be committed "as though they were his own" (*als eigene gewollt hat*). Finally, the Court found that the Accused knew of the plan at least two hours before the commission of the crime.

23. In the *Furundzija* case, the Trial Chamber of ICTY took into account the above decision and found that an "approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity." [21] As regards the nature of assistance provided by the accomplice, it held that it is not necessary for the assistance to be tangible or to be directly linked to the crime by a causal relationship. [22] As to the effect of such assistance,

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[18] *Ibid.*, para. 65.

[19] Strafsenat. Urteil vom 10. August 1948 gegen K und A StS 18/48, Oberste Gerichtshof der Britischen Zone (Entscheidungen, Vol. I, pp. 53 and 56) Judgement of the German Supreme Court in the British Occupied Zone.

[20] *The Prosecutor v. Anto Furundzija,* ICTY Judgement of 10 December 1998 paras. 205 and following

[21] *Ibid.*, para. 207.

[22] *Ibid.*, para. 232.

the Chamber tried to summarize the case-law on the subject by stating that "the assistance should have a substantial effect on the commission of the crime", but that it could be in the form of moral support. [23] When the *actus reus* of an omission consists effectively in moral support having a substantial effect on the commission of the crime, the requisite and sufficient *mens rea* is knowledge of the fact that the "acts" assist the commission of the offence, and therefore render the accused an accomplice. [24] In the *Blaskic* Judgement, the Trial Chamber held that the accomplice must have, "as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct." [25]

24. In the *Akayesu* Judgement, the Trial Chamber found the Accused guilty of crimes against humanity for aiding and encouraging others to commit acts of sexual violence by, *inter alia*, allowing that the said acts be committed within the *bureau communal* while he was present, and because he knew or had reason to know that acts of sexual violence were being committed. The Chamber found, on these two points, that the Accused had facilitated the commission of the crimes through words of encouragement in other acts of sexual violence which, by virtue of his authority, "sent a clear signal of official tolerance, without which these acts would not have taken place." [26]

25. I had to review the above case-law, which I consider relevant for the assessment of the criminal responsibility of the Accused, who was present at Gatwaro stadium during the period the refugees were held and massacred there.

C. Standards for the assessment of evidence

26. Issues regarding the assessment of testimonial evidence in the specific context of the cases brought before this Tribunal have been the subject of progressive development since the *Akayesu* Judgement, for the Tribunal is not bound by any approach modeled on national rules of evidence (Rule 89 of the Rules of Procedure and Evidence).

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[23] *Ibid.*, paras. 234 and 235.
[24] *Ibid.*, para 249.
[25] *The Prosecutor v. Blaskic,* Judgement of 3 March 200, para. 286.
[26] *The Prosecutor v. Akayesu,* Judgement 2 September 1998, para. 293 and 294.

27. Regarding testimonial evidence with respect to the events which occurred at Gatwaro stadium, I hold the view that the majority applied strict assessment standards which were not related to the nature or reliability, but to the quantity and accuracy, of the information provided by witnesses whose credibility is not being questioned (cf. The testimonies of Witness A, Witness AC and Witness G in Chapter V.3 of the Judgement). In fact, in assessing these testimonies, the majority applied standards that have to do more with precision required for issues of identification of a person hitherto unknown, rather than for recognition of a person already known to the witness. In this case, given that no evidence was adduced tending to show that the witnesses present at the stadium may have been faced with a problem of mistaken identity, I hold the opinion that the standard of proof applied by the majority is erroneous. It seems to me that said standard is artificial and far-fetched in the sense that, although it is mainly up to the parties to examine the witnesses during the trial in adversarial proceedings, the Chamber is also allowed to put any additional questions to the witnesses at any stage in the course of the trial, in order to clarify or specify the issues raised, as provided for in Article 85(B) of the Rules on the presentation of evidence. [27] In my opinion, the majority did not draw the appropriate conclusions from the oral evidence presented to establish the presence of the Accused at Gatwaro stadium between 13 and 18 April 1994.

28. Regarding the difficulty of most of the witnesses to provide specific information, I would like to recall precisely the requisite standard in taking oral evidence, as expounded in the *Akayesu* Judgement:

> "[...] Similar cultural constraints were evident in their difficulty to be specific as to dates, times, distances and locations [...] The Chamber did not draw any adverse conclusions regarding the credibility of witnesses based only on their reticence and their circuitous responses to questions." [28]

29. As to the assessment of the discrepancies between prior witness statements and their testimonies before the Chamber, once again, I concur with the stand taken in the *Akayesu* Judgement :

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[27] Rule 85 (B) of the Rules of Procedure and Evidence specifically provides that: "It shall be for the party calling a witness to examine him in chief, but a judge may at any stage put any question to the witness"

[28] *The Prosecutor v. Akayesu,* Judgement 2 September 1998, para. 156.

> "The Chamber noted that during the trial, for a number of these witnesses, there appeared to be contradictions or inaccuracies between, on the one hand, the content of their testimonies under solemn declaration to the Chamber, and on the other, their earlier statements to the Prosecutor and the Defense. This alone is not a ground for believing that the witnesses gave false testimony. Indeed, an often levied criticism of testimony is its fallibility. Since testimony is based mainly on memory and sight, two human characteristics which often deceive the individual, this criticism is to be expected [...] Moreover, inaccuracies and contradictions between the said statements and the testimony given before the Court are also the result of the time lapse between the two. Memory over time naturally degenerates, hence it would be wrong and unjust for the Chamber to treat forgetfulness as being synonymous with giving false testimony."[29] (Emphasis added)

30. I therefore totally agree with the following assessment, made in that same Judgement, of the impact of the peculiar circumstances and the widening time difference on the testimonies :

> "The Chamber is unable to exclude the possibility that some or all of these witnesses did actually suffer from post traumatic or extreme stress disorders, and has therefore carefully perused the testimonies of these witnesses, those of the Prosecutor as well as those of the Defence, on the assumption that this might possibly have been the case. Inconsistencies or imprecision in the testimonies, accordingly, have been assessed in the light of this assumption, personal background and the atrocities they have experienced or have been subjected to."[30]

31. Lastly, regarding the *unus testis, nullus testis* principle, the Chamber, in the *Akayesu* Judgement, deliberately refused to apply it, stating that "it can rule on the basis of a single testimony provided such testimony is, in its opinion, relevant and credible". [31] The Appeals Chamber endorsed this stand in the *Aleksovski* case when it affirmed that "Similarly, the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration." [32]

32. In light of the various standards for assessing evidence discussed above, I have drawn conclusions, different from those of the majority, regarding the individual criminal responsibility of the Accused with respect to the two events referred to above.

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29 *Ibid*, para. 140.
30 *Ibid*, paras. 142 and 143.
31 *Ibid*, para. 135.
32 *The Prosecutor v. Zlatko Aleksovski*, ICTY Appeals Chamber Judgement, 24 March 2000, para. 62.

II. Defence Arguments

33. Throughout the trial, the Defence argued that the powers and duties of the Accused, as *Bourgmestre,* were to be viewed *in concreto,* in light of the circumstances that prevailed at the time of the acts with which he is charged. On the one hand, the Defence submitted that the Accused, given his personality and character as a moderate man who had a great love of justice, set up a security shield for the people under threat, by organising pacification meetings, issuing fake identity cards to the Tutsi and by even meeting with the *Abakiga* to dissuade them from pursuing the massacres and looting. On the other hand, the Defence asserted that the *de facto* authority of the Accused over Mabanza *commune* had deteriorated following the breakdown of law and order and had become extremely limited in the wake of the events, and that consequently he could not be held responsible for the atrocities and crimes committed in Mabanza *commune.* Therefore, the Accused could not be considered an accomplice for failing to carry out his administrative and legal duties under Rwandan national law, for, in the opinion of the Defence, the affirmative acts of the Accused for the people of Mabanza do not allow for establishing evidence of any criminal intent that would make him an accomplice who aided and abetted the perpetration of any of the crimes provided for in the Statute.

34. The Defence contends that the Accused was overly powerless to stop or punish criminal acts committed by a swarm of "invaders" (including those who shared their criminal intent), and that the only power he had left was the authority and control he could exercise over the communal police. However, the Defence alleges that the Accused had limited *de jure* control over the communal police, and sufficient *de facto* control at certain moments. The Defence further contends that to have dealt with such murderous intents shows the Accused's genuine courage and unfailing determination to continue defending his people.

35. The Defence underscored the "Accused's good character" to show that he lacked the specific criminal intent to commit genocide. Yet, it is important to note in this regard that the concept of "good character" borrowed from Common Law only applies to proof of the requisite criminal intent regarding the Accused's criminal responsibility as a

principal or co-perpetrator and is not applicable, in the same manner, to the assessment of accomplice criminal responsibility, which has different *mens rea* requirements.

36. It is worth noting that the Defence does not contest that, as a civilian authority of Mabanza *commune*, the Accused had legal duties, as well as the power to ensure respect for the law by all the citizens of his *commune,* and the obligation to punish and prevent crime in his *commune*, to the extent possible. Many of the Prosecution and Defence witnesses alike describe the Accused as a well-known figure, for he had been in office for fourteen years as head of the *commune* and, in the discharge of his duties, enjoyed undoubted respect throughout the *commune*. Moreover, in his official capacity as *Bourgmestre*, the Accused had the obligation to take measures for the protection of the entire population of Mabanza *commune*.

37. I would like to add that the disciplinary measures provided for in case of failure by the communal employees to comply with their obligations are laid down in Chapter VIII of the Presidential Order on the Status of Communal Officials of 25 November 1975, [33] which is pertinent in assessing the relationship between the Accused and Célestin Semanza, Assistant *Bourgmestre*, as presented by the majority opinion in Chapter VII of the Judgement. Article 38 of the Order stipulates that the *"agents qui, d'après des indices graves, sont présumés avoir commis une faute pouvant être sanctionnée par la disponibilité disciplinaire ou la révocation, peuvent, par mesure d'ordre prise par le bourgmestre, être suspendus de leurs fonctions jusqu'à la clôture de l'instruction. Cette mesure entraîne, pour l'agent, l'interdiction d'exercer toute fonction et le place dans une position d'attente pour une période maximum de 3 mois"*[employees who, in light of strong evidence, are alleged to have committed an offence punishable by disciplinary suspension or dismissal may, by order of the *bourgmestre*, be suspended from their duties pending completion of the investigation. Under this measure, the employee shall be barred from performing any duties and shall be kept in such a state for a maximum period of three months]." With respect to the performance evaluation of communal staff, which was the responsibility of the *Bourgmestre*, Chapter VI of the

[33] Defence Exhibit No. 97.

Order also provides that *"tout agent qui a obtenu deux fois consécutives la note synthétique "Médiocre" est démis de ses fonctions* [an employee who receives an overall "Poor" *[Médiocre]* rating two consecutive times shall automatically be dismissed from his duties," (Article 24 of the Order). Yet, the Accused never gave such rating to the *assistant bourgmestre* Semanza, whom he accused before this Chamber of insubordination and even fraud. I am of the opinion that, under the law, the Accused had the necessary means to take disciplinary action against Semanza, but deliberately failed to use them (see Chapter II, Section 6 of the Judgement). I am of the view that the Accused deliberately described his working relationship with Semanza as deplorable in a bid to dissociate himself from the latter's actions and show that he did not enjoy sufficient support in the discharge of his duties.

38. As regards the activities at Trafipro roadblock, the Accused had the duty to take action, by virtue of his powers to maintain law and order in the *commune*, with a view to ensuring control of the activities being carried out there and, as an administrative authority, the duty and power to supervise the civilians who were running a high-risk system, considering the specific circumstances prevailing in Rwanda during that period.

39. With respect to the meeting of 25 April 1994 that followed the massacres in Gitesi commune, particularly in Gatwaro stadium and at the Home St. Jean Complex, I specifically asked the Accused whether he took any steps to seek explanations from his superiors concerning the maintenance, or rather the lack thereof, of law and order in Kibuye. I even asked the Accused whether, in light of the circumstances, he did not consider tendering his resignation, expressing his outrage or even making a report to the *Prefet's* superior on the behaviour of the *gendarmes* who participated in the massacres at the stadium. The Accused answered :

> "Your Honour, I share the opinion. But I thought it was up to the superior, my superiors to take the initiative to follow-up on what happened in the prefecture. That was not the first time that such atrocities had occurred, but not on that scale. On each occasion, there were consents, and there were decisions to investigate and follow-up.[34]

[34] Transcript of the hearing of 5 June 2000, p. 62.

40. Nevertheless, the Accused failed to mention any measures said superiors may have taken in that respect.

41. Regarding security in the *commune*, I would like to note that the Accused frequently made reference to attacks by the *Abakiga* on the *commune* in order to support his claim that he was overwhelmed by hordes of uncontrollable attackers and that he felt personally threatened. However, in the Accused's official correspondence with the prefecture or even in the entries in his personal [35] diary with respect to the dates of the attacks, there is no mention of these "infamous", though ill-defined, *Abakiga*. On the other hand, I note that the *Interahamwe* are mentioned in the diary, although their presence in Mabanza was contested by the Accused, who stated: "I told you that in Mabanza there was no wing of the *Interahamwe*..... *Interahamwe* militia." [36] Such is also the case with the letter to the *Préfet* dated 25 June 1994, in which the Accused mentioned that he felt personally threatened by the assailants from Rutsiro and Kavoye but did not indicate that they were *Abakiga* [37]. Regarding the actual authority and control that the Accused exercised over the *Abakiga*, I deem it worth recalling that although the Accused did not state it, he in fact made it possible to prevent *Abakiga* attacks on a religious institution on several occasions between 16 and 18 April, as was clearly testified to by Defence Witness RA. Witness RA testified that when the assailants arrived on 16 April 1994, a communal policeman intervened and shot in the air, causing the attackers, to disperse. Witness RA testified that in the early hours of 17 April 1994, she and others went to see the Accused at his residence for advice on how best to protect several Tutsi members of the institution who had subsequently decided to leave Mabanza.

42. It should be underscored, with respect to the Accused's awareness of the inherent risks involved in the activities at the roadblocks at the time, that this same Witness RA testified that the Accused advised them against sending their colleagues to Kibuye due to the danger on the road, and provided them with a room in the IGA building, in order to hide them. Witness RA further testified that the Accused and others met with the attackers on 18 April 1994 and pleaded with them to stop the attacks. Witness RA

[35] Prosecution Exhibit No. 85
[36] Transcript of the hearing of 9 June 2000, p. 89.

testified that he did not attend the said meeting but had been informed later that the assailants had agreed to suspend attacks on their institution, and that they never ever returned there. I would like to compare this testimony to that of the Accused to the effect that he was overwhelmed when he had to ensure the protection of the refugees at the *commune* office, and that he felt personally threatened by the same attackers whom he had decided to confront, although they were many more on 18 April 1994. Witness RA further testified that the Accused assigned a reservist and a communal policeman to watch over them at Kabilizi: one to watch over Rubengera College and the other to watch over witness RA's location. [38]

43. In my opinion, this testimony proves that the Accused was in a position to exercise his powers relating to the maintenance of law and order, and specifically to prevent the *Abakiga* from committing their atrocities, but chose, on many occasions, to exercise his authority and control selectively, whereas such were part of his duties and obligations.

