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International Criminal Tribunal for Rwanda

Tribunal Pénal International pour le Rwanda

UNITED NATIONS

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TRIAL CHAMBER III

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| **Before Judges:** | Yakov Ostrovsky, Presiding<br>Lloyd G. Williams, QC<br>Pavel Dolenc |
| **Registrar:** | Adama Dieng |
| **Judgement of:** | 15 May 2003 |

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# THE PROSECUTOR

v.

# LAURENT SEMANZA

## Case No. ICTR-97-20-T

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# JUDGEMENT AND SENTENCE

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**Counsel for the Defence:**

Charles Acheleke Taku
Sadikou Ayo Alao

**INDEX**

I. Introduction ..... 1

A. The Tribunal and its Jurisdiction ..... 1

B. The Indictment ..... 2

C. The Accused ..... 4

II. The Proceedings ..... 5

A. Procedural Background ..... 5

B. The Trial ..... 7

C. Evidentiary Matters ..... 8

D. Witness Protection Issues ..... 9

III. The Defence Case ..... 10

A. The Accused's Detention in Cameroon ..... 10

B. The Nullity of the Indictment Due to Vagueness and Cumulative Charges ..... 11

1. Failure to Specify Precise Dates of Criminal Acts ..... 12

2. Failure to Specify Precise Locations of Criminal Acts ..... 14

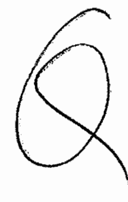
3. Failure to Specify the Identity of Victims ..... 15

4. Failure to Specify the Form of Participation ..... 15

5. Cumulative Charges ..... 16

6. Conclusion ..... 17

C. The Prosecution's Failure to Prove that Genocide Occurred in Bicumbi and Gikoro ..... 17



D. The Prosecution's Failure to Establish a Nexus Between an Internal Armed Conflict and the Death of Civilians in Bicumbi and Gikoro .......... 18

E. Personal Jurisdiction and Superior Responsibility .......... 19

F. Challenges to the Credibility of Witnesses and the Sufficiency of the Evidence Supporting the Prosecution's Case .......... 19

G. Alibi .......... 20

1. Notice of Alibi .......... 20

2. Gahengeri-Bicumbi (period of mourning): End of March 1994 - 8 April 1994 .......... 22

3. Gahengeri-Bicumbi (RPF attack): 8 April 1994 .......... 26

4. Nzige-Bicumbi: 9 April 1994 .......... 31

5. Gitarama Prefecture: 9 April 1994 – May 1994 .......... 34

6. Impossibility .......... 38

7. General Conclusion .......... 40

IV. The Prosecution Case .......... 41

A. Paragraph 3.10 of the Indictment .......... 41

1. Allegations .......... 41

2. Findings .......... 45

B. Paragraphs 3.11 and 3.18 of the Indictment .......... 47

1. Allegations .......... 47

2. Findings .......... 58

C. Paragraph 3.12 of the Indictment .......... 63

1. Allegations .......... 63

2. Findings........66

D. Paragraph 3.13 of the Indictment........68

1. Allegations........68

2. Findings........70

E. Paragraph 3.14 of the Indictment........73

1. Findings........73

F. Paragraph 3.17 of the Indictment........76

1. Allegations........76

2. Findings........77

G. Paragraph 3.19 of the Indictment........79

1. Allegations........79

2. Findings........81

H. General Allegations........83

1. Paragraphs 3.1, 3.2, and 3.3 of the Indictment........83

2. Paragraph 3.4 of the Indictment........84

3. Paragraph 3.5 of the Indictment........85

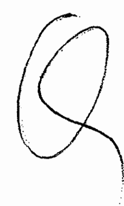
4. Paragraph 3.6 of the Indictment........87

V. The Law........92

A. Genocide........92

1. Mens Rea........93

2. Actus Reus........95



B. Crimes Against Humanity.......97

1. The Relationship Between the Enumerated Acts and the General Element 97

2. The Attack.......98

3. The Mental Element for Crimes Against Humanity.......99

4. The Enumerated Acts.......100

C. Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II Thereto (Article 4 of the Statute).......107

1. Article 4 of the Statute and the Principle of Nullum Crimen Sine Lege ...108

2. The Nature of the Conflict.......108

3. Ratione Personae: Perpetrators.......109

4. Ratione Personae: Victims.......111

5. Ratione Loci.......112

6. The Nexus Between the Alleged Violation and the Armed Conflict.......112

7. Serious Violation.......113

8. Specific Violations.......113

D. Individual Criminal Responsibility.......115

1. Responsibility Under Article 6(1) of the Statute.......115

2. Responsibility Under Article 2(3) of the Statute.......119

3. Responsibility Under Article 6(3) of the Statute.......121

E. Cumulative Charges and Convictions.......125

1. Cumulative Charges.......125

2. Cumulative Convictions.......125

VI. Legal Findings ..... 126

A. Criminal Responsibility ..... 126

B. Genocide and Complicity to Commit Genocide ..... 130

1. Genocide in Bicumbi and Gikoro Communes ..... 130

2. Musha Church ..... 131

3. Mwulire Hill ..... 133

4. Mabare Mosque ..... 134

5. Conclusion With Respect to Count 1 and Count 3 ..... 134

C. Direct and Public Incitement to Commit Genocide ..... 135

D. Crimes Against Humanity ..... 136

1. General Elements ..... 136

2. Count 4: Murder ..... 137

3. Count 5: Extermination ..... 141

4. Count 6: Persecution ..... 142

5. Count 8: Rape ..... 144

6. Count 10: Rape ..... 144

7. Count 11: Torture ..... 145

8. Count 12: Murder ..... 148

9. Count 14: Murder ..... 149

10. Intra-Article 3 Cumulative Convictions ..... 151

E. Article 3 Common to the Geneva Conventions and Additional Protocol II Thereto ..... 155

1. Existence of a Non-International Armed Conflict ............ 155

2. Victims ............ 155

3. Nexus to the Non-International Armed Conflict ............ 156

4. Specific Violations of Common Article 3 and Additional Protocol II ...... 158

VII. The Verdict ............ 165

VIII. Sentencing ............ 167

A. Gravity of the Offences ............ 167

1. Sentencing Ranges ............ 168

B. Aggravating Factors ............ 170

1. Criminal Acts Not Alleged in the Indictment ............ 171

2. The Number of Deaths ............ 172

3. The Conduct of the Defence ............ 173

4. Influence of the Accused ............ 173

C. Mitigating Factors ............ 174

1. Reduction of Sentence for Violation of Rights ............ 175

2. Credit for Time Served ............ 177

D. Conclusion ............ 178

1. Genocide and Extermination (Counts 3 and 5) ............ 178

2. Rape, Torture, Murder (Counts 10, 11, 12, and 14) ............ 178

3. Conclusion ............ 179

Separate Opinion of Judge Yakov Ostrovsky Concerning Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II

Separate and Dissenting Opinion of Judge Pavel Dolenc

ANNEX I: INDICTMENT

ANNEX II: JUDICIAL NOTICE

ANNEX III: LIST OF CITED JUDGEMENTS AND SENTENCES

7486

# I. INTRODUCTION

## A. The Tribunal and its Jurisdiction

1. This Judgement in the case of *The Prosecutor v. Laurent Semanza* is rendered by Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Tribunal for Rwanda ("Tribunal"), composed of Judge Yakov Ostrovsky, presiding, Judge Lloyd G. Williams, QC, and Judge Pavel Dolenc.

2. The Tribunal was established by the United Nations Security Council after the Council considered official United Nations reports indicating that genocide and widespread, systematic, and flagrant violations of international humanitarian law had been committed in Rwanda.[1] The Security Council determined that this situation constituted a threat to international peace and security; determined to put an end to such crimes and to bring to justice the persons responsible for them; and expressed conviction that the prosecution of such persons would contribute to the process of national reconciliation and to the restoration and maintenance of peace. Consequently, on 8 November 1994, the Security Council acting under Chapter VII of the United Nations Charter adopted Resolution 955 establishing the Tribunal.[2]

3. The Tribunal is governed by the Statute annexed to Resolution 955 ("Statute"), and by its Rules of Procedure and Evidence ("Rules").[3]

4. 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 and Rwandan citizens responsible for such violations committed in the territory of neighbouring states. Under Article 1 of the Statute, *ratione temporis* jurisdiction is limited to acts committed between 1 January 1994 and 31 December 1994. The Tribunal has *ratione materiae* jurisdiction over genocide, crimes against

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[1] *Report of the Secretary-General on the Situation in Rwanda*, UN Doc. S/1994/924; *Preliminary Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, UN Doc. S/1994/1125; and Reports of the Special Rapporteur for Rwanda of the UN Commission on Human Rights, UN Doc. S/1994/1157, Annexes I and II.
[2] UN Doc. S/RES/955 (1994).

humanity, and serious violations of Article 3 common to the Geneva Conventions ("Common Article 3") and Additional Protocol II thereto, as provided in Articles 2, 3, and 4 of the Statute. The provisions of Articles 2, 3, and 4 are set out below in Chapter IV.

**B. The Indictment**

5. The initial indictment against Laurent Semanza ("Accused") containing seven counts was submitted by the Prosecutor on 16 October 1997 and was confirmed by Judge Lennart Aspegren on 23 October 1997.

6. On 31 May 1999, the Prosecutor moved the Chamber for leave to amend the initial indictment by adding seven new counts. On 18 June 1999, the Chamber orally granted the Prosecution application after having noted no objection from the Defence. However, the Chamber ordered the Prosecution to further substantiate the concise statement of facts in the indictment with respect to the new charges, in particular those based on Common Article 3 and Additional Protocol II. The written reasons for the Chamber's decision were reserved. The Prosecution filed the first amended indictment on 23 June 1999. On 24 June 1999, the Prosecution made an oral application for leave to correct minor translation discrepancies between the English and French versions of the first amended indictment. The Trial Chamber orally granted leave to do so. On 2 July 1999, the Prosecutor filed the second amended indictment to comply with the Chamber's decision of 24 June 1999. On 1 September 1999, the Chamber handed down the written version of the decision rendered orally on 18 June 1999 with respect to the Prosecutor's Motion for Leave to Amend the Indictment. In compliance with that decision, on 12 October 1999, the Prosecutor filed the third amended indictment ("Indictment"). This Indictment contains the final version of the Prosecutor's charges and is the basis of the present Judgement. The text of the Indictment is set out in Annex I to this Judgement.

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[3] The Rules were adopted on 5 July 1995 and were successively amended on 12 January 1996, 15 May 1996, 4 July 1996, 5 June 1997, 8 June 1998, 4 June 1999, 1 July 1999, 21 February 2000, 26 June 2000, 31 May 2001, and 5 and 6 July 2002.

7. The Indictment charges the Accused with fourteen counts of genocide, crimes against humanity, and serious violations of Common Article 3 and Additional Protocol II.

8. The Indictment alleges that the Accused acted with the intent to destroy the Tutsi population in Rwanda as an ethnic or racial group. It is further stated that the Accused's acts formed part of a widespread or systematic attack against the Tutsi civilian population on political, ethnic, or racial grounds and that these acts were committed during and in conjunction with a non-international armed conflict in the territory of Rwanda between its Government and the Rwandan Patriotic Front ("RPF").

9. It is alleged in the Indictment that the Accused organized, executed, directed, and personally participated in attacks, which included killings, serious bodily or mental harm, and sexual violence, at four locations in Bicumbi and Gikoro communes during the month of April 1994. The Indictment alleges that the Accused is responsible for crimes that occurred on or about 10 April 1994 at Ruhanga church in Gikoro commune (paragraph 3.10); between 9 and 13 April 1994 at Musha church in Gikoro commune (paragraph 3.11); between 7 and 20 April 1994 at Mwulire Hill in Bicumbi commune (paragraph 3.12); and about 12 April 1994 at Mabare mosque in Bicumbi commune (paragraph 3.13). For his alleged involvement in the attacks at Ruhanga church, Musha church, Mwulire Hill, and Mabare mosque, the Accused is charged with: genocide (Count 1) and complicity to commit genocide (Count 3); murder (Count 4), extermination (Count 5), persecution (Count 6), and rape (Count 8) as crimes against humanity; rape and other serious violations of Common Article 3 and Additional Protocol II listed in Article 4(a) of the Statute (Count 7), and rape and other forms of indecent assault as serious violations of Common Article 3 and Additional Protocol II (Count 9).

10. The Indictment also states that during the Musha church attack, the Accused, along with Gikoro Bourgmestre Paul Bisengimana, cut off the arm of Victim C, resulting in his death (paragraph 3.18). For this act the Accused is charged with torture (part of Count 11) and murder (part of Count 12) as crimes against humanity, and with serious violations of Common Article 3 and Additional Protocol II (part of Count 13).

11. The Indictment further alleges that between 1991 and 1994, the Accused chaired meetings during which he made threatening remarks against Tutsi, and where he incited, planned, and organized the massacres of Tutsi civilians (paragraphs 3.7 and 3.8), for which he is charged with direct and public incitement to commit genocide (Count 2).

12. The Indictment asserts that between 7 and 30 April 1994, in Gikoro commune, the Accused incited a group to rape Tutsi women before killing them, resulting in the rape of two women and the death of one of them (paragraph 3.17). For this event, the Accused is charged with rape (Count 10), torture (part of Count 11), and murder (part of Count 12) as crimes against humanity; and with serious violations of Common Article 3 and Additional Protocol II (part of count 13).

13. Finally, the Indictment alleges that on 8 April 1994, the Accused instigated a group of *Interahamwe* in Bicumbi to kill members of a particular Tutsi family, resulting in the death of four family members and two neighbours (paragraph 3.19), for which he is charged with murder as a crime against humanity (Count 14).

14. For all the Counts, except for incitement to commit genocide (Count 2) and complicity in genocide (Count 3), the Accused is charged cumulatively with all forms of personal responsibility pursuant to Article 6(1) and with superior responsibility under Article 6(3) of the Statute.

**C. The Accused**

15. The Indictment alleges that the Accused was born in 1944 in Musasa commune, Kigali Rural prefecture, Rwanda. He was bourgmestre of Bicumbi commune for more than twenty years, until being replaced by Juvenal Rugambarara in 1993. After he ceased to serve as bourgmestre, the Accused remained a member of the *Mouvement Républicain National et Démocratique* ("MRND"), which, up to 1994, was the political party of the President of Rwanda, Juvénal Habyarimana. The Accused was nominated as an MRND representative to the National Assembly which was to be established pursuant to the Arusha Accords.

## II. THE PROCEEDINGS

### A. Procedural Background

16. On or about 26 March 1996, the Accused was arrested in Cameroon pursuant to an international arrest warrant issued by the Office of the Public Prosecutor (*Parquet général*) of Rwanda.

17. On 15 April 1996, the Prosecutor of the Tribunal submitted to the authorities of Cameroon a request for provisional measures in respect of the Accused and others, pursuant to Rule 40. On 6 May 1996, the Prosecutor requested the authorities of Cameroon to extend the detention of the Accused by three weeks.

18. On 17 May 1996, the Prosecutor informed the authorities of Cameroon of her intention to proceed only against four of the twelve suspects named in the request for provisional measures, not including the Accused.

19. On 21 February 1997, the Court of Appeal for the Centre Province in Yaoundé, Cameroon, dismissed the Rwandan request for extradition and ordered the release of the Accused. On the same day, the Prosecutor of the Tribunal submitted a new request for the provisional detention of the Accused pursuant to Rule 40.

20. On 3 March 1997, the Tribunal issued an Order, filed the following day, requesting the authorities of Cameroon to transfer the Accused to the Tribunal's Detention Facility pursuant to Rule 40*bis*.[4]

21. On 29 September 1997, while awaiting transfer to the Tribunal, the Accused filed a writ of *habeas corpus ad subjiciendum* with the Tribunal, challenging the lawfulness of his detention in Cameroon. The Defence withdrew the writ on 6 July 2000.[5]

22. The indictment against the Accused was confirmed on 23 October 1997,[6] and the Accused was transferred to the Tribunal's Detention Facility on 19 November 1997.

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[4] *Prosecutor v. Semanza,* Case No. ICTR-97-20-DP, Order for Transfer and Provisional Detention, TC, 3 March 1997.

[5] T. 6 July 2000 p. 37. *See also* Notice of Discontinuance of Writ of Habeas Corpus by Defendant, filed on 6 July 2000.

23. On 16 February 1998, the Accused made his initial appearance before the Tribunal and pleaded not guilty to the seven counts contained in the initial indictment.

24. On 18 June 1999, the Trial Chamber granted the Prosecutor's motion to amend the indictment.[7] On 23 June 1999, the Prosecutor filed the first amended indictment. On 24 June 1999, the Accused made a further appearance and entered a plea of not-guilty on the charges contained in the first amended indictment. There were no further pleas with respect to the second and third amended indictments, which only corrected translation errors or clarified the facts alleged in the first amended indictment and did not contain any new charges.

25. On 24 August 1999, the Defence filed a motion to set aside the arrest and detention of the Accused as unlawful. On 6 October 1999, the Chamber denied the Defence Motion.[8] On 12 October 1999, the Accused appealed the Trial Chamber's decision. In its decision rendered on 31 May 2000, the Appeals Chamber found that certain of the Accused's rights had been violated during his arrest and detention.[9] The Appeals Chamber ordered that the appropriate remedy would be financial compensation if the Accused is found not guilty or a reduction in sentence if he is found guilty.

26. On 3 November 2000, the Chamber took judicial notice of certain facts and documents listed in Annex II, to this Judgement.[10]

27. On 9 February 2001, the Chamber granted leave to the Government of the Kingdom of Belgium to file an *amicus curiae* brief and to make submissions about the scope of Common Article 3 and Additional Protocol II.[11]

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[6] *Prosecutor v. Semanza,* Case No. ICTR-97-20-I, Decision Confirming the Indictment, TC, 23 October 1997.

[7] *Prosecutor v. Semanza,* Case No. ICTR-97-20-I, Oral Decision on the Motion by the Office of the Prosecutor for Leave to Amend the Indictment, TC, T. 18 June 1999 pp. 55-56. *Prosecutor v. Semanza,* Case No. ICTR-97-20-I, Written Decision on the Motion by the Office of the Prosecutor for Leave to Amend the Indictment, TC, 1 September 1999.

[8] *Prosecutor v. Semanza,* Case No. ICTR-97-20-I, Decision on the Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful, TC, 6 October 1999.

[9] *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Decision, AC, 31 May 2000.

[10] *Prosecutor v. Semanza,* Case No. ICTR-97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54, TC, 3 November 2000.

[11] *Prosecutor v. Semanza,* Case No. ICTR-97-20-T, Decision on the Kingdom of Belgium's Application to File an *Amicus Curiae* Brief and on the Defence Application to Strike the Observations

28. On 6 February 2002, the Chamber partially granted a Defence motion filed on 13 November 2001 and took judicial notice of the following documents: *Décret-Loi No. 10/75: Organisation et fonctionnement de la préfecture [au Rwanda]*, and *Décret-Loi No. 18/75 du 14 août 1978*, to the extent that it amended or otherwise modified *Décret-Loi No. 10/75.*[12]

**B. The Trial**

29. The trial started on 16 October 2000 with the opening of the Prosecution case. The Prosecutor conducted her case during five periods: 16 to 17 October 2000; 6 to 15 November 2000; 4 to 7 December 2000; 6 to 20 March 2001; and 18 to 25 April 2001. Over the course of twenty-nine trial days, the Prosecutor called twenty-four witnesses and entered eighteen exhibits into the record.

30. On 20 July 2001, the Defence filed a Motion for a Judgement of Acquittal.[13] In its decision of 27 September 2001, the Chamber denied this motion.[14]

31. The Defence case opened on 1 October 2001 and was conducted during four periods: 1 to 10 October 2001; 22 October 2001 to 14 November 2001; 26 to 28 November 2001; and 28 January 2002 to 28 February 2002. Over the course of forty-four trial days, the Defence called twenty-seven witnesses and entered forty-five exhibits into the record.

32. At the end of the Defence case, the Prosecutor filed a Motion for Leave to Call Rebuttal Evidence to respond to the Defence of Alibi. With the Chamber's leave, the Prosecution called three rebuttal witnesses during the period of 15 to 25 April 2002.[15]

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of the Kingdom of Belgium Concerning the Preliminary Response by the Defence, TC, 9 February 2001. The brief was filed on 16 October 2000. In a letter dated 29 May 2002, the Belgian Government advised the Chamber that it did not wish to make oral submissions. The Belgian Government further stated that it wished to pursue only the submissions regarding the nexus between the acts covered by Article 4 of the Statute of the Tribunal and the armed conflict.

[12] *Prosecutor v. Semanza,* Case No. ICTR-97-20-T, Decision on the Defence Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94(B) and 54, TC, 6 February 2002.

[13] Defence Motion for a Judgement of Acquittal in Respect of Laurent Semanza after Quashing the Counts Contained in the Third Amended Indictment.

[14] *Prosecutor v. Semanza,* Case No. ICTR-97-20-T, Decision on the Defence Motion for a Judgement of Acquittal in Respect of Laurent Semanza after Quashing the Counts Contained in the Third Amended Indictment (Article 98*bis* of the Rules of Procedure and Evidence) and Decision on the

33. After the completion of the Prosecution case in rebuttal, the Defence filed a Motion for Leave to Call Rejoinder Witnesses. The Chamber denied this motion.[16]

34. The parties submitted their final trial briefs on 12 June 2002. On 17 June 2002, the Prosecutor presented her oral closing arguments. On 18 June 2002, the Defence presented its oral closing arguments. On 19 June 2002, the parties completed rebuttal and rejoinder to the closing arguments, and the Presiding Judge declared the trial hearing closed pursuant to Rule 87(A).

### C. Evidentiary Matters

35. Rule 89 sets out the general provisions of the Tribunal's rules of evidence. In accordance with this Rule, a Chamber may admit any relevant evidence which it deems to have probative value. Furthermore, in cases not otherwise provided for under the Tribunal's rules of evidence, the Chamber is bound to apply rules of evidence which best favour a fair determination of the matter before it and which are consonant with the spirit of the Statute and the general principles of law. The Chamber is not bound by national rules of evidence.

36. The Chamber observes that in this case, prior written statements of witnesses were not systematically tendered into evidence in their entirety. Rather, when the parties used such statements during examination, they read the relevant portions of the statements into the record. Only in the case of Witness CBN did the Chamber admit the entire statement into evidence.[17] When inconsistencies were raised between the content of a prior statement and the testimony during trial, the Chamber's point of departure was the account given by a witness in his testimony in court. The Chamber notes that differences between prior statements and testimony in court may be due to various factors, such as the lapse of time, the language used, the questions put to the

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Prosecutor's Urgent Motion for Suspension of Time-Limit for Response to the Defence Motion for a Judgement of Acquittal, TC, 27 September 2001.

[15] *Prosecutor v. Semanza,* Case No. ICTR-97-20-T, Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence, TC, 27 March 2002.

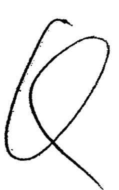
[16] *Prosecutor v. Semanza,* Case No. ICTR-97-20-T, Decision on Defence Motion for Leave to Call Rejoinder Witnesses, TC, 30 April 2002.

[17] This followed the witness's sworn acknowledgement that the statement was genuine and the Prosecutor's waiver of her right to cross-examine the witness. T. 31 October 2001 p. 87.

witness, the accuracy of interpretation and transcription, and the impact of trauma on the witness. However, when the inconsistencies cannot be explained to the satisfaction of the Chamber, the probative value of the testimony may be questioned.

**D. Witness Protection Issues**

37. Part of the evidence adduced by the parties was given in closed sessions due to witness protection concerns. In analysing evidence received during closed sessions in this Judgement, the Chamber was mindful of the need to avoid unveiling identifying particulars of protected witnesses so as to prevent disclosure of their identities to the press or the public. At the same time, the Chamber wished to provide in the Judgement as much detail as possible to make it easy to follow its reasoning. In view of these concerns, when referring to evidence received in closed sessions in this Judgement, the Chamber used language designed not to reveal protected information yet specific enough to convey the basis for its reasoning.



## III. THE DEFENCE CASE

38. The Defence raised several arguments, described below, in an effort to challenge the jurisdiction of the Tribunal, the validity of the Indictment, and the sufficiency of the evidence supporting the Prosecution's case, including a defence of alibi.