III. Factual and legal findings relating to allegations in paragraph 4.14 of the Indictment

A. Trafipro roadblock : Setting up, Staffing and Purpose,

44. As regards the erection and running of the Trafipro roadblock, I am of the opinion that the Accused failed in his duty to act and thus incurred liability as an accomplice for the crimes committed in the context of the operations at this roadblock.

1. Setting up of roadblocks

45. The Accused testified that he had first given oral instructions concerning the erection of roadblocks, which were confirmed in writing on 3 June 1994, within a context he described as one of "resumption of the war", in order to check infiltration by members of the Rwandan Patriotic Front (RPF). In his view, said oral instructions were given at the end of April or beginning of May, after the communal council met pursuant to the

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[37] Prosecution Exhibit No. 84.
[38] Transcript of the hearing of 2 May 2000, pp. 72 and 73.

Prime Minister's instructions of 27 April 1994 [39]. The Accused further testified: "I was implementing what instructions I had been issued by the prime minister through the préfet." [40] In fact, the Accused stated as follows:

> "I spoke with the communal council during - - because we had talked about this during the meeting of the communal council we determined the criteria for recruitment, and furthermore, I relayed the directives to all the conseillers, and it was during that meeting that we invited people who were supposed to man the roadblock and we were telling them what their functions would be."[41]

46. However, the Accused also testified that the instructions had been given after 13 April, "during the second half of the month of April." [42] I note that, the exact date on which the roadblock was erected remained vague throughout the testimony of the Accused, despite the fact that questions were repeatedly asked on this point.

47. Witness Z testified that on the evening of 13 April, he had gone to the *Bourgmestre's* home to receive instructions relating to the erection of the roadblock the next day, in the company of a certain Rushimba. Witness Y, for his part, does not specify the date on which the roadblock was set up. Rather, he testified that the roadblock was set up in the month of April, and that he himself, was not among the first people posted to man the roadblock.

48. Explaining why the Trafipro roadblock was erected at that particular location, the Accused stated : "This was why the roadblock was set up close to the *bureau communal*, so that if need be we could call upon the police at the *bureau communal*. So, it was the official roadblock I had referred to, and this is why it was set up there. It was a strategic location" [43]. Hence, it should be noted that the location of the Trafipro roadblock was chosen by the Accused on the basis of the intervention facilities it offered, particularly, assistance from the communal police posted at the *bureau communal*.

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39 Prosecution Exhibit No. 77 A.
40 Transcript of the hearing of 9 June 2000, p. 42.
41 Transcript of the hearing of 9 June 2000, p. 43.
42 Transcript of the hearing of 9 June 2000, p. 76.
43 Transcript of the hearing of 9 June 2000, pp. 54-55.

2. Instructions

49. The Accused was questioned on several occasions on the nature and scope of the instructions he had allegedly given prior to the "attestation" and "certification" of 3 June 1994, by which he specified measures for the proper manning of the roadblocks and for averting the ill-treatment or even killing of passers-by. I note that the Accused responded to questions put to him by the Chamber by referring to the directives contained in the Prime Minister's circular letter dated 27 April 1994, which was transmitted to the Accused by the *Préfet* on 30 April 1994.[44] In this correspondence, the *Préfet* also referred to the security meeting held in Kibuye on 25 April 1994 which was attended by the Accused. Yet, it is essential to note that the Prime Minister's circular letter contains no specific information as to the functions and conduct expected of those manning the roadblock other than that "officially" recognized roadblocks could be set up to ensure "that the enemies find no passageway to infiltrate", that where it was possible, the communal authorities could, in particular, be assisted by the National Army, and finally, that at the said roadblocks, "the citizens must guard against taking it out on innocent people". [45]

50. In a second letter from the *Préfet* dated 30 April 1994 still to the Accused, the *Préfet* addressed the specific issue of the organization and control of roadblocks by civilians who were to be trained by reservists selected by the *Bourgmestre,* and of the need to organize information meetings for the population after the said recruitment. [46] Yet, the Accused never mentioned the above recommendations concerning the training of people posted to the roadblock, precisely to organize their functions, nor the information meetings to ensure the safety of the population. When questioned on this specific issue, the Accused stated that there were "no reservists in Mabanza who were used to train in the civil defence programme." [47] But then, the erection of the roadblock could not be considered as a purely administrative task, particularly, within the context of the time,

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44 Prosecution Exhibit No. 77 B.
45 Prosecution Exhibit No. 77 A.
46 Prosecution Exhibit No. 77 A.
47 Transcript of the hearing of 9 June 2000, p. 96.

where the official purpose was to check infiltration by the RPF-*Inkotanyi,* identified as the enemy, but sometimes generally considered to be Tutsis.

51. I would like to recall that by virtue of his duties as the official in charge of maintaining law and order and of ensuring security in the *commune*, the Accused had the primary responsibility for the operation of the Trafipro roadblock, before and after it became "official". At the time the Trafipro roadblock was set up, the Accused assumed responsibility for the initiative, as well as for the instructions, which he may or may not have given in the month of April, concerning the co-ordination of efforts. I hold the view that it is irrelevant and certainly insufficient for the Accused to rely on vague instructions transmitted to him by the *Préfet* only at a later date to show the practical measures he allegedly took at that time.

52. I note that the evidence adduced supports a finding that killings occurred at the very location of the roadblocks or in connection with the activities at the three roadblocks erected in Mabanza *commune* (Trafipro, Gitikinini and Gacaca roadblocks). Consequently, even if the Trafipro roadblock was set up for *a priori* legitimate security reasons, its *modus operandi* was, through the willful negligence of the Accused and in full awareness of the foreseeable risks, left at the mercy of individuals, whether or not selected by him, who had jointly participated in criminal acts against the Tutsi.

53. Furthermore, I would like to state that at the time the circular letters of 3 June 1994 were published, by which those manning the roadblock were officially appointed and the supervisory committee set up, massive attacks against the Tutsi population had, in the main, already occurred, and the risk of maltreating fleeing Tutsi civilians seeking refuge had, in fact, reduced, either because most of them had already been killed or because those who had not escaped were in hiding.

54. It should also be noted that as regards the "unofficial" roadblocks in the *commune*, cited by many witnesses (Witnesses AA, AB, B, RA, Z and ZD), the Accused merely produced, as evidence of measures he took against the "recalcitrant" persons who allegedly erected the said roadblocks, a letter dated 12 July 1994, requesting two people

to "dismantle" the roadblock set up "on their own initiative".[48] I would like to emphasize that this letter was written barely two days before the Accused escaped, and that as the official in charge of maintaining law and order, as well as security, he could or ought to have taken different measures that were more positive and immediate, if he had wanted to take prompt action to dismantle an "official" roadblock, instead of writing a letter to individuals who deliberately violated communal security rules and regulations, and who were known to him.

3. Individuals assigned to man the roadblocks

55. With regard to the persons actually manning the Trafipro roadblock and in reference to the letter of 3 June 1994, the Accused testified that the "attestation" concerned the same people as those who manned the roadblock right from the time it was set up. He stated as follows :

> "The TRAFIPRO roadblock was always manned by these people. What we did was, to give them the attestation because those who were passing at the roadblock would ask them who they were; you are asking me for my identification, in what capacity. So it's at that point in time that we had been obliged to give them specific assignments and so that if there is any passer-by asking them who they were, they could show this official attestation. But it was always these people who were at the roadblock, at this roadblock. And referring to what happened in the past, I told you that when we started setting up the roadblocks we were expecting what was happening in other communes, and I was telling them that they should not behave in the same manner." [49]

56. Since this "attestation" dates back to early June, that is nearly two months after the Trafipro roadblock was set up, it cannot, in itself, be used as evidence to show the persons who at one time or another manned or supervised the roadblock from the time it was set up, or to show that it was always the same persons. Moreover, the Accused's claim is contradicted by the testimonies of several witnesses, including Witness Z and Witness Y.

57. The majority found that the presence of Witness Y from April until around 3 June 1994 (para. 914 of the Judgement) was uncontested, and further found that the

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[48] Defence Exhibit No. 18.
[49] Transcript of the hearing of 9 June 2000, pp. 39 and 40.

testimonies of Witnesses O, AA, Z and Y, supported by prior witness statements, suggest (para. 919 of the Judgement) that Witness Z and Rushimba were regularly present at the Trafipro roadblock. The majority concluded that even though it was not possible to establish the exact dates when Z and Rushimba were present at the Trafipro roadblock, the Chamber found that they were at the roadblock with considerable regularity. The majority also took into account the close proximity of the roadblock to the *bureau communal* in assessing the Accused's awareness of the situation (para. 925 of the Judgement). Hence, the majority does not hesitate to conclude that it cannot accept the Accused's contention that the "attestation" of 3 June 1994 gives a complete picture of the persons who were regularly present at the roadblock while it was operational (para. 924 of the Judgement). However, I note that the majority drew no other conclusion other than stating that it could not accept that the Accused was unaware of the fact that other persons, besides the five who were appointed, were present at the Trafipro roadblock on a regular basis (para. 925 of the Judgement).

58. In his testimony, the Accused stated that the people stationed at the roadblock enjoyed the trust of the communal council, because they had been selected by the said council and that the commission appointed on 3 June 1994 verified that the persons posted at the roadblock discharged their duties properly and that no one was ill-treated. [50] The letter further states, for the information of members of the supervisory commission, that no one was to appear at the roadblock without the "certification", which suggests that there was a likelihood of that happening or that it did happen, thus confirming the testimonies of Y and Z, which made no reference to the "attestations". The Accused testified as follows :

[50] Prosecution Exhibit No. 94.

> "You see, I gave them assignments, and in those assignments there was no mention made of how Tutsis should be sought. My instructions were clear. Amongst the people with whom I was working, there were those who would go beyond what they were supposed to do and we wanted to bring them back to order [...] I do not think, that is not surprising if there is one person amongst this team who made mistakes. But, they knew that they could be punished. This is why I set up this verification commission so that they could direct and supervise these people." [51]

59. The Accused testified that the persons appointed were people who conducted themselves properly and had his confidence. [52] As regards the level of training and background of said persons, the Accused answered, "No, these were exemplary farmers". [53] The Accused stated that he listened to the *conseillers*' views and that the level of training required for persons manning the roadblock was "that they had completed at least primary school or post-primary education and so on".[54] The Accused admitted that he had confidence in them, and that he had selected people of good moral standing in the village for the job.[55]

60. Incidentally, he testified that he did not authorise Witness Z and Rushimba to man the roadblock, although it was established that they were regularly present at the Trafipro roadblock. The presence of a number of people unofficially manning this roadblock during that period would suggest that the Accused did not exercise sufficient control over the people manning the roadblock from at least 3 June 1994, despite the fact that the roadblock was close to both his office and his residence. Reacting to Witness Z's testimony that he received instructions to man the roadblock, the Accused testified that Witness Z's name was in the register of arrest warrants and summonses issued by the courts [56] because he was a wanted person on 17 June 1994. [57] I note, however, that the Accused gave no explanation for the arrest of this witness and that this information sheds no light on what Witness Z's status and duties might have been.

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51 Transcript of the hearing of 9 June 2000, p. 49.
52 Transcript of the hearing of 8 June 2000, p. 231.
53 Transcript of the hearing of 7 June 2000, p. 161.
54 Transcript of the hearing of 9 May 2000, p. 30.
55 Transcript of the hearing of 8 June 2000, p. 265 of the French version.
56 Defence Exhibit No. 100.
57 Transcript of the hearing of 7 June 2000, p. 169 of the French version.

61. The "attestation" of 3 June 1994 sent to Witness Y and four other persons contained the following instruction : "During the checks your are required to conduct, you are kindly requested not to ill-treat passers-by, as some have already done" [58] (emphasis added). The Accused stated in that regard that, "This was why there was a five-man commission set up, responsible to verify whether or not passers-by had been maltreated and whether the enemy has infiltrated through this passageway." [59]

62. It is my opinion that, in the specific context of April 1994, the Accused should have ensured that all the necessary measures were taken, like the ones he formally took in June 1994, for the proper and effective operation of the Trafipro roadblock even before it was made "official". Specifically, the Accused had the obligation to ensure that measures were taken to limit, as far as possible, any maltreatment of the civilian population. It appears, moreover, that a number of "unofficial" roadblocks, besides the one at Trafipro, were allowed to operate during the month of April. Considering that the Accused had authority over the persons assigned to man the roadblock, even though they were selected in consultation with the communal council, he incurred full responsibility for the setting up and operation of the said roadblock by virtue of his duties as the official responsible for maintaining law, order and security.

63. When I reminded the Accused that Witness Y had spoken in detail about the key role played by Rushimba in the killing of Judith and that Rushimba was apparently the leader of those manning the Trafipro roadblock, he answered: "The names that I have are the five whom I asked to appoint their leader themselves. I don't see the name of Rushimba because you recall that during this period there were people who were at the roadblock like the Witness "Z" whom we referred to and who was on this list." [60] *[NB. French transcript states that witness Z was not on the list: "...**n'est pas** sur cette liste..."]* When asked whether Rushimba had been authorised to act as a leader, the Accused answered, "If it was Cyakubwirwa, that maybe is the one who was known as Rushimba, maybe. Otherwise, I wouldn't know very well. [...] Fidele Cyakubwirwa, Fidèle Cyakubwirwa, but here we have Fidèle Kubwimana. I don't know whether we are

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58 Defence Exhibit No. 62.
59 Transcript of the hearing of 9 June 2000, p. 37.

dealing with the same person."[61] In conclusion, whether or not Rushimba was the nickname of one Kubwimana or one Kyakubwira, the testimonies are consistent with the fact that Rushimba held, at least *de facto*, a position of authority or leadership over the persons who manned the Trafipro roadblock from the time it was set up in April 1994. Hence, considering the proximity of the roadblock to the communal office and the fact that the *Bourgmestre* was responsible for its erection, the Accused could not have been unaware of the presence and role of Rushimba and Witness Z, and failed to provide adequate supervision over a system that inherently presented obvious risks.

64. Accordingly, I hold the opinion that by allowing these individuals to man and run the roadblock for the entire period that it was operational, the Accused incurred liability as an accomplice in the arrest and murder of the only two Tutsis who came to the roadblock, or were taken there while it was operational.

B. Purpose of the Trafipro roadblock

65. The majority has noted that neither the *Prefet's* letter of 30 April 1994, nor even the "attestation" or "certification" of 3 June 1994 support a finding that the roadblock was established for criminal purposes, but that precisely, the "certification" warned against the ill-treatment of passers-by (para. 935 of the Judgement). Yet, it had already been established earlier that this letter that was sent at the end of April only came "to make official" a roadblock which had already been erected earlier on the verbal instructions of the Accused, which instructions the Accused was unable to explain in detail, despite the questions put to him by the Chamber to that effect. Moreover, the letters of June 1994 cannot serve as documentary evidence of due diligence on the part of the Accused for the period prior thereto, because they cover only part of the period during which the roadblock was operational. Furthermore, as the majority noted, the actual conduct of operations at the roadblock during this period is the revealing factor of its objective, which is not necessarily reflected by the documentary evidence (para. 938 of the Judgement).

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[60] Transcript of the hearing of 9 June 2000, p. 36.
[61] Transcript of the hearing of 9 June 2000, pp. 44 and 45.