### A. The Accused's Detention in Cameroon

39. The Defence advanced the argument, previously rejected by the Appeals Chamber, that the Tribunal lacks jurisdiction because the Accused was detained in Cameroon in violation of Rule 40*bis*.[18] The Defence noted that the Prosecutor had justified this period of detention to the Trial Chamber and the Appeals Chamber as *force majeur*, a failure on the part of Cameroonian authorities to transfer the Accused quickly.[19] The Defence asserted that this issue should be reexamined because, subsequent to the Appeals Chamber's ruling, a Cameroonian court found that the declaration of Judge Mballe, on which the Prosecutor based her argument, is a "false document in Cameroonian Courts".[20] The Defence submitted that Judge Mballe's declaration was therefore "null and void" and concluded that the Prosecution's use of the declaration "vitiates everything", requiring the immediate release of the Accused.[21]

40. The Appeals Chamber settled the issue of the violation of Rule 40*bis* in connection with the Accused's detention in Cameroon pending his transfer to the Tribunal.[22] The Appeals Chamber held that the Accused's right to be promptly charged pursuant to Rule 40*bis* could not have been violated because the initial indictment against the Accused had already been confirmed at the time of his transfer to the Tribunal's Detention Facility.[23] Although the Appeals Chamber alluded to the rationale behind the Cameroonian authorities' failure to transfer the Accused, mentioning not only the declaration of Judge Mballe but also that of U.S. Ambassador

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[18] T. 18 June 2002 pp. 94-96; *Conclusions de la défense après la clôture des débats suite à la décision de la 3ème Chambre en date du 2 Mai 2002*, filed 12 June 2002, ["Defence Closing Brief"] pp. 7-8.
[19] T. 18 June 2002 p. 94; Defence Closing Brief p. 7.
[20] T. 18 June 2002 p. 95; Defence Closing Brief p. 7.
[21] T. 18 June 2002 pp. 95-96; Defence Closing Brief p. 8.
[22] *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Decision, AC, 31 May 2000, paras. 91-104.

David Scheffer as well as other evidence, the Appeals Chamber's holding is not based solely on this peripheral discussion. The Chamber therefore holds that the attempt of the Defence to reargue this settled issue based solely on the peripheral matter of the validity of Judge Mballe's attestation is without merit.

**B. The Nullity of the Indictment Due to Vagueness and Cumulative Charges**

41. The Defence raised a number of challenges to the Indictment asserting that it was vague and thus prejudiced the Accused's ability to organize his defence.[24]

42. As the primary accusatory instrument, an indictment must contain a concise statement of the facts detailing the crime or crimes with which an accused is charged.[25] The accused also has a right to be "promptly" informed "in detail" of the nature of the charges against him.[26] The Chamber emphasises that allegations of vagueness should normally be dealt with in the pre-trial stage.[27] The Defence has not offered any explanation for its delay in raising many of its specific challenges to the Indictment until its Closing Brief. Nonetheless, the Chamber finds that its duty to ensure the integrity of the proceedings and safeguard the rights of the Accused warrants full consideration of the arguments of the Defence.[28]

43. The Chamber emphasises that at this post-trial phase it is concerned only with defects in the Indictment that actually prejudiced the rights of the Accused.[29] The Chamber notes that the Defence failed to articulate any particular instance of prejudice.

44. The fundamental question in determining whether an indictment was pleaded with sufficient particularity is whether an accused had enough detail to prepare his defence.[30] The indictment must state the material facts underpinning the charges, but

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[23] *Semanza*, Decision, AC, 31 May 2000, para. 100.
[24] Defence Closing Brief pp. 16-19.
[25] Article 17(4); Rule 47(C).
[26] Articles 19(2), 20(4)(a).
[27] *Kupreskic,* Judgement, AC, para. 79. *See also* Rule 72(F).
[28] *Kupreskic,* Judgement, AC, para. 79. *See also Kayishema and Ruzindana*, Judgement, AC, paras. 95, 97; *Ntakirutimana*, Judgement, TC, para. 52.
[29] *Kupreskic,* Judgement, AC, paras. 115-125 (undertaking prejudice analysis for vagueness allegations raised in the post-trial phase).
[30] *Kupreskic,* Judgement, AC, para. 88.

need not elaborate on the evidence by which such material facts are to be proved.[31] The Chamber assesses the materiality of a particular fact in the context of the alleged criminal conduct with which the accused is charged.[32]

45. In cases where the Prosecutor alleges that an accused personally committed the criminal acts, an indictment generally must plead with particularity the identity of the victims, the time and place of the events, and the means by which the acts were committed.[33] The specificity required to plead these kinds of facts is not necessarily as high where criminal responsibility is predicated on accomplice liability or superior responsibility.[34] The Chamber is also mindful that even when personal participation is alleged, situations may exist where the nature or scale of the alleged crimes makes it impracticable to require a high degree of specificity in the identity of victims or the dates of commission.[35]

*1. Failure to Specify Precise Dates of Criminal Acts*

46. The Defence argued that the Indictment failed to specify the dates of the alleged acts by using language such as: (i) "on or about" a particular date in paragraphs 3.10, 3.13, and 3.18; (ii) "between" two specific dates in paragraphs 3.7, 3.11, 3.12, 3.15, 3.16, and 3.17; (iii) "as of the beginning of 1994" in paragraph 3.8; and (iv) "as early as 1991" in paragraph 3.9.[36]

47. The Prosecutor's use of "on or about" a particular date in paragraphs 3.10, 3.11, 3.12, 3.13, 3.18, and 3.19 did not prejudice the Accused in this case because the underlying events actually occurred on the particular dates set out in each of these paragraphs.

48. In paragraphs 3.11 and 3.12, the Chamber finds that "between" appropriately refers to two relatively narrow five to thirteen day ranges when the Accused allegedly

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[31] *Kupreskic,* Judgement, AC, para. 88.
[32] *Kupreskic,* Judgement, AC, para. 89.
[33] *Kupreskic,* Judgement, AC, para. 89.
[34] *See Brdjanin and Talic*, Case No. IT-99-36, Decision on Objections by Momir Talic to the Form of the Amended Indictment, TC, 20 February 2001, paras. 18-20.
[35] *Kupreskic,* Judgement, AC, para. 89.
[36] Defence Closing Brief p. 16. Though the Defence complained about the use of "on or about" only in paragraphs 3.10, 3.13, and 3.18, the Chamber notes that this phrase is also in paragraph 3.11, 3.12, and 3.19.

"organized" the Musha church and Mwulire Hill massacres. Though both paragraphs also refer to the Accused "execut[ing]" the massacres during this same period, intimating personal participation and thus requiring greater specificity, each of these paragraphs clarifies any ambiguity by averring the particular date on which the Accused is alleged to have physically participated in the massacres.

49. Paragraph 3.17 refers to a specific event on a single date when the Accused allegedly instigated a particular group of men to rape and kill Tutsi women, "immediately" resulting in the commission of those criminal acts. This type of an allegation should generally be pleaded with particularity concerning the date on which it occurred. However, the Chamber finds that "between April 7 and April 30" is appropriate in this instance because Prosecution Witness VV, the sole witness, could not recall the exact date, and thus the date could not be pleaded with greater particularity. Moreover, the paragraph describes the event and the Accused's alleged conduct in detail.

50. The Chamber finds the date ranges used in paragraphs 3.7, 3.8, and 3.9 to be problematic. Paragraph 3.7 alleges that "between 1991 and 1994" the Accused chaired meetings where he made threatening remarks toward Tutsis. Paragraph 3.8 alleges that the Accused chaired meetings where he incited and planned the killings of Tutsi civilians "as of the beginning of 1994". Paragraph 3.9 alleges that the Accused trained and distributed weapons to *Interahamwe* "as early as 1991 . . . until 1994". These paragraphs allege in a general way instances of specific conduct which, if proven, are either criminal or could be used to infer *mens rea* in support of a criminal conviction. The Indictment's use of these exceedingly broad date ranges provides grossly inadequate notice of particular conduct or events, making it difficult for the Accused to prepare his defence. Though the Prosecutor is allowed a degree of latitude where the exact dates of events are not known to her, the one to four year ranges in paragraphs 3.7, 3.8, and 3.9 are not acceptable, particularly where the allegations are devoid of any other detail that might assist the Accused in identifying the events alluded to in the Indictment. Notably, these paragraphs even neglect to mention the most basic of details such as the commune where the events allegedly occurred.

51. The Chamber also finds that the date ranges used in paragraphs 3.15 and 3.16 are impermissibly vague. These paragraphs refer broadly to the Accused's responsibility

as a superior and as an accomplice to the direct perpetrators' unspecified rapes and other acts of sexual violence which allegedly occurred in Bicumbi and Gikoro "between 6 April and 30 April". This date range is problematic in particular because these paragraphs fail to identify any specific criminal act, particularise the location where the acts occurred, or specify the Accused's conduct or his relationship with any known principal perpetrator.

52. The Chamber notes that the broad allegations in paragraphs 3.7, 3.8, 3.9, 3.15, and 3.16 leave the impression that the Prosecutor had not obtained any particular and specific information or evidence regarding these allegations. Under such circumstances, the Accused cannot possibly be expected to effectively prepare a defence.

*2. Failure to Specify Precise Locations of Criminal Acts*

53. The Defence argued that in paragraphs 3.7, 3.8, 3.9, 3.15, 3.16, and 3.19, the Indictment failed to specify the precise locations where certain violations allegedly occurred.[37]

54. As discussed above, the Chamber finds paragraphs 3.7, 3.8, 3.9, 3.15, and 3.16 impermissibly vague because they lack even the most general details about where the alleged acts took place.

55. Considering witness and victim protection concerns, the Chamber finds that the Indictment alleges sufficient detail concerning the murders alleged in paragraph 3.19.[38] The Chamber notes that the "particular house in Bicumbi Commune" was that of protected Prosecution Witness VAM's son and further identification could have disclosed the identity of Witness VAM. Upon the disclosure of the witness's personal details to the Accused consistent with the witness protection order, the Defence would have had adequate notice of the location of the underlying crimes.

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[37] Defence Closing Brief p. 18.

[38] *See generally Prosecutor v. Semanza,* Case No. ICTR-97-20-I, Decision on the Prosecution Motion for Protection of Witnesses, TC, 10 December 1998.

*3. Failure to Specify the Identity of Victims*

56. The Defence challenged the Prosecution's failure to disclose the identity of Victims A through H and J in paragraphs 3.17 through 3.19 of the Indictment.[39]

57. Taking into account witness protection concerns, the Chamber finds that the Prosecutor adequately identified Victims A and B in paragraph 3.17 as well as Victims D through H and J in paragraph 3.19. The Chamber notes that Victim A is protected Prosecution Witness VV whose cousin is Victim B. The Chamber further notes that Victims D through H and J are the family members and neighbours of protected Prosecution Witness VAM. Therefore, the identification of these victims in the Indictment would have disclosed the identities of protected witnesses. The Chamber notes that the disclosure to the Defence of the particulars of Prosecution Witnesses VV and VAM pursuant to the witness protection order provided adequate identification of the victims in these paragraphs in sufficient time to prepare a defence.

58. The Chamber finds that the Prosecutor's use of the pseudonym "Victim C" in paragraph 3.18 is inappropriate, particularly because there is no apparent victim or witness protection concern justifying the use of a pseudonym as opposed to the victim's name. The Chamber, however, cannot identify any particular prejudice flowing from this lack of specificity. The Chamber notes that this paragraph specifically alleges that the Accused cut the victim's arms during an interrogation in Musha sector on 13 April 1994. The Defence notably did not find either the date or location of this act vague. In light of the particularity with which the event was pleaded, the identity of Victim C became readily apparent to the Defence when Prosecution Witness VA, who testified about this event, disclosed the victim's name in her written statement and during her testimony on 7 March 2001.

*4. Failure to Specify the Form of Participation*

59. The Defence argued that the Indictment was vague because it failed to specify the role played by the Accused in the alleged violations of the Statute, and instead alleged for each count that the Accused engaged in one or all possible forms of participation

that might give rise to criminal responsibility.[40] The Chamber notes that it is vague to plead all possible forms of criminal responsibility in the Indictment for each criminal act charged to an accused unless the Prosecutor actually intends to prove each of the forms of responsibility.[41] The Chamber notes that the ambiguity which exists in this charging strategy may be cured where the paragraphs referenced in each count of an indictment provide greater detail concerning the accused's participation. In this case, each paragraph of the Indictment provides further specificity concerning the Accused's conduct, indicating, for example, whether he allegedly personally participated in a massacre. Moreover, the Chamber cannot identify any possible prejudice to the Accused. In light of the potential for ambiguity, the Chamber emphasises that the Prosecutor should not plead what she does not intend to prove.[42]

*5. Cumulative Charges*

60. The Defence asserted that the vague and speculative nature of the Indictment is aggravated by the fact that the Accused was cumulatively charged with multiple crimes for conduct arising out of a single incident.[43] The Defence also submitted that it is inadmissible in law for an indictment to charge the same acts as genocide, crimes against humanity, and violations of Common Article 3 and Additional Protocol II.[44] Moreover, the Defence argued that it was impermissible to simultaneously charge an individual for both genocide and complicity to commit genocide.[45] The Chamber finds that these arguments lack merit and emphasises that the Appeals Chamber has confirmed the propriety of charging cumulatively.[46]

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[39] Defence Closing Brief pp. 21-23.
[40] Defence Closing Brief p. 19.
[41] *Brdjanin and Talic*, Case No. IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, TC, 26 June 2001, para. 8; *Brdjanin and Talic*, Case No. IT-99-36, Decision on Objections by Momir Talic to the Form of the Amended Indictment, TC, 20 February 2001, para. 11.
[42] *Brdjanin and Talic*, Case No. IT-99-36, Decision on Objections by Momir Talic to the Form of the Amended Indictment, TC, 20 February 2001, para. 11.
[43] Defence Closing Brief pp. 19-21, 73, 74.
[44] Defence Closing Brief p. 19.
[45] Defence Closing Brief p. 73.
[46] *Musema*, Judgement, AC, para. 369. *See also Bagilishema*, Judgement, TC, paras. 108-109; *Kunarac*, Judgement, AC, para. 167; *Celebici*, Judgement, AC, para. 400.

*6. Conclusion*

61. The Chamber finds that paragraphs 3.7, 3.8, 3.9, 3.15, and 3.16 of the Indictment are impermissibly vague and that for this reason they prejudiced the Accused's ability to prepare his defence. The Chamber therefore will not consider these paragraphs in its factual or legal findings. Consequently, the Chamber cannot enter a conviction for direct and public incitement to commit genocide (Count 2), which is based solely on paragraphs 3.7 and 3.8, and rape as a crime against humanity (Count 8), which is based solely on paragraphs 3.15 and 3.16.

62. The Defence's remaining arguments concerning the lack of precision of the Indictment with respect to dates, locations, identities of witnesses, and forms of participation as well as cumulative charging lack merit for the reasons set forth above.

## C. The Prosecution's Failure to Prove that Genocide Occurred in Bicumbi and Gikoro

63. The Defence submitted that the Prosecution failed to introduce evidence that genocide was committed in Bicumbi and Gikoro communes.[47] The Defence argued that the Prosecution never presented proof that civilian Tutsis were targeted and killed as alleged in paragraphs 3.3 and 3.4.2 of the Indictment.[48] In support of this claim, the Defence argued that the evidence revealed that both Hutus and Tutsis were killed without any distinction.[49] The Defence supported this argument with reference to the report of United Nations Special Rapporteur Degni Ségui, the testimonies of Witnesses VD, VF, VAO, MTP, BP, BZ, and Ndengejeho, and the report of Lecomte and Vorhauer.[50] The Defence also asserted that the Prosecution never clearly identified the authors of the crimes, and asserted that Special Rapporteur Degni Ségui's report indicated that the RPF massacred Hutus and Tutsis at the Church of Saint Paul of Kigali.[51]

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[47] Defence Closing Brief pp. 75, 77.
[48] Defence Closing Brief pp. 8-9, 78.
[49] Defence Closing Brief p. 9.
[50] Defence Closing Brief p. 9.
[51] Defence Closing Brief pp. 9, 11. The Chamber notes that what occurred at the Church of St. Paul of Kigali is not relevant to this case.

64. In addition, the Defence argued that the Prosecution failed to introduce evidence that there was a premeditated planning for the crimes that occurred, rather than a spontaneous reaction to President Habyarimana's death.[52] The Defence asserted also that the Prosecution did not introduce proof of the Accused's intent to commit genocide.

65. The Chamber will address whether the Prosecution established that genocide occurred in Bicumbi and Gikoro in its factual and legal findings.

**D. The Prosecution's Failure to Establish a Nexus Between an Internal Armed Conflict and the Death of Civilians in Bicumbi and Gikoro**

66. The Defence argued that the Prosecution never established the existence of a non-international armed conflict in Rwanda.[53] Rather, the Defence argued that "monumental" evidence reflected the existence of an international armed conflict involving Uganda.[54]

67. The Defence also argued that the Prosecution never introduced evidence that the alleged crimes that occurred in Bicumbi and Gikoro had a nexus to an internal armed conflict or that the Accused would have intended the attacks that occurred in those localities to form part of a non-international armed conflict in Rwanda.[55]

68. The Defence asserted that the failure to introduce evidence of a nexus between the civilian deaths and an internal armed conflict requires the dismissal of the counts related to both Article 3 (crimes against humanity) and Article 4 (serious violations of Common Article 3 and Additional Protocol II) of the Statute.[56]

69. The Defence also submitted that the counts related to crimes against humanity should be dismissed because the Prosecution had alleged in the Indictment that these acts were committed to advance a war effort. The Defence asserted that the

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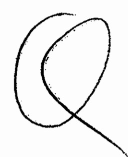
[52] Defence Closing Brief p. 11.
[53] Defence Closing Brief pp. 12, 15.
[54] Defence Closing Brief pp. 123, 124, 125.
[55] Defence Closing Brief p. 12.
[56] Defence Closing Brief pp. 14, 16, 45.



Prosecution had not proven the existence of this war effort.[57] The Defence also noted that the Prosecution failed to prove that there was a widespread or systematic attack or that the Accused had knowledge of a widespread or systematic attack.[58]

70. The Chamber will consider these matters in its factual and legal findings.

### E. Personal Jurisdiction and Superior Responsibility

71. The Defence asserted that the Accused could not be criminally responsible for the criminal acts of the *Interahamwe* or other government agents because he held no administrative or military position within the Rwandan government or within the *Interahamwe* militia that would have allowed him to either plan, order, or be informed of the preparations of the crimes alleged in the Indictment.[59] The Defence also concluded that the Tribunal therefore lacked personal jurisdiction.[60]

72. The Tribunal has personal jurisdiction over the Accused pursuant to Articles 1, 5, and 8 of the Statute because he is a natural person alleged to have committed crimes on the territory of Rwanda within the Tribunal's temporal and subject matter jurisdiction. The question of whether the Accused is criminally responsible as a superior is a mixed question of fact and law that goes solely to the issue of criminal responsibility rather than jurisdiction. The Chamber will consider whether a superior-subordinate relationship existed between the Accused and others in its subsequent findings.

### F. Challenges to the Credibility of Witnesses and the Sufficiency of the Evidence Supporting the Prosecution's Case

73. The Defence raised a number of challenges to the credibility of the Prosecution's witnesses and to the sufficiency of the evidence supporting the Prosecution's case with respect to each count in the Indictment. In addition, the Defence asserted that material contradictions in the testimony of Prosecution witnesses involving times,

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[57] Defence Closing Brief pp.15-16, 116.
[58] Defence Closing Brief p. 124.
[59] Defence Closing Brief p. 23.
[60] Defence Closing Brief pp. 32-33.

dates, and locations preclude the Chamber from entering a conviction.[61] According to the Defence, the Indictment and Prosecution witnesses assert that the Accused simultaneously participated in massacres at numerous locations.[62] The Defence submitted several examples of the alleged internal inconsistencies in the Prosecutor's case as well as conflicts between that case and the Accused's alibi.

74. The Chamber will consider these arguments when making its findings.

**G. Alibi**

75. At trial the Defence advanced an alibi to establish that the Accused could not have committed the acts alleged in the Indictment. The Chamber notes that the Accused's alibi involves a continuous narrative that spans the period of the crimes alleged in the Indictment. Therefore, to preserve the integrity of the alibi, the salient testimony including the Prosecutor's rebuttal of the alibi and an assessment of its credibility and reliability are set forth below.

76. The Chamber will fully consider the evidence of the Accused's alibi when determining whether the Prosecutor has proved the Accused's guilt beyond a reasonable doubt.

*1. Notice of Alibi*

77. The Chamber recalls that the Defence presented its evidence supporting the Accused's alibi without providing the advance notice prescribed in Rule 67(A), though the Defence indicated that it was aware of the alibi from the very beginning of the case.[63] The Defence explained that it had failed to give notice because the Accused needed to ask his family to search his personal items for "medical bills, petrol bills, or documents related to transportation."[64] The Defence asserted that without this corroborating proof, it was not "legally" in a position to disclose the alibi.[65] The Defence thus opted to proceed under Rule 67(B) and "allow the

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[61] *See* Defence Closing Brief p. 94.
[62] *See* Defence Closing Brief pp. 34-35.
[63] T. 18 June 2002 pp. 59, 60.
[64] T. 18 June 2002 p. 62.
[65] T. 18 June 2002 p. 62.

Prosecutor to criticise [its] position."[66] The Chamber permitted the Defence to present the Accused's alibi based on Rule 67(B) and then allowed the Prosecutor to present rebuttal evidence limited exclusively to the alibi.

78. In its closing argument, the Prosecutor highlighted that the Defence had at least six opportunities during the proceedings to provide notice of its intent to assert an alibi, but failed on each occasion.[67] Based on the repeated failure of the Defence to give advance notice, the Prosecution urged the Chamber to draw adverse inferences against the Accused.[68]

79. The Defence asserted, however, that the Prosecution had some notice of its alibi in the form of (i) a *procès-verbal* taken in Cameroon in which the Accused indicated that he fled his residence on 8 April 1994,[69] and (ii) the request of the Defence to the Prosecution to disclose names of the RPF members illegally occupying the Accused's home since 9 April 1994.[70]

80. The Chamber recalls its earlier finding that the Defence failed to give notice of its intent to enter the alibi defence as required by Rule 67(A)(ii)(a).[71] In addition, the Chamber has taken due note of the Defence's assertions that the Accused gave notice of his alibi in the form of the Cameroonian *procès-verbal* taken after his arrest and the Defence's request for disclosures concerning the occupation of the Accused's home in Gahengeri. The Chamber finds that such notice does not satisfy the requirements plainly set forth in Rule 67(A)(ii)(a). Neither of the documents indicates "the place or places at which the accused claims *to have been present* at the time of the alleged crime".[72] These documents provide only a cryptic indication that the Accused was not at his home, without any reference as to where he was at any particular time.

81. The Chamber also is not convinced by the asserted explanation of the Defence for failing to give proper notice based on its lack of and search for corroborating physical

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[66] T. 18 June 2002 pp. 62-63.
[67] T. 17 June 2002 p. 105.
[68] T. 17 June 2002 pp. 105-109.
[69] T. 18 February 2002 pp. 101-102.
[70] Defence Closing Brief pp. 46-47.
[71] *Prosecutor v. Semanza*, Case No. ICTR-97-20-I, Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence, TC, 27 March 2002, para. 10.

evidence, none of which was ever produced. Rule 67 does not require an accused to disclose the extent and nature of the underlying proof of his alibi prior to the trial.[73]

82. Notwithstanding the non-compliance of the Defence with the provisions of Rule 67(A)(ii)(a), the Trial Chamber emphasises that it fully considered the Accused's alibi in light of Rule 67(B). However, where, as in this case, the Defence fails to show good cause for its failure to act in accordance with Rule 67(A)(ii)(a), the Chamber may take into account this failure when weighing the credibility of the alibi defence.[74]

*2. Gahengeri-Bicumbi (period of mourning): End of March 1994 - 8 April 1994*

83. The Defence in its closing arguments and in its Closing Brief asserted that the Accused remained at his home in Gahengeri from 28 March 1994 until 8 April 1994 in observation of the traditional period of mourning after an unknown assailant killed his daughter Nyinwumubyeyi Marie-Mère de Dieu ("Mubyeyi") on 28 March 1994.[75] The Defence explained that Mubyeyi was buried the next day and that the mourning period was set to end on 9 April 1994.[76] The Defence submitted that the Accused and his family remained at their home during the mourning period, according to Rwandan tradition, until they were forced to flee the region when their home came under attack on the night of 8 April 1994.[77]

84. The Accused testified that his daughter Mubyeyi was killed by a bullet fired over the wall of his residential compound at around 5:30 p.m. in the evening.[78] The Accused could not recall the date, but stated that she was killed on 26 or 27 March

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[72] Rule 67(A)(ii)(a) (emphasis added).