66. Questioned on the meaning of the word "enemy", appearing in paragraph two of the English version of the "attestation" dated 3 June 1994, [62] the Accused answered : "Enemy is mwanzi, mwanzi [...] Mwanzi is what we used to define the enemy and it means member of the RPF." [63] With respect to the ethnic group of those who could pass through the Trafipro roadblock, without encumbrance, the Accused testified that they were passers-by who were in vehicles. [...] any ethnic group." The Accused further testified : "Why not say that there were Tutsis that passed by this roadblock? I can give you an example, the example of convoys that I was aware of by Deputy Musafiri. His wife was Tutsi. There was also another Tutsi woman. [...] They were in a vehicle which was filled with Tutsis and they passed by this roadblock. They arrived in Kibuye. I remember meeting them there. And later on, they went to Zaire, via Lake Kivu." [64] However, I note that this fact is not corroborated by witnesses Y and Z who were regularly present at the Trafipro roadblock.

67. Witness Z testified that during his recruitment, he went to the home of the *Bourgmestre*, which was guarded by a policeman, to ask about the details of the assignment. The Accused specifically asked him to meet one Rushimba to set up the roadblock very early the next morning, "because the enemies are escaping." [65] Witness Z explained that the *Bourgmestre* used the word *Inyenzi* which, at that time, according to the Witness, meant a Tutsi, or a member or a sympathizer of the RPF. The instructions given by the *Bourgmestre* were that he should check the identification papers of anyone passing through the roadblock, as well as vehicles, in the objective of seeking out the enemy. When passing, the *Bourgmestre* would greet them and would ask about the work and he would urge them on. [66] The Witness testified that about one thousand people passed by everyday, but as regards the ethnic origin of these people, he stated that "at that time, they were Hutus because Tutsis could not pass by the roadblock, they were in hiding." [67] Apart from Judith and Bigirimana, he did not see any other Tutsis. [68] He

62 Prosecution Exhibit No. 94.
63 Transcript of the hearing of 9 June 2000, pp. 44-46
64 Transcript of the hearing of 9 June 2000, p. 33
65 Transcript of the hearing of 8 February 2000, p. 39.
66 Transcript of the hearing of 8 February 2000, p. 52.
67 Transcript of the hearing of 8 February 2000, pp. 55 to 56.
68 Transcript of the hearing of 8 February 2000, pp. 75 to 76.

testified that policemen would pass by because the *bureau communal* was not far from the roadblock and that the *gendarmes* would also come there; in fact, at one point in time, the *gendarmes* came into the region and occupied the building belonging to the Chinese and "they would always come by the roadblock".[69]

68. Witness Y testified to having committed an act of genocide in 1994 by killing three people, two of whom he knew were Tutsis. He explained that it was Rushimba Fidèle and Saidi Rucanos who asked him to go and "man" the roadblock, "because they are the ones who had been there earlier and they asked me to join them there at the roadblock". [70] As regards the instructions, he testified that, "my friends who had come before me in this job told me that we needed to check all the identity cards which had a photograph inside." [71] This statement means that Witness Y was not among the first group of persons posted to man the roadblock. He also stated that his duty was to check all the identity cards which had a photograph inside and also the documents of vehicles. The instruction was to "check whether the identity card contained the photograph and, if there were no photographs, to send the individual to the *bureau communal.*" [72] According to this witness, the purpose of the roadblock was "to fight against the enemy". [73] He testified that he saw the *Bourgmestre* every morning and evening when he was returning home [74] because it was the main road. Asked about the presence of Tutsis at the roadblock, the Witness explained that "The Tutsis, at that time, didn't want to be seen because they were the ones who were being sought". [75] Witness Y testified that he did not see any policemen at the Trafipro roadblock, [76] but that there were *gendarmes* who would come there from the Chinese camp and sometimes they would come in shifts, [77] which is consistent with the testimony of Witness Z.

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69 Transcript of the hearing of 8 February 2000, p. 74.
70 Transcript of the hearing of 7 February 2000, p. 28.
71 Transcript of the hearing of 7 February 2000, p. 34.
72 Transcript of the haring of 7 February 2000, p. 35.
73 Transcript of the hearing of 7 February 2000, p. 32.
74 Transcript of the hearing of 7 February 2000, p. 33.
75 Transcript of the hearing of 7 February 2000, p. 36.
76 Transcript of the hearing of 7 February 2000, p. 55.
77 Transcript of the hearing of 7 February 2000, p. 55.

69. I note, furthermore, that Witness AB testified that the reason for mounting the roadblocks was to identify the Tutsis and "when Tutsis were found, they were killed or if you had a face that looked like a Tutsi's face, you were killed". [78] Asked about the killings which took place in Mabanza *commune* in April 1994, Witness Y stated that "what was happening in the commune was seen by everybody. Everybody knew that there were killings and I don't see how the *Bourgmestre* would be unaware of them when he was there present". [79] Witness RA testified that on 17 April, when he asked the *Bourgmestre* to assist some threatened Tutsis, the Accused advised him not to go to Kibuye because there were roadblocks on the road and that they would be killed if they went.[80] Moreover, Witness B testified that he personally saw two people killed at two different roadblocks, including Pastor Muganga at the Trafipro roadblock. Witness RJ testified that at the roadblocks, the Hutus could go through whereas the Tutsi were stopped. Witness AA testified to having seen about thirty bodies near the Trafipro roadblock and the *bureau communal*, before the bodies were buried in mass graves. Witness A testified that he saw people being killed at the roadblock near Bagilishema's residence where he had seen policemen and the *Interahamwe* controlling this roadblock. [81]

70. It appears from the foregoing that the instructions which were given by the Accused when the Trafipro roadblock was being set up were obviously inadequate and came in too late to avert the risks of criminal conduct on the part of armed civilians, who at that time were manning the roadblock, against the Tutsis, sometimes considered as the RPF-*Inkotanyi* enemy, within the context of the war at the time. I am satisfied that such failure to exercise control gave rise to misconduct on the part of those manning the roadblock in question, since the Accused had the responsibility and the means to control the operations at the Trafipro roadblock right from the time it was set up and throughout the period it was operational.

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78 Transcript of the hearing of 15 November 1999, pp. 109 and 110.
79 Transcript of the hearing of 7 February 2000, p. 60.
80 Transcript of the hearing of 2 May 2000 (Closed session) , p. 49.
81 Transcript of the hearing of 17 November 1999, p. 56.

C. The Accused's Complicity in the murders of Judith and Bigirimana

1. The murder of Judith

71. The Accused testified that he heard about Judith's death for the first time before this Chamber and expressed surprise, as follows:

> "I thought she died in Kibuye. It's here that I heard she was killed in Mabanza [...] during that period there were a lot of deaths regrettably so, but regarding Judith I thought she left with the others to Kibuye. It was later that I heard she was killed in Mabanza by the attackers. It so happened that the deliquesce [sic] of Mabanza and the Abakigas who arrived, it's possible that she died around that time but I was not informed."[82]

72. When asked whether Judith was well known in Mabanza on account of the charitable work she performed and whether her death therefore made news, the Accused answered as follows regarding Judith's personality:

> "I told you that Judith was a farmer and that her husband was a nurse. He wasn't even an assistant medical, what we call a -- is someone who had finished a primary education and then through experience and practice acquires experience to be able to treat people. So the husband was not very well known. Maybe he was well known in his cellule where they lived and maybe the sector but not throughout the commune not in the whole commune and the medication that people have referred to. Maybe this was medication fraudulently acquired by the husband from the centre at which he worked. And maybe she was helping her neighbours with this medicine. It wasn't something which was recognised and official." [83]

73. In my opinion, by this assertion, the Accused, who claimed that he did not know Judith in person, tried to justify his not being aware of her death by using disparaging terms and denigrating her role as a benefactor, as testified to by one of her killers himself, while at the same time alleging that she engaged in quasi fraudulent activities.

74. Witness Y testified that Judith had been taken from Gitikinini to the Trafipro roadblock by Rushimba and that she was not asked for her identification papers because even her neighbour knew her quite well and was aware that she was Tutsi.[84] Describing

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82 Transcript of the hearing of 7 June 2000, p. 160.
83 Transcript of the hearing of 9 June 2000, pp. 160 and 161.
84 Transcript of the hearing of 7 February 2000, p. 63 (French).

where they had passed with Judith, the witness explained that they had passed three paces away from the *bureau communal*. He added : "I didn't observe who was in the Secretary's office but I did indeed see the *Bourgemestre* in his office." [85]. In his prior written statement, Witness Y stated:

> "When I mentioned in my admission that Bagilishema was a witness, I was responding to a question as to whether anyone had seen us leading her to her death and stating that Bagilishema saw us go by. [...] The fact that the murder happened so close to Bagilishema's office leads me to believe that he definitely knew about it. I can state that no inquiry was conducted in the case, at least neither of us, who committed the murder, was brought to book."[86]

75. That Witness Y testified that those who were manning the roadblock did not even take the trouble to ask Judith for her papers because they knew she was Tutsi suggests conclusively that the decision to kill her was based on ethnic grounds, without the duty to check papers in order to identify "the enemy" being even complied with. This tempers the testimony by the same witness to the effect that, in principle, anyone whose papers were in order, regardless of their ethnicity, could pass without incident. I note that the conduct of the people manning the roadblock at the time, including Witness Y, shows on the contrary, discrimination on ethnic grounds against passers-by identified as Tutsis.

76. To the question as to whether the Accused saw them pass by with Judith, Witness Y answered, "Indeed, he saw us, he saw us."[87] Under cross-examination, Witness Y asserted they had seen the Accused :

> "The office had glass windows, I cannot therefore not state whether he saw us or not but we could see him. [...] Since we passed in front of him without speaking to him I cannot tell you that he knew what we were going to do."[88]

77. Discussing the three crimes he committed in 1994 and the fact that the Accused had been informed of such crimes, Witness Y testified, "I believe he must have known this because we did this while he was still there."[89] Witness Y stated lastly, "We were

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85 Transcript of the hearing of 7 February 2000, p. 52.
86 Defence Exhibit No. 64.
87 Transcript of the (in camera) hearing of 7 February 2000, p. 53 (French).
88 Transcript of the hearing of 7 February 2000, p. 54.
89 Transcript of the hearing of 7 February 2000, p. 26.

there, we were all there. These things happened within this *commune*. He was present in the *commune* and my reasoning or my understanding is that he was aware."[90]

78. Witness Z testified that one Mutiganda came to see him one morning and said to him that he had found an *Inyenzi* in a banana plantation. Witness Z immediately led Judith to the roadblock and, along the way, he met Rushimba who took Judith by the hand. [91] They passed by the communal office, with Rushimba and Witness Y holding Judith and Witness Z behind them, 5 or 10 metres behind them. [92] As they passed by the communal office, after the other three people had gone by, the *Bourgmestre* came out and allegedly asked him "where he had found her", to which Witness Z answered that he had found her "somewhere there in a banana plantation" and had told her that they were going to "work on her", to which the Accused allegedly answered: "...that's fine, go ahead."[93] Witness Z testified that when he reached Judith's home, Rushimba and Witness Y had already killed Judith. He further testified that he thought that the Accused came out of his office because "...he saw them pass by because they -- it is just -- we passed by just the window of the *Bourgmestre* and the curtains were drawn open. So I think he came out to find out what was happening and that was when we met".[94]

79. The majority found that the only evidence concerning the Accused's possible involvement in the murder of Judith was given by Witness Z, who testified to having discussed it with him in front of the communal office immediately after Judith and the people who were escorting her had passed by[95] (para. 959 of the Judgement). The majority found further that if the allegation that the Accused had seen the two roadblock attendants pass in front of his office with Judith had been proved, even if Judith was not being held, that should have alerted the Accused to imminent danger, given the specific circumstances of the time (para. 962 of the Judgement). However, relying on the "contradictions" between Witness Z's written statements and his testimony, coupled with its assessment of the witness's allegations of the arrest and murder of Bigirimana, the

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90 Transcript of the hearing of 7 February 2000, p. 62.
91 Transcript of the hearing of 8 February 2000, pp. 62 and 63.
92 Transcript of the hearing of 8 February 2000, p. 67.
93 Transcript of the hearing of 8 February 2000, p. 67.
94 Transcript of the hearing of 8 February 2000, p. 67.
95 Transcript of the hearing of 8 February 2000, p. 75 (French).

majority found that those statements reinforce the Chamber's doubts as to the credibility of the witness. The majority held, based on the findings made in light of its assessment of the circumstances surrounding the killing of Bigirimana, as described by Witness Z, that apart from the statements of the said witness regarding his involvement in the murder of Judith, it cannot rely on other aspects of the witness's testimony (para. 960 of the Judgement).

80. The apparent contradiction noted by the majority in the account of the meeting between Witness Z and the *Bourgmestre* prior to the murder of Judith is minor in my estimation, and relates at most to the sequence of the words exchanged between the Accused and Witness Z in front of the communal office, but does not raise doubts as to whether a meeting might have taken place. The majority stated that no other witness could corroborate such a meeting although, as it found, the accounts of the events by Witnesses Y and Z are not inconsistent *per se*, but that the majority ruled out the possibility that such a meeting ever happened based on the evidence of a witness that it had already found unreliable in light of his testimony on the murder of Bigirimana (para. 961 of the Judgement). Now, unlike the majority, I am satisfied that Witness Z's testimony regarding his meeting with the *Bourgmestre* is consistent with the evidence of Witness Y who explained that he saw that the *Bourgmestre* was in his office when they passed by with Judith right in front of the *bureau communal* prior to killing her.

81. It is also my opinion, that the mere fact that Witnesses Y and Z knowingly passed in front of the communal office and did not bother to use an alternate route whereas they had the intent to kill Judith conclusively shows that there prevailed at the time a culture of impunity where the activities at the Trafipro roadblock were concerned. Witnesses Y and Z likely did not have the sense that they were acting in violation of any rule or directives from the communal authorities, otherwise they would certainly have chosen to hide, and not taken the obvious and patent risk of meeting the *Bourgmestre*. Plainly, they did not expect to be questioned, reprimanded or even punished for the criminal conduct they were about to engage in, whereas clearly the Accused knew that such individuals manned the Trafipro roadblock as he had met them there on a regular basis.

82. Moreover, Judith, a resident of Mabanza, knowing that she certainly faced death at the hands of the persons who were leading her to her home, elected not to ask the *Bourgmestre* to intervene although the latter was in his office when they passed by. The Accused himself admitted that, given Witness Y's murderous intent, it would have been inconceivable for him to dare pass in front of the communal office with Witness Z, whom he knew to be a delinquent [96]. He further testified that, if that had happened, Judith would certainly have sought his assistance and that it seemed to him odd for someone going past the *bureau communal* under the escort of killers not to ask him or the security forces who were present at the *bureau communal* for assistance [97].

83. I find, unlike the Majority, that there is sufficient reliable and credible evidence that the Accused knew about Judith and the people flanking her passing by, that he may have spoken to Witness Z about it and that he failed to act to prevent the crime and punish its perpetrators at that particular time (para. 965 of the Judgement).

84. Lastly, the fact that the murder was likely committed in April [98], or in any event prior to the June written instructions on which neither of the two witnesses at the roadblock testified, coupled with the fact that such persons, of whom at least one was formally appointed by the Accused, failed to comply with "directives" relating to the operation of the roadblock, leads me to further question whether there ever was such a thing as "directives" regarding the safety of civilians crossing the roadblock. In my opinion, this is a confirmation of the Accused's wilful negligence in erecting the Trafipro roadblock, negligence which became criminal as he continued to operate the roadblock prior to the directives of early June 1994.

2. The murder of Bigirimana

85. Regarding Bigirimana, Witness Y testified that "he was in a vehicle, we made him come down because he did not have any identity papers."[99] One Semugeshi had said

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96 Transcript of the hearing of 9 June 2000, p. 156.
97 Transcript of the hearing of 9 June 2000, p. 156.
98 Witness Z talks of "end of April" in his admission to the Rwandan authorities of 22 June 1998, Defence Exhibit No. 112.
99 Transcript of the hearing of 7 February 2000, p. 38.

he knew him and that he was an enemy of the country and speaking to Witness Z "he asked him to go and kill him."[100] Witness Y further testified "he asked us to go and deal with him and that he was going to buy us tea, obviously, speaking figuratively." [101] They then left, armed with machetes and a club, to kill him in a small forest about 150 metres from the *bureau communal.* Witness Z landed the first blow and Witness Y struck with the club.[102] It should be noted that Witness Y testified that he did not see the Accused[103] at the time of Bigirimana's arrest, but not that the Accused was not at the roadblock as held by the majority (para. 944 of the Judgement). Moreover, during the examination of Witness Y, no questions were put to him as to whether Bigirimana's wife had been present and what role she might have played during the arrest of her husband.

86. Witness Z testified that Bigirimana was stopped in his vehicle "as they usually did", that they searched "his clothing" for weapons and that he himself allegedly "discovered that he had two identity cards: one indicating that he was a Hutu and the other that he was a Tutsi";[104] which he characterized as a serious offence.[105] One Semugeshi arrived claiming to know Bigirimana very well as a Tutsi who worked with the *Inyenzi.*[106] Witness Z testified that there were a lot of people at the roadblock.[107] As to whether Witness Y had engaged in control operations alongside him, Witness Z testified that he was at the roadblock and that they allegedly "encircled the gentleman's vehicle, the vehicle aboard which François Birgirimana was."[108] Bigirimana's wife, a Hutu woman, allegedly went to plead with the *Bourgmestre,* who was walking towards the roadblock to intervene but the *Bourgmestre* allegedly told her it was none of his business and that she should go and talk to the people manning the roadblock. The Accused then allegedly went past, pretending not to see them,[109] as he headed towards his

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100 Transcript of the hearing of 7 February 2000, p. 38.
101 Transcript of the hearing of 7 February 2000, p. 37.
102 Transcript of the hearing of 7 February 2000, p. 38.
103 Transcript of the hearing of the hearing of 7 February 2000, p. 48 - 49.
104 Transcript of the hearing of 8 February 2000, p. 57.
105 Transcript of the hearing of 8 February 2000, p. 57.
106 Transcript of the hearing of 8 February 2000, p. 56.
107 Transcript of the hearing of 8 February 2000, p. 58.
108 Transcript of the hearing of 9 February 2000, p. 77.
109 Transcript of the hearing of 8 February 2000, p. 79.

residence.[110] Under cross-examination, Witness Z testified that Bigirimana's wife and the *Bourgmestre* met on the road to the *bureau communal* and not at the Trafipro roadblock and that he approached the *Bourgmestre* to show him Bigirimana's identity cards and give him some explanations.[111] They allegedly detained Bigirimana until the evening when Witness Y, Rushimba and himself, allegedly took Bigirimana to a bush and killed him with machetes because he was an accomplice, a Tutsi, and also because Semugeshi had given him some money.[112]

87. The majority noted inconsistencies in the testimonies of Witness Y and Witness Z who confessed to killing Bigirimana following his arrest at Trafipro roadblock and drew some conclusions therefrom as to the credibility of Witness Z (para. 961 of the Judgement).

88. After reviewing the details of this event as recounted by two people manning the roadblock, who both confessed to committing genocide on François Bigirimana, I am unpersuaded that both accounts are irreconcilable and give rise to doubts as to the credibility of Witness Z. Indeed, Witness Y testified that Bigirimana had to climb out of his vehicle because he had no identity papers while Witness Z testified that he personally found the two identity cards. Witness Z physically had them since he explained that he went to show them to the *Bourgmestre* while the latter was discussing with Bigirimana's wife. Therefore, it is not unlikely, given the fact that there were many of them at the roadblock, that Witness Y thought that Bigirimana did not have any identity papers, since they were in the possession of Witness Z. On the other hand, the meeting between Bigirimana's wife and the Accused may not have happened at the specific time of arrest nor at the exact location of the Trafipro roadblock but a few yards from there, on the road between the *bureau communal* and the roadblock and it is not unlikely that Witness Z was the only person who witnessed the meeting since he had in his possession Bigirmana's identity cards and had approached the *Bourgmestre* of his own accord to show them to him. I wish to add that, Witness Y did not testify that the Accused was not

[110] Transcript of the hearing of 8 February 2000, p. 70.
[111] Transcript of the hearing of 9 February 2000, p. 79.
[112] Transcript of the hearing of 8 February 2000, p. 59.

at the roadblock at the time of Bigirimana's arrest; he only testified that he had not seen him there.[113]

D. Findings

89. After carefully reviewing the testimonial evidence, I must respectfully disagree with the majority finding that the Accused incurs no criminal responsibility for erecting and controlling activities at the Trafipro roadblock, where Tutsis were arrested or taken to and then killed, in pursuance of a policy of discrimination on ethnic grounds that the Accused allowed to prevail through willful failure to act, whatever the motives of the perpetrators of the crimes might otherwise have been.

90. The majority holds that only the killings of Judith and Bigirimana can be ascribed with certainty to activities at a roadblock in Mabanza (para. 1014 of the Judgement). Consequently, the majority goes on to find that there cannot be the slightest causal link between the fate suffered by civilian victims under such a system and the reckless operation of the roadblock by the Accused (para. 1021 of the Judgement). I wish to observe on this point that the number of victims at the roadblock is irrelevant to the issue of assessing the gravity of the Accused's negligence in erecting and operating such a roadblock, because Witnesses Z and Y, who were themselves regularly present at the roadblock, testified that Tutsis did not use to pass through the roadblock at that time (Witness Z explained that Tutsis who had passed through the Trafipro roadblock and had been arrested were Judith and Birigmana).[114] Such a limited number of Tutsis who passed through the roadblock appears to me to be more indicative of the fact that there was not a large number of Tutsi civilian victims at the Trafipro roadblock, rather than suggesting that the Accused operated the said roadblock in a reasonable fashion.

91. Lastly, the majority addressed the conditions that may be relied on to show criminal negligence on the part of the Accused by holding that four elements must necessarily be proved cumulatively (para. 1011 of the Judgement) : (1) the murders of Judith and Bigirimana were committed in the context of activities at the Trafipro

[113] Transcriptof the hearing of 7 February 2000, p. 49.
[114] Transcript of the hearing of 8 February 2000, p. 75.

roadblock; (2) the Accused was responsible for the operation of the roadblock in his capacity as the authority in charge of maintaining law and order in the *commune* (the majority also finds that the first two elements were proved); (3) the measures that the Accused took to prevent any potential crimes at the roadblock were woefully inadequate in the circumstances at the time, such measures having been taken over a month after the re-establishment of the Trafipro roadblock; (4) the crimes in question could have been prevented or punished had the Accused exercised due diligence in his duty to control the persons manning the roadblock, by ensuring, *inter alia*, that they were trained by reservists, as suggested in the *Préfet's* letter and by initiating investigations into the incidents mentioned in the Attestation of 3 June 1994.

92. The majority finds, in spite of there not being proffered any such documentary evidence prior to 3 June 1994 and in spite of the vague responses given by the Accused when questioned as to the nature of directives given during the erection of the roadblock, that it cannot be found that the Accused had shown negligence in operating the roadblock because the Accused somewhat exercised *de facto* control over the roadblock (para. 1018 of the Judgement). Now, such a suggestion of a *de facto* role by the Accused in the daily supervision of activities at the Trafipro roadblock is not supported by the testimony of the Accused himself who never suggested that he exercised any such regular control over the said roadblock. Indeed, had the Accused so admitted, such an admission would have given rise to other forms of liability arising from negligence, while suggesting that he willfully ignored what was going on at the roadblock.

93. The majority finds that in the absence of dates on which Judith and Bigirmana were killed, it cannot rule out that the killings were committed at a time when the Accused was not fully in control of the administration of his *commune*, particularly during the attacks by the *Abakiga*. However, it appears reasonable to me to find on the basis of the testimonies of both Witnesses Z and Y that the Accused was in his office while the witnesses were taking Judith away, and at the time when Judith and Bigirimana were killed. Moreover, neither witness testified that the *commune* was attacked by the *Abakiga* during those days (para. 1019 of the Judgement).

94. The majority finds further that it is doubtful that Judith and Bigirimana would have been spared if the Accused had not been negligent, suggesting thereby that the Accused's failure to comply with his duty to act was inconsequential (para. 1020 of the Judgement). I wish to note that this finding is at variance with the majority's holding that the Accused regularly passed by the roadblock, and that should have allowed him to exercise reasonable control over the activities there, including over the people manning the roadblock. However, the majority appears to justify this finding by alleging that one cannot rule out the possibility that the Accused did not have sufficient means of control during those days.

95. Consequently, I am satisfied beyond any reasonable doubt that the evidence outlined and discussed *supra* shows willful negligence on the part of the Accused.

96. With respect to the Accused's criminal intent, it is my opinion that the evidence adduced at trial which shows the negligence evinced by the Accused in deliberately turning a blind eye to the inherent risks in erecting and operating the Trafipro roadblock, is akin to a consistent pattern of conduct.[115] I am persuaded that, over and beyond his duty, the Accused, in his capacity as *Bourgmestre,* had the resources to control on a daily basis the activities and organization of the persons manning the only "official" roadblock in the *commune,* erected close to the *bureau communal,* a location the Accused had to pass as he went to and from home to the office. Furthermore, the Accused was aware that the situation posed a danger for Tutsis, as he admitted to being so aware during his interview with Witness RA, especially where the Mabanza-Kibuye road was concerned. It was proved at trial, and this is not disputed by the parties, that Mabanza *commune* was subjected to certain attacks and that the Accused knew that the Tutsis in Mabanza were the primary targets of such attacks. Consequently, the erection of a roadblock, manned by armed Hutu civilians, who were sometimes generally likened to the *Interahamwe,* to prevent infiltration by members of RPF, obviously posed a special risk for Tutsi civilians.

[115] Pursuant to Rule 93 of the Rules of Procedure and Evidence, evidence of a consistent pattern of conduct is admissible in proving the guilt of an accused.

97. I note that the powers to check identification, to search, to confiscate, to an extent, to arrest and detain which were exercised by individuals who, as testified by the Accused, had no special training apart from primary education, are by virtue of delegation of powers, among the basic powers of the *Bourgmestre* relating to his responsibility for maintaining law and order in the *commune*. Notwithstanding the scope of such delegation of powers, the Accused never referred in his testimony to any measures he might have taken to enforce the *Préfet's* directive to the effect, *inter alia*, that the persons manning roadblocks should be trained by reservists.

98. Furthermore, to the extent that the Accused alleges, in his defence, that he knowingly and unlawfully issued a number of false identity cards to Tutsis who came either to the *bureau communal* or to his home, it is my opinion that he could not have been unaware of the consequences of carrying an identity card indicating a Tutsi ethnicity, and more specifically when crossing a roadblock at that particular time.

99. Consequently, there is no denying that the risks posed by such a system were real and could be perceived by an Accused-*Bourgmestre* who had been in office for 14 years, from the moment such a screening system was put in place, and it became known that the persons manning the roadblocks enjoyed considerable power at the time major massacres were being perpetrated in Mabanza *commune* and in Kibuye *préfecture*. Those circumstances alone warranted that the Accused became doubly vigilant and ensured an adequate level of supervision over activities at the roadblock throughout that period. Consequently, even the supervisory and control actions taken by the Accused in June appear inadequate to me, especially as they relate to incidents which allegedly occurred from the time the roadblock had been erected but which were never followed up on. Therefore, it is not impossible that the killings testified to by Witnesses Z and Y would be part of such "incidents". Yet, no proceedings were instituted by the Accused to identify, to punish or to prosecute the perpetrators of those crimes.

100. There is no evidence prior to June 1994, not even in the Accused's testimony, that he in any way tried to prevent persons not assigned to the roadblock from actually manning it, or that he punished those who inflicted ill-treatment on passersby. It is my

view that such information concerning ill-treatment of passersby, coupled with the fact that the Accused knew that "unofficial" roadblocks had been erected in the *commune* and admitted to having been aware of what was happening at other roadblocks in other *communes* or even on the Kibuye road, constitute a body of indicia sufficient to show that the Accused had reason to know the nature of the risks posed by the Trafipro roadblock. In the instant case, I am satisfied that considering the information available to the Accused, he must have been aware of the probability of criminal conduct by the individuals manning the roadblock and that his was so serious a conduct as to amount to criminal negligence as defined in the *Blaskic* Judgement.

101. In light of the foregoing, it is my opinion that the Accused willfully neglected his duty to exercise appropriate control over the *modus operandi* at the only roadblock under his responsibility, and thereby aided substantially the principals of the crimes. The Accused did not fulfil his duties of supervision and maintenance of law and order in Mabanza *commune*. Therefore, I find that through willful negligence, the Accused incurred liability for complicity in crimes against humanity – murder – committed by individuals assigned regularly, or even permanently, to the Trafipro roadblock.

IV. The Accused's complicity in the detention and maltreatment of refugees at Gatwaro stadium (paras. 4.23, 4.24 and 4.31 of the Indictment)

102. I respectfully distance myself from the position of the majority who, in finding evidence of his presence at the stadium insufficient, failed to hold the Accused criminally liable for complicity in the unlawful confinement of the Mabanza refugees at the Gatwaro stadium, in Kibuye, from 13 to 18 April 1994.

103. After carefully weighing the testimonial evidence adduced, I am of the view that the Accused's testimony is not credible since he testified before the Chamber that he never went to Gatwaro stadium, nor even to Kibuye town between 9 and 25 April 1994, despite credible and corroborated testimonial evidence placing him at Gatwaro stadium on 13, 14 and 18 April 1994.

104. For the purposes of my reasoning, I refer to the facts as set out in Chapter V, Section 3.2 of the majority judgement without undertaking an exhaustive review of all the testimonial evidence.

A. Monitoring by the Accused of the situation with respect to the Mabanza refugees in Gitesi

105. With regard to the circumstances surrounding the departure of the refugees, the Accused testified as follows:

> "Given the circumstances in which I received the message, there was no way of checking. It is when I received this message, and that I was sensing what was going to happen, especially given what was being said elsewhere, rumours, I didn't check on what was happening in Kibuye, whether they would be able to receive these people. I was simply thinking that they should flee and run away."[116]

106. The Accused testified that after the refugees left for Kibuye, he had thought that their safety would be ensured by *Préfecture* and *commune* authorities in Kibuye.[117] In response to questions from the Chamber on the nature and content of actions he allegedly took to check on the plight of the refugees at the stadium, the Accused explained that he did not go to Kibuye because he had to face attacks occurring in the Mabanza *commune* on that day. He further testified that the *gendarmerie* Commander, Jabo, had told him in the afternoon of 13 April 1994 that the refugees had arrived safely in Kibuye. Now, it is worth noting that, as the Accused testified to himself, his meeting with Commander Jabo was a chance encounter and that the Accused had failed to take action, on his own initiative, to ensure that the refugees would arrive in Kibuye safe and sound, even if no crime under Statute of the Tribunal's had been committed during the transfer. Questioned on the monitoring of the Mabanza refugees' safety in Kibuye, the Accused added that he went to Kibuye only when he was invited.[118] Coming from a Government-appointed *Bourgmestre* in office for 14 years, and with a well-established reputation in Government, such an explanation does not appear to me credible, in light of the events unfolding at the time and the movement of a substantial part of the *commune's* Tutsi

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116 Transcript of the hearing of 5 June 2000, p. 44.
117 Transcript of the hearing of 5 June 2000, p. 42
118 Transcript of the hearing of 5 June 2000, p. 51.

population. Therefore, I am unpersuaded by the Accused's assertion that he had taken practical and concrete action to check on the plight of the refugees and I would add that this point is important to assessing the role of the Accused in the events that occurred at Gatwaro stadium as from the transfer of refugees.