[73] *Kayishema and Ruzindana*, Judgement, AC, para. 112 ("[i]f the Defence is not in a position to produce evidence of the accused's whereabouts, it is, nevertheless, at liberty to disclose to the Prosecutor, and then produce before the Trial Chamber, all evidentiary material likely to raise doubts as to the accused's responsibility for the crimes charged").

[74] *Kayishema and Ruzindana*, Judgement, TC, para. 237, *aff'd Kayishema and Ruzindana,* Judgement, AC, para. 117. *See also Rutaganda*, Judgement, TC, para. 298.

[75] Defence Closing Brief p. 33. The Chamber notes that the Accused's daughter was referred to by the Prosecutor, the Defence, and Defence witnesses interchangeably as "Mubyeyi", "Umubyeyi", or "Marie-Mère de Dieu".

[76] Defence Closing Brief p. 33. The Chamber notes that no witness testified, as the Defence submits, that Mubyeyi's burial was 29 March. This submission contradicts the Accused's testimony that she was buried on 4 April. T. 28 February 2002 pp. 114-115.

[77] Defence Closing Brief p. 33.

[78] T. 18 February 2002 p. 51.

1994.[79] He later testified that Mubyeyi died on either 27 or 28 March and that she was buried on 4 April 1994.[80] The Accused explained that after his daughter's death, he and his family remained at their home in Gahengeri in observation of the traditional period of mourning and received guests.[81] The Accused indicated that he was observing the mourning period as late as 8 April 1994.[82]

85. Defence Witness PFM indicated that she was at the Accused's home when Mubyeyi was killed.[83] The witness did not recall the exact date of Mubyeyi's death, but testified that someone had fired into the garden from outside the wall of the compound and killed her between 7:00 and 8:00 p.m., sometime between 20 and 30 March 1994.[84] Witness PFM believed that Mubyeyi had been killed by the RPF whose elements, according to her, had infiltrated the area.[85] Witness PFM testified that the Accused and his family were preparing to end the mourning period when the president died and that the period was to end on 9 April 1994.[86]

86. Witness PFM testified that she saw the Accused on 6 April 1994 when he informed her that the President of Rwanda had been killed.[87] Witness PFM also stated that she saw the Accused on the morning of 7 April 1994, and stated that he was visibly sad at the death of the president and that he was smoking a cigarette.[88] The witness testified that she then spent most of her time on 7 April 1994 praying in the chapel located in the upper part of the Accused's compound with the Accused's wife and older children.[89] The witness stated that she spent part of 8 April 1994 hiding under a bed because of intense shooting she heard outside the Accused's compound.[90] Witness PFM testified that she saw the Accused in the living room of his house in the evening of 8 April 1994: (i) between 7:00 and 8:00 p.m., speaking with a man whom she did not know; (ii) "later on", as the Accused continued to drink beer with the man

[79] T. 18 February 2002 pp. 49, 50.
[80] T. 28 February 2002 pp. 114-115.
[81] T. 18 February 2002 pp. 49-50.
[82] T. 18 February 2002 p. 125; T. 18 February 2002 p. 141 (French).
[83] T. 13 November 2001 pp. 63, 75-76.
[84] T. 13 November 2001 pp. 75, 76, 77.
[85] T. 13 November 2001 p. 77; T. 14 November 2001 p. 3.
[86] T. 14 November 2001 pp. 34, 75; T. 14 November 2001 pp. 38, 83 (French).
[87] T. 13 November 2001 pp. 43-44.
[88] T. 13 November 2001 p. 45.
[89] T. 13 November 2001 pp. 45-46.
[90] T. 13 November 2001 p. 47.

and Bizuru, a neighbour, who had just arrived; and (iii) around 11:00 p.m., when she fled the compound with the Accused and his family.[91]

87. Witness PFM attested that after 6 April 1994, the Accused "never" left his compound on foot and noted that his vehicle was "always" in the garage.[92] She explained that she would have seen him leave because the windows of the chapel in the main house in the Accused's compound and of her room in the compound faced the garage and that if the Accused had left his room, he would also have passed by the chapel in the main house.[93]

88. Defence Witness KNU testified that she stayed at the Accused's home in Gahengeri from 2 until 8 April 1994 when she fled with the Accused and his family.[94] She testified that she was invited to the Accused's home by one of his children to assist in preparations for the end of the mourning period.[95] The witness testified that she did not know the exact date or cause of Mubyeyi's death and could only state that she died in the month of March during the school exam period before the Easter holiday.[96]

89. Witness KNU testified that the Accused and his family remained at home from 6 April 1994 until the night of 8 April 1994, when they fled.[97] The witness acknowledged, however, that she did not see the Accused at all times throughout that forty-eight hour period and that she did not keep track of the Accused's whereabouts.[98] The witness testified that she saw the Accused smoking on the morning of 7 April 1994 and noted that he appeared sad.[99] The witness also recalled one other unspecified occasion when she saw him in the sitting room of the house.[100] Witness KNU stated that she spent part of the day on 8 April 1994 praying in the children's chapel in the building on the south part of the compound and then went to

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[91] T. 13 November 2001 pp. 47-48.
[92] T. 13 November 2001 p. 62.
[93] T. 13 November 2001 p. 62.
[94] T. 12 November 2001 pp. 22, 57-59, 65, 71.
[95] T. 12 November 2001 p. 47; T. 12 November 2001 pp. 52-53 (French) («Elle m'avait demandé d'aller les assister pour préparer la célébration de fête de fin . . . de levée de deuil»).
[96] T. 12 November 2001 p. 48.
[97] T. 12 November 2001 pp. 22, 23, 26-27, 66-69, 71, 74.
[98] T. 12 November 2001 p. 68; T. 13 November 2001 p. 6.
[99] T. 12 November 2001 p. 23.
[100] T. 12 November 2001 p. 67.

bed around 8:00 or 9:00 pm.[101] Witness KNU also explained that while she was at the Accused's residence, she stayed in the house on the south part of the compound while the Accused stayed in the house on the north end.[102] The witness testified that she visited the Accused's home regularly on various holidays and that she was very fond of him.[103]

90. Defence Witness MLZ testified that he was a frequent visitor at the Accused's home and a friend of his children.[104] He stated that he was aware that the Accused had lost his daughter Mubyeyi and that he noticed an atmosphere of mourning when he arrived at the Accused's home on 8 April 1994 around noon.[105] Witness MLZ stated that he saw the Accused once on 8 April 1994, around 4:00 p.m.[106]

91. The Chamber finds that the close personal relationships that Witnesses PFM, KNU, and MLZ had with the Accused and his family call into question their credibility. In this regard the Chamber highlights their exaggerated assertions that the Accused remained *consistently* at home, whereas the Accused was seen by these witnesses at his home on only a handful of brief occasions during the relevant period.

92. The Chamber emphasises that Witnesses PFM, KNU, and MLZ attest only to six brief sightings of the Accused at his home in Gahengeri between 6 and 8 April 1994: (a) in the evening of 6 April (PFM); (b) in the morning of 7 April (KNU, PFM); (c) at 4:00 p.m. on 8 April (MLZ); (d) around 7:00 p.m. or 8:00 p.m. on 8 April (PFM); (e) around 11:00 p.m. on 8 April (KNU, PFM); and (f) on one unspecified occasion (KNU). Other than those sightings, Witnesses KNU, PFM, and MLZ, who arrived only on 8 April 1994, claim to have spent most of their time outside the presence of the Accused in either the children's south residence, one of the two chapels, or hiding under their beds. Furthermore, though PFM asserted that she would have seen the Accused leave the house from either the chapel or a bedroom, the Chamber recalls that on 7 April 1994 the witness was focused on prayer in the chapel, and on 8 April 1994 she hid under a bed. Therefore, the Chamber does not find that Witnesses KNU,

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[101] T. 12 November 2001 pp. 27, 28, 29.
[102] T. 12 November 2001 pp. 26, 83, 85.
[103] T. 12 November 2001 pp. 50, 61.
[104] T. 26 October 2001 p. 55.
[105] T. 26 October 2001 pp. 29-30, 32.
[106] T. 26 October 2001 pp. 21, 24.

PFM, and MLZ provide reliable testimony for the proposition that the Accused remained at home at all times from 6 to 8 April 1994.

93. The Chamber also does not find that the mourning of Mubyeyi's death reliably corroborates the proposition that the Accused remained *consistently* at home between 6 and 8 April 1994. The Chamber emphasises that the record is not sufficiently specific about the scope and nature of Rwandan mourning traditions.

*3. Gahengeri-Bicumbi (RPF attack): 8 April 1994*

94. The Defence asserted that at various times on 7 and 8 April 1994, the Accused's home in Gahengeri was threatened by intense gunfire.[107] The Defence submitted that in the face of this attack, the Accused and his family fled their home around 11:00 p.m. on the night of 8 April 1994 with the assistance of a neighbour called Bizuru, who was an APEGA driver, and sought refuge that night in Nzige.[108]

95. The Accused testified that on 7 April 1994 he heard gunfire for about forty minutes between 3:00 and 4:00 p.m., which intensified on 8 April 1994 and lasted about four hours until 6:00 p.m.[109] The Accused noted that his neighbours informed him that the shots he heard were fired by white people travelling on the Gihumuza road in vehicles bearing UNAMIR inscription.[110]

96. The Accused testified that around 10:30 p.m. on 8 April 1994, he was at home speaking with his neighbour Bizuru when a security guard informed him that his home was under attack.[111] The Accused stated that his children were awakened and that around 11:00 p.m. the family fled the compound to go to Nzige in his white Audi, which he drove, and a white pick-up truck, driven by Bizuru.[112] The Accused explained that the assailants fired shots at them as they left the compound with their lights off.[113] The Accused also testified that he learned after fleeing that a female member of the RPF who had defected from the gendarmerie was among those who

[107] Defence Closing Brief p. 34.
[108] Defence Closing Brief pp. 37-38.
[109] T. 18 February 2002 pp. 52, 54, 55, 56.
[110] T. 18 February 2002 pp. 55, 56.
[111] T. 18 February 2002 p. 57.
[112] T. 18 February 2002 pp. 57, 58; T. 21 February 2002 p. 107.
[113] T. 18 February 2002 p. 57.

directed the attacks against his residence and that the RPF had sent her on a mission to kill him.[114]

97. Defence Witness KNU testified that on 8 April 1994, the Accused's household servants awakened her and the other children around 11:00 p.m. and informed them that RPF elements and Tutsis from Kajevuba and Runyinya armed with traditional weapons and guns had encircled the compound.[115] The witness stated that she and other members of the household then fled the compound to Nzige in a white pick-up truck driven by Bizuru and a white Audi driven by the Accused.[116] She noted that "[they] could not see properly" in the fog and rain because their vehicle lights were off and the only light came from the lights on the fence of the compound.[117] The witness explained, nonetheless, that from the back of the pick-up truck, she could see a group of people standing behind the fence armed with guns and what looked like spears.[118]

98. Defence Witness PFM testified that she heard gunfire for a brief period in the evening of 7 April 1994 and that on 8 April 1994, the gunfire was different and more intense, lasting all day.[119] She noted that at around 10:30 or 11:00 p.m., a household servant came to the chapel in the house on the lower part of the compound and informed the witness that he had seen armed men and soldiers from Runyinya nearby, running toward the house.[120] Witness PFM stated that she then personally informed the Accused and his wife that the compound was under attack and that it was necessary to flee.[121] She explained that the Accused's wife gathered the sleeping children and that they fled the compound in the back of Bizuru's white truck and in the Accused's Audi. The witness stated that she heard a few gunshots about five seconds after the vehicles left the gate with their lights off.[122] The witness noted that they then spent the night in Nzige.[123]

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[114] T. 19 February 2002 pp. 112-113.
[115] T. 12 November 2001 pp. 29, 30.
[116] T. 12 November 2001 pp. 33-34.
[117] T. 12 November 2001 p. 33.
[118] T. 12 November 2001 p. 34.
[119] T. 13 November 2001 pp. 46, 47.
[120] T. 13 November 2001 pp. 48-49.
[121] T. 13 November 2001 p. 49.
[122] T. 13 November 2001 pp. 49-50.
[123] T. 13 November 2001 p. 50.

99. Defence Witness MLZ testified that he came to the Accused's compound on 8 April 1994 around noon seeking safety from the gunfire in the vicinity.[124] He explained that he entered the Accused's compound through a door normally left unlocked while bullets were flying overhead.[125] The witness testified that he spent the evening chatting with the other children and went to bed at around 7:00 p.m.[126] The witness testified that he did not hear anything throughout the evening, but noted that the servants told him the next morning that the Accused and his family had fled during the night at around 11:00 p.m.[127] The witness testified that he left the Accused's home in the morning of 10 April 1994 and that the situation at that time seemed calm.[128] Witness MLZ then stayed in a neighbouring home until 13 April 1994 when he saw the RPF come from Gikoro commune and saw the torching of the Accused's home.[129]

100. Defence Witness DCN, who lived in Gahengeri near the Accused,[130] testified that on 7 April 1994 he heard sustained gunfire emanating from the Gihumuza forest close to the Accused's residence and, according to what people said, fighting had erupted between commune police officers and RPF infiltrators.[131] The witness explained that he fled Bicumbi, like most of the population, on 19 April 1994 when the RPF took control of the commune between 18 and 20 April 1994.[132] Witness DCN stated that when he fled, he passed through Nzige, Karenge, and Bugesera, and explained that people were saying that the Accused must have fled on 8 or 9 April 1994 when his home was torched and that they did not know where he was.[133]

101. Defence Witness MV testified that she heard from the Accused's neighbours that the Accused fled Bicumbi on 9 April 1994, noting that because the Accused was "well loved" in the commune, whatever happened to him was public knowledge.[134]

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[124] T. 26 October 2001 pp. 19-21, 22.
[125] T. 26 October 2001 pp. 20-21.
[126] T. 26 October 2001 p. 38.
[127] T. 26 October 2001 pp. 40, 41.
[128] T. 26 October 2001 pp. 44, 45.
[129] T. 26 October 2001 pp. 46, 47.
[130] T. 22 October 2001 pp. 31, 35.
[131] T. 22 October 2001 pp. 24, 25, 35, 36.
[132] T. 22 October 2001 pp. 25, 76.
[133] T. 22 October 2001 pp. 56, 57.
[134] T. 22 October 2001 pp. 132, 133, 134.

102. Defence Witness BGN2, who was from Bicumbi, testified that he heard from other refugees that the Accused fled two days after the president was killed when the RPF, led in part by a woman who had defected from the gendarmerie, surrounded and attacked his home in Gahengeri.[135] The witness explained that the RPF wanted to kill the Accused because he was an important and popular person who had refused to join their ranks.[136]

103. Defence Witness Nyetera testified that the Accused and his family fled Bicumbi on 8 April 1994 based on his own personal investigations conducted in Belgium and what he heard from people who saw the family flee to Gitarama.[137]

104. Defence Witness SAP testified, without recalling the date, that from Kabuga he could see flames in Bicumbi and that people fleeing from Bicumbi told him that the Accused's home had been torched.[138] The witness noted that some people were saying that the Accused had fled while others were saying he had died.[139] The witness later confirmed his prior written statement, in which he had stated that the Accused had fled after the death of the president.[140]

105. Prosecution Rebuttal Witness XXK testified that everyone in Gahengeri, including the Accused, fled on 18 or 19 April 1994.[141] The witness, who identified the Accused in court, explained that she lived near the Accused and was a family friend.[142] She explained that in the early morning of 18 or 19 April 1994, Bizuru, whom she knew well, stopped by her home and told her he was leaving with the Accused's family.[143] The witness noted that she did not personally see the Accused leave at this time.[144] Witness XXK testified that she fled later that day around 5:30 p.m., but did not know at the time that Bizuru was dead.[145] She explained that she later learned in a refugee camp that Bizuru died somewhere in Nzige secteur between

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[135] T. 27 November 2001 pp. 84, 85, 92-93.
[136] T. 27 November 2001 p. 85.
[137] T. 11 February 2002 pp. 53, 90, 119, 120.
[138] T. 23 October 2001 pp. 115, 116.
[139] T. 23 October 2001 pp. 115, 116.
[140] T. 23 October 2001 pp. 127, 128, 129.
[141] T. 23 April 2002 pp. 18, 113.
[142] T. 23 April 2002 pp. 16, 17, 19-20, 55, 57-58.
[143] T. 23 April 2002 pp. 12, 18, 48, 49, 50, 51, 52.
[144] T. 23 April 2002 pp. 51, 52.
[145] T. 23 April 2002 p. 64.

19 and 21 April 1994 as he returned to collect his family.[146] The witness highlighted that she saw the remains of his burned vehicle in Nzige after returning from exile.[147] The witness also stated that the day after she fled, she again passed by the Accused's home on her way to the Rwamagana refugee camp and saw that it had been set on fire.[148]

106. Prosecution Expert Witness André Guichaoua opined in his rebuttal testimony that according to his sources, the Accused remained in Bicumbi beyond 9 April 1994 and that his flight from Gahengeri likely corresponded to the RPF's offensive there on 19 or 20 April 1994.[149]

107. The Chamber does not find the accounts of Witnesses KNU and PFM concerning the attack on the Accused's home to be credible or reliable. In addition to their close personal relationships with the Accused, the Chamber also notes their exaggerated accounts of the attack. Moreover, the Chamber notes that MLZ, who was allegedly in the house with KNU and PFM at the time, heard nothing of what would presumably have been a significant attack lending an air of incredibility and internal inconsistency to the Defence's proposition.

108. The Chamber also finds that testimonies of Defence Witnesses DCN, MV, BGN2, and Nyetera are not reliable because they consist solely of vague assertions gleaned from other people, lacking even the slightest indicia that their unidentified sources had any first hand knowledge. The Chamber also notes that Defence Witness DCN's friendship with the Accused's children and his past collaboration with the Accused in MRND youth recruitment undermine his credibility. The Chamber, nonetheless, finds that Defence Witness DCN's detailed first-hand account of his flight from the RPF advance in Bicumbi around 19 April 1994 is credible and reliable. The Chamber also notes the consistency of his account with that of Prosecution Rebuttal Witness XXK.

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[146] T. 23 April 2002 pp. 36, 53-54, 76-77, 112.
[147] T. 23 April 2002 pp. 35, 36, 41, 46-47, 53-54, 55, 56.
[148] T. 23 April 2002 pp. 96, 97.
[149] T. 22 April 2002 p. 13.

109. The Chamber does not find the testimony of Witness SAP concerning the date of the Accused's flight and the torching of his house to be reliable, noting that it is based primarily on the sighting of flames somewhere in Bicumbi from Kabuga and on vague, conflicting accounts from unidentified people fleeing from Bicumbi. The Chamber also recalls that though the witness claimed to have known the Accused since 1978, he did not recognize the Accused in court, until after the Defence counsel suggested that the Accused looked younger after being in detention.[150]

110. The Chamber recalls that Prosecution Expert Witness Guichaoua was called to testify concerning the Accused's ascent to power in Bicumbi and the nature of his authority in the commune, and not as a fact witness concerning the Accused's whereabouts or the RPF offensive. Therefore, the Chamber does not find his testimony particularly reliable concerning the Accused's presence in Bicumbi during the relevant time.

111. The Chamber finds the detailed testimony of Prosecution Rebuttal Witness XXK concerning Bizuru's actions on 18 or 19 April 1994 to be reliable and credible, particularly because of her first-hand knowledge. The Chamber also notes the consistency between Witness XXK's and Defence Witness DCN's accounts of when the residents of Bicumbi fled the RPF advance. The Chamber also fully notes the suggestion of the Defence that Witness XXK's present marital circumstances may result in her bias. Even if true, the Chamber does not find this to impugn her credibility, recalling that the witness clearly held the Accused in high esteem as evidenced by her desire to greet him in court and by her respectful references to him while testifying.[151]

*4. Nzige-Bicumbi: 9 April 1994*

112. The Defence submitted that after spending the night in Nzige, the Accused telephoned Kanombe Camp in Kigali from the commune office to ask for protection and that he was urged to flee the region.[152] The Defence asserted that the Accused's presence for several hours at the commune office is confirmed by several witnesses

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[150] T. 23 October 2001 p. 47.
[151] T. 23 April 2002 p. 117.
[152] Defence Closing Brief pp. 35, 36.

and an audio recording made of his call to Kanombe Camp, entered into evidence as Exhibit P11.[153]

113. The Accused testified that on the morning of 9 April 1994, he went to the commune office in Nzige at around 7:00 a.m. to make a few telephone calls and that he was later joined by some members of his family.[154] The Accused stated that he telephoned Kanombe Camp from the commune office to explain what had happened the night before, but the camp commander was unavailable, and the Accused was advised to leave the area immediately to save his life.[155] The Accused noted that when he went to the commune office, Bizuru left Nzige to collect his family and that while at the commune office making telephone calls, he learned that Bizuru had been killed and that Bizuru's vehicle was burned.[156] The Accused stated that after learning this news, he left the commune between 11:00 a.m. and 12:00 noon and took the Bugesera road to the home of one of his friends in Ruhango, Gitarama prefecture, arriving there around 11:00 p.m.[157]

114. The transcript of the intercepted conversation between the Accused and Camp Kanombe reflects that the Accused "just met" the Bourgmestre of Giti who "fled to Gikoro *commune*" because the "*Inkotanyi*" were in Rutare.[158]

115. Defence Witness PFM testified that on the morning of 9 April 1994, Bizuru left Nzige to return to his home, located near the Accused's compound, notwithstanding the Accused's attempts to dissuade him because of reports from their household staff that assailants had taken over the neighbourhood.[159] Witness PFM stated that after Bizuru left, the Accused's family went to the commune office and that about thirty minutes later people from Kanzige came running to inform them that Bizuru had just been killed and his vehicle burned.[160] The witness noted that upon hearing this news, the Accused then entered the commune office to telephone Kigali

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[153] Defence Closing Brief pp. 37, 38.
[154] T. 18 February 2002 p. 71; T. 21 February 2002 pp. 77, 78, 81, 82, 83.
[155] T. 18 February 2002 pp. 71, 75; T. 21 February 2002 pp. 79, 80, 81.
[156] T. 18 February 2002 pp. 71, 72; T. 21 February 2002 pp. 79, 108, 109, 110.
[157] T. 18 February 2002 pp. 84, 88; T. 21 February 2002 pp. 75, 79, 110.
[158] Exhibit P 11(c) p. 16.
[159] T. 13 November 2001 pp. 50, 51.
[160] T. 13 November 2001 p. 51.

to ask for protection.[161] The witness stated that the Accused returned from the office five minutes later and explained that there was no way to protect them because "assailants were everywhere along the road they had to use."[162] The witness testified that they then fled Nzige and arrived at the home of the Accused's friend in Ruhango, Gitarama, late that night.[163] The witness explained that on their way to Ruhango they took the road to Muhure, passing through Karenge, crossing the Nyankariro bridge, and continued on their way, stopping briefly at the Bugesera market so the young children could eat.[164] The witness also noted that they took the road to Muhure because they did not believe that the assailants who had come from Rwamagana and Gikoro near Byumba, had arrived in that region yet.[165]

116. Defence Witness KNU testified that on the morning of 9 April 1994, the Accused sent Bizuru back to the Accused's home to retrieve some items.[166] She stated that she and the others had accompanied the Accused to the commune office, but that they remained outside in the compound while the Accused went alone into the office to make a phone call.[167] She explained that the Accused telephoned Kanombe Camp in Kigali because he had just learned that Bizuru had been burned in his vehicle.[168] The witness explained that she accompanied the Accused and his family as they left the commune office around noon in the Accused's Audi and a pick-up truck.[169] The witness noted that they arrived at the house of a friend of the Accused in Ruhango, Gitarama between 11:00 p.m. and 1:00 a.m. that night.[170]

117. Defence Witness CBN, who identified the Accused in court, stated in her written declaration, which was admitted into evidence, that she saw the Accused at the commune office in Nzige for about three hours on the morning of 9 April 1994, that

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[161] T. 13 November 2001 p. 52.
[162] T. 13 November 2001 p. 52.
[163] T. 13 November 2001 pp. 52-54.
[164] T. 13 November 2001 pp. 52-54.
[165] T. 13 November 2001 p. 52.
[166] T. 12 November 2001 pp. 38-39.
[167] T. 12 November 2001 pp. 36, 37, 116.
[168] T. 12 November 2001 pp. 116, 121.
[169] T. 12 November 2001 p. 38.
[170] T. 12 November 2001 p. 40.

the Accused explained that he was fleeing with his family to Gitarama, and that he was not able to get in touch with Kigali in order to request soldiers to protect him.[171]

118. The Chamber notes that in contrast to the Accused's testimony, the transcript of the intercepted telephone call, which the Defence acknowledged is between the Accused and Camp Kanombe, does not indicate that the RPF had just attacked the Accused's home, that the Accused had to flee his home, or that someone from the camp urged the Accused to flee Nzige. Instead, the transcript reflects that the Accused "just met" the Bourgmestre of Giti who "fled to the Gikoro commune" because the *Inkotanyi* were in Rutare.[172] The transcript is inconsistent with the Accused's testimony and therefore undermines the credibility and reliability of the Accused's testimony concerning the attack on his house and his flight.