107. With respect to his schedule, the Accused testified that from 13 April 1994 "the *Abakiga* came [everyday], and this time they did not remain at Mabanza they continued up to Gitesi, towards Gitesi and they would go back in the evenings."[119] Now, during that period, the majority of Tutsis from Mabanza were refugees in Kibuye, Gitesi *commune,* upon the Accused's advice as given in the morning of 12 April 1994. I am of the view that the Accused cannot therefore claim that he was unaware of the possible attacks on the Tutsi refugee population in Gitesi by the same *Abakiga* who were attacking Mabanza during that same period. Furthermore, I note that there is no independent or specific factual evidence adduced by the Accused that on 15, 16 and 17 April 1994 other *Abakiga* attacks occurred in Mabanza requiring that the Accused remain in the *commune* to ensure the safety of the population.

108. With regard to the actual security conditions prevailing in Mabanza from 13 April 1994, the Accused, when questioned on how he kept the *Préfet* informed through a report on the events of 13 April 1994, testified that he had spoken to the *Préfet* in the morning of 13 April, following the departure of the refugees, but not subsequently because the telephone lines had been cut. As to whether he could not have possibly sent a message to the *Préfet* through the *gendarmerie* Commander, Jabo, since the telephone was no longer working, the Accused replied: "I didn't have a specific message for him, he himself, would have been aware of what happened in Mabanza."[120] And this, despite the fact that that day was described by the Accused as "total chaos in Mabanza"[121] and would have certainly prompted a commensurate reaction, including, notifying higher authorities with a view to their possible intervention. I note that this attitude stands in stark contrast to the Accused's zealous promptitude in informing the *Préfet* in the night of 12 to 13 April of imminent danger he had had to face before the refugees fled the *bureau*

[119] Transcript of the hearing of 5 June 2000, pp. 133 - 134.
[120] Transcript of the hearing of 5 June 2000, p. 121.

communal. For instance, after midnight in the night of 12 to 13 April 1994, upon realizing that the *préfecture* had brought in other refugees from Rutsiro, the Accused testified that he had telephoned the *Préfet* and even offered to resign:

> "At that point in time, at that very time at midnight, I telephoned the *Préfet*, it was very late but I took the liberty to call him at night. I asked him what they were trying to do [...] So I asked why the *Préfet* was bringing people before consulting me, we should have looked at the ways and means of finding a solution to my problems. That is what I believe we should have done. Moreover, I said to the *Préfet*, I had invited him on several occasions to come and see with his own eyes the conditions under which I was working and the problems with which I was faced and he never came. [...]I told him, by telephone, that I would bring - - that I was going to give him the keys to the office on the morning of the 13th."[122]

109. Concerning the Accused's alleged offer to resign presented to the *Préfet* that morning, it seems to me that in light of the events which followed the departure of the Tutsi refugees, such as the widespread attacks described by the Accused, or the withdrawal of the *gendarmerie* forces and, especially, the massacre of the majority of the Mabanza Tutsi population in Kibuye on 17 and 18 April, the Accused would have had several serious opportunities to tender his resignation to the *Préfet*, but elected to remain in office, in spite of such events.

110. During his testimony, the Accused insisted on the number of times he contacted the *Préfet* during the night of 12 to 13 April 1994. In my opinion, such insistence served as a justification for the fact that the Accused had no other recourse than "to advise" the refugees to leave for Kibuye and to ask them to vacate the *bureau communal* in the morning of 13 April, in order to get rid of the "burden" brought, in his view, by the *Préfet*. Now, it should be noted that from 9 April 1994, the Accused had five *gendarmes* following the Kibuye security meeting held on that day, and that instead of stationing them close to the *bureau communal* where the Tutsi population, who were the primary targets of the attackers, had sought refuge as of that same date, the Accused had elected to post the *gendarmes* to Mushubati, although the latter had no means of transport.[123] Nevertheless, the *gendarmes* had a telephone line and it appears quite strange that the

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[121] Transcript of the hearing of 5 June 2000, p. 113.
[122] Transcript of the hearing of 5 June 2000, pp. 29-32.

Accused elected not to call the *gendarmes* at least in the evening of 12 April 1994 so that they might come and ensure the security of the *bureau communal* considering the fresh influx of refugees that evening.

111. Furthermore, I note that despite the Accused being presumably aware of an imminent danger as identified in the morning of 13 April 1994, none of the witnesses who at the time were refugees at the *bureau communal* testified to the Accused explaining to them the specific nature of such a danger. However, the Accused testified at length to an imminent attack by attackers composed of *Abakiga* from Rutsiro.

112. Lastly, in light of the unique circumstances in which the Accused decided to dispatch, as a matter of urgency, thousands of refugees from the *bureau communal* to Kibuye in the morning of 13 April 1994, it appears to me doubtful that the Accused could have proceeded without seeking prior authorization from *Préfet* Kayishema, given the well-established chain of command which required the Accused, in his capacity as *Bourgmestre*, to first seek such an authorization. If true, then such unorthodox conduct seems to me to stand in stark contrast to the Accused's reluctance, in light of the opportunities he presumably had, to go to the *Préfecture*, even without invitation, following the departure of the refugees, to ensure that they would actually be safe there. By extension, this observation applies to the Accused's reluctance to address the 25 April 1994 security meeting in Kibuye, which in particular followed the massacres at Gatwaro Stadium and which will be discussed in detail below.

113. Consequently, I am of the opinion that the totality of the Accused's contradictory attitude in the face of the unfolding events casts doubt on the veracity of his testimony. I find therefrom that the explanations provided by the Accused as to the magnitude of the attacks on Mabanza *commune* served to conceal his willful negligence in checking on the plight of the Tutsi refugees, with the Accused relying on "the alibi" offered by the *Abakiga* attacks on the *commune* to show that, he had been blocked in Mabanza on the one hand, and that he had to attend to the population of the *commune*, on the other hand.

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[123] Transcript of the hearing of 8 June 2000, pp. 142 and 143 (French).

B. Regarding the presence of the Accused at Gatwaro stadium on 13 and 14 April 1994.

1. 13 April 1994

114. Witness A and Witness AC testified to seeing the Accused at Gatwaro stadium on 13 April 1994 though there is about a one-hour discrepancy in the time they both testified to seeing him. (According to Witness AC, the Accused was with Semanza).[124] However, the Accused testified that he had remained in Mabanza where the *bureau communal* had allegedly been *inter alia* attacked by *Abakiga* in the morning.[125]

115. Witness A testified that the Accused arrived at the stadium gates around 2 p.m. but as he did not have a watch, the time he had given was a rough estimate.[126] Witness A testified that the Accused followed the refugees when they left Mabanza for Kibuye but that the Accused had stopped to speak to some *gendarmes* and joined them in Kibuye as the gates of Gatwaro stadium were being opened.[127] Now, since Witness A failed to mention in his prior statements the Accused following the refugees as they left the *bureau communal*, the majority finds that such failure casts doubt on the evidence of Witness A who testified before the Chamber to seeing the Accused on that day (para. 536 of the Judgement).

116. Witness AC testified to the Accused arriving unarmed and in civilian clothing, around 3 p.m. that same day. The witness explained that the Accused spoke to the *gendarmes* at the stadium gates and that after his departure, the *gendarmes* allegedly stated that nobody would be allowed out of the stadium and even beat back the refugees who attempted to follow the Accused. The majority found that there were inconsistencies between the testimony of the witness and his prior statement as to the specific conduct of the Accused when he arrived that day. The majority noted discrepancies between the prior statements of Witness AC and his testimony: either the Accused entered the stadium or he tried to enter the stadium, or he took a few steps into the stadium. The majority

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124 Transcript of the hearings of 17 November 1999, p. 22 and 23 and of 18 November 1999, p. 39.
125 Transcript of the hearing of 5 June 2000, p. 42.
126 Transcript of the hearing of 17 November 1999, p. 74.
127 Transcript of the hearing of 17 November 1999, p. 31.

finds, that in the face of such discrepancies and consistencies with the account of the visit of the Accused the day before, coupled with the fact that the witness only gave a sketchy account of the visit, it cannot be ruled out that the witness actually remembered a single visit which he was now recounting as two separate visits (para. 538 of the Judgement).

117. For my part, I hold the opinion that since these questions were not clearly put to Witness AC during his testimony, the majority's finding which is based specifically on a prior statement is speculative. At any rate, according to the majority decision itself, it should have been found that the witness remembered at least one visit of the Accused to the stadium, although this fact is not even accepted by the majority. Regarding the absence of details, I note that the majority acknowledges with respect to the evidence of the other witnesses who had been at the stadium at that time, but who had not seen the Accused, that it is not unlikely that the Accused made "short visits" which went unnoticed. But the majority nonetheless required comprehensive and specific details about the visits of the Accused as testified to by the witnesses who saw the Accused "briefly."

118. In my opinion the other testimonies regarding the Accused being present at Mabanza in the morning of 13 April 1994 are not inconsistent with the Accused possibly visiting Gatwaro stadium in the early afternoon since he had a vehicle and the roads would have been free by then as the refugees had already arrived at their destination. For his part, the Accused testified that Mabanza was 20 kilometres away from Kibuye *préfecture* and "moreover, that it was not a tarmac road, it took me one hour to get to Kibuye." [128] I am unpersuaded by the majority's finding that in light of the evidence of Witness A and Witness C, it would have been impossible for the Accused to have gone to the stadium on two separate occasions on 13 April 1994 (para. 539 of the Judgement). This, although the majority noted that the witnesses give an approximate time and that the only factual difference lies in the fact that one of the witnesses testified that the Accused was at the stadium before the gates were opened (Witness A) while the other witness was already inside the stadium (AC). It is quite possible for the Accused to have remained for a while in the vicinity of the stadium or in Gitesi *commune*; therefore, I fail

to see how such two witnesses could be said to be describing an unlikely situation all the more since the time given were estimates.

2. 14 April 1994

119. The Accused testified that on that very day of 14 April in the morning, the *Abakiga* returned to the *commune* in greater numbers and attacked a group of peasants near the *bureau communal* and that once again, they attacked Karungu like they had done the day before."[129]

120. Witnesses A and AC[130] testified to seeing the Accused again in a vehicle with Semanza on 14 April 1994 (according to Witness A, in the company of Dr. Léonard and according to Witness AC, at 9 a.m. in the company of two communal police officers and the communal driver)[131] head towards the entrance and speak to the *gendarmes*. Witness AC testified that the Accused was in civilian clothing and unarmed while the policemen were armed. Witness A who was high on the larger stand further testified that when they arrived, the refugees shouted: "that they", referring to the visitors, were coming to kill them. In my opinion, if there was a mix-up as to the day of the visit (Thursday or Friday) between Witness A's testimony and his prior statement, such a discrepancy has little impact on the reliability of the evidence of a witness who was recounting the same incident on both occasions, an incident which involved the Accused being present at the stadium that day. I do not share the view of the majority that it was prompted by "the absence of details" from Witness A on such a visit to consider the prior statements of the said witness (para. 549 of the Judgement). I am puzzled by such an approach to assessing evidence that I cannot endorse.

121. Regarding the visit of the Accused to the stadium on 14 April 1994, the majority finds that the evidence of Witness A is not conclusively corroborated by the testimony of Witness AC and notes specifically the fact that Witness AC did not testify to a "striking and relevant detail" as mentioned by Witness A who testified that when the Accused

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128 Transcript of the hearing of 9 June 2000, p. 72.
129 Transcript of the hearing of 5 June 2000, pp. 42, 113 and 125.
130 Transcript of the hearing of 17 November 1999, p. 38 and of 18 November 1999, p. 43.
131 Transcript of the hearing of 18 November 1999, p. 44.

arrived, the refugees screamed "that they," referring to the visitors, had come to kill them (para. 551 of the Judgement). Thus, though the majority finds that Witness A had not provided sufficient detail to erase the subsisting doubt with respect to the visit of the Accused, it seems incongruous for the majority to rely on a "striking and relevant detail" given by this same witness to find that the testimonies of A and AC are not conclusively corroborative of one another, in spite of the fact that Witness AC was at another location in the stadium and that this may account for his failing to mention such a detail. (para. 551 of the Judgement.)

3. Findings on the presence of the Accused at the Stadium on 13 and 14 April 1994 and on the assessment of the testimonial evidence

122. I note that, even though the Accused renounced his defence of alibi in the course of the trial, and whereas he claimed in his testimony that he did not go to Kibuye between 9 and 25 April 1994, the Accused was only able to provide little information on his schedule and activities in Mabanza during this period. Even though several witnesses place the Accused in Mabanza on 13 and 14 April, at various times during the day on 13 April, their testimonies, in the main, only point to the mornings. It therefore seems to me that the Accused could very possibly have travelled between Mabanza and Kibuye during the day, considering that, as suggested by the Accused himself, one hour by road was sufficient to cover such a distance. I would like to note, moreover, that the evidence used to "corroborate" the presence of the Accused on 13 and 14 April 1994 in Mabanza, is testimonies which had not been accepted by the Trial Chamber when they suggested the Accused's involvement in other crimes committed in Mabanza (particularly, Witnesses AB, Z and H).

123. Moreover, it being established that the Accused was present at the stadium during this period, in the absence of evidence to show that he objected to the crimes which were committed there at that time, and taking into account his status as an authority, I am of the opinion that the probability that the Accused was, at that time, associated with the perpetrators of the crimes is, to my mind, established, even in the absence of evidence to show that the Accused was privy to a preconceived plan. Such probability, in my opinion, is supported by the statement of Witness A, as to the incident which occurred upon the

arrival of the Accused on 14 April 1994, during which incident the refugees inside the stadium cried out "that they" – including the Accused who was among the visitors – had come to kill us [refugees], a detail described by the majority as "striking and pertinent."

124. Consequently, I differ with the majority which, in assessing the evidence in support of the presence of the Accused at the stadium, and in light of the factual findings which could be made on the basis of evidence of the presence of an authority at the scene of the crime, applied a double standard regarding the assessment of evidence and, in several cases, the test applied proved to be inappropriate. Thus, the majority stated that an allegation of the presence of the Accused must be treated with caution if such allegation is not supported by other evidence (para. 532 of the Judgement). In other words, where lack of detail raised doubt, the majority would apply the following test : examine other testimonies or take into account witness statements to clarify or test the veracity of allegation made by a witness, whereupon if there is no corroboration, the doubt would persist and presence would not have been proven (para. 532 of the Judgement).

125. As I stated *supra* in the introductory remarks, I hold, on the contrary, that testimonial evidence has an intrinsic value, and that evidence must be tested when the witness is giving testimony and not *a posteriori*, by relying, particularly, on the witness' prior statements, without such statements being necessarily put to him during his testimony. I insist on the fact that prior statements must be used with caution, by taking into account the lack of information on the conduct of the examination of the witness, and by ensuring that apparent inconsistencies are brought to the knowledge of the witness, thus giving him the opportunity to provide an explanation during his testimony.