119. The Chamber also notes that the credibility and reliability of Defence Witness CBN's statement is rendered questionable by her lengthy working relationship with the Accused.

120. The Chamber recalls its finding that the testimony of Prosecution Rebuttal Witness XXK, which indicates that Bizuru was alive as late as 18 or 19 April 1994, is reliable and credible.

*5. Gitarama Prefecture: 9 April 1994 – May 1994*

121. The Accused testified that on 18 April 1994, he left Ruhango and relocated to Murambi centre in Gitarama town because he had been spending a lot of money on petrol travelling sixty kilometres daily between the two areas to check on his business of selling potatoes and transporting them between Gisenyi and Ruhengeri.[173] The Accused explained that while he lived in Murambi, he continued to look after his business.[174] The Accused stated that on 15 May 1994, the *Inkotanyi* advance forced him to flee from Murambi to Gisenyi where he remained until crossing into Goma, Zaire, on 17 July 1994.[175]

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[171] T. 31 October 2001 pp. 76, 77, 82, 85, 86; Exhibit D 21 pp. 4-5. *See supra* note 17.
[172] Exhibit P 11(c) p. 16.
[173] T. 18 February 2002 pp. 90, 91, 92, 96; T. 27 February 2002 pp. 62, 63.
[174] T. 18 February 2002 p. 96.
[175] T. 18 February 2002 pp. 95, 96.

122. Defence Witness PFM testified that on the morning of 10 April 1994, she accompanied the Accused to Gitarama town where he made a call to Gisenyi around 9:00 or 10:00 a.m. to order the return of his trucks to Gitarama for the transport of potatoes.[176] The witness indicated that from 10 April 1994 until fleeing to Gisenyi on 20 May 1994 she accompanied the Accused every day to Gitarama town and remained in the market with him each day while the trucks were unloaded and the potatoes were sold.[177] The witness explained that she always accompanied the Accused while they were in Gitarama looking after the trucks and that he did not leave her "alone at any occasion except when he went to the bathroom."[178] The witness noted that she accompanied the Accused to Gisenyi and again when he fled to Goma, Zaire.[179]

123. Defence Witness KNU testified that she remained with the Accused and his family in Ruhango, Gitarama, from 9 until 12 April 1994 and that she did not see the Accused again after that date.[180]

124. Defence Witness CYS testified that he stayed with the Accused and his family at the home of the Accused's friend in Ruhango, Gitarama, from 9 until 18 April 1994.[181] The witness noted that during his stay the Accused mainly remained in his room, but that he occasionally went to Gitarama town with his children to look after his trucks.[182] The witness testified that he accompanied the Accused to Gitarama town when he left Ruhango on 18 April 1994,[183] and that he saw the Accused again in Gisenyi, fleeing to Zaire.[184] Witness CYS noted his own involvement in a trading business between Kigali and Gitarama, which the witness did not abandon even during the war, and that he transported potatoes between Gisenyi and Kibuye, which required him to periodically go to Gisenyi on business.[185]

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[176] T. 13 November 2001 pp. 55, 56.
[177] T. 13 November 2001 pp. 56, 61.
[178] T. 13 November 2001 p. 62.
[179] T. 13 November 2001 pp. 61-62.
[180] T. 13 November 2001 pp. 8, 9.
[181] T. 26 November 2001 pp. 62, 63, 69.
[182] T. 26 November 2001 pp. 63, 64.
[183] T. 26 November 2001 p. 63.
[184] T. 26 November 2001 pp. 64-65.
[185] T. 27 November 2001 pp. 15, 16, 49.

125. Defence Witness CYM3 testified that he saw the Accused, whom he identified in court, on 11 April 1994 standing next to his vehicle near the Gitarama market.[186] The witness indicated that he recognized the Accused because in Rwanda the name of the owner is written on the side of his vehicle.[187] The witness also saw the Accused on 13 July 1994 in Gisenyi and 18 July 1994 in Goma, Zaire.[188]

126. Defence Witness SAM testified that he spoke with the Accused in Ruhango market around 9:00 a.m. on 12 April 1994.[189] The witness stated that the Accused recounted his flight on 8 April 1994 and noted that he was staying with a friend in Ruhango.[190] The witness noted that he also saw the Accused in Gitarama on 20 April 1994.[191]

127. Defence Witness TDB testified that he heard that the Accused's house was destroyed a few days after the death of the president.[192] The witness also explained that the RPF attacked his own home near Musha church on the night of 13 April 1994, killing his wife and daughter and that that night he fled to Ruhango, Gitarama, where he saw the Accused on 14 April 1994.[193] The witness explained that he had past professional contacts with the Accused, but noted that he was not the Accused's friend.[194]

128. In addition, other Defence witnesses testified that they saw the Accused in Gitarama on 25 April 1994 (SAP),[195] at the beginning of May 1994 (SDN1),[196] and on 12 May 1994 (BGN2).[197]

129. Prosecution Rebuttal Witness DCH stated that he met the Accused between 8 and 12 April 1994 at a roadblock near the Kabuga mosque, about two kilometres from

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[186] T. 5 November 2001 pp. 17, 41, 42, 43, 130.
[187] T. 5 November 2001 p. 41.
[188] T. 5 November 2001 p. 43.
[189] T. 8 October 2001 pp. 61, 88.
[190] T. 8 October 2001 p. 62.
[191] T. 8 October 2001 p. 88.
[192] T. 4 October 2001 pp. 64, 65.
[193] T. 4 October 2001 pp. 65, 66.
[194] T. 4 October 2001 p. 69.
[195] T. 23 October 2001 p. 68.
[196] T. 30 October 2001 p. 39.
[197] T. 27 November 2001 p. 87.

the Bicumbi commune border on the road from Kigali to Kibungo or Rwamagana.[198] Witness DCH also testified that on 14 April 1994 the Accused came to Kabuga and asked for reinforcements for an attack on refugees at Ruhanga church in Gikoro.[199] The witness confirmed that the Accused was among the attackers at Ruhanga church in Gikoro on 16 April 1994.[200]

130. The Chamber is primarily concerned with the reliability and credibility of Defence Witnesses PFM, KNU, CYS, SAM, CYM3, and TDB because each provided a first-hand account placing the Accused in Gitarama prefecture during the relevant period when the Prosecutor alleged that he was committing crimes in Bicumbi.

131. The Chamber finds that Defence Witness PFM's exaggerated account of never leaving the Accused's side except when he was in the bathroom lacks credibility and further reflects the inherent bias in her testimony flowing from her close relationship to the Accused.

132. The Chamber finds that Witness CYS's testimony does not reliably account for the Accused's consistent presence in Gitarama prefecture between 9 and 18 April 1994. The Chamber notes that during the period when the Accused allegedly remained in Ruhanga, the witness was periodically in Gisenyi looking after his own potato transport business. In addition, though the witness stated that the Accused frequently travelled to Gitarama town, the Chamber notes that the witness can only attest to the Accused actually travelling to Gitarama town on 18 April 1994 when the witness allegedly accompanied him. The Chamber also finds that the friendship between Witness CYS, his family, and the Accused may call into question his credibility. Furthermore, the Chamber notes that CYS stated that the Accused spent most of his time in his room whereas the testimony of the Accused and PFM reflect that the Accused spent a significant portion of every day in Gitarama town.

133. The Chamber notes that Defence Witness TDB's identification of the Accused in Gitarama town on 14 April 1994 appears credible and reliable because it is an unbiased first hand account. The Chamber notes, however, that from the witness's

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[198] T. 15 April 2002 pp. 67, 86-89.
[199] T. 15 April 2002 p. 119.
[200] T. 15 April 2002 pp. 138, 139.

testimony it is not able to reliably determine if the attack on the witness's home on 13 April 1994 was conducted by the RPF.

134. The Chamber does not find Witness CYM3's sighting of the Accused in Gitarama market on 11 April 1994 particularly credible or reliable because the identification is based primarily on seeing a car with the Accused's name written on its side.

135. The Chamber finds that Witness SAM's relationship with the Accused as a neighbour and frequent visitor to his home calls into question the credibility of the testimony of his discussions with the Accused on 12 and 20 April 1994.

136. The Chamber notes that Witness KNU did not provide any detailed testimony concerning the Accused's presence in Gitarama.

137. The Chamber does not find the Prosecution Rebuttal Witness DCH's testimony reliable or credible concerning the Accused's activities during the relevant events. In particular, while the witness places the Accused at the Ruhanga church massacre in Gikoro between 14 and 17 April 1994, the Chamber recalls that this is inconsistent with the evidence proffered by Prosecution witnesses in the case in chief suggesting that the massacre occurred on 10 April 1994. Furthermore, though the witness claimed to be well acquainted with the Accused and characterized him as his "boss", the Chamber highlights that in the witness's guilty plea before the Rwandan courts, he implicated a number of his accomplices while notably failing to mention the Accused.

*6. Impossibility*

138. The Defence also asserted as part of the alibi that it would have been physically impossible for the Accused to participate in the acts or be at the sites as alleged in the Indictment. The Defence submitted that in the aftermath of the attack on the president's plane it was difficult to move around in the entire territory of Rwanda.[201] The Defence attempted to corroborate this assertion by pointing to the

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[201] Defence Closing Brief p. 34.

testimony of several witnesses who attested that they did not see the Accused at the massacre sites.[202]

139. Defence Expert Witness Pascal Ndengejeho testified that it would have been impossible for the Accused to travel from Gahengeri to Gikoro because, even before President Habyarimana's plane was shot down, the RPF had completely taken over the area.[203] The Accused also explained that the RPF occupied the entire area, making it impossible to travel.[204] Furthermore, Defence Witness ZC testified that the Accused could never have set foot in Ruhanga in Gikoro commune in April 1994 because he would have had to pass through nearby Rugende where he had enemies who were "ready to attack him using sharp objects".[205]

140. Prosecution Expert Witness André Guichaoua testified in rebuttal that during April and May 1994 many dignitaries and political and military authorities travelled between Murambi, Gitarama, and Kigali each day and that, therefore, the Accused could have easily spent the nights in Murambi and have travelled to Bicumbi during the days.[206]

141. Prosecution Rebuttal Witness DCH, a state employed bus driver, testified that beginning on 20 April 1994, he transported people six times a day from Kigali to Gitarama, covering the distance in one hour.[207]

142. The Chamber does not find the testimony of Defence Expert Witness Ndengejeho, concerning the location of the RPF in Gikoro commune to be reliable because his information appears to be based principally on unidentified sources and on the account of a professor who avoided Gikoro because he was told by someone that the RPF controlled the area.

143. The Chamber finds Defence Witness ZC's testimony that the Accused had enemies in Rugende credible, but does not find it reliable for the proposition that these enemies would have prevented his passage through the place in a vehicle.

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[202] Defence Closing Brief p. 35.
[203] T. 30 January 2002 pp. 110-114.
[204] T. 18 February 2002 p. 95.
[205] T. 6 November 2001 pp. 41, 55; Defence Closing Brief p. 34.
[206] T. 22 April 2002 pp. 20-22.

144. The Chamber finds Prosecution Expert Witness Guichaoua's general testimony concerning the ability of officials to travel between Gitarama and Kigali reliable, but does not accept the extension of this testimony to cover the ability of the Accused to travel from Kigali to Bicumbi and Gikoro.

145. The Chamber finds Prosecution Rebuttal Witness DCH's testimony about transporting people from Kigali to Gitarama credible and reliable, but also does not accept the extension of this testimony to cover the ability of the Accused to travel from Kigali to Bicumbi and Gikoro.

146. The Chamber will consider whether evidence reflects that it was impossible for the Accused to move around his locality in its factual findings.

*7. General Conclusion*

147. The Chamber has carefully considered the evidence submitted in support of the Accused's alibi and recalls that a significant portion of the evidence is incredible and unreliable. Moreover, in the opinion of the Chamber, the claim by the Defence that it was aware of the alibi from the beginning of the case, but decided, without good cause, not to give notice of it, suggests that the Accused's alibi was an afterthought.

148. The Chamber emphasises that the failure of the Defence to submit credible and reliable evidence concerning the Accused's alibi in no way undermines the presumption of his innocence. The Prosecutor alone bears the burden of proving the Accused's guilt beyond a reasonable doubt, despite the existence of the alibi. Accordingly, the Chamber will fully consider the evidence of the alibi in making its findings about whether the Prosecutor proved beyond a reasonable doubt the Accused's involvement in the alleged crimes.

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[207] T. 16 April 2002 pp. 23-26, 27, 29.

# IV. THE PROSECUTION CASE

## A. Paragraph 3.10 of the Indictment

149. Paragraph 3.10 of the Indictment reads:

> On or about 10 April 1994, Laurent SEMANZA worked in close cooperation with the Bourgmestre of Gikoro, Paul BISENGIMANA, to organize and execute the Ruhanga massacres, Gikoro commune, where thousands of persons had taken refuge to escape the killings in their sector.

### *1. Allegations*

150. Witness VF testified that in the morning of 10 April 1994, after Paul Bisengimana and the police attacked her hill, she fled towards Ruhanga where she heard that people were resisting attacks.[208] En route, the witness travelled through Rugende, a small commercial centre.[209] At approximately 10:00 a.m., the witness concealed herself in a bush to avoid *Interahamwe* militiamen, who were chasing people.[210] From her hiding place, which was five metres from the road, she observed the Accused, whom she identified in court, in a white pick-up truck with armed soldiers in the uniform of the Presidential Guard.[211] She noted that the Accused was not armed.[212] The witness testified that the soldiers began to shoot, killing many people in Rugende, and she fled on to Ruhanga.[213] In contradiction to her prior statement, the witness denied that Bisengimana was also in the vehicle with the Accused.[214]

151. Later the same day, the witness joined a group of between 15,000 and 20,000 mostly Tutsi refugees, including her relatives, at the school and Protestant church in Ruhanga.[215] Soon after, the Presidential Guards and *Interahamwe* surrounded the complex and shot some of the unarmed refugees who were resisting the attacks using

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[208] T. 6 December 2000 pp. 26-27, 99, 111.
[209] T. 6 December 2000 pp. 27, 96, 98, 101.
[210] T. 6 December 2000 pp. 27, 58-59, 100.
[211] T. 6 December 2000 pp. 23-24, 27-28, 100-104.
[212] T. 6 December 2000 p. 28.
[213] T. 6 December 2000 pp. 28-29.
[214] T. 6 December 2000 p. 107.
[215] T. 6 December 2000 pp. 28-29, 49-50, 113, 114.

stones and pieces of wood.[216] The witness testified that the Presidential Guards ordered the women and children who were hiding indoors to move outside to be killed by the *Interahamwe*.[217] Witness VF testified that the *Interahamwe* partially undressed her and others, doused them with petrol, and set them on fire.[218] The refugees, including the witness, were also beaten with clubs and machetes.[219] The witness testified that almost all of the other refugees died during this attack and that she was seriously injured.[220] The witness, who suffered serious injuries affecting her ability to clearly identify those around her, could not confirm that the Accused was present during the attack, but, nevertheless, concluded that the attack was committed by members of the Presidential Guard led by the Accused, since they were the same soldiers whom she had seen earlier in the day in Rugende with him.[221]

152. Prosecution Witness VAO testified that she learned about the events at Ruhanga from a woman whom she met in a refugee camp in May 1994 and who, according to her, is now dead.[222] This woman told VAO that many people were raped and killed at the Protestant church in Ruhanga, which was later torched.[223] The woman told VAO that the refugees at the church initially resisted the *Interahamwe*, who left to seek reinforcements and returned with the Accused.[224] The witness was told that the Accused ordered the *Interahamwe* to rape the survivors and that the women and girls were raped.[225] The witness also recalled hearing that the Presidential Guard and other people with guns from Bicumbi were also present, but gave no details.[226]

153. Pierre Duclos, a Prosecution investigator, testified that when he visited Ruhanga, the church was completely destroyed.[227]

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[216] T. 6 December 2000 pp. 30, 114.
[217] T. 6 December 2000 pp. 30-31.
[218] T. 6 December 2000 pp. 33, 46, 117.
[219] T. 6 December 2000 pp. 33, 46.
[220] T. 6 December 2000 p. 47.
[221] T. 6 December 2000 pp. 31-32, 49, 117.
[222] T. 20 March 2001 pp. 55, 58.
[223] T. 20 March 2001 pp. 56, 58.
[224] T. 20 March 2001 p. 56.
[225] T. 20 March 2001 p. 58.
[226] T. 20 March 2001 p. 97.
[227] T. 16 October 2000 p. 79.

154. The Accused testified that he could not go to Ruhanga because he had enemies there who would have killed him.[228] He recalled that on 10 April 1994 he was in Ruhango in Gitarama prefecture.[229]

155. Defence Witness ZC testified that he had never heard that the Accused led attacks on Ruhanga in 1994.[230] He stated that the Accused had enemies in Rugende who were prepared to attack him and that, therefore, the Accused could not go to Ruhanga.[231] The witness explained that in order to travel from Gahengeri to Ruhanga, one would necessarily pass through Rugende.[232] The witness had not heard that the Accused passed through Rugende with armed escorts in 1994, which, had it happened, would not have escaped the notice of the local population, according to him.[233] Witness ZC also denied that the Accused could have been accompanied by armed escorts since all soldiers were fighting a war.[234] The witness subsequently admitted that there might be an alternate route to Ruhanga through Musha.[235]

156. Defence Witness BZ testified that he conducted an investigation into the events in Ruhanga and was given information about these events by the conseiller of Mfumbwe.[236] The witness explained that some people from Gikomero sought refuge at Ruhanga parish after killing a cellule official.[237] The witness testified that when people heard that an official had been killed, they called the gendarmes in Kabuga.[238] According to this witness, the gendarmes opened fire on the refugees at Ruhanga, leaving many victims.[239] The witness was not told that the Accused was present in Ruhanga during this event.[240]

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[228] T. 18 February 2002 p. 127.
[229] T. 18 February 2002 p. 127.
[230] T. 6 November 2001 pp. 54, 55.
[231] T. 6 November 2001 pp. 55, 113.
[232] T. 6 November 2001 pp. 42, 82, 83.
[233] T. 6 November 2001 pp. 87, 110, 111.
[234] T. 6 November 2001 pp. 87, 110, 111.
[235] T. 6 November 2001 pp. 88-99.
[236] T. 2 October 2001 p. 34.
[237] T. 2 October 2001 pp. 33, 34. The Chamber notes that line 23 of page 33 of the English transcript refers to the parish "in Gikomero" rather than Gikoro. This is inconsistent with the witness's testimony in Kinyarwanda.
[238] T. 2 October 2001 pp. 33, 34.
[239] T. 2 October 2001 p. 34.
[240] T. 2 October 2001 p. 35.

157. Defence Witness MV testified that she heard that five days after the death of the president, RPF supporters began attacking Hutus in Ruhanga, an area with mainly Tutsi inhabitants.[241] According to her, some Hutus fled to Kabuga and others to Rugende.[242] The witness explained that residents of Rugende accompanied the Hutus back to their homes in Ruhanga.[243] Halfway there, they were attacked by the people of Ruhanga and RPF soldiers.[244] The Hutus fled and sought assistance from the gendarmes of Kabuga.[245] The witness saw the gendarmes travelling on foot to Ruhanga.[246] She heard that the gendarmes were then attacked near the church and the school in Ruhanga, resulting in a fight between the gendarmes and the RPF soldiers in which some people, both Hutu and Tutsi, were killed.[247] Witness MV was not told that the Accused was present during the events at Ruhanga and did not see his white car passing through Rugende.[248]

158. Defence Witness SWT testified that he did not observe the killings in Ruhanga in April 1994, but that he heard from refugees who had fled Ruhanga that they were attacked during the night by people wielding guns and knives.[249] The witness explained that his sector conseiller asked twenty unarmed[250] young people to escort the refugees back to the site of the attack.[251] When they arrived, the group was attacked again and the young people, who were under the leadership of the *Interahamwe*,[252] returned to get reinforcements from the gendarmes.[253] They reported that some of the witness's neighbours were amongst the attackers.[254] The witness explained that neither the people who assisted those being attacked nor the gendarmes were from the Accused's commune.[255] The witness testified that he did not hear the Accused's name mentioned in relation to the fighting, which lasted for ten or eleven

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[241] T. 22 October 2001 p. 114.
[242] T. 22 October 2001 p. 115.
[243] T. 22 October 2001 p. 118.
[244] T. 22 October 2001 p. 119.
[245] T. 22 October 2001 p. 119.
[246] T. 22 October 2001 pp. 134-135.
[247] T. 22 October 2001 pp. 119, 123, 126.
[248] T. 22 October 2001 pp. 128, 129, 134.
[249] T. 25 October 2001 pp. 70-72.
[250] T. 25 October 2001 p. 89.
[251] T. 25 October 2001 p. 72.
[252] T. 25 October 2001 p. 88.
[253] T. 25 October 2001 p. 72.
[254] T. 25 October 2001 p. 72.
[255] T. 25 October 2001 p. 74.

days, and did not think that the Accused had any relationship with the incident because he lived too far away.[256]

*2. Findings*

159. The Chamber has carefully considered the evidence of Prosecution Witnesses VF and VAO. Witness VF gave detailed eye-witness testimony about the events at Ruhanga church on 10 April 1994. However, as a result of her injuries, the witness was unable to confirm that the Accused was at the scene, but assumed that he was since she could identify the Presidential Guards with whom she saw the Accused earlier in the day. The Chamber is not convinced that this assumption is reliable, since, as Witness VF admitted, she had difficulty making identifications as a result of her injuries. The other Prosecution witness to testify about the Ruhanga church events in the Prosecution's case-in-chief, Witness VAO, could offer only hearsay evidence. Although she was told that the Accused was at the scene, the Chamber cannot be certain of the accuracy or time frame of the events she described. Witness VAO was also the only witness to testify about rapes occurring during the attack at Ruhanga church, again solely on the basis of hearsay.

160. The Chamber recalls that Prosecution Witness DCH, who testified extensively about events at Ruhanga church, was called as a rebuttal witness for the sole purpose of rebutting the defence of alibi. In rejecting the Defence request to call rejoinder witnesses, the Chamber reaffirmed that "[a]ny evidence adduced in rebuttal that falls outside this narrow issue will not be considered by the Chamber in its deliberations."[257] Therefore, the Chamber emphasises that the evidence of Witness DCH may be used only to rebut the Accused's alibi and cannot be used to support the substance of the Prosecution's case against the Accused. The Chamber is of the opinion, moreover, that to rely on the evidence of Witness DCH to convict the Accused of direct participation in the Ruhanga massacre would violate the Accused's right to a fair trial, since the Accused was not given the opportunity to respond to the new allegations that were raised only in the Prosecutor's rebuttal. The Chamber notes

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[256] T. 25 October 2001 p. 74.
[257] *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on Defence Motion for Leave to Call Rejoinder Witnesses, TC, 30 April 2002, para. 13.

that the evidence of Witness DCH, which substantially departed from the evidence proffered in the Prosecution's case-in-chief, alleged the Accused's personal involvement in multiple attacks in Ruhanga from 14 through 17 April 1994, rather than a single attack at Ruhanga church on 10 April 1994, as alleged in the Indictment.

161. On the basis of the evidence presented, the Chamber finds that an attack against Tutsi refugees occurred at Ruhanga church on 10 April 1994. However, the Chamber does not find any evidence proving that the Accused worked in close cooperation with Bisengimana to organize or execute this massacre. Moreover, the Prosecutor failed to prove that the Accused was present during the massacre at Ruhanga church. The Chamber, therefore, finds that paragraph 3.10 of the Indictment has not been proven beyond a reasonable doubt.

**B. Paragraphs 3.11 and 3.18 of the Indictment**

162. The Chamber will consider the allegations relevant to paragraphs 3.11 and 3.18 of the Indictment together because the alleged incident of torture and murder (paragraph 3.18) occurred during the events at Musha church (paragraph 3.11).