126. In this instance, the majority holds that Witness A only gave superficial information regarding his observation of the Accused; it points out, in particular, that there is no precision as to what the Accused was doing, whether or not he was accompanied, whether he was standing or sitting in a vehicle or whether he was armed (para. 537 of the Judgement). I note that Witness A provided several details, but that the majority did not make factual findings therefrom, because it considered them as being insufficient to remove doubt as to the presence of the Accused. I deem it appropriate to

recall that, in the opinion of the majority, depending on the location of an individual at the stadium and taking into account the fact that there was a crowd inside the stadium, it is not to be ruled out that a brief visit could go unnoticed (para. 542 of the Judgement). *A fortiori,* to require that witnesses provide such details and accurate information is, in my opinion, unjustified and unfair, considering that the witnesses recognized, and not identified, the Accused under such circumstances as have been described.

127. Lastly, when the majority states that it does not give any weight to the fact that Witnesses A and AC allegedly saw the Accused at the stadium on 13 April within an interval of about one hour, it nevertheless draws the inference that if the Accused had been present when the refugees were entering the stadium (as testified by Witness A), the Accused would not have had to return at a later stage to ask whether the refugees he had sent had arrived, (as testified by Witness AC) (para. 539 of the Judgement). I hold the opinion that such a finding is irrelevant and smacks more of speculation. I would like to add that the assessment of Witness AC's testimony by the majority with regard to the visit of the Accused on 13 April 1994 and the finding that the said superficial and sketchy description of the visit of the Accused could very well apply to the visit of the next day is, in my opinion, unfounded (para. 541 of the Judgement). Regarding the visit of 14 April 1994, I disagree with the finding of the majority that the testimonies of A and AC are insufficiently corroborative of one another. In light of these testimonies, I am of the opinion that the majority failed to consider the fact that the witnesses were at two different locations in the stadium at the time they saw the Accused on 14 April 1994.

128. When the majority holds that it is not satisfied beyond reasonable doubt that the presence of the Accused on 13 and 14 April 1994 is established, it adds that, assuming that the Accused was there, the witnesses did not provide sufficient details concerning the purpose of his visit, and that, therefore, there was insufficient evidence of his criminal intent (para. 543 of the Judgement). I note that by such reasoning, the majority rejects its own logic regarding the hypothetical significance of the presence of an authority, who does not intervene for the refugees, whereas he has, at least the means to express his disapproval, if only to take positive action to protect the said refugees.

129. Moreover, even though the Chamber finds that the ill-treatment inflicted upon the refugees at the stadium during the period from 13 April to the day of the attack, on 18 April 1994, amounted to inhumane acts committed during said period (crimes against humanity), the majority went ahead to find that, in any case, even if the Accused were present at the stadium on 13 April, no crime under the Statute had been committed at that time which could give rise to any liability (para. 543 of the Judgement). I must point out here that the reasoning of the majority on this point does not at all take into account its own factual findings that crimes against humanity were committed during the period commencing from 13 April 1994.

130. In light of the foregoing, and considering the testimonies of Witnesses A and AC that I find credible and reliable, I respectfully disagree with the factual findings of the majority as regards the lack of sufficient evidence of the presence of the Accused at the stadium on 13 and 14 April 1994. I am convinced that having visited the stadium on these various occasions, the Accused was aware of the inhumane detention conditions under which the refugees found themselves, most of whom came from Mabanza, and that being so aware, he did not intervene in their favour. Accordingly, I find that by his presence, even transient, at the time the refugees were undergoing inhumane treatment, the Accused provided some form of moral support, some legitimacy to the criminal activities being carried out, and thereby incurred liability as an accomplice. Furthermore, by his silence and failure to intervene in favour of the refugees, notably those from Mabanza, the Accused facilitated the perpetration of said crimes. Lastly, I am convinced that by going to the stadium on two occasions at the time the refugees were in forced confinement, the Accused could not have been unaware of the fact that presence would be interpreted as encouragement, or even as acquiescence by those who were responsible for the refugees' living conditions, in particular, the *gendarmes* posted at the stadium gates on 13 and 14 April 1994. I am convinced that in his capacity as a respected administrative authority, the Accused's presence at the scene of the crimes helped to legitimize the said crimes in a significant manner because, in the absence of effective denunciation, such conduct provided moral or psychological support to the perpetrators of the crimes. The tacit acquiescence of the Accused is shown through his behaviour and attitude as described by the witnesses, in particular, his conversations with the

gendarmes, whose role and intention he must have been aware of, between 13 and 14 April 1994. Considering the entire circumstancial evidence, I am satisfied that the Accused, failing his objection to the perpetration of the crimes in question, knew that his presence would very likely contribute to the perpetration of criminal acts by other persons, whose role and intention he had been able to verify.

131. I am therefore satisfied beyond reasonable doubt that the Accused is liable as an accomplice, pursuant to Article 6 (1) of the Statute and, of other inhumane acts under Article 3 (1) of the Statute, committed from 13 to 14 April at Gatwaro stadium, as alleged in Count 5 of the Indictment.

V. Complicity of the Accused in the attack on Gatwaro Stadium on 18 April 1994 (paras. 4.13, 4.26 and 4.27 of the Indictment)

132. The fact that there was a widespread and systematic attack on 18 April 1994 against the civilian population that was compelled to take refuge in the stadium has been proved beyond reasonable doubt, and is uncontested by the Accused.

1. Evidence of the Accused's presence in the Stadium on 18 April 1994

133. First of all, I want to state that I concur with one of the findings of the majority relating to the lack of credibility on the part of Witness AA concerning the Accused's involvement in the events at the stadium. In fact, I hold the opinion that the doubts and questions raised during Witness AA's testimony, considering his prior statement and guilty plea before the Rwandan authorities, were not erased even after he was cross-examined thereon during the trial (paras. 607-637 of the Judgement).

134. Witness Z testified that on the day of the attack on the Home St. Jean complex or on the stadium (17 or 18 April 1994), the Accused, who was armed, stopped by at the Trafipro roadblock with Semanza and armed *Abakiga* and allegedly told the witness that he was going to Kibuye, as he always did whenever he was going there.[132]

[132] Transcript of the hearing of 8 February 2000, pp. 52 and 53.

135. Prior to the attack, Witness AC saw Semanza in the communal vehicle that was carrying the *Interahamwe*[133] stop near the stadium gate.

136. Witness A testified that on the morning of 18 April 1994 prior to the attack on the stadium, he saw the Accused, together with Semanza and policemen in a vehicle, but that the Accused left in the same vehicle after he heard the refugees shouting.[134] The witness, who happened to be at the grandstand located in the uppermost part of the stadium, described it as a brief stopover. His description is obviously limited, but it does not call into question the fact that this event occurred. I cannot subscribe to the finding of the majority regarding the credibility of this witness' testimony, when they state that "...the evidence provided by Witness A about the presence of the Accused at the Stadium is unclear." (para. 641 of the Judgement).

137. Contrary to the majority opinion, Witness G recognised, and not identified, the Accused who was with *Préfet* Kayishema and the attackers on Gatwaro hill before the *Préfet* gave the signal to launch the attack (para. 649 of the Judgement). It should be noted that although the credibility of Witness G was not at issue, the majority nevertheless went ahead to apply improper standards for the assessment of evidence as to whether Witness G identified, and not recognised the Accused. Although the majority relied on the testimony of said witness for its finding that the Accused, who was with the attackers, was a person known to the witness, it states, with regard to *Préfet* Kayishema, that it is not satisfied with the evidence relied on by the Prosecution to show that this witness knew the *Préfet* prior to the events at the stadium. The fact remains that, the majority accepted that Witness G knew the Accused, based on Witness G's testimony given in camera to the effect that he and the Accused lived in close proximity to each other,[135] without considering particularly relevant facts (para. 650 of the Judgement) In my view, the majority unjustifiably adopted a double standard in assessing the evidence. On the other hand, during the in camera hearing, the witness provided pertinent information as to what he was able to see, the exact position where he was, that is on the

[133] Transcript of the hearing of 18 November 1999, p. 50.
[134] Transcript of the hearing of 17 November 1999, p. 36.
[135] Transcript of the hearing of 26 January 2000 (in camera), p. 39 (French).

first step in the stands[136] and as to the fact that the Accused was on Gatwaro hill together with *Préfet* Kayishema.[137] The witness duly indicated all these locations in a photograph of Gatwaro stadium.[138] During the attack, the witness could see the Accused who was standing, but not carrying a weapon that day.[139] However, the majority emphasised that the Prosecution had failed to discharge its duty to provide sufficient evidence regarding the conditions in which Witness G viewed the events, in order to dispel any doubt (para. 652 of the Judgement); yet the witness testified that he was only a short distance away from the Accused.[140] In the opinion of the majority, the fact that Witness G testified that the Accused was in a standing position on the hill cannot be accepted as a distinctive factor of conduct that could help distinguish the Accused from the other attackers (para. 652 of the Judgement). The majority further stated that Witness G's view "presumably" included a porch filled with people, which suggests that their opinion is based on speculation (para. 649 of the Judgement). It should be noted that Witness G was in a location different from that of the other two witnesses who were at the stadium during the attack (A and AC). Thus, since Witness G was relatively closer to Gatwaro hill, he was able to recognise the Accused on the said hill while Witnesses A and AC may not have seen him from their location in the stadium. Nonetheless, since the majority held that no other witness had corroborated the fact that the Accused was on the hill before and during the attack, it concluded that on account of the distance and given that Witness G was unable to provide further details, the presence of the Accused had not been proven, for there was still doubt (para. 653 of the Judgement).

138. On the contrary, I am of the view that the testimonial evidence given by Witnesses A and G regarding the presence of the Accused before and during the attack on the stadium is not contradictory. I take the view that in light of the surrounding circumstances, Witness A, who was right at the top of one of the stands when the attack began, before he subsequently came down to the field[141], that is in a stand opposite the one where Witness G was, saw the Accused in the morning of 18 April 1994 when he

136 *Ibid.*, p. 36 (French).
137 *Ibid.*, pp. 33 - 36 (French).
138 Prosecution Exhibit No. 65.
139 Transcript of the hearing of 26 January 2000, pp. 37 and 38 (French).
140 Transcript of the hearing of 26 January 2000, p. 16.

arrived in a vehicle and not during the attack. On the contrary, Witness G who was in a stand opposite that of Witness A did not see the Accused in the morning of 18 April 1994, but rather around 2 p.m., just before the attack and when it began, at which time the Accused was on Gatwaro hill.

139. I find that since both witnesses saw the Accused at two different times of the day on 18 April 1994 from different locations inside the stadium, it is both well-founded and justified to consider them credible, and I dismiss as immaterial the contention of the majority that the witness' observation of the Accused was inadequate. Consequently, I am of the opinion that the testimonies of Witnesses A and G prove beyond reasonable doubt that the Accused was present in Gatwaro stadium on 18 April 1994 before and during the attack on the refugees who were being detained there.

2. The Accused's testimony

140. The Accused testified that on the morning of 18 April 1994, he went, together with policemen and Pastor Eliphaze, to Rubengeri Parish to request the *Abakiga* to withdraw from the *commune.* The *Abakiga* allegedly did not listen to him and went towards Gitesi town in Kibuye.[142] Thus, while the *Abakiga* returned to Mabanza in much larger numbers than in the previous days, the Accused was informed of their intentions and the direction they were heading for on the morning of 18 April 1994, after having met with them.[143] The Accused further testified that following the failed attempt, he stayed in the *bureau communal* until midday, helping people whose identity cards had been torn, by getting them new ones, so that if the *Abakiga* returned they would not be killed.[144] I must point out that I was not satisfied with the Accused's explanation in support of his testimony that he decided suddenly to face the *Abakiga* on 18 April 1994, whereas the attacks on Mabanza *commune* had begun since 13 April 1994, at which date he claimed he was not in a position to stop them because he was personally threatened, whereas the number of attackers increased daily, as per his testimony. When asked where the *Abakiga* were heading for on 18 April 1994, the Accused reiterated that they

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141 Transcript of the hearing of 17 November 1999, p. 61 (French).
142 Transcript of the hearing of 5 June 2000, pp. 141 - 142.
143 Transcript of the hearing of 5 June 2000, pp. 140 - 141.

"were going towards Gitesi.[145]" The Accused further testified that it was on that day that the *Abakiga* committed their criminal acts in Kibuye and added : "but in Mabanza, I was faced with other problems. It was the people who were coming to me. Coming to tell me about how they had problems".[146] As the majority noted, the Accused later testified that he had stayed at home on the afternoon of 18 April 1994, that he had received people; but then this has not been corroborated by any other testimony or documentary evidence. I hold the view that the evidence adduced supports a finding that the Accused was informed on the morning of 18 April 1994 that the refugees in Mabanza who were at Gatwara stadium in Gitesi *commune* faced possible attacks and, it also shows that by going to the stadium on the morning of 18 April 1994, as testified by Witness A, the Accused knew or had reason to know that an attack was imminent.

141. The Accused testified subsequently that at midday he returned home to receive people requesting him to help obtain identity cards for them, and that he allegedly wrote letters to the *conseillers* and members of the *cellule*, whereas there is no evidence of such official correspondence in the *commune's* outgoing mail register.[147] And for good reason, the Accused asserted as follows :

> "Between the 12 and 27 April 1994 that indicates the chaos which was prevailing in the commune. The commune was totally paralysed. The secretariat was not functioning. All the communal departments were paralysed. That is why between the 12 and 27 there is no letter, there is no other letter which went out of the commune".[148]

142. This testimony raises doubts as to the Accused's contention that on the afternoon of 18 April 1994, while the attack was being launched on the Gatwara stadium, he stayed at home to write "official letters" of which no trace exists, whereas one testimony situates him at the said stadium at the same moment, at the beginning of the afternoon when the attack was launched.

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144 Transcript of the hearing of 5 June 2000, p. 142.
145 Transcript of the hearing of 5 June 2000, p. 141.
146 Transcript of the hearing of 5 June 2000, p. 142.
147 Defence Exhibit No.18.
148 Transcript of the hearing of 6 June 2000, p. 100.

143. When questioned on the tragic fate of the Mabanza refugees in Kibuye and the identity of the attackers, the Accused testified that he thought that the higher authorities had been informed of the situation in Kibuye. Thus, he thought it was up to them [authorities] to take the initiative to follow up on what happened in the *Préfecture* and conduct the necessary investigations, for that was not the first time that such atrocities had occurred[149]. Yet, after the massacres in Gitesi *commune,* which he admitted he was aware of since 19 April 1994, the Accused remained quiet and took no measures, at least, until 25 April 1994. His failure to request the identity of persons killed or to order an investigation following the massacre of thousands of members of the Mabanza population appears, to say the least, incomprehensible, and indeed, incompatible with the Accused's ostensible concern for the security of the Mabanza population, whose most vulnerable section, composed of the Tutsis, had just been annihilated.

144. I hold the view that had the Accused's intention not been criminal when he went to the stadium on the day of the attack, he would have intervened, at least, by trying to stop the attacks, in order to protect the Tutsi population of Mabanza who had sought refuge there and over whom he had responsibility. If he did not have the means to stand up to the attackers, and having understood that the higher administrative authorities would not intervene or might have been involved in the massacres, and if the Accused had not acquiesced in the massacres, he would at least have taken measures *a posteriori* to identify or repatriate the bodies of Mabanza natives killed. It is therefore not credible, as the Defence indicated hypothetically, that even if the Accused had been at the stadium on the day of the attack, he would have been there only passively, whereas as he himself admitted, the Accused knew that the attackers were moving towards Gitesi town in Kibuye and that when he went there he did not object to the crimes committed.

145. In his capacity as the official responsible for the security of the inhabitants of Mabanza, the Accused testified that he went to Kibuye on 25 April 1994 to attend a security meeting at the *Préfecture* with, among others, *Préfet* Kayishema and some other *bourgmestres.* In that regard, the Accused testified that the authorities deplored what had happened and made recommendations to the higher authorities aimed at averting a

[149] Transcript of the hearing of 5 June 2000, p. 62.

recurrence of such situations in the future.[150] The Accused testified that, at the meeting, the *Préfet* mentioned that *gendarmes*, delinquents and the *Abakiga* had taken part in the killings and that nobody, not even him [the Accused], had inquired about the number of victims in spite of the fact that thousands of Tutsis from Mabanza were among the victims.[151] The Accused further testified that they [the *Préfet* and *Bourgmestre* of Gitesi] were overwhelmed and that they decided that each *Bourgmestre* was to ensure that what had happened in Kibuye did not occur elsewhere.[152] When I asked the Accused if he had sought an explanation about the apparent participation of *gendarmes* in the massacres at Gatwaro stadium, he gave the following answer:

> "This meeting did not last long, because there were problems between the Prefect and the Bourgmestre of Gitesi commune, the urban commune of Gitesi, regarding what happened in the town. Then we had to give the security status report of the various communes. But the meeting did not last long. It was one hour, it lasted an hour."[153]

146. When I insisted on knowing if the massacres had not been carried out with the knowledge and under the supervision of the administrative authorities of Kibuye, the Accused responded: "The *Préfet* explained to us that the local commander "went to the battlefield ... and that he himself was threatened. That is how he explained the situation to us, ... that he was unable to do anything during that period."[154] The Accused never testified that the issue of the *Préfet's* use of his power to call in the armed forces as provided for in the Legislative Decree of 11 March 1975 on the organization and functioning of the *prefecture* was raised by the participants at the security meeting.[155] The Accused then added :

> "... then he had problems explaining what happened. So on that point, the Prefect asked us it we needed fuel. We told him that we needed fuel for our communes."[156]

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150 Transcript of the hearing of 5 June 2000, p. 69.
151 Transcript of the hearing o 8 June 2000, p. 256.
152 Transcript of the hearing of 6 June 2000, p. 103.
153 Transcript of the hearing of 6 June 2000, p. 102.
154 Transcript of the hearing of 6 June 2000, p. 103.
155 Article 11 of the Legislative Decree sets forth the conditions under which the *Préfet* may use his powers to call in the armed forces to restore public order.
156 Transcript of the hearing of 6 June 2000, p. 104.

147. It seems surprising to me, to say the least, that the type of problem raised by the Accused during that meeting, in his capacity as an administrative authority, and particularly at a time when, according to him, the town was stinking and strewn with bodies,[157] was a problem of petrol and fuel supply, whereas a large part of the Tutsi population of Mabanza had just been exterminated.

148. As to the majority's question whether the Accused could not have done more (paras. 665 - 683 of the Judgement), I hold the view that, the evidence confirming his presence at the stadium on 18 April 1994, and the fact that he had failed in his duty as a local government representative during and after the massacres indisputably establish the extent of liability and negligence of the Accused in connection with the massacres at Gatwaro stadium. Moreover, I am convinced that the difficulty with which the Accused answered questions about his failure to order an investigation into the massacres in order to denounce them or punish the perpetrators thereof could be logically explained by the fact that the Accused, who was present at the time of the massacres, acquiesced in their commission.

149. Besides, given the fact that during that meeting, the Accused realized that the authorities of Gitesi, who were administratively in charge of Gatwaro stadium, did not take a clear stand when recounting the horrendous massacres which had just taken place there, and the fact that *gendarmes* were involved in the killings, I fail to see the relevance of the letter that the *Bourgmestre* sent to that same *Préfet* on 24 June 1994, which even contrasts with the timidity displayed by the Accused at the meeting of 25 April 1994 following the massacres. In that letter written in June, when a large part of the Tutsi population had already been massacred at Kibuye, the Accused, with full knowledge of the facts, vehemently denied being an accomplice "who supports Hutus married to Tutsis and the Tutsi in general", and requests that the *Préfet* counter the attack by the Hutus from Rutsiro and Kavoye: "otherwise the population of Mabanza commune would defend itself, which can result in a confrontation between the Hutus, whereas what we presently needed the most is their unity to face the *Inyenzi-Inkotanyi*." [158] For all these

[157] Transcript of the hearing of 6 June 2000, p. 101.
[158] Prosecution Exhibit No. 84.

reasons, the Accused urgently requested assistance from the *Préfet.* This documentary evidence brings to light the ambiguous nature of the relationship between the Accused and the *Préfet,* a relationship the Accused sometimes described as distant, when explaining why he dared not ask him about the massacres at Gitesi, and sometimes as very frank, when trying to show that he could count on the *Préfet* to, among other things, intervene to ensure his own protection, and inform him if the people of Mabanza could take care of "accomplices." I hold the opinion that this last point proves that the Accused was not powerless in the face of the events he has recounted.

150. In light of the explanations given by the Accused, it is apparent that after the large- scale massacre in Kibuye, he failed in his duties and responsibilities as a *Bourgmestre.* He did not attempt to clarify the situation about the officials nor to identify the victims of Mabanza, and was evasive on the questions he could have asked as to how the events unfolded, even though he was present at the "security" meeting of 25 April 1994, which was attended by all the authorities concerned by the massacres.

VI. Findings

151. Testimonial evidence of the presence of the Accused at Gatwaro stadium on 18 April 1994 appears to me to irreparably impair the credibility of the Accused's testimony and impugn his vague and even sometimes surreal accounts of his activities in Mabanza *commune* on that day aimed at rebutting the allegations that he was present at the stadium. On this specific point, I concur with Judge Pillay's finding in her separate opinion in the Musema Judgement that "once the credibility of a witness has been impaired, the testimony of that witness is inherently unreliable in all its parts, unless it is independently corroborated."[159] In the said case, Judge Pillay dissented with the majority's finding that the sole testimony of a witness, who had otherwise been found to be a credible witness, while the Accused was not, was insufficient to prove that the Accused was present at the crime site. Judge Pillay went on to hold that "the testimony

[159] *The Prosecutor v. Musema*, Judgement rendered by the Trial Chamber on 27 January 2000, Separate Opinion of Judge Navanethem Pillay, para. 4, p. 315.

of Witness [..] cannot be rejected in one instance on the basis of testimony from the Accused and accepted in another instance despite testimony from the Accused."[160]

152. In the instant case, I am satisfied that the testimonies of Witnesses A and G prove beyond reasonable doubt that the Accused was present before and during the attack on the stadium on 18 April 1994, and that the Accused knew or had reason to know that the attack was being planned or was indeed imminent.

153. It is my opinion that by being willfully present during the said attack the Accused incurs criminal responsibility as an observer who acquiesced in the commission of crimes by others and thereby encouraged such crimes. I am satisfied that the testimonial evidence adduced shows the Accused's acquiescence in the crimes committed, since it does not evince any reprobation whatsoever of the crimes by the Accused, despite the duties and obligations incumbent upon him in his capacity as *Bourgmestre*, even if he were outside his respective administrative district. Though not explicit, it is my opinion that, in the instant case, the criminal intent of the Accused can be inferred from the body of facts presented above. I am satisfied that by being present at the stadium in the morning and afternoon of 18 April 1994, even in the absence of evidence of a pre-conceived plan, the Accused could not have been unaware that an attack was going to be launched against the refugees at the stadium and that, he therefore incurs accomplice liability under Article 6(1). In the case at bar, the subjective element of the crime does not arise from co-perpetration because in my view it has not been shown that Accused in any way shared as such the same criminal intent with the perpetrators of the crimes. However, as held in the *Tadic* Judgement, [161] in respect of complicity, *mens rea* can, *inter alia,* comprise knowledge of the common design to inflict ill-treatment. Such an intent may be proved either directly or as a matter of inference from the nature of the Accused's authority within an organizational hierarchy.[162] In the said case, the Chamber further held that what is required, beyond the negligence, is a specific intent to the extent that even if the person had no intention of bringing about certain results, that person was

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160 *Ibid*, p. 317.
161 *The Prosecutor v. Tadic*, Judgement rendered by the Appeals Chamber on 15 July 1999.
162 *Ibid.*, para. 220.

aware that the actions of the group were most likely to lead to that result (*dolus eventualis*).

154. It ensues from the foregoing that the Accused could not have been unaware that his presence at the massacre site would encourage, if not, sanction the crimes perpetrated on the refugees by hundreds of attackers. Even if a direct causal relationship with the commission of the crimes has not been shown, his participation came in the form of moral support. I am satisfied that the presence of the Accused at Gatwaro stadium on 18 April 1994 contributed substantially to the perpetration of the crimes testified to by the witnesses during the massacre of the Tutsi refugees. There is no denying that there were residents of his *commune*, who were under his responsibility, among the victims of the said massacre and that his mere presence, as the highest-ranking authority in Mabanza *commune*, in the absence of any opposition on his part to the criminal acts in progress, could only have encouraged the perpetrators of the crimes.

155. The French Code of Criminal Procedure provides under Article 353 with respect to the Assize Court [*Cour d'assises*] that "The law does not ask an accounting from judges of the grounds by which they became convinced [...]. The Law asks them only the single question [...]: 'Are you thoroughly convinced?'" I am thoroughly convinced that the Accused is guilty, under Article 6(1) of the Statute, of complicity in genocide and crimes against humanity (murder and extermination), crimes covered under Articles 2(3)(e) and 3(a), 3(b) and 3(i) of the Statute, in respect of counts two, three, and four and five, and that his guilt on such counts warrants a guilty verdict.

Done in Arusha on 7 June 2001 in French and English, the French text being authoritative.

Judge Mehmet Güney

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

ANNEX A

CASE NO: ICTR-95-1A-I

THE PROSECUTOR OF THE TRIBUNAL

AGAINST

Ignace Bagilishema

AMENDED INDICTMENT

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1. The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to his authority under Article 17 of the Statute of the International Criminal Tribunal for Rwanda (the Statute of the Tribunal) charges:

IGNACE BAGILISHEMA

with **GENOCIDE, COMPLICITY IN GENOCIDE; CRIMES AGAINST HUMANITY**; and **SERIOUS VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II** as set forth below.

2. The present indictment contains charges against an individual who committed serious violations of international humanitarian law in Kibuye Prefecture, Territory of Rwanda where thousands of men, women and children were killed and a large number of persons wounded in April, May and June 1994.

3. **THE ACCUSED**

3.1 **Ignace Bagilishema** was born in 1955 in Rubengera Sector, Mabanza Commune, Kibuye Prefecture, Rwanda. Bagilishema's father was Louis Ntaganda, and his mother was

Kampundu. **Ignace Bagilishema** was appointed as Bourgmestre of Mabanza Commune on February 8, 1980.

3.2 **Ignace Bagilishema** acted as Bourgmestre until the end of July 1994. At all times relevant to this indictment **Ignace Bagilishema** was the Bourgmestre of Mabanza Commune. In this capacity, **Ignace Bagilishema** exercised authority and control over employees of this commune, including his subordinates, in particular, his assistants Semanza Celestin, Nsengimana Apollinaire, both Assistant Bourgmestres of Mabanza Commune, and a Nzanana Emile.

3.3 In his capacity as Bourgmestre of Mabanza commune, **Ignace Bagilishema** also exercised authority and control over members of the Police Communale and *Gendarmerie Nationale.*

4. CONCISE STATEMENT OF FACTS

4.1 Unless specifically stated herein, the violations of International Humanitarian Law referred to in this indictment took place in Rwanda between 1st April and 31st July 1994.

4.2 During the events referred to in this indictment, Tutsis, Hutus and Twas were identified as ethnic or racial groups.

4.3 During the events referred to in this indictment, there were in Rwanda, widespread or systematic attacks directed against a civilian population on political, ethnic or racial grounds.

4.4 During the events referred to in this indictment, there was a non-international armed conflict in the territory of Rwanda. The victims referred to in this indictment were persons protected under Article 3 common to the Geneva Conventions of 1949 and additional protocol II thereof, and who took no active part in the conflict.

4.5 During the events referred to in this indictment, Rwanda was divided into eleven prefectures, one of which was Kibuye. The Prefecture of Kibuyeconsists of nine communes namely; Rutsiro, Mabanza, Kivumu, Gitesi, Bwakira, Mwendo, Giosvu, Gishyita, and Rwamatamu communes.

4.6 The events which form the basis of this indictment, occurred in Mabanza, Gitesi, Gishyita and Gisovu communes within the Prefecture of Kibuye.

4.7 On 6 April 1994, the plane transporting President Juvénal Habyarimana of Rwanda crashed on its approach to Kigali airport, Rwanda. Attacks and killings of civilians began soon thereafter throughout Rwanda.

4.8 Following the news of the death of President Habyarimana, **Ignace Bagilishema** between 9-13 April 1994, attended several meetings with the prefet of Kibuye, Clement Kayishema and other local authorities including the Commanding officer of the Gendarmerie Nationale stationed in Kibuye Prefecture.

4.9 From about 9 April 1994 through 30 June 1994, thousands of men, women and children sought refuge in various locations in Mabanza, Gitesi, Gisovu and Gishyta communes. These men, women and children were predominantly Tutsis and were seeking refuge from attacks on Tutsis, which had occurred throughout the Prefecture of Kibuye.

Attacks in Mabanza Commune.

4.10 In Mabanza commune, members of the Tutsi population sought refuge in various areas within the 13 secteurs of the commune. These individuals were regularly attacked, throughout the period of 9 April 1994 through to 30 June 1994. The attackers, comprising of members of the Gendarmerie Nationale, communal policemen and Interahamwe militiamen, used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis in Mabanza commune.

4.11 Throughout April, May, and June 1994, **Ignace Bagilishema**, in concert with others, including but not limited to Clement Kayishema, Semanza Celestin, Nsengimana Apollinaire, Nzanana Emile and Munyampundu, brought to the area of Rubengera sector, Mabanza commune, armed individuals and directed them to attack the people residing and/or seeking refuge at various locations therein, including the commune office.

4.12 In addition, **Ignace Bagilishema** personally attacked and killed persons residing or seeking refuge in Mabanza commune.

4.13 Throughout April, May and June 1994, **Ignace Bagilishema**, in concert with others, committed acts of Murder and encouraged others to capture, torture and kill Tutsi Men, women and children, seeking refuge from attacks within the area of Mabanza, Gitesi, Gishyita and Gisovu communes, Kibuye Prefecture.

4.14 In particular, **Ignace Bagilishema** acting in concert with others including Clement Kayishema, Semanza Celestin, Nsengimana Apollinaire, Nzanana Emile and Munyampundu, between 9 April and 30 June 1994 permitted and encouraged Interahamwe militiamen to set up roadblocks at strategic locations in and around Mabanza commune. The primary purpose of the said roadblocks was to screen individuals in order to identify and single out Tutsis. Between 9 April and 30 June 1994 **Ignace Bagilishema** ordered the detention of several Tutsis at the various roadblocks within Mabanza. Such detainees were handed over to **Ignace Bagilishema** and were subsequently killed by the communal police, the Gendarmerie Nationale, Interahamwe and armed civilians under his authority and control.