163. Paragraph 3.11 of the Indictment reads:

> Between 9 and 13 April 1994, Laurent SEMANZA worked in close cooperation with the Bourgmestre of Gikoro, Paul BISENGIMANA, to organize and execute the massacres at the Musha church, Gikoro commune, where several hundred people had taken refuge to escape the killings in their sector. On or about 13 April 1994, Laurent SEMANZA led the attack on the refugees at the Musha church and personally participated in the killings.

164. Paragraph 3.18 of the Indictment reads:

> On or about 13 April 1994, in Musha Sector, Gikoro Commune, Laurent SEMANZA and Paul BISENGIMANA interrogated a Tutsi man, Victim C, in order to obtain information about the military operations of the *Inkotanyi*, or RPF. During the time the interrogation was taking place, the RPF was advancing toward Gikoro and Bicumbi communes. Laurent SEMANZA and Paul BISENGIMANA each cut off one of Victim C's arms while they were interrogating him. Victim C died as the result of these injuries. Laurent SEMANZA intended the acts described in this paragraph to be part of the non-international armed conflict against the RPF as stated in paragraphs 3.4.2 and 3.4.3 *supra*.

*1. Allegations*

165. Prosecution Witness VA testified that she sought refuge at Musha church from 7 to 13 April 1994.[258] The witness explained that there were refugees in all six buildings of the church complex.[259]

166. Witness VA testified that she saw the Accused, whom she identified in court,[260] as well as Bisengimana, Rugambarara, Rwabukumba, and Rwakayigamba come to the church between 11:00 a.m. and 12:00 noon on 9 April 1994.[261] The

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[258] T. 7 March 2001 pp. 52, 104.
[259] T. 7 March 2001 p. 57.
[260] T. 7 March 2001 p. 92.
[261] T. 7 March 2001 pp. 57-58, 105.

witness stated that the Accused led this group.[262] The witness was confident in her recognition of the Accused because she vividly recalled seeing the Accused in 1992 leading an MRND rally where the participants arrested Tutsis and dragged them through the mud.[263] According to the witness, the Accused and those who came to the church with him held a meeting with the priest and some of the refugees.[264] Witness VA testified that after the meeting, she heard the Accused tell Bisengimana that the church had to be burned down to kill the refugees inside.[265] Witness VA testified that Bisengimana expressed his reluctance to burn down the church, and instead proposed starving the refugees to death.[266] The witness noted that the *Interahamwe* then guarded the refugees on 11 and 12 April 1994 to prevent their escape.[267]

167. Witness VA testified that on 13 April 1994 at 5:00 a.m., the *Interahamwe*, who had spent the night outside the church, opened fire on the Tutsi refugees in the church.[268] The witness stated that she could see the assailants through the window of the church.[269] She explained that the *Interahamwe* continued firing until 10:00 a.m., but were not able to open the church, so they went to Bicumbi for the Accused.[270]

168. Witness VA testified that the Accused and several *Interahamwe* armed with traditional weapons arrived after 10:00 a.m. in a Toyota belonging to Bicumbi commune, and were followed by three vehicles transporting policemen and soldiers armed with guns and grenades.[271] The witness later clarified that she saw three vehicles in total: a Toyota vehicle that belonged to Bicumbi commune, in which the Accused came; a vehicle from the Gikoro commune driven by Manda, which transported petrol and *Interahamwe*; and a Toyota driven by Rugambarara, with soldiers and policemen.[272]

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[262] T. 7 March 2001 p. 58.
[263] T. 7 March 2001 pp. 97, 98.
[264] T. 7 March 2001 p. 60.
[265] T. 7 March 2001 pp. 60, 118-119.
[266] T. 7 March 2001 p. 61.
[267] T. 7 March 2001 pp. 69, 70.
[268] T. 7 March 2001 pp. 72, 73; T. 8 March 2001 pp. 18, 19.
[269] T. 8 March 2001 p. 18.
[270] T. 7 March 2001 pp. 72, 73; T. 8 March 2001 p. 19.
[271] T. 7 March 2001 pp. 73, 74, 75, 124; T. 8 March 2001 p. 20.
[272] T. 8 March 2001 p. 19.

169. Witness VA testified that the *Interahamwe*, policemen, and thirty to forty soldiers attacked the church with gunfire and grenades, injuring her and others inside.[273] The witness stated that the Accused led the attack against the church.[274] Witness VA further testified that Manda and Twagerayezi climbed on the roof of the church and threw petrol on it, burning a young man on the lower part of his body.[275] Witness VA stated that the soldiers and *Interahamwe* fired a rocket-propelled grenade that broke a hole in the wall, and that the *Interahamwe* entered the church and opened its door.[276] The witness stated that the Accused, Bisengimana, and Rugambarara then entered, and the Accused asked the refugees in the church to identify Rusanganwa, a Tutsi teacher and "an important personality" in Gikoro commune.[277] Witness VA testified that Rusanganwa came out of his hiding place because he had no place to go.[278]

170. According to Witness VA, Rusanganwa was told to stand at the entrance of the church, and the Accused asked him when the "*Inkotanyi*" were going to arrive.[279] Rusanganwa responded: "I am not God, I know neither the day nor the time."[280] Witness VA testified that the Accused then took a machete from Hatageka, an *Interahamwe* accompanying him, and cut one of Rusanganwa's legs and an arm.[281] Bisengimana then took the machete and cut Rusanganwa's other limbs.[282] The

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[273] T. 7 March 2001 pp. 75, 84; T. 8 March 2001 pp. 17-20, 23, 31, 43, 56-57.
[274] T. 7 March 2001 pp. 81-82.
[275] T. 7 March 2001 pp. 75-76.
[276] T. 7 March 2001 p. 76.
[277] T. 7 March 2001 pp. 76, 80-81. The English transcripts refer to Rusanganwa in this colloquy as Lusanganwa. After reviewing the Kinyarwanda to French translation, the witness's original statement in French, and unchallenged references to this individual as Rusanganwa by other witnesses, the Chamber notes that the spelling of this individual's name as Lusanganwa in this portion of the English transcript is a non-material translation or transcription error.
[278] T. 7 March 2001 p. 77.
[279] T. 7 March 2001 p. 77.
[280] T. 7 March 2001 p. 77.
[281] T. 7 March 2001 pp. 77, 78, 79. The Chamber notes that in the English transcript, the Prosecutor refers to the Accused "cutting off" Rusanganwa's limbs. According to that transcript, the witness used "to cut off" after initially using the more general verb "to cut". In contrast, the French transcript generally uses the general verb "*couper*" and only once uses the more specific verb "*amputer*". In order to clarify any discrepancy, the Chamber has reviewed the audio recording of the proceedings. The recording clearly indicates that both the Kinyarwanda interpreter and the witness speaking in Kinyarwanda consistently used the infinitive verb "*gutema*", which is consistent with the general verb "to cut" in English or "*couper*" in French.
[282] T. 7 March 2001 p. 79.

*Interahamwe* put Rusanganwa in a vehicle where they were throwing other dead bodies.[283] Witness VA never saw Rusanganwa alive again.[284]

171. The Defence pointed out during cross-examination that Witness VA had told investigators that the Accused and Bisengimana came to the church on 10 April 1994 to ask about Rusanganwa.[285] Witness VA responded that she had been confused about the date, and clarified that she did not see them on 10 April 1994.[286] The Defence also observed that the witness statement notes that the Accused cut only Rusanganwa's arms.[287] The witness explained that she told the investigators that Rusanganwa's legs were also cut and that the omission of this from the written statement was a mistake or a misunderstanding on the part of the investigators.[288]

172. Witness VA stated that after attacking Rusanganwa the Accused ordered children to leave the church.[289] The witness explained that, outside the church, Hutu children were separated from Tutsi children, and the Tutsi children were then killed by gunfire and grenades.[290]

173. The witness testified that she saw "everything" because she was covered with dead bodies.[291] The witness explained that when the assailants came to load the dead bodies in vehicles, they noticed that she was not yet dead; they struck her head with a hammer and undressed her.[292] Later, they threw her in a pit full of dead bodies, from which she subsequently escaped.[293]

174. Prosecution Witness VM, a Hutu, testified that on 7 April 1994, he took refuge in Musha church when the killings started in Bicumbi.[294] The witness noted that other Hutus also sought refuge in the church.[295] Witness VM testified that the day after his

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[283] T. 7 March 2001 pp. 80-81.
[284] T. 7 March 2001 pp. 80-81.
[285] T. 8 March 2001 p. 11.
[286] T. 8 March 2001 pp. 11, 12.
[287] T. 8 March 2001 p. 45.
[288] T. 8 March 2001 pp. 48-49.
[289] T. 7 March 2001 pp. 81-82.
[290] T. 7 March 2001 p. 82.
[291] T. 7 March 2001 p. 85.
[292] T. 7 March 2001 p. 85.
[293] T. 7 March 2001 p. 85.
[294] T. 6 March 2001 pp. 80, 81.
[295] T. 6 March 2001 p. 83.

arrival at the church, the Accused, whom he identified in court, along with Bisengimana, Rugambarara, and members of the police came to the church.[296] The witness was confident that he saw the Accused at Musha church because it was "impossible" not to know the Accused, who during his tenure as the bourgmestre, had been introduced to all the school children in the commune.[297] Witness VM testified that the Accused appeared to be the leader of this group because he was giving instructions.[298] Witness VM testified that the Accused was taking notes, which the witness believed were the names of particular refugees being sought.[299]

175. Witness VM testified that four to six days after he took refuge at the church, several vehicles arrived in the morning full of *Interahamwe*, soldiers, and policemen.[300] Through the openings in the walls of the church, the witness saw the Accused transporting the *Interahamwe* in his brown car, which he had seen the Accused use on other occasions.[301] The witness later clarified that the *Interahamwe* did not come in the Accused's vehicle, but rather followed in several vehicles.[302] Witness VM testified that armed soldiers also followed the Accused.[303] Witness VM stated that among the attackers he could identify two *Interahamwe* named Mugabo and Manda.[304] Witness VM stated that he also saw Bisengimana.[305] Witness VM testified that the Accused led the attack.[306] He explained that he knew the Accused as a bourgmestre and that he witnessed the Accused giving instructions, including to shoot people.[307]

176. Witness VM testified that the Accused, *Interahamwe*, police, and soldiers went into the church compound and asked the refugees to open the door to the church.[308] The refugees refused to open the door.[309] The witness stated that the

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[296] T. 6 March 2001 pp. 88-90, 101.
[297] T. 7 March 2001 pp. 46-47.
[298] T. 6 March 2001 p. 91.
[299] T. 6 March 2001 p. 90.
[300] T. 6 March 2001 pp. 92, 137-138.
[301] T. 6 March 2001 p. 134.
[302] T. 6 March 2001 p. 137.
[303] T. 6 March 2001 p. 138.
[304] T. 6 March 2001 p. 98.
[305] T. 6 March 2001 p. 99.
[306] T. 6 March 2001 p. 92.
[307] T. 6 March 2001 pp. 99, 144.
[308] T. 6 March 2001 pp. 92-93.
[309] T. 6 March 2001 p. 93.

attackers then fired bullets and grenades into the church through an opening they had made in the wall before they shot at the door and entered.[310]

177. Witness VM explained that after entering the church, the attackers threatened to shoot anyone who would not leave.[311] Witness VM indicated that he and others went outside, but noted that some people stayed in the church.[312] Witness VM stated that after he left the church, he heard shouting inside the church as well as explosions and gunfire.[313] The witness testified that he was not certain if the Accused was one of the attackers who entered the church because the church was very large and because he was made to go outside.[314]

178. Witness VM testified that outside the Accused ordered the Hutus to identify themselves from amongst the refugees and stated that nothing would happen to them.[315] Witness VM stated that he identified himself as a Hutu and that a soldier then questioned him.[316] Witness VM stated that the refugees claiming to be Hutu were lined up, and that the Accused directed the attackers to kill the Tutsi refugees.[317] Witness VM stated that the Accused then also directed the killing of those refugees whom he recognised as Tutsis in the group of the Hutus.[318] On the Accused's directions, the soldiers and *Interahamwe* killed the Tutsi refugees with machetes and guns.[319] The witness stated that many people were killed during the attack.[320] The witness testified that he did not witness the Accused shoot or cut anyone.[321]

179. After being read his prior statement, Prosecution Witness VD recalled that he saw the Accused and Bisengimana on 13 April 1994 between 7:30 and 8:00 a.m. at the Musha sector office with people from various cellules of Musha sector.[322] The witness testified that the Accused, whom he identified in court, and Bisengimana had

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[310] T. 6 March 2001 pp. 93, 142.
[311] T. 6 March 2001 p. 93.
[312] T. 6 March 2001 p. 93.
[313] T. 6 March 2001 p. 97.
[314] T. 6 March 2001 p. 144.
[315] T. 6 March 2001 p. 93.
[316] T. 6 March 2001 p. 93.
[317] T. 6 March 2001 pp. 94-95.
[318] T. 6 March 2001 p. 95.
[319] T. 6 March 2001 pp. 95-96; T. 7 March 2001 pp. 15, 46.
[320] T. 7 March 2001 p. 18.
[321] T. 6 March 2001 pp. 144-145.
[322] T. 14 March 2001 pp. 46-49.

been driving around Musha sector in a white Hilux looking for the people to whom they had given weapons in order to go to Musha church.[323] Witness VD also testified that later an individual named Micoyabgagabo, who had participated in the attack at Musha church, told the witness in a bar that the attack against the Tutsis was successful because of the *Interahamwe* brought by the Accused.[324]

180. Prosecution Witness VV stated that she saw the Accused, Bisengimana, and Rugambage around 10:00 a.m. at some point in April 1994 in front of a house where she was hiding in Nzige sector.[325] Witness VV testified that she saw the Accused and Bisengimana in a grey sedan-style vehicle.[326] The witness testified that Major Rugambage arrived to meet them with soldiers.[327] From the uniforms they were wearing, Witness VV also recognised three soldiers of the Presidential Guard who had come in Major Rugambage's vehicle.[328] Witness VV explained that while the men were talking, many people gathered around them and she heard the Accused address the crowd about killing and raping Tutsis.[329] Witness VV testified that after speaking, the Accused, Bisengimana, and Rugambage went to Musha church, where the witness could see smoke and hear the sound of explosions.[330]

181. The Prosecutor's investigator Pierre Duclos testified that when visiting Musha church in 1997, he observed holes in the doors and the roof where the metal was torn by projectiles fired into the church from the outside and a mark that he was told was dried blood.[331]

182. The Accused denied that he was at Musha church between 7 and 13 April 1994.[332] He indicated that it would have been impossible for him to be there and that he was either at his home in Gahengeri or had left the region.[333]

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[323] T. 14 March 2001 pp. 17, 48, 49.
[324] T. 14 March 2001 pp. 11, 12.
[325] T. 29 March 2001 pp. 7, 14, 19, 53-54.
[326] T. 29 March 2001 pp. 16, 20-21.
[327] T. 29 March 2001 p. 21.
[328] T. 29 March 2001 p. 18.
[329] T. 29 March 2001 pp. 8-9. *See also* sec. IV.F hereof.
[330] T. 29 March 2001 p. 9.
[331] T. 16 October 2000 pp. 78, 79.
[332] T. 18 February 2002 p. 130; T. 28 February 2002 pp. 74-77.
[333] T. 18 February 2002 p. 130; T. 28 February 2002 pp. 74-77. *See also* sec. III.G.2-6 hereof.

183. Defence Witness BZ, a corporal in the gendarmerie, stated that he was on leave in Gikoro during the events in Musha between 10 and 14 April 1994.[334] Witness BZ testified that a young man called Rugamba had shot at a night patrol and then fled to Musha church.[335] According to the witness, members of the night patrol went to the church where they found many people, including Gikoro's RPF leaders.[336] The witness explained that the night patrol went to ask for assistance from the gendarmes, who were posted at the commune office, and from the soldiers who had come from fighting the *Inkotanyi* in Byumba.[337]

184. Witness BZ explained that he was at the commune office when the first gendarmes returned from Musha church.[338] The witness stated that one section of the soldiers and gendarmes had gone to the church, and the refugees threw a grenade at them.[339] Witness BZ testified that the soldiers and gendarmes returned to the commune office to get reinforcements and that he went to Musha church with this second group.[340]

185. Witness BZ stated that the commune had approximately eleven gendarmes, and the soldiers from Byumba numbered approximately forty or fifty.[341] Witness BZ noted that the soldiers and gendarmes came on foot, and that the only vehicle he saw at the church belonged to the sisters.[342] The witness also stated that he did not see civilian authorities outside the church.[343] He recalled seeing *Interahamwe*, including their president, Jean Claude Mukwiye, outside the church.[344]

186. Witness BZ stated that when the gendarmes and soldiers reached the church they asked the people inside to open the door, but the refugees refused.[345] According to the witness, Muteyinkingi, an ex-soldier who was affiliated with the RPF, threw a grenade from inside the church, and then the gendarmes and soldiers threw grenades

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[334] T. 2 October 2001 pp. 13, 43, 55.
[335] T. 2 October 2001 pp. 12, 29.
[336] T. 2 October 2001 pp. 12-14.
[337] T. 2 October 2001 pp. 15-16.
[338] T. 2 October 2001 p. 46.
[339] T. 2 October 2001 p. 46.
[340] T. 2 October 2001 pp. 46-47.
[341] T. 2 October 2001 p. 27.
[342] T. 2 October 2001 p. 26.
[343] T. 2 October 2001 p. 22.
[344] T. 2 October 2001 p. 22.

and fired heavy weapons to open the door.[346] The witness noted that wounded people came out of the church and mixed with the soldiers.[347] The witness stated that the soldiers were scared because the *Inkotanyi* were in the area, and so they fired and killed many of the refugees.[348]

187. According to Witness BZ, after forcing the door open, the gendarmes instructed the soldiers to take from among the refugees those who had fired at the gendarmes and soldiers or who possessed grenades.[349] The witness stated that the soldiers told the gendarmes to leave them alone to do the "work" because they were more familiar with the *Inkotanyi*.[350] Witness BZ explained that the "work" was "to shoot these people, since [the soldiers] were saying that they were *Inkotanyis*."[351]

188. Witness BZ agreed that a massacre occurred at Musha church and that Tutsi civilians were killed.[352] The witness later added that there were both Tutsi and Hutu victims.[353] Witness BZ stated that he did not witness anyone sever a refugee's limbs.[354] The witness denied being a participant in the attack on Musha church, noting that he was not part of the Rwamagana gendarmerie squad.[355] According to the witness, after the attack, he went to inform the Gikoro Bourgmestre Bisengimana, who was sick at home, about what had happened.[356] The witness testified that he did not see the Accused during the events.[357]

189. Defence Witness MBZ indicated that her basis of knowledge concerning the events at Musha church derived primarily from what she "heard people talking about".[358] She testified that she saw refugees going towards Musha church from the north and that she thought they were escaping the intense combat with the RPF taking

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[345] T. 2 October 2001 p. 15.
[346] T. 2 October 2001 pp. 12-13, 15.
[347] T. 2 October 2001 p. 15.
[348] T. 2 October 2001 p. 15.
[349] T. 2 October 2001 p. 17.
[350] T. 2 October 2001 p. 17.
[351] T. 2 October 2001 p. 17.
[352] T. 2 October 2001 pp. 79-80.
[353] T. 2 October 2001 p. 92.
[354] T. 2 October 2001 p. 26.
[355] T. 2 October 2001 pp. 56, 58.
[356] T. 2 October 2001 pp. 24, 25.
[357] T. 2 October 2001 pp. 8-9.
[358] T. 3 October 2001 p. 12.

place there.[359] Witness MBZ testified, without specifying the day, that some people among the refugees had weapons and that the police went to the church to disarm them.[360] Witness MBZ stated that the refugees opened fire on the police, who then called security agents.[361] The witness testified that the security agents opened the church doors and tried to disarm the refugees, resulting in a fight with wounded people and fatalities.[362] While the witness testified that she did not know the ethnicity of the refugees, she opined that the victims at Musha church were both Hutus and Tutsis.[363] The witness noted that she did not hear that the Accused was at the church during the attack; she had heard that no authorities were there.[364]

190. Defence Witness BP testified that he was about eighty meters from Musha church when he witnessed military personnel and civilians at the church massacre refugees who appeared to be from "all ethnic groups".[365] The witness also stated that the civilians were not armed and did not kill anyone.[366] Witness BP stated that during the attack he did not see the Accused, whom he identified in court,[367] or any vehicles at the church.[368]

191. Defence Witness TDB testified that he heard gunshots and saw explosions at Musha church around 10:00 or 11:00 a.m. on 13 April 1994, which lasted about two hours.[369] According to the witness, he then tried to go to Musha church to see what was happening, but gendarmes stopped him about twenty meters away from there.[370] He explained that he saw gendarmes, policemen, people in "combat" gear, and about 100 dead bodies, including those of two gendarmes.[371] Witness TDB testified that he did not see any *Interahamwe* nearby, but admitted that he had told investigators that

[359] T. 3 October 2001 pp. 12-15.
[360] T. 3 October 2001 p. 13.
[361] T. 3 October 2001 p. 13.
[362] T. 3 October 2001 pp. 13, 14.
[363] T. 3 October 2001 pp. 14, 15.
[364] T. 3 October 2001 p. 16.
[365] T. 3 October 2001 pp. 110, 111, 112, 130.
[366] T. 3 October 2001 p. 111.
[367] T. 3 October 2001 p. 105.
[368] T. 3 October 2001 pp. 112, 117.
[369] T. 4 October 2001 p. 58.
[370] T. 4 October 2001 p. 58.
[371] T. 4 October 2001 pp. 58, 59, 63.

*Interahamwe* from Kabuga attacked the refugees at the church because that is what other people were saying.[372]

192. Defence Witness MTP stated that about one week after the death of the president, she left her workplace when she heard grenade explosions, but stopped at the church on her way home to see what was happening.[373] Witness MTP testified that police officers had gone to Musha church to verify whether the refugees in the church were armed and that the refugees threw a grenade at them.[374] The witness stated that the police left and then returned on foot with civilians from Gikoro and soldiers from the Mutara war front.[375] Witness MTP clarified that she was not present during the initial attack, but arrived only after the police were reinforced.[376] The witness testified that she saw the refugees start shooting and throwing grenades, and the soldiers returned fire.[377] Once the fighting started, she fled.[378] The witness did not know how many people died, but saw two dead soldiers and two dead police officers before she fled from the church.[379] Witness MTP testified that she did not see the Accused, Bisengimana, and Rugambarara, whom she knew, at the church.[380] She noted that a Tutsi named Mukwiye, who was the head of the *Interahamwe* in Gikoro commune, was the only important person whom she saw there.[381]

193. Defence Expert Witness Ndengejeho stated that he had adequate knowledge of the events at Musha church, but was uncomfortable testifying about them because he was not there.[382] Ndengejeho testified that Rusanganwa was an MDR member and a school head master in Gikoro.[383] Ndengejeho noted that he was not familiar with how Rusanganwa disappeared, but stated that according to his knowledge, the Accused was not in Musha at that time, so he could not have assaulted Rusanganwa.[384] Moreover, Ndengejeho stated that the Accused could not possibly have travelled from

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[372] T. 4 October 2001 pp. 86-87, 89-90.
[373] T. 24 October 2001 pp. 24, 41; T. 25 October 2001 pp. 11-12, 23.
[374] T. 24 October 2001 p. 18.
[375] T. 24 October 2001 pp. 18, 28.
[376] T. 24 October 2001 p. 23; T. 25 October 2001 p. 25.
[377] T. 24 October 2001 pp. 18-19.
[378] T. 24 October 2001 p. 23; T. 25 October 2001 p. 25.
[379] T. 24 October 2001 p. 20.
[380] T. 24 October 2001 pp. 23, 24.
[381] T. 24 October 2001 pp. 23, 24.
[382] T. 30 January 2002 p. 130.
[383] T. 30 January 2002 pp. 107, 108.

Gahengeri in Bicumbi to Gikoro after 7 April 1994 because the RPF had captured Gikoro commune in the evening of 6 April 1994.[385] Ndengejeho also opined that the Accused most likely could not be linked to the events in Gikoro commune because it was a separate commune from Bicumbi.[386]

*2. Findings*

a. Massacre at Musha Church

194. The testimonies reveal that a large number of civilians sought refuge at Musha church beginning on 7 April 1994 and that the refugees were massacred at the church on 13 April 1994.

195. The Chamber notes that Witnesses VA and VM provided eye witness accounts of the Accused's participation in the massacre at Musha church. Both witnesses gave similar and largely consistent accounts of how the attack unfolded. After careful consideration, the Chamber finds that both witnesses are credible and accepts their detailed and reliable accounts. The Chamber is mindful of minor differences between their accounts, but is satisfied that these are not material and are explained by the passage of time, the chaos of an armed attack, and the witnesses' differing vantage points during the assault.

196. Based on the accounts provided by Witnesses VA and VM, it emerges that the Accused, Paul Bisengimana, and others went to Musha church on 8 or 9 April 1994 in order to assess the situation shortly after the refugees began arriving there. At that time, the Accused expressed an intention to kill the refugees. The Accused, Bisengimana, and others then returned to the church with *Interahamwe*, soldiers, and gendarmes on 13 April 1994 around midmorning. These assailants proceeded to attack the refugees in the church with gunfire and grenades. After gaining access to the church, the attackers ordered the refugees to leave the church, and many complied. At some point after these refugees left the church, the Accused ordered the Hutu refugees to separate from the Tutsi refugees. The Tutsis were then executed on

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[384] T. 30 January 2002 pp. 107-110.
[385] T. 30 January 2002 pp. 110-113.
[386] T. 30 January 2002 pp. 80, 81.

directions from the Accused, which Witness VM saw from close range. While the Tutsi refugees outside the church were being separated and executed, the assailants continued to attack those remaining in the church.

197. The testimonies of Prosecution Witnesses VD, VV, and Duclos provide further corroboration to many aspects of VA's and VM's first-hand accounts. Witness VD saw the Accused and Bisengimana gathering local *Interahamwe* in Musha sector on the morning of the attack on 13 April 1994. Witness VV saw the Accused in the company of Bisengimana, *Interahamwe*, and soldiers head toward Musha church from where she saw smoke and heard explosions. Duclos testified that he observed tears in the metal door and the roof of the church indicating that bullets had been fired into the church from outside. The Chamber finds these aspects of the testimonies of Witnesses VD, VV, and Duclos to be credible and reliable, and accepts them.

198. The principal points of contention, which emerge from the accounts provided by the Accused and Defence Witnesses BZ, MBZ, BP, TDB, and MTP, are whether the Accused or *Interahamwe* under his direction participated in the attack and whether armed refugees or RPF infiltrators provoked the attack.

199. The Chamber does not find Witness BZ to be credible and thus cannot accept his account of the provocation for the attack or of who was present at Musha church. The Chamber recalls that Witness BZ indicated that he did not know any other witness who came to the Tribunal to testify on behalf of the Defence in this case.[387] However, Witness MBZ, who was the very next witness to testify, stated that she was married to Witness BZ and that both witnesses were aware that the other was testifying in this case.[388] The Chamber further does not find it plausible that as a gendarme, the witness would remain on leave in the chaos of April 1994 and then accompany other gendarmes and soldiers to Musha church without assisting them in the attack.

200. The Chamber recalls that the Witness MBZ specified that her information concerning the attack at Musha church was based on what she "heard people talking about". The Chamber highlights that Witness MBZ stated that she never discussed the

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[387] T. 2 October 2001 p. 105.

events at Musha church with her husband, Witness BZ,[389] even though he testified one day earlier and claimed to be an eye-witness.[390] The Chamber cannot rely on her testimony that some of the refugees were armed or that the Accused was not present, insofar as the basis of her account is vague and of questionable credibility.

201. The Chamber recalls that Witness BP observed only part of the massacre at Musha church and that this was from a distance of eighty metres. The Chamber does not accept the witness's conclusion that the Accused was not present during the attack because the witness did not indicate that he could have identified individual attackers from such a distance and because he did not witness the entire event.

202. The Chamber accepts Witness TDB's testimony that he heard gunfire and grenade explosions for about two hours on the morning of 13 April 1994, noting its consistency with the first hand accounts provided by Witnesses VA and VM. The Chamber cannot accept as reliable, however, the speculation that *Interahamwe* did not participate in the attack when by the witness's own admission he arrived at the scene after the attack had ended.

203. Witness MTP gave detailed testimony about the origins of the attack on the Musha church. The Chamber recalls that the witness admitted that she was not present at the beginning of the attack and that she did not state the basis of her knowledge. Thus, the Chamber does not find her account of how the attack began reliable. The witness also stated that during the period when she was at the church, she claimed to see the refugees fire on the soldiers, who then returned the fire. The Chamber notes that the witness, who was with a "huge crowd",[391] was only briefly at the church. Thus, her testimony about the nature of the alleged exchange of fire or as to whether particular individuals were present during the attack is not reliable.

204. The Chamber has also carefully considered the Accused's alibi, discussed above in Chapter III, in the context of all the evidence submitted concerning the events at Musha church. In particular, the Chamber recalls that the Accused claimed

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[388] T. 3 October 2001 p. 37.
[389] T. 3 October 2001 p. 71.
[390] T. 3 October 2001 p. 71.
[391] T. 24 October 2001 p. 20.

to be in Gitarama town on 13 April 1994 when the massacre occurred, which was confirmed only by the testimony of Defence Witness PFM, whose testimony, in the opinion of the Chamber, is biased by her close personal relationship with the Accused. The Chamber further emphasises that even if the Accused had gone at some point to Gitarama, as his evidence indicates, the testimony of Defence Witness TDB, who travelled from Gikoro to Ruhango, Gitarama on 13 April 1994, confirms that the Accused could have travelled between the two places at that time.

205. The Chamber notes that the Accused's alibi does not call into question the reliable and credible identification of the Accused at Musha church around midday on 8 or 9 April 1994. The Chamber recalls that the Accused, who claimed to be at his home on 8 April 1994, was not actually seen there from early morning on 7 April 1994 until 4:00 p.m. on 8 April 1994. The reliable and credible sighting of the Accused at Musha church is not impeached by the simple belief of Defence Witnesses KNU and PFM that the Accused never left his home on 8 April 1994. The Chamber also recalls that the Accused claimed to be at the commune office in Nzige until noon on 9 April 1994 when he allegedly left for Ruhango, Gitarama, arriving nearly twelve hours later. The Accused's alibi on 9 April 1994 likewise does not preclude his presence at Musha church on 9 April 1994, as the evidence suggests only that he remained at the commune office until around noon.

206. The Chamber therefore finds beyond a reasonable doubt that Tutsi civilians were killed at Musha church by soldiers, gendarmes, and *Interahamwe* militiamen on 13 April 1994, as alleged in paragraph 3.11 of the Indictment. Upon considering all relevant evidence, including the alibi, the Chamber finds beyond a reasonable doubt that the Accused participated in this attack by gathering *Interahamwe* to take part in the attack and by directing the assailants to kill Tutsi refugees, as alleged in paragraph 3.11 of the Indictment.

207. The Chamber further finds that the Prosecutor did not introduce sufficient evidence to prove that the Accused worked in close cooperation with Bisengimana to organize the massacre at Musha church.

208. The Chamber also does not find that there is any reliable evidence on the record to demonstrate that there were armed refugees or RPF infiltrators in Musha

church or that they provoked the attack at Musha church and engaged in armed resistance.

b. Torture and Murder of Victim C at Musha Church

209. The Chamber notes that Victim C is Rusanganwa and that his torture and murder, alleged in paragraph 3.18 of the Indictment, occurred during the events at Musha church on 13 April 1994.

210. As explained above, the Chamber has found that the Accused participated in the massacre at Musha church on 13 April 1994. The question at this point is whether the Prosecution proved beyond a reasonable doubt that the Accused tortured and killed Rusanganwa during the course of this massacre.

211. The Chamber recalls that Prosecution Witness VA was the sole witness to testify about this event. The witness first stated that the Accused cut Rusanganwa's arms and Bisengimana cut his legs. The Prosecutor later asked whether the Accused cut one or both arms. The witness answered that the Accused cut a leg and an arm. In cross-examination, the Defence pointed out that the witness's written statement mentions only that Rusanganwa's arms were cut. The Chamber recalls that the witness attributed this omission to a misunderstanding by the investigators who took her statement and to whom, the witness testified, she told that Rusanganwa's legs were also cut.

212. The Chamber is satisfied that the apparent confusion or contradiction in Witness VA's account is not material and is explained by the trauma of the event, the manner in which her testimony was elicited, and an apparent misunderstanding between the witness and the investigators. Her testimony concerning this event was otherwise detailed and vivid, and the Chamber accepts that the witness heard the Accused question Rusanganwa about the RPF advance and then saw the Accused strike him with a machete.

213. Therefore, the Chamber finds beyond a reasonable doubt that the Accused intentionally inflicted serious injuries on Rusanganwa after questioning him at Musha church and that Rusanganwa died as a result of those injuries.

7424

### C. Paragraph 3.12 of the Indictment

214. Paragraph 3.12 of the Indictment reads:

> Between 7 and 20 April 1994, Laurent SEMANZA organized and executed the massacres at Mwulire Hill, Bicumbi Commune, where several thousand people had taken refuge to escape the killings. On or about 16 and 18 April 1994, Laurent SEMANZA directed the attacks on the refugees at Mwulire Hill and personally participated in the killings.

#### *1. Allegations*

215. Prosecution Witness VN testified that on 7 April 1994 he began to feel insecure in Nzige sector and that he sought refuge on Mwulire Hill.[392] The witness stated that on 8 April 1994 there were more than five hundred people seeking refuge there, the vast majority of whom were Tutsi, and that they were attacked.[393] The fighting started at about 2 p.m. and ended at around 4:30 p.m. with no casualties on either side.[394] Witness VN testified that there were more than 100 assailants led by François Rwabugibo, a policeman from Bicumbi commune.[395]

216. The witness testified that the attacks continued on 9 April 1994, and that by 10 April 1994 there were more than 5,000 refugees gathered at Mwulire Hill, all of whom were civilians.[396] The witness stated that the attacks lasted through 18 April 1994.[397] The witness indicated that the attackers were armed with guns and grenades, as well as traditional weapons, while some of the refugees had traditional weapons, including spears, arrows, sticks, and stones.[398] Six members of his family died during the attacks on Mwulire Hill.[399]

217. Witness VN testified that the Accused came to Mwulire Hill on 18 April 1994, the day when the assailants carried out a large-scale attack on the refugees.[400]

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[392] T. 9 November 2000 pp. 69-70.
[393] T. 9 November 2000 pp. 71-72; T. 14 November 2000 pp. 17-18.
[394] T. 14 November 2000 pp. 26, 27.
[395] T. 9 November 2000 p. 72; T. 14 November 2000 p. 24.
[396] T. 9 November 2000 pp. 75, 101, 106.
[397] T. 9 November 2000 p. 101.
[398] T. 9 November 2000 pp. 102, 104; T. 14 November 2000 p. 103.
[399] T. 9 November 2000 p. 107.
[400] T. 9 November 2000 pp. 102, 104.

7423

According to the witness, the Accused brought *Interahamwe* and soldiers and their equipment in a red Toyota pick-up truck belonging to the APEGA school.[401] The witness stated that the *Interahamwe* and soldiers whom the Accused brought joined other assailants in the attack on the refugees.[402] The witness testified that after bringing the *Interahamwe* and soldiers, the Accused stayed near his vehicle.[403] The witness did not see the Accused participate in the fighting.[404] The refugees tried to defend themselves, but were vanquished on 18 April 1994 because the attackers had brought "relatively heavy arms" and soldiers to back them up.[405] The witness testified that on 19 and 20 April 1994, RPF soldiers came and took away the wounded.[406] Witness VN stated that on 18 April 1994 the RPF was not in Bicumbi yet, but that they were in Gahin and Rukara, and also at Kayonze market in Kayonze commune.[407]

218. Prosecution Witness VP, a Tutsi who identified the Accused in court, testified that he sought refuge on Mwulire Hill from the afternoon of 13 April 1994.[408] When he arrived on Mwulire Hill, he found that over 5,000 people, mostly Tutsis, were taking refuge there and that their numbers kept increasing, so that by 18 April 1994 there were about 10,000 refugees.[409] The witness testified that from 15 through 17 April 1994 there were daily attacks on the refugees, which the refugees tried to ward off with stones.[410] The witness recognised several of the attackers including people who, according to him, had received arms from the Accused and Rugambarara.[411]

219. Witness VP testified that on 18 April 1994 the assailants mounted a major attack and defeated the refugees on Mwulire Hill.[412] On 18 April 1994, the witness stated, the Accused came to the hill before midday.[413] According to the witness, the Accused was in a military uniform and was carrying a firearm.[414] The witness

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[401] T. 9 November 2000 pp. 104-106; T. 14 November 2000 pp. 60, 61.
[402] T. 9 November 2000 pp. 105, 106.
[403] T. 9 November 2000 p. 105; T. 14 November 2000 pp. 61-62.
[404] T. 14 November 2000 p. 61.
[405] T. 9 November 2000 p. 104.
[406] T. 9 November 2000 p. 107; T. 14 November 2000 p. 62.
[407] T. 9 November 2000 pp. 108, 112.
[408] T. 4 December 2000 pp. 35, 36, 59.
[409] T. 4 December 2000 pp. 62, 63, 64; T. 5 December 2000 p. 93.
[410] T. 4 December 2000 pp. 63-64; T. 5 December 2000 pp. 84-85.
[411] T. 4 December 2000 pp. 66-67, 71-72.
[412] T. 4 December 2000 pp. 68, 83.
[413] T. 4 December 2000 p. 68.
[414] T. 4 December 2000 p. 69.

specified that the Accused, accompanied by commune officials, soldiers, and *Interahamwe*, was on the west side of Mwulire sector, while other assailants were on the other side, and that thus the refugees were surrounded.[415] The witness testified that the Accused used his firearm during the attack to shoot at refugees who were on a football field near the sector office.[416] The witness stated that many of the refugees died on the football field before noon.[417]

220. Witness VP stated that when the assailants ran out of ammunition, around 1 p.m., the attacks ceased until about 2.30 p.m. when the assailants, including the Accused, returned.[418] According to the witness, the assailants then attacked the survivors of the earlier attack.[419] The refugees tried to defend themselves, in particular the women and children, and their livestock, but were defeated, the witness stated.[420] The attack continued until about 5 p.m. and the assailants killed many people so that "the whole hill was full of corpses."[421] The witness testified that his oldest child was killed during this attack, as was his brother-in-law and other relatives, and that one of his children is disabled as a result of the attack.[422]

221. The Accused denied that he participated in the attacks at Mwulire or that he was present in Mwulire on the dates "contained in the Indictment."[423] He specifically denied that he was in Mwulire on 8, 9, 11, 12, and 13 April 1994.[424] The Accused added that he learned from refugees that on 18 April 1994 Mwulire was controlled by the RPF.[425]

222. Defence Witness Nyetera testified, without indicating the basis of his knowledge, that the RPF controlled Mwulire from the beginning of April 1994 and that from "the very first days of April ... even before the 6th of April" the RPF had

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[415] T. 4 December 2000 p. 69.
[416] T. 4 December 2000 pp. 69-70; T. 5 December 2000 p. 99.
[417] T. 4 December 2000 p. 70.
[418] T. 4 December 2000 p. 70.
[419] T. 4 December 2000 p. 70.
[420] T. 4 December 2000 pp. 70-71.
[421] T. 4 December 2000 p. 71.
[422] T. 4 December 2000 pp. 72-73.
[423] T. 27 February 2002 p. 111. *See also* sec. III.G.2-6 hereof.
[424] T. 18 February 2002 p. 125; T. 28 February 2002 pp. 76, 77, 78.
[425] T. 18 February 2002 p. 132.

7421

"people" there.[426] Witness Nyetera acknowledged that he knew that the Mwulire Hill massacre took place in April 1994, but could not recall the specific date.[427]

223. Defence Expert Witness Ndengejeho testified that he learned that in Mwulire there had been a conflict between Hutus and Tutsis due to infiltrators.[428]

*2. Findings*

224. Based on the testimonies of Prosecution Witnesses VN and VP, and Defence Witness Nyetera and Defence Expert Witness Ndengejeho, the Chamber finds that in April 1994 there were attacks on mostly Tutsi, civilian refugees on Mwulire Hill. From the record of testimonies of Witnesses VN and VP it emerges that in April 1994 mostly Tutsi refugees sought safety on Mwulire Hill so that by 10 April 1994 there were more than 5,000 of them at that location, and by 18 April 1994 there were up to 10,000. From 8 April 1994 the refugees came under daily attacks. On 18 April 1994, the refugees on Mwulire Hill were attacked and vanquished by the assailants including *Interahamwe*, soldiers, commune officials, and the Accused. In particular, Witnesses VN and VP testified about the deaths of their relatives resulting from this attack, and Witness VP stated that the assailants killed so many people that the whole hill was full of corpses.

225. Witness VP gave evidence that during the attack on 18 April 1994, the Accused, who was armed and accompanied by commune officials, soldiers, and *Interahamwe*, shot at refugees who were on a football field near the sector office and that many of these refugees died. Witness VN testified that on that date, the Accused brought *Interahamwe* and soldiers and their "equipment" to Mwulire Hill. The Chamber understands "equipment" to mean implements that were used to kill and injure the victims. While Witness VN testified that he saw the *Interahamwe* and the soldiers whom the Accused brought join other assailants in the attack on refugees, he testified that the Accused stayed near his vehicle and that he did not see the Accused take part in the fighting.

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[426] T. 11 February 2002 pp. 58-59.
[427] T. 11 February 2002 p. 59.
[428] T. 30 January 2002 pp. 133-134.

226. The Chamber finds the evidence given by Witnesses VN and VP to be credible and reliable. In the view of the Chamber, the statement of Witness VN that he did not see the Accused take part in the attack is not inconsistent with VP's testimony that he saw the Accused participate in the attack by shooting at the refugees. The Chamber recalls that the attack took place throughout the day and that it involved many people. Witness VN did not indicate at which time or for how long he observed the Accused at Mwulire Hill on 18 April 1994, and he did not specify the location at which he saw the Accused on that day.

227. The Chamber has also carefully considered the Accused's alibi, discussed above in Chapter III. In particular, the Chamber recalls that the Accused claimed that on 18 April 1994 he was travelling in Gitarama prefecture, from Ruhango to Gitarama town, an account which was supported by Defence Witness PFM, who, in the opinion of the Chamber, is biased by her personal relationship with the Accused, and by Defence Witness CYS, who also had a close relationship with the Accused.

228. Upon considering the entire evidence on the record including the alibi, the Chamber finds beyond a reasonable doubt, based primarily on the eye-witness account of Witness VP, that the Accused participated in the killings of Tutsi refugees on Mwulire Hill on 18 April 1994. The Chamber finds, however, that there is no evidence on the record that the Accused organized, executed, or directed the attacks.

**D. Paragraph 3.13 of the Indictment**

229. Paragraph 3.13 of the Indictment reads:

> On or about 12 April 1994, Laurent SEMANZA organized and executed the massacre at Mabare mosque, Bicumbi Commune, where several hundred people had taken refuge to escape the killings. On or about 12 April 1994, Laurent SEMANZA directed the attacks on refugees at the Mabare mosque and personally participated in the killings.

*1. Allegations*

230. Prosecution Witness VAK, a Tutsi, testified that on 11 April 1994, he sought refuge at the Mabare mosque, which he identified in court from a photograph marked as Exhibit P5, 14(A).[429] According to the witness, on the morning of 12 April 1994 at approximately 10:00 a.m., *Interahamwe*, Bicumbi commune police, and the Accused, whom he identified in court, attacked the Tutsi refugees in the mosque with guns and grenades.[430] The witness stated that the Accused, who appeared to be in overall command of the attack, carried a small shotgun and wore a long overcoat.[431] The witness noted, however, that he did not see the Accused shoot at any of the refugees.[432] Witness VAK explained that the attack continued until 4:00 p.m and that around 300 people were killed.[433] According to the witness, after the killings the Accused adressed the *Interahamwe* and told them: "We came to assist you, and I believe that those who have not been killed would not be able to resist you. Go and find them and exterminate them."[434]

231. The Accused denied participating in the killing of refugees at Mabare mosque and confirmed that he was not at Mabare mosque on 12 April 1994.[435]

232. Defence Witness MDB testified that during April 1994 she was staying with a family member in Mabare sector who lived in the vicinity of Mabare mosque.[436]

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[429] T. 15 March 2001 pp. 91, 117, 118.
[430] T. 15 March 2001 pp. 91-92, 103-104.
[431] T. 15 March 2001 pp. 92, 93.
[432] T. 15 March 2001 p. 119.
[433] T. 15 March 2001 p. 92.
[434] T. 15 March 2001 p. 92.
[435] T. 27 February 2002 p. 114; T. 28 February 2002 p. 78. *See also* sec. III.G.2-6 hereof.

7418

Witness MDB explained that beginning on 7 April 1994, "purport[ed]" refugees from various places began to gather at Mabare mosque.[437] The witness testified that the refugees were both Hutu and Tutsi and estimated their number at around 500.[438] The witness stated that these people were armed with arrows and spears, and that they stole at night from the local residents, creating insecurity.[439] According to the witness, the local population therefore contacted the security forces, in particular the gendarmes, who went to the mosque to disperse the people there.[440] The witness testified that she saw uniformed gendarmes pass by her house on their way to the mosque.[441]

233. Witness MDB stated that she was not present at the mosque during the attack, but learned about what had transpired there from her relatives who went to the mosque to see who was causing the insecurity.[442] The witness testified that when the refugees saw the gendarmes, the refugees began attacking them, using arrows and firearms.[443] According to the witness, the gendarmes, acting in self-defence, shot at the refugees.[444] Witness MDB testified that the civilian population did not "intervene" on the side of the gendarmes, but that they followed the gendarmes and were "very near" to them.[445] The witness, who had earlier identified the Accused in court, testified that she did not see the Accused at the mosque and that nobody told her that he was there.[446]

234. Witness MDB testified that "many" refugees died during the attack and that she did not know of any gendarme who lost his life there.[447] Subsequently, however, the witness stated that "not many" of the refugees died because when some died, the others fled.[448]

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[436] T. 26 November 2001 pp. 35, 37.
[437] T. 26 November 2001 pp. 12, 13.
[438] T. 26 November 2001 pp. 14, 16.
[439] T. 26 November 2001 pp. 13, 35.
[440] T. 26 November 2001 p. 13.
[441] T. 26 November 2001 pp. 14, 15, 36, 37.
[442] T. 26 November 2001 pp. 17, 36.
[443] T. 26 November 2001 p. 16.
[444] T. 26 November 2001 p. 16.
[445] T. 26 November 2001 pp. 17, 19.
[446] T. 26 November 2001 pp. 10-11, 19.
[447] T. 26 November 2001 pp. 16-17.
[448] T. 26 November 2001 p. 16.

7417

235. Defence Witness Nyetera testified that he heard about the Mabare mosque events, but that he did not hear of the involvement of the Accused in them.[449] The witness stated that "people were informed that there was an armed band made up of Moslems and that there were weapons in that place and this is what happened. The gangs met and confronted each other, some of them had fire weapons, bows and arrows and so on and so forth."[450]

236. Defence Witness CBN stated that, based on information she gathered from policemen, Tutsis sought refuge in Mabare from all other sectors of Bicumbi.[451] According to the witness, other Tutsis joined the refugees in order to make the sector a Tutsi area.[452] The witness stated that the Hutu population felt threatened and tried to defend itself against this invasion, particularly because some of the Tutsis were armed and attacked the population.[453] This resulted in a large fight.[454] However, the witness explained, no one came from outside the commune to kill the Tutsis.[455] The witness stated that the Accused could not have taken part in the attack because he had left Bicumbi on 9 April 1994.[456]

237. Defence Expert Witness Ndengejeho testified that he heard and read that the persons responsible for the massacre came from outside the commune and that there were about 1,500 people in prison on account of the massacre at the mosque.[457]

*2. Findings*

238. Prosecution Witness VAK provided first-hand, detailed testimony about the events at Mabare mosque on 12 April 1994, which the Chamber finds to be credible and reliable.

239. The Chamber recalls that Defence Witness MDB's account of the events is based primarily on her personal observation of gendarmes on their way to the mosque

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[449] T. 11 February 2002 pp. 87, 88.
[450] T. 11 February 2002 p. 88.
[451] Exhibit D 21, Statement of Witness CBN, p. 5.
[452] Exhibit D 21, Statement of Witness CBN, pp. 5-6.
[453] Exhibit D 21, Statement of Witness CBN, p. 6.
[454] Exhibit D 21, Statement of Witness CBN, p. 6.
[455] Exhibit D 21, Statement of Witness CBN, p. 6.
[456] Exhibit D 21, Statement of Witness CBN, p. 6.
[457] T. 30 January 2002 p. 141.

and on the recollections her relatives who were at the mosque during the attack shared with her. The Chamber accepts her account that government security forces and members of the civilian population went to Mabare mosque and that gendarmes killed a number of the refugees there. The Chamber, however, does not find her account reliable concerning whether the refugees were armed or whether they provoked the attack, or whether the Accused was present, because she did not see the attack.