4.15 **Ignace Bagilishema** between 9 April and 30 June 1994 detained over 100 Tutsi refugees at the commune office jailhouse at Mabanza. On or about 15 April 1994, **Ignace Bagilishema** allowed Interahamwe militiamen, access to the said jailhouse, following which several Tutsi refugees detained therein, were tortured and killed.

4.16 **Ignace Bagilishema** between 9 April and 30 June 1994 ordered Interahamwe militiamen to dig a mass grave within the precinct of the commune office in Mabanza.

4.17 The remains of several Tutsi refugees killed during attacks at both the commune office and elsewhere within Mabanza commune, were between 9 April and 30 June 1994, with the knowledge, consent and acquiescence of **Ignace Bagilishema**, buried in a mass grave within the precinct of the commune office in Mabanza.

4.18 From 9 April 1994, **Ignace Bagilishema** encouraged thousands of Tutsi men, women and children seeking refuge from attacks in the commune, to seek safe refuge within the premises of the communal office at Mabanza. Many others, who had fled to the hills, were on

the instructions of **Ignace Bagilishema**, ferried back to the communal office in vehicles belonging to the commune and confined to the jailhouse therein on the instructions of **Ignace Bagilishema**.

4.19 By 11 April 1994, **Ignace Bagilishema** had placed communal policemen outside the commune office with instructions to them to prevent the refugees gathered therein from leaving the said office. **Ignace Bagilishema** also instructed the communal policemen to admit incoming refugees to the communal office.

4.20 On 12 April 1994, **Ignace Bagilishema** met with Prefet Clement Kayishema, during which the latter commented that Mabanza commune was the only commune left in Kibuye with "scum and filth" The refugees that had sought refuge in the communal office in Mabanza were on the instruction of **Ignace Bagilishema** divided into 2 groups. The first group comprising of intellectuals were put in a military truck and driven towards Kibuye and were never seen again. The second group of refugees comprising mostly of peasants were detained at the communal office in Mabanza and were subsequently transferred to Gatwaro stadium in Kibuye Town where they were killed.

Attacks in Kibuye Town, Gitesi Commune.

4.21 On or about 13 April 1994, **Ignace Bagilishema** ordered members of the Tutsi population, who at his request, had gathered at the communal office for protection, to go to Gatwaro stadium in Kibuye Town, Gitesi commune.

4.22 On arrival in Kibuye town, Gitesi commune, on 13 April 1994, **Ignace Bagilishema** acting in concert with others including Clement Kayishema, Semanza Celestin, Nsengimana Apollinaire, Nzanana Emile and Munyampundu, divided the refugees into two groups. **Ignace Bagilishema** ordered the first group to seek refuge at the Catholic Church and Home St. Jean complex (hereinafter "the complex"); and the second group to Gatwaro stadium (hereinafter, "the Stadium") both in Kibuye town Gitesi commune.

4.23 By about 17 April 1994, thousands of men, women and children from various locations sought refuge in the Catholic Church and Home St. Jean Complex (the Complex) and at the Gatwaro stadium located in Kibuye town. These men, women and children were unarmed

and were predominantly Tutsis. They were in the Complex seeking protection from attacks on Tutsis which had occurred throughout the Prefecture of Kibuye.

4.24 After people gathered in the complex and at the stadium, these locations were surrounded by persons under **Ignace Bagilishema**'s control, including members of the Gendarmerie Nationale and communal policemen. These persons prevented the men, women and children held therein from leaving, thus denying them access to basic amenities such food and water for several days.

4.25 On 17 April 1994 those individuals who were ordered by **Ignace Bagilishema** to seek refuge at the complex, were attacked by a combined force of attackers consisting of the Gendarmerie Nationale, communal police Interahamwe and armed civilians .The attackers used guns, grenades, machetes, spears, cudgels and other weapons to kill the people in the Complex.

4.26 On 18 April 1994, **Ignace Bagilishema**, acting in concert with others, including, Clement Kayishema, Semanza Celestin, Nsengimana Apollinaire, Nzanana Emile and Munyampundu, brought to Gatwaro stadium, the Gendarmerie Nationale, communal police, Interahamwe and armed civilians, and directed them to attack the people seeking refuge there.

4.27 In addition, **Ignace Bagilishema**, on 18 and 19 April 1994, personally attacked and killed persons seeking refuge at Gatwaro stadium, Kibuye town. The attack on refugees at Gatwaro the Stadium continued on 19 April 1994.

4.28 In ordering the Tutsi men women and children to the complex and stadium, **Ignace Bagilishema** knew or had reason to know that attacks at these locations was imminent.

Attacks in Gishyita and Gisovu Communes.

4.29 Gishyita and Gisovu communes are divided into 8 and 9 secteurs respectively. Tutsi individuals seeking refuge in the area of Bisesero which spans both communes, were regularly attacked, throughout the period of 9 April 1994 through to 30 June 1994. The attackers comprising of members of the Gendarmerie Nationale, communal policemen and

Interahamwe militiamen used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis in Gishyita and Gisovu communes.

4.30 Throughout April, May and June 1994, **Ignace Bagilishema** acting in concert with others, including Clement Kayishema, Semanza Celestin, Nsengimana Apollinaire, Nzanana Emile and Munyampundu brought to the area of Bisesero armed individuals, including members of the Gendarmerie Nationale, communal policemen and Interahamwe militiamen and directed them to attack the people seeking refuge there. In addition, **Ignace Bagilishema** personally attacked and killed persons seeking refuge on Gitwa hill in the area of Bisesero.

4.31 **Ignace Bagilishema**, during the months of April, May, and June 1994, in Mabanza, Gitesi, and Gisovu communes, Kibuye Prefecture, in the Territory of Rwanda, did commit other inhumane acts including but not limited to, persistently searching for Tutsis, separating Tutsis from other ethnic or racial groups, beating Tutsis, knowingly leading Tutsis to the massacre sites, and unlawfully confining the Tutsis at the commune office and Gatwaro Stadium without water, sanitation or food, thereby forcing the Tutsis to eat grass.

4.32 The attacks described above resulted in thousands of deaths and numerous injuries to the men, women and children within Mabanza, Gitesi, Gisovu and Gishyita communes, Kibuye Prefecture.

5. CHARGES

For all the acts outlined in the paragraphs specified in each of the counts, the accused either planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation and execution of the said acts, or knew or had reason to know that persons acting under his authority and control had committed or were about to commit the said acts and he failed to take necessary and reasonable measures to prevent the said illegal acts or punish the perpetrators thereof.

Count 1:

By his acts in relation to the events referred to in paragraphs 4.9 - 4.31 above, **Ignace Bagilishema** is individually responsible for the crimes alleged below, pursuant to Article 6(1) and 6(3) of the Statute of the Tribunal:

Ignace Bagilishema, during the months of April, May and June 1994, in Mabanza, Gitesi, Gishyita and Gisovu communes, Kibuye Prefecture, in the Territory of Rwanda, is responsible for the killing or causing of serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, an ethnic or racial group as such and has thereby committed GENOCIDE in violation of Article 2(3)(a) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

Count 2:

By his acts in relation to the events referred to in paragraphs 4.14 - 4.25 above, **Ignace Bagilishema** is individually responsible for the crime alleged below, pursuant to Article 6(1) and 6(3)of the Statute of the Tribunal:

Ignace Bagilishema, during the months of April, May and June 1994, in Mabanza, Gitesi, Gishyita and Gisovu communes, Kibuye Prefecture, in the Territory of Rwanda, is an accomplice to the killing and causing of serious bodily or mental harm to members of the Tutsi population and has thereby committed COMPLICITY IN GENOCIDE in violation of Article 2(3)(e) and punishable in reference to Article 22 and 23 of the Statute of the Tribunal.

Count 3:

By his acts in relation to the events referred to in paragraphs 4.10 - 4.3 1 above, **Ignace Bagilishema** is individually responsible for the crime alleged below, pursuant to Article 6(1) and 6(3) of the Statute of the Tribunal:

Ignace Bagilishema, during the months of April, May and June 1994, in Mabanza, Gitesi, Gishyita and Gisovu communes, Kibuye Prefecture, in the Territory of Rwanda, is responsible for the MURDER of civilians, as part of a widespread or systematic attack

against a civilian population on political, ethnic, or racial grounds, and has thereby committed a CRIME AGAINST HUMANITY in violation of Article 3(a) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

Count 4:

By his acts in relation to the events referred to in paragraphs 4.10 - 4.30 above, **Ignace Bagilishema** is individually responsible for the crime alleged below, pursuant to Article 6(1) and 6(3) of the Statute of the Tribunal: **Ignace Bagilishema** during the months of April, May and June1994, in Mabanza, Gitesi, Gishyita and Gisovu communes, Kibuye Prefecture, in the Territory of Rwanda, is responsible for the EXTERMINATION of civilians, as part of a widespread or systematic attack against a civilian population on political, ethnic, or racial grounds, and has thereby committed a CRIME AGAINST HUMANITY in violation of Article 3(b) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

Count 5:

By his acts in relation to the events referred to in paragraphs 4.10 - 4.31 above, **Ignace Bagilishema** is individually responsible for the crime alleged below, pursuant to Article 6(1) and 6(3) of the Statute of the Tribunal:

Ignace Bagilishema, during the months of April, May and June 1994, in Mabanza, Gitesi, Gishyita and Gisovu communes, Kibuye Prefecture, in the Territory of Rwanda, did commit OTHER INHUMANE ACTS, including but not limited to, the causing of serious physical and mental harm, such as the persistent search for Tutsis in the months following the attack, the separation of Tutsis from other ethnic or racial groups, severe beating of Tutsis, knowingly leading Tutsis to the massacre sites, and unlawfully confining the Tutsis at the commune office and Gatwaro Stadium without water, sanitation or food, thereby forcing the Tutsis to eat grass as part of a widespread and systematic attack against a civilian population on political, ethnic, or racial grounds, and has thereby committed a CRIME AGAINST HUMANITY in violation of Article 3(i) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

Count 6:

By his acts in relation to the events referred to in paragraphs 4.10 - 4.31 above, **Ignace Bagilishema** is individually responsible for the crime alleged below, pursuant to Article 6(1) and 6(3) of the Statute of the Tribunal:

Ignace Bagilishema, during the months of April, May and June 1994, inGisovu and Gishyita communes, Kibuye Prefecture, in the Territory of Rwanda, is responsible for causing violence to life, health and physical or mental well-being of persons, in the course of a non-international armed conflict, in particular, murder as well as cruel treatment such as torture or any form of corporal punishment, and has hereby committed SERIOUS VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OFADDITIONAL PROTOCOL II thereof, in violation of Article 4 (a) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

Count 7:

By his acts in relation to the events referred to in paragraphs 4.10 - 4.31 above, **Ignace Bagilishema** is individually responsible for the crime alleged below, pursuant to Article 6(1) and 6(3) of the Statute of the Tribunal:

Ignace Bagilishema, during the months of April, May and June 1994, in Mabanza, Gitesi, Gisovu and Gishyita communes, Kibuye Prefecture, in the Territory of Rwanda, is responsible for causing outrages upon personal dignity of women, including humiliating and degrading treatment, in the course of a non-international armed conflict, and has thereby committed SERIOUS VIOLATIONS OF ARTICLES 3 COMMON TO THE GENEVA CONVENTIONS AND OFADDITIONAL PROTOCOL II thereof, in violation of Article 4(e) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

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At Arusha, Tanzania this seventeenth day of September 1999.

For the Prosecutor

Bernard A Muna

Deputy Prosecutor

ANNEX B

Glossary of Terms

Additional Protocol I	Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflicts (Protocol I) of 8 June 1977.
Additional Protocol II	Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977.
Abakiga	In the present case the term is used generally for persons from certain northern parts of Rwanda.
Akayesu (TC)	*The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement of 2 September 1998.
Akayesu (AC)	*The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Appeals Chamber Judgement of 1 June 2001.
Aleksovski (TC)	*Prosecutor v. Zlatko Aleksovski,* Case No. IT-95-14/1-T, Judgement of 25 June 1999.
Blaskic (TC)	*Prosecutor v. Tihomir Blaskic,* Case No. IT-95-14-T, Judgement of 3 March 2000.
Bureau Communal	Compound containing the offices and other buildings of the Administration of the *commune.*
CDR	Coalition for the Defence of the Republic (*Coalition pour la Défense de la République*).
Čelebići (Delalić) (TC)	*Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, Case No. IT-96-21-T, Judgement of 16 November 1998.

Čelebići (Delalić) (AC)	*Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, Case No. IT-96-21-A, Judgement of 20 February 2000.
Cellule	A political and administrative subdivision of a *secteur*.
Commentary on the Additional Protocols	ICRC Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949.
Commune	A political and administrative subdivision of a prefecture.
Common Article 3	Article 3 common to four Geneva Conventions of 12 August 1949 for the Protection of War Victims.
Furundzija (TC)	*Prosecutor v. Anto Furundzija*, Judgement of 10 December 1998, Case No. IT-95-17/1-T10.
Geneva Conventions	Geneva Convention I for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, 12 August 1949. Geneva Convention II for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949. Geneva Convention III Relative to the Treatment of Prisoners of War, 12 August 1949. Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
Genocide Convention	The UN Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.

High Command Case	*U.S. v. Wilhelm von Leeb* et al, Nuremberg International Military Tribunal Under Control Council Law No. 10, 28 November 1947 to 28 October 1948.
ICTY	UN International Criminal Tribunal for the Former Yugoslavia.
ILC	International Law Commission.
Kayishema and Ruzindana (TC)	*The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement of 21 May 1999
Kupreškić and Others (TC)	*Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Vladimir Šantić, Drago Josipović, Dragan Papić*, Decision of 15 May 1998 on Defence Challenges to Form of the Indictment, Case No. IT-96-16-PT.
MDR	Republican Democratic Movement (*Mouvement démocratique républicain*).
MRND	National Revolutionary Movement for Development (*Mouvement révolutionnaire national pour le développment*). After 1991, referred to as National Republican Movement for Democracy and Development (*Mouvement républicain national pour la démocratie et le développment*).
Musema (TC)	*The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement of 27 January 2000.
Nuremberg Tribunal	International Military Tribunal, Nuremberg, 14 November 1945 to 1 October 1946.

PL	Liberal Party (*Parti libéral).*
Prefect	An individual responsible for the administration of a Prefecture
Prefecture	Territorial and administrative unit in Rwanda.
PSD	Social-Democratic Party (*Parti social-démocrate*).
Rome Statute	The Statute of the International Criminal Court of 17 July 1998.
RPF	Rwandan Patriotic Front (*Front patriotique rwandais*).
Rutaganda (TC)	*The Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-T, Judgement of 6 December 1999.
Secteur	A political and administrative subdivision of a *commune.*
Tadić (TC)	*Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Judgement of 7 May 1997.
Tadić (AC)	*Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgement of 15 July 1999.
Tadić Jurisdiction Decision	*Prosecutor v. Duško Tadić'* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Case No. IT-94-1-AR72, 2 October 1995.
Yamashita	*U.S. v. Yamashita*, 327 U.S. 1 (1946).