240. The Chamber recalls that Defence Witness CBN's account of what occurred at Mabare mosque derives solely from information she gathered from unidentified policemen. There is no indication whether her sources had any first-hand knowledge of what had transpired during the attack or shared with her everything that had occurred. The Chamber also notes that the statement that the Accused did not participate in the massacre is based solely on the Accused's statement to the witness at the commune office in Nzige on 9 April 1994 that he was fleeing. The Chamber, therefore, does not find CBN's account reliable.

241. The Chamber does not find Defence Witness Nyetera's account of a clash between "gangs" to be credible or reliable because he provided no basis for this assertion, which conflicts with the first-hand account of Prosecution Witness VAK and with that of Defence Witness MDB who was nearby.

242. The Chamber notes that Defence Expert Witness Ndengejeho's account lacks sufficient detail to be reliable, particularly where it is also based solely on what he read and heard from unidentified sources.

243. The Chamber has also carefully considered the Accused's alibi, discussed above in Chapter III, in the context of all the evidence submitted in respect of the events at Mabare mosque. In particular, the Chamber recalls that the Accused claimed to be in Gitarama prefecture on 12 April 1994. This claim was supported by Defence Witness PFM, who, in the opinion of the Chamber, is biased by her close personal relationship with the Accused, and Defence Witness SAM, an acquaintance and a frequent visitor to the Accused's home, who allegedly saw the Accused in Ruhango market around 9:00 a.m. on 12 April 1994.

244. After considering all relevant evidence, including the alibi, the Chamber finds beyond a reasonable doubt, based primarily on the account of Prosecution Witness

VAK, that the Accused was armed and present on 12 April 1994 during the attack on Mabare mosque and that the attack resulted in the death of around 300 Tutsi refugees. The Chamber finds, however, that there is insufficient evidence on the record to show beyond a reasonable doubt that the Accused organized, executed, or directed the said killings. The Chamber is mindful of Witness VAK's testimony that it appeared to him that the Accused was in overall command of the attack. However, the witness did not explain the basis for this view in any detail, and the Chamber did not find any evidence on the record to confirm that the Accused directed the attack on Mabare mosque.

## E. Paragraph 3.14 of the Indictment

245. Paragraph 3.14 of the Indictment reads:

> The massacres referred to in paragraphs 3.8 through 3.13, above, included killing and causing serious bodily and mental harm, including rape and other forms of sexual violence, to members of the Tutsi ethnic group. Laurent SEMANZA intended these massacres to be part of the non-international armed conflict against the RPF because he believed the Tutsi refugees to be enemies of the Government and/or accomplices of the RPF as stated in paragraphs 3.4.2 and 3.4.3 supra.

246. The evidence concerning the alleged violence at massacre sites has already been considered by the Chamber in its factual findings in relation to Paragraphs 3.10, 3.11, 3.12, and 3.13 of the Indictment.[458]

### *1. Findings*

a. Killings

247. The Chamber has already found that a substantial number of members of the Tutsi ethnic group was killed at Ruhanga, Musha church, Mwulire Hill, and Mabare mosque.

b. Serious Bodily or Mental Harm

248. The Chamber finds beyond a reasonable doubt that Witness VF and other Tutsi victims suffered burns and other forms of serious bodily harm during the attack on Ruhanga church compound on 10 April 1994. However, the Chamber has already found that the Prosecutor failed to prove beyond a reasonable doubt that the Accused participated in or was present during this attack.

249. The Chamber has also heard evidence that other people, including Witness VA and the child of Witness VP, were injured during the massacres at Musha church and Mwulire Hill. Defence Witness BZ mentioned wounded persons mixing with soldiers

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[458] The Chamber has already adjudicated on paragraphs 3.8 and 3.9 of the Indictment. *See supra.* para. 61.

at Musha church and Witness VN testified that the RPF soldiers took the wounded from Mwulire Hill. However, the Prosecutor failed to lead evidence about the nature or extent of these injuries, and thus the Chamber is unable to conclude whether these injuries amount to serious bodily or mental harm. Witness VA also testified that Manda and Twagerayezi burned a young man on the lower part of his body when they climbed on the roof of Musha church. However, the witness did not specify whether this man was a refugee or an attacker and did not mention his ethnicity. No witnesses testified about any bodily or mental harm inflicted during the attack at Mabare mosque. The Chamber therefore finds that the Prosecutor has failed to prove beyond a reasonable doubt that the massacres at Musha church, Mwulire Hill, or Mabare mosque included the causing of serious bodily or mental harm to members of the Tutsi ethnic group. Although it is likely that many victims at these sites suffered a variety of injuries, particularly given the weapons and methods used by the attackers, the Prosecutor did not present sufficient evidence to enable the Chamber to make a specific finding about the allegations of causing serious bodily or mental harm during the massacres. The Chamber finds, therefore, that the Prosecution has not proven these allegations beyond a reasonable doubt.

c. Rapes and Other Forms of Sexual Violence

250. The Prosecution did not lead any evidence about rapes or other forms of sexual violence during the Mwulire Hill, Musha church, or Mabare mosque massacres. Prosecution Witness VAO was the only witness to testify about rapes during the Ruhanga massacre. The Chamber recalls that she was not an eye-witness to the alleged rapes, about which she learned from a woman whom she met at a refugee camp. The Chamber finds, therefore, that the Prosecution did not prove these allegations beyond a reasonable doubt.

251. The Chamber notes that various assailants raped several Tutsi females, including Prosecution Witnesses VR, VAW, VAV, and VAO, at various locations in Bicumbi and Gikoro communes during April 1994. None of these women, however, was raped during the massacres referred to in paragraphs 3.8 through 3.13 of the Indictment as alleged in paragraph 3.14. These crimes appear to fall within the broad

language of paragraphs 3.15 and 3.16 of the Indictment. However, the Chamber decided to disregard those paragraphs because they are impermissibly vague.[459]

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[459] *See supra* paras. 51, 52, 54, 61.

7411

**F. Paragraph 3.17 of the Indictment**

252. Paragraph 3.17 of the Indictment reads:

> Between April 7 and April 30 1994, Laurent SEMANZA spoke to a small group of men in Gikoro Commune. He told them that they had killed Tutsi women but that they must also rape them before killing them. In response to Semanza's words the same men immediately went to where two Tutsi women, Victim A and Victim B, had taken refuge. One of the men raped Victim A and two men raped and murdered Victim B. Laurent SEMANZA intended the acts described in this paragraph to be part of the non-international armed conflict against the RPF as stated in subparagraphs 3.4.2. and 3.4.3 supra.

*1. Allegations*

253. Prosecution Witness VV, a Tutsi woman, stated that on the morning of the attack at Musha church in April 1994 at approximately 10:00 a.m., she overheard a discussion between the Accused, Rugambage, Bisengimana, three members of the Presidential Guard, and a crowd of others from Bicumbi and Gikoro.[460] She stated that the Accused asked the crowd how the work of killing Tutsis was progressing, to which they responded that they were busy doing their work.[461] The witness testified that she then heard the Accused say: "Are you sure you're not killing Tutsi women and girls before sleeping with them.... [y]ou should do that and even if they have some illness, you should do it with sticks."[462] The witness explained that the Accused used the Kinyarwanda word *kurongora*, which means "to marry" and also "to make love".[463]

254. Witness VV testified that three of the men who heard the Accused's instructions came to the house where she and her cousin were hiding.[464] She explained that one of the attackers stayed inside the house with the witness, while the two other men took her cousin outside.[465] The witness testified that the man told her that they

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[460] T. 29 March 2001 pp. 7-8, 14, 16-18.
[461] T. 29 March 2001 pp. 8-9.
[462] T. 29 March 2001 pp. 9, 33-35.
[463] T. 29 March 2001 p. 10.
[464] T. 29 March 2001 pp. 10, 12.
[465] T. 29 March 2001 p. 10.

had permission to rape them.[466] She stated that the man removed her clothes and had non-consensual sexual intercourse with her and told her that he would kill her if she resisted.[467] The witness explained that she could not see what the other two attackers were doing to her cousin, but heard her cousin scream that she preferred that the attackers kill her.[468] According to the witness, when she left the house, she found that her cousin had been killed and buried.[469]

255. The Accused denied any knowledge of rapes in Bicumbi commune, explaining that "[i]n Rwandan tradition or culture, rape has never existed."[470] Other Defence witnesses made similar broad assertions, stating either that rape is unknown in Rwanda[471] or that they did not see or hear of any rapes in 1994.[472]

256. The Accused denied that he was in the area during the relevant period.[473] The Accused also specifically denied that he ordered *Interahamwe* to do as they pleased with Tutsi women, including raping them, and noted that he was accused of being in multiple places at the same time on that date.[474]

*2. Findings*

257. The Chamber notes that Witness VV is referred to in the Indictment as Victim A, and that her cousin is Victim B.

258. The Chamber has carefully reviewed and considered the transcript of the evidence of Witness VV, which was given by deposition pursuant to Rule 71. The Chamber finds her consistent and detailed evidence to be credible and reliable. Although the witness did not specify a certain date in April 1994, the Chamber notes that she testified that the event was contemporaneous with the attack at Musha church.

[466] T. 29 March 2001 pp. 11, 12.
[467] T. 29 March 2001 pp. 11, 42-43.
[468] T. 29 March 2001 p. 11.
[469] T. 29 March 2001 p. 11.
[470] T. 20 February 2002 p. 42.
[471] Witness BP, T. 4 October 2001 pp. 16, 18; Witness ZC, T. 6 November 2001 pp. 56-57.
[472] *See* Witness KM, T. 9 October 2001 p. 3; Witness MV, T. 22 October 2001 p. 137; Witness BP, T. 3 October 2001 p. 121; T. 4 October 2001 p. 15; Witness MDB, T. 26 November 2001 pp. 23, 40.
[473] T. 20 February 2002 p. 65.
[474] T. 20 February 2002 p. 65; T. 27 February 2002 pp. 116-117.

7409

Therefore, the Chamber finds that the attack on Witness VV occurred on or about 13 April 1994.

259. The Chamber finds that the unsubstantiated claims of Defence witnesses that no rapes occurred in their localities or in Rwanda are not credible or reliable. The Chamber also notes that there is no reliable or credible evidence that places the Accused at another place during the meeting.

260. The Chamber has also carefully considered the Accused's alibi in relation to these events, discussed above in Chapter III. In particular, the Chamber recalls that the Accused claimed to be in Gitarama town on 13 April 1994 which was supported by Defence Witness PFM, whose testimony, in the Chamber's opinion, is biased by her close personal relationship with the Accused.

261. Upon considering all relevant evidence, including the alibi, the Chamber finds based on the testimony of Prosecution Witness VV that the Prosecutor proved beyond a reasonable doubt that on 13 April 1994 at approximately 10:00 a.m. the Accused directed a group of people to rape Tutsi women before killing them. The Chamber also finds beyond a reasonable doubt that Victim A was raped by one of the men in the group and that her cousin, Victim B, was taken outside and killed by two other men from the group.

262. Witness VV did not observe what happened to her cousin after she was taken outside, but testified that she heard Victim B screaming that she would prefer to be killed. On the basis of this evidence, the Chamber is not able to conclude beyond a reasonable doubt that Victim B was also raped and/or tortured before she was killed.

## G. Paragraph 3.19 of the Indictment

263. Paragraph 3.19 of the Indictment reads:

> On or about 8 April 1994, Laurent SEMANZA met Juvenal RUGAMBARARA and a group of *Interahamwe* in front of a particular house in Bicumbi Commune. Laurent SEMANZA told the *Interahamwe* to search for and kill the members of a particular Tutsi family. Immediately thereafter, in Laurent SEMANZA's presence, Juvenal RUGAMBARARA also told the *Interahamwe* to locate and kill the same Tutsi family. A short time later the *Interahamwe* searched a field near the house and found and killed four members of the family; Victim D, Victim E, Victim F and Victim G, and also a neighbor, Victim H, and her baby, Victim J.

### *1. Allegations*

264. Prosecution Witness VAM, a Tutsi, testified that on 8 April 1994 at around 9 a.m. she saw the Accused, who arrived in a car alone, and Rugambarara, who came in a vehicle with *Interahamwe*, stop in front of the house of one of her sons.[475] The house was located on the road, near the witness's house.[476] The witness heard the Accused say that the witness's family was not yet killed and that no Tutsi should survive, that the Tutsi should be sought out and killed.[477]

265. Witness VAM testified that afterwards a certain Denis from Gahengeri arrived and asked the Accused and Rugambarara for weapons to go and "work" in Mwulire because the Tutsis there were defending themselves.[478] The witness observed all of this from about ten meters away, from a spot behind her son's house where she was hiding in a sorghum field.[479] The witness stated that Denis said that one person from her family was among the Tutsis who were defending themselves in Mwulire.[480] According to the witness, the Accused, referring to her children, told the *Interahamwe* who were there: "You have to look for them and kill them. And this young man who is here in Mwulire, you have to find him. And I will give 300,000 francs to anybody

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[475] T. 13 March 2001 pp. 31, 32, 96, 100.
[476] T. 13 March 2001 p. 98.
[477] T. 13 March 2001 pp. 31-32.
[478] T. 13 March 2001 pp. 32, 101, 102.
[479] T. 13 March 2001 p. 102.
[480] T. 13 March 2001 p. 32.

who brings his dead body to me."[481] The witness stated that the Accused put this bounty on one of her sons.[482] After giving the order, the Accused left and the *Interahamwe* started to look for the witness's family.[483]

266. Witness VAM testified that from her hiding spot in the sorghum field she saw an *Interahamwe* called Rutegesha, one of the people told by the Accused to kill her children, shoot at her son's home.[484] She later clarified that the person who shot at the house was Antoine Rutikanga.[485] The witness stated that no one was in the house, however, because they were hiding in the sorghum field.[486] After the shots, the witness stayed in the sorghum field because in her view there was no other place of refuge to which to run.[487]

267. The witness testified that later that day, at 12:30 p.m., she saw the *Interahamwe* kill six people.[488] The *Interahamwe* found four of her children who were hiding in the sorghum field, and beat them with clubs and machetes, killing them.[489] The *Interahamwe* also killed a neighbour and her child.[490] When the assailants found them, the witness testified, that they said: "Now, we have to kill you because the Tutsis must die" and killed them on the spot.[491] The witness stated that the assailants knew her children.[492] The *Interahamwe* included Rutagakwa, Antoine Rutikanga, and Manigura.[493]

268. Defence Witness CBM1 testified that he knew some of the members of Witness VAM's family.[494] The witness testified that he knew that Witness VAM's son's house was located "very near" the road to Gahengeri.[495] The witness stated that he could not say whether there was a sorghum field in front of the house because he

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[481] T. 13 March 2001 p. 33.
[482] T. 13 March 2001 pp. 34, 104.
[483] T. 13 March 2001 p. 37.
[484] T. 13 March 2001 p. 34.
[485] T. 13 March 2001 p. 42.
[486] T. 13 March 2001 pp. 35-36.
[487] T. 13 March 2001 pp. 102-103.
[488] T. 13 March 2001 pp. 36-37.
[489] T. 13 March 2001 pp. 37-38, 44-47.
[490] T. 13 March 2001 p. 37.
[491] T. 13 March 2001 p. 39.
[492] T. 13 March 2001 p. 40.
[493] T. 13 March 2001 pp. 41-42.
[494] T. 29 October 2001 p. 60.
[495] T. 29 October 2001 p. 59.

did not know the exact location of the residence.[496] Witness CBM1 testified that he did not witness, nor did he hear, that members of Witness VAM's family were killed in a sorghum field close to the said house.[497]

*2. Findings*

269. The Chamber finds that Prosecution Witness VAM, who provided a detailed first-hand account, is credible and that her testimony is reliable. The Chamber does not consider as material the fact that the witness first said that it was Rutegesha who shot at her son's home and later stated that it was Rutikanga who did so. The Chamber accepts her account of the events set out above. The Chamber is bolstered in this finding by the fact that VAM observed the events herself at a short distance. The testimony of Witness CBM1 did not refute the evidence given by Witness VAM. Rather, the testimony of CBM1 corroborates the testimony of Witness VAM to the extent that it confirms certain names she mentioned.

270. The Chamber has also carefully considered the Accused's alibi, discussed above in Chapter III, in the context of all the evidence submitted concerning these murders. In particular, the Chamber recalls that the Accused claimed to be at his home on 8 April 1994, which was supported by Defence Witnesses KNU and PFM, whose accounts, in the Chamber's opinion, are unreliable as well as biased by their close personal relationship with the Accused. The Chamber also recalls that the Accused was not actually seen at his home from early morning on 7 April 1994 until 4:00 p.m. on 8 April 1994, and that his alleged presence there is corroborated only by the beliefs of Witnesses KNU and PFM.

271. Upon a review of all the evidence, including the alibi, the Chamber finds beyond a reasonable doubt, based on the evidence of Prosecution Witness VAM, that on 8 April 1994 in the morning, the Accused met Rugambarara and a group of *Interahamwe* in front of a certain house in Bicumbi commune. The Accused told the *Interahamwe* that a certain Tutsi family had not yet been killed, that no Tutsi should survive, and that the Tutsis should be sought out and killed. Later the same day, the

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[496] T. 29 October 2001 p. 59.
[497] T. 29 October 2001 p. 61.

*Interahamwe* searched a field near the house of the family mentioned by the Accused, found four members of that family, and killed them. At the same time, the *Interahamwe* also killed two neighbours of the family.

272. The Chamber, therefore, finds that to this extent the allegations contained in paragraph 3.19 of the Indictment have been proven beyond a reasonable doubt.

## H. General Allegations

### *1. Paragraphs 3.1, 3.2, and 3.3 of the Indictment*

273. Paragraphs 3.1, 3.2, and 3.3 of the Indictment read as follows:

> 3.1 Unless specifically stated herein, the violations of International Humanitarian Law referred to in this indictment took place in Rwanda between the 1st of April and 31st of July 1994.
>
> 3.2 During the events referred to in this indictment, Tutsis, Hutus and Twas were identified as ethnic or racial groups.
>
> 3.3 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.

a. Findings

274. As the Chamber has found in the sections on the various factual allegations, all proven facts giving rise to the violations alleged under the Statute in this case took place in Rwanda in 1994.

275. With respect to paragraph 3.2 of the Indictment, the Chamber recalls that it took judicial notice of the following fact: "Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa."[498] The Chamber therefore finds that during the events referred to in the Indictment, Tutsi, Hutu, and Twa were identified as ethnic groups.

276. The Chamber also took judicial notice relevant to paragraph 3.3 of the Indictment:

> The following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994. There were throughout Rwanda widespread or systematic attacks against a

[498] *Prosecutor v. Semanza*, Case No. ICTR-97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54, TC, 3 November 2000, para. 48. *See* Annex II, Part A, para. 1.

> civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there was a large number of deaths of persons of Tutsi ethnic identity.[499]

277. The Chamber therefore finds that between 6 April 1994 and 17 July 1994 there were in Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification.

*2. Paragraph 3.4 of the Indictment*

278. Paragraphs 3.4 and 3.4.1 of the Indictment read as follows:

> 3.4 After the Rwandan Patriotic Front (RPF) attack of October 1990, the Rwandan Government policy was characterized by the identification of the Tutsis as the enemies to be defeated.

> 3.4.1 This policy defined the main enemy as Tutsis from inside or outside the country, who wanted power, who did not recognize the achievement of the revolution of 1959, and who was [*sic*] seeking armed confrontation. The secondary enemy was defined as those who provided any kind of assistance to the main enemy. This latter category was considered as accomplices of RPF.

279. In support of these allegations, the Prosecution relies mainly on references by various experts and observers to speeches of certain government and party officials, and to the general content of radio broadcasts, as well as certain public and private statements of the Accused.[500] From these sources it is possible to ascertain that the Tutsi were generally identified with the RPF. However, the evidence adduced by the Prosecution is general in nature and is insufficient for the Chamber to make findings about the substance of official Rwandan government policy.

280. Paragraph 3.4.2 of the Indictment reads:

> 3.4.2 During the events referred to in this indictment, there was a non-international armed conflict in the territory of Rwanda between the Government of Rwanda and the Rwandan Patriotic Front (RPF). The victims referred to in this indictment were Tutsi civilians in Bicumbi and Gikoro communes. These were persons who were protected under Article 3 common to the Geneva

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[499] *Prosecutor v. Semanza,* Case No. ICTR-97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54, TC, 3 November 2000, para. 48. *See* Annex II, Part A, para. 2.

[500] Prosecution Closing Brief, filed 12 June 2002, ["Prosecution Closing Brief"] para. 34.

> Conventions of 1949 and under Additional Protocol II thereto, and who were not taking active part in the conflict.

281. The Chamber took judicial notice of the fact that "[b]etween 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character."[501] The Chamber has no doubt as to the nature of the conflict. Therefore, the Chamber finds in respect of the first part of paragraph 3.4.2 that, during the events referred to in the Indictment, there was a non-international armed conflict on the territory of Rwanda between the Government of Rwanda and the RPF.

282. The Chamber notes the allegation in paragraph 3.4.2 that the victims were Tutsi civilians in Bicumbi and Gikoro communes who were protected under Common Article 3 and Additional Protocol II. The Chamber will consider this allegation in its findings, where relevant.

283. Paragraph 3.4.3 reads:

> 3.4.3 Laurent SEMANZA intended the attacks on these victims to be part of the non-international armed conflict because he believed that Tutsi civilians were enemies of the Government and/or accomplices of the RPF and that destroying them would contribute to the implementation of the Government policy against the enemies and the defeat of the RPF.

284. The Chamber will consider the intentions and motives of the Accused in the findings made in connection with the specific counts in the Indictment.

*3. Paragraph 3.5 of the Indictment*

285. Paragraph 3.5 of the Indictment reads:

> At the time of the events referred to in this indictment, the MRND (*Mouvement Républicain National pour le Développement et la Démocratie*) was one of the political parties in Rwanda. The members of the youth wing of the MRND were called, *Interahamwe*. The majority of them went on to become paramilitary militiamen. During the events referred to in this indictment the term *Interahamwe* came to be applied to civilians, regardless of their political or organizational affiliation, who attacked the Tutsi civilian population.

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[501] *Prosecutor v. Semanza*, Case No. ICTR-97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54, TC, 3 November 2000, para. 48. *See* Annex II, Part A, para. 3.

a. Allegations

286. Prosecution Expert Witness Guichaoua referred to the creation of the *Interahamwe* "youth movement" and stated that it increased the influence and operational resources of the MRND.[502]

287. Defence Expert Witness Ndengejeho testified that some massacres committed between April 1994 and July 1994 were reportedly committed by the *Interahamwe.*[503] Ndengejeho explained that up to 6 April 1994 the *Interahamwe* were the youth wing of the MRND party, but that after that date "*Interahamwe* came to mean the extreme youth of the various parties, as well as foreign elements."[504]

288. The Accused testified that the *Interahamwe* were the youth wing of the MRND party and that their role was to sensitise the population to the ideals of the MRND party and also to recruit members for that party.[505]

289. Testimonies of other Defence witnesses support the proposition that the *Interahamwe* were the youth wing of the MRND party.[506]

b. Findings

290. Upon consideration of the evidence on the record, the Chamber finds that the MRND was one of the political parties during the relevant times referred to in the Indictment and that a group named *Interahamwe* was the youth wing of that party. The record bears scant evidence, however, that the majority of *Interahamwe* went on to become paramilitary militiamen. Accordingly, the Chamber shall reserve its findings on this particular generalised allegation and shall rule upon it only to the extent that it may relate to specific elements of the specific counts of the Indictment.

291. The Chamber also reserves its findings as to the general allegation that the term *Interahamwe* came to be applied to civilians, regardless of their political or organizational affiliation, who attacked the Tutsi civilian population. Notwithstanding

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[502] *See* Exhibit P 14.I-9 p. 38.
[503] T. 5 February 2002 p. 145.
[504] T. 5 February 2002 pp. 148, 149.
[505] T. 13 February 2002 p. 102.

Professor Ndengejeho's opinion testimony that after 6 April 1994 the term *Interahamwe* came to be applied to all "extreme youth of the various parties, as well as foreign elements", the Chamber believes that a finding as to the membership of particular units of the *Interahamwe* must be made, if necessary, within the specific context of the counts of the Indictment.

*4. Paragraph 3.6 of the Indictment*

292. Paragraph 3.6 of the Indictment reads:

> Laurent SEMANZA was Bourgmestre of BICUMBI commune for over twenty years. At the time of the events referred to in this indictment, the accused was a member of the Central Committee of the MRND. Furthermore, he was nominated as an MRND Representative to the National Assembly of the broad-based transitional government, which was to be established pursuant to the Arusha Accords. Consequently, he was a very influential person in his community, both in Bicumbi commune and in neighbouring GIKORO commune, and had *de facto* and/or *de jure* authority and control over militiamen, in particular *Interahamwe,* and other persons, including members of the Rwandan Armed Forces (FAR), communal police and other government agents. He used his influence and authority as an agent of the government to advance its war effort against the RPF.

a. Allegations

293. The evidence shows that the Accused served as bourgmestre of Bicumbi commune for more than twenty years ending in 1993, when he was replaced by Rugambarara.[507] The Accused and Prosecution Witnesses VN and VC testified that the Accused was then appointed to serve in the parliament.[508]

294. Several Prosecution witnesses noted the Accused's wealth, lengthy leadership role in the commune, and his apparent and perceived connections with President Habyarimana and other government officials, and stated that although the Accused was no longer the bourgmestre he remained influential and appeared to be in control

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[506] *See, e.g.,* Witness SDN1, T. 30 October 2001 p. 14; Witness ZC, T. 6 November 2001 p. 53; Witness KM, T. 9 October 2001 p. 11; Witness SAM, T. 8 October 2001 p. 70.

[507] Witness VN, T. 8 November 2000 pp. 144, 145; Witness VP, T. 4 December 2000 p. 38; Witness Nyetera, T. 7 February 2002 pp. 99, 101; Witness BZ, T. 1 October 2001 pp. 106, 107, 108; Testimony of the Accused, T. 13 February 2002 p. 102; T. 27 February 2002 p. 11; Witness PFM, T. 13 November 2001 p. 24.

[508] Testimony of the Accused, T. 27 February 2002 p. 17; Witness VN, T. 8 November 2000 p. 146; T. 13 November 2000 pp. 13, 23; Witness VC, T. 7 November 2000 pp. 108-109, 110.

of the commune.[509] Prosecution Witnesses VC and VAO noted that many believed that the Accused was still the bourgmestre in April 1994.[510]

295. Prosecution Expert Witness Guichaoua chronicled the Accused's career from bookkeeper to the "Great Bourgmestre" and alluded to the Accused's various political and personal connections with important personalities, including President Habyarimana.[511]

296. Guichaoua stated that, based on his research, the Accused became chairman of the MRND party in Kigali-Rural after April 1992, a role usually held by the prefect.[512] Because there was no prefect at the time, Guichaoua agreed with the proposition that this role allowed the Accused a say in the administration of the prefecture.[513] Guichaoua further explained that as the MRND party chair in the prefecture, the Accused was an *ex officio* member of the MRND National Committee.[514] Guichauoa noted that, as of 1992, the MRND Central Committee no longer existed, and that, after party restructuring, the National Committee was created.[515] Witness VN also testified that the Accused was the MRND party chairman for Kigali-Rural prefecture and that he played a role in founding several minor, MRND-affiliated political parties with neighbouring bourgmestres.[516]

297. Guichaoua agreed with the Prosecutor's propositions that (i) the Accused's leadership role was evident in Gikoro and Bicumbi; (ii) the Accused in April 1994 was in a position to lead killers in attacks against Tutsis as well as Hutus who were opposed to the killings of Tutsis and that the Accused's orders had to be executed; (iii) the Accused "could" have had a role in the administration of the civil defence program by virtue of his role in the MRND; (iv) the Accused was recognised as an influential person because he was retained as a member of parliament in the

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[509] Witness VP, T. 4 December 2000 pp. 38, 92; Witness VC, T. 7 November 2000 pp. 107, 109, 110-111, 114; Witness VAP, T. 6 December 2000 pp. 129-130, 132; T. 7 December 2000 p. 36; Witness VAO, T. 20 March 2001 pp. 46-47; Witness VJ, T. 6 November 2000 pp. 56-57, 93-94; Witness VN, T. 8 November 2000 pp. 150-151, 153, 154-157; T. 13 November 2000 p. 51; Witness Duclos, T. 17 October 2000 p. 24.
[510] Witness VAO, T. 20 March 2001 pp. 46-47, 30-31; Witness VC, T. 7 November 2000 pp. 110-111.
[511] Exhibit P 14.
[512] T. 23 April 2001 p. 158; T. 25 April 2001 pp. 25-27.
[513] T. 23 April 2001 pp. 158, 161; T. 24 April 2001 pp. 73-74.
[514] T. 25 April 2001 pp. 25-26.
[515] T. 25 April 2001 p. 25.

transitional assembly; and (v) the Accused was considered a wealthy man.[517] Guichaoua explained that because of his wealth, the Accused was in a position to fund political activities and party militants.[518]

298. Guichaoua explained that the direct power to requisition gendarmes was within the province of the prefectural security committee, composed of the prefect, who was its chair, a representative of the ministry of justice, the prosecutor, and the commander of a military camp.[519] Guichaoua was not aware whether the Accused was a member of such a committee.[520]

299. The Accused denied that he remained politically active or that he held an MRND leadership position, and noted that he had no influence or authority over those responsible for the genocide.[521] Other Defence witnesses, including BZ, Nyetera, PFM who lived with the Accused, and JAM who was part of the president's household, testified that during the relevant events in 1994, the Accused was no longer politically active and was not particularly rich, influential, or well-connected.[522]

300. Defence Expert Witness Ndengejeho, who was an MDR and government official, acknowledged that the Accused, as bourgmestre, had a high degree of status and popularity.[523] He testified, however, that there was general consensus that the Accused should be removed as bourgmestre because his commune was "becoming his own private backyard".[524]

301. Ndengejeho explained that when he was in Bicumbi commune after Rugambarara became the bourgmestre, he paid official visits to him and not to the

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[516] T. 8 November 2000 pp. 146, 147-148.
[517] T. 23 April 2001 pp. 139-142, 153-154, 166-167; T. 24 April 2001 pp. 30-34.
[518] T. 24 April 2001 pp. 34-36, 39-40.
[519] T. 25 April 2001 pp. 11-12.
[520] T. 25 April 2001 p. 12.
[521] Testimony of the Accused, T. 19 February 2002 p. 34; T. 27 February 2002 pp. 17-18; T. 28 February 2002 p. 115.
[522] Witness BZ, T. 1 October 2001 pp. 108, 109, 110; Witness Nyetera, T. 7 February 2002 p. 116; T. 11 February 2002 pp. 12-14; T. 12 February 2002 pp. 182-183; Witness JAM, T. 28 November 2001 pp. 10, 11, 36, 44-46; Witness PFM, T. 13 November 2001 pp. 28-29.
[523] T. 31 January 2002 pp. 57-58.
[524] T. 29 January 2002 pp. 120-121.

Accused.[525] Ndengejeho stated that after being replaced by Rugambarara, the Accused withdrew from politics, and though he was invited, he did not even attend the prefecture councils.[526] However, Ndengejeho noted that the Accused remained a member of the MRND national committee, but stated that this committee had only an advisory role.[527]

302. Ndengejeho explained that after leaving his post as bourgmestre, the Accused became a businessman and invested in a national transportation company.[528] He agreed that the Accused was rich and had productive land, but stated that having money did not give an individual the power to influence people and events.[529] Other Defence witnesses also noted the Accused's wealth and property holdings.[530]

b. Findings

303. Based on the uncontested evidence, including the testimony of the Accused, the Chamber finds that the Accused was bourgmestre of Bicumbi commune for more than twenty years until 1993, and that he was subsequently appointed to serve in the parliament that was to be established pursuant to the Arusha Accords.

304. The Chamber finds that the Accused was widely viewed as an important and influential personality in his locality, based, in particular, on his lengthy and successful tenure as bourgmestre, his appointment to parliament, his wealth, his perceived connections to the president, and the consistently held views of the witnesses. The Chamber also accepts that the Accused, at the very least, was acquainted with the president and some government officials. However, the Chamber finds that the Prosecutor failed to prove the extent, nature, and effect of any possible personal or political connection beyond a reasonable doubt.

305. While the Chamber notes that some members of the community believed that the Accused remained the bourgmestre of Bicumbi commune during the events alleged in the Indictment, insufficient proof exists on the record to establish that the

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[525] T. 29 January 2002 pp. 123, 139.
[526] T. 29 January 2002 pp. 134-135.
[527] T. 29 January 2002 p. 132; T. 30 January 2002 p. 52.
[528] T. 29 January 2002 pp. 134-135.
[529] T. 30 January 2002 pp. 52, 60.

Accused actually continued to exercise any of the official functions of the post directly or by influencing Rugambarara.

306. The Prosecutor also did not prove beyond a reasonable doubt that the Accused held a leadership role in the MRND during the events covered by the Indictment, in particular in April 1994. The Chamber recalls that Guichaoua acknowledged the difficulty in proving that someone was an MRND official, and that his proof came from a rare, undated Ministry of Interior document.[531] Moreover, Witness VN could not remember when the Accused held the position of MRND party chief in Kigali-Rural, and Ndengejeho never specified exactly when the Accused served on the National Committee. In any event, even if this had been established, the Prosecutor failed to submit sufficient evidence to demonstrate the scope of the authority that a member of the MRND National Committee or a prefecture party chair might possess, or the nature and extent of the Accused's active participation in the party.

307. The Chamber will address in its legal findings whether the Accused had effective control over militiamen, in particular *Interahamwe*, and other persons, including members of the Rwandan Armed Forces ("FAR"), commune police and other government agents, as well as, if necessary, whether he used his influence and authority as an agent of the government to advance its war effort against the RPF.

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[530] Witness CYM3, T. 5 November 2001 pp. 18, 19; Witness PFM, T. 13 November 2001 p. 67.
[531] T. 25 April 2001 pp. 27-29.

## V. THE LAW

### A. Genocide

308. Count 1 of the Indictment charges the Accused with committing genocide. Count 2 charges the Accused with direct and public incitement to commit genocide. Count 3 charges him with complicity to commit genocide. Direct and public incitement to commit genocide and complicity in genocide are discussed in the Individual Criminal Responsibility section below.

309. Article 2(2) of the Statute provides:

> 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:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[532]

310. The Indictment charges the Accused with genocide by killing and causing serious bodily or mental harm, including rapes and other forms of sexual violence, against members of the Tutsi ethnical or racial group. The Chamber will discuss only those elements that are applicable to determining liability for the crime of genocide in this case.

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[532] The definition of genocide in the Statute of the Tribunal is identical to the definitions of genocide in the Convention on the Prevention and Punishment of the Crime of Genocide, 18 December 1948, art. II, 78 U.N.T.S. 277 ["Genocide Convention"], and the Statute of the International Criminal Court, 17 July 1998, art. 6, UN Doc. A/Conf.183/9 ["ICC Statute"].

*1. Mens Rea*

311. In order to find an accused guilty of the crime of genocide it must be proved that he possessed the requisite *mens rea* of the genocidal acts listed in Article 2 of the Statue. Accordingly, it must be demonstrated that the alleged perpetrator committed any of the enumerated acts with the intent to destroy, in whole or in part, a group, as such, that is defined by one of the protected categories, nationality, race, ethnicity or religion.[533]

312. The determination of *mens rea* in the case of genocide requires the following: firstly, it must be established that a person, who killed or caused serious bodily or mental harm to another person, did so on the basis of the victim's membership in a protected group; secondly, it must be established that the perpetrator's intent was to destroy that group as such in whole or in part.

313. A perpetrator's *mens rea* may be inferred from his actions. While noting the inherent difficulty of finding an accused's genocidal intent in the absence of a confession or other admissions, the *Akayesu* Judgement presents various factors that a Chamber may examine to infer the accused's mental state:

> [I]t 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 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.[534]

314. The Chamber adopts the methods enumerated in *Akayesu* for assessing the specific genocidal intent of an accused.

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[533] Statute, art. 2(2). *See Ntakirutimana*, Judgement, TC, para. 784; *Bagilishema*, Judgement, TC, paras. 60-61; *Musema*, Judgement, TC, para. 164; *Rutaganda*, Judgement, TC, para. 49; *Kayishema and Ruzindana*, Judgement, TC, para. 91; *Akayesu*, Judgement, TC, para. 517.

[534] *Akayesu*, Judgement, TC, para. 523. *See also Bagilishema*, Judgement, TC, paras. 62-63; *Musema*, Judgement, TC, paras. 166-167; *Rutaganda,* Judgement, TC, paras. 61-63; *Kayishema and Ruzindana,* Judgement, TC, para. 93; *Jelisic*, Judgement, TC, para. 73.

a. "To Destroy"

315. Article 2 of the Statute indicates that the perpetrator must be shown to have committed the enumerated prohibited acts with the intent to "*destroy*" a group. The drafters of the Genocide Convention, from which the Tribunal's Statute borrows the definition of genocide verbatim, unequivocally chose to restrict the meaning of "destroy" to encompass only acts that amount to physical or biological genocide.[535]

b. "In Whole or in Part"

316. Although there is no numeric threshold of victims necessary to establish genocide, the Prosecutor must prove beyond a reasonable doubt that the perpetrator acted with the intent to destroy the group as such, in whole or in part.[536] The intention to destroy must be, at least, to destroy a substantial part of the group.[537]

c. Protected Groups

317. The Statute of the Tribunal does not provide any insight into whether the group that is the target of an accused's genocidal intent is to be determined by objective or subjective criteria or by some hybrid formulation. The various Trial Chambers of this Tribunal have found that the determination of whether a group comes within the sphere of protection created by Article 2 of the Statute ought to be assessed on a case-by-case basis by reference to the *objective* particulars of a given social or historical context, and by the *subjective* perceptions of the perpetrators.[538] The Chamber finds that the determination of a protected group is to be made on a case-by-case basis, consulting both objective and subjective criteria.

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[535] *Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May – 26 July 1996*, UN GAOR International Law Commission, 51st Sess., Supp. No. 10, p. 90, UN Doc. A/51/10 (1996) ("As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.").

[536] *Bagilishema*, Judgement, TC, para. 58; *Musema,* Judgement, TC, para. 165; *Rutaganda*, Judgement, TC, para. 60; *Kayishema and Ruzindana,* Judgement, TC, paras. 95, 96, 98; *Akayesu*, Judgement, TC, para. 521.

[537] *Bagilishema*, Judgement, TC, para. 64.

[538] *See, e.g., Bagilishema*, Judgement, TC, para. 65; *Musema,* Judgement, TC, paras. 161-163; *Rutaganda*, Judgement, TC, paras. 56-58; *Kayishema and Ruzindana*, Judgement, TC, para. 98; *Akayesu*, Judgement, TC, para. 702. *See also Jelisic*, Judgement, TC, paras. 69-72 (using a subjective approach to determine definition of a group while holding that the intent of the drafters of the Genocide convention was that groups were to be defined objectively).

*2. Actus Reus*

318. Article 2(2) of the Statute lists the conduct that constitutes the *actus reus* of the crime of genocide.

a. Killing Members of the Group

319. In order to be held criminally liable for genocide by killing members of a group, in addition to showing that an accused possessed an intent to destroy the group as such, in whole or in part, the Prosecutor must show the following elements: (1) the perpetrator intentionally killed one or more members of the group, without the necessity of premeditation;[539] and (2) such victim or victims belonged to the targeted ethnical, racial, national, or religious group.[540]

b. Serious Bodily or Mental Harm

320. The term "serious bodily harm" is not defined in the Statute. Nevertheless, the Chamber finds that the Statute seeks to punish serious acts of physical violence, including sexual violence, falling short of killing. In the *Kayishema and Ruzindana* Judgement, the Tribunal ruled that serious bodily harm is "harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses".[541] Moreover, the Tribunal has ruled that "serious harm" need not be an injury that is permanent or irremediable.[542]

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[539] *Bagilishema*, Judgement, TC, paras. 55, 57-58; *Musema*, Judgement, TC, para. 155; *Rutaganda*, Judgement, TC, paras. 49, 50; *Kayishema and Ruzindana*, Judgement, TC, para. 103; *Akayesu*, Judgement, TC, para. 501. *See also Kayishema and Ruzindana*, Judgement, AC, para. 151.

[540] *Bagilishema*, Judgement, TC, para. 55; *Musema*, Judgement, TC, paras. 154-155; *Rutaganda*, Judgement, TC, para. 60; *Kayishema and Ruzindana*, Judgement, TC, para. 99; *Akayesu*, Judgement, TC, para. 499.

[541] *Kayishema and Ruzindana*, Judgement, TC, para. 109. *But see Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May – 26 July 1996*, UN GAOR International Law Commission, 51st Sess., Supp. No. 10, p. 91, UN Doc. A/51/10 (1996) ("The bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.").

[542] *Bagilishema*, Judgement, TC, para. 59; *Musema*, Judgement, TC, para. 156; *Rutaganda*, Judgement, TC, para. 51; *Kayishema and Ruzindana*, Judgement, TC, para. 108; *Akayesu*, Judgement, TC, para. 502.

321. Similarly, the term "serious mental harm" is not defined in the Statute. This Tribunal has held "serious mental harm" to mean more than minor or temporary impairment of mental faculties.[543]

322. The Chamber adopts the foregoing standards pronounced in *Akayesu* and *Kayishema and Ruzindana* as to the determination of serious bodily or mental harm. In addition, the Chamber finds that serious mental harm need not be permanent or irremediable.

323. In addition to showing that an accused possessed an intent to destroy a protected group, in whole or in part, as such, the following elements must be proved in order to show that the accused committed the crime of genocide by causing serious bodily or mental harm to members of the group: (1) the perpetrator intentionally caused serious bodily or mental harm to one or more members of the group;[544] and (2) such person or persons belonged to the targeted national, ethnical, racial, or religious group.[545]

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[543] *Kayishema and Ruzindana*, Judgement, TC, para. 110.

[544] *Bagilishema*, Judgement, TC, paras. 55, 59; *Musema*, Judgement, TC, paras. 154, 156; *Rutaganda*, Judgement, TC, paras. 49, 51; *Kayishema and Ruzindana*, Judgement, TC, paras. 100, 108-110, 112-113.

[545] *Bagilishema*, Judgement, TC, para. 55; *Musema*, Judgement, TC, para. 154; *Rutaganda*, Judgement, TC, para. 60; *Akayesu*, Judgement, TC, paras. 502, 712, 721.

**B. Crimes Against Humanity**

324. Counts 4, 5, 6, 8, 10, 11, 12, and 14 of the Indictment charge the Accused with crimes against humanity.

325. Pursuant to Article 3 of the Statute:

> 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.

*1. The Relationship Between the Enumerated Acts and the General Elements*

326. A crime against humanity must have been committed as part of a widespread or systematic attack against any civilian population on discriminatory grounds. Although the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack.

*2. The Attack*

327. An "attack" is generally defined as an unlawful act, event, or series of events of the kind listed in Article 3(a) through (i) of the Statute.[546] An "attack" does not necessarily require the use of armed force, it could also involve other forms of inhumane mistreatment of the civilian population.[547]

a. The Attack Must be Widespread or Systematic

328. This Tribunal has consistently held that, in line with customary international law, the requirements of "widespread" and "systematic" should be read disjunctively in accordance with the English version of the Statute, rather than cumulatively in accordance with the French text.[548] The Chamber observes that this jurisprudence does not fully articulate the basis of such a custom. However, the Chamber notes that a Trial Chamber of the International Tribunal for the Former Yugoslavia ("ICTY") reviewed the limited practice on this issue in the *Tadic* Judgement and concluded that widespread *or* systematic was an element of crimes against humanity in customary international law.[549] The Chamber does not see any reason to depart from the uniform practice of the two Tribunals.

329. "Widespread" refers to the large scale of the attack.[550] "Systematic" describes the organized nature of the attack.[551] The Appeals Chamber of the ICTY recently clarified that the existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population

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[546] *Musema*, Judgement, TC, para. 205; *Rutaganda*, Judgement, TC, para. 70; *Kayishema and Ruzindana*, Judgement, TC, para. 122; *Akayesu*, Judgement, TC, para. 581.
[547] *Musema*, Judgement, TC, para. 205; *Rutaganda*, Judgement, TC, para. 70; *Akayesu*, Judgement, TC, para. 581.
[548] *Ntakirutimana,* Judgement, TC, para. 804; *Bagilishema*, Judgement, TC, para. 77; *Musema*, Judgement, TC, paras. 202-203; *Rutaganda*, Judgement, TC, para. 68; *Kayishema and Ruzindana*, Judgement, TC, para. 123, footnote 26; *Akayesu*, Judgement, TC, para. 579.
[549] *Tadic*, Judgement, TC, paras. 646-648. *See also Kunarac*, Judgement, AC, para. 93; *Tadic*, Judgement, AC, para. 248; *Krnojelac*, Judgement, TC, para. 55; *Krstic,* Judgement, TC, para. 480; *Kordic and Cerkez*, Judgement, TC, para. 178; *Blaskic*, Judgement, TC, para. 202; *Kupreskic*, Judgement, TC, para. 544; *Jelisic*, Judgement, TC, para. 53.
[550] *Akayesu*, Judgement, TC, para. 580. *See also Ntakirutimana,* Judgement, TC, para. 804; *Bagilishema*, Judgement, TC, para. 77; *Musema*, Judgement, TC, para. 204; *Rutaganda*, Judgement, TC, para. 69.
[551] *Ntakirutimana,* Judgement, TC, para. 804; *Musema*, Judgement, TC, para. 204; *Rutaganda*, Judgement, TC, para. 69; *Kayishema and Ruzindana*, Judgement, TC, para. 123; *Akayesu*, Judgement, TC, para. 580.

and that it was widespread or systematic, but that the existence of such a plan is not a separate legal element of the crime.[552]

b. The Attack Must be Directed Against any Civilian Population

330. A civilian population must be the primary object of the attack.[553] A population remains civilian in nature even if there are individuals within it who are not civilians and even if the members of the population at one time bore arms, so long as the population is "predominantly civilian".[554] The term "population" does not require that crimes against humanity be directed against the entire population of a geographic territory or area.[555] The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack.

c. The Attack Must be Committed on Discriminatory Grounds

331. Article 3 of the Statute requires that the attack against the civilian population be committed "on national, political, ethnical, racial or religious grounds". Acts committed against persons outside the discriminatory categories may nevertheless form part of the attack where the act against the outsider supports or furthers or is intended to support or further the attack on the group discriminated against on one of the enumerated grounds.[556]

*3. The Mental Element for Crimes Against Humanity*

332. The accused must have acted with knowledge of the broader context of the attack and knowledge that his act formed part of the attack on the civilian

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[552] *Kunarac*, Judgement, AC, para. 98.

[553] *Bagilishema*, Judgement, TC, para. 79; *Musema*, Judgement, TC, para. 207; *Rutaganda*, Judgement, TC, para. 72; *Kayishema and Ruzindana*, Judgement, TC, paras. 127, 128; *Akayesu*, Judgement, TC, para. 582.

[554] *Bagilishema*, Judgement, TC, para. 79; *Rutaganda*, Judgement, TC, para. 72; *Kayishema and Ruzindana*, Judgement, TC, para. 128; *Akayesu*, Judgement, TC, para. 582.

[555] *Bagilishema*, Judgement, TC, para. 80; *Kunarac*, Judgement, AC, para. 90.

[556] *Musema*, Judgement, TC, para. 209; *Rutaganda*, Judgement, TC, para. 74.

population.[557] However, the accused need not necessarily share the purpose or goals behind the broader attack. There is no requirement that the enumerated acts other than persecution be committed with discriminatory intent.[558]

*4. The Enumerated Acts*

333. The Accused is charged with committing crimes against humanity of murder, extermination, torture, rape, and persecution. The Chamber will therefore limit its discussion to these offences.

a. Murder

334. The English version of Article 3(a) of the Statute refers to "murder", which is a broad legal term encompassing premeditated, intentional, and certain types of reckless homicide.[559] The French version of Article 3(a) of the Statute refers only to the premeditated form of murder: "*assassinat*".[560]

335. In *Akayesu, Rutaganda,* and *Musema,* the Trial Chambers concluded that the reference to the broader term "murder" in the English text of Article 3 was more consistent with customary international law, but did not fully articulate the evidence

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[557] *Ntakirutimana,* Judgement, TC, para. 803; *Bagilishema,* Judgement, TC, para. 94; *Musema,* Judgement, TC, para. 206; *Kayishema and Ruzindana,* Judgement, TC, para. 134.
[558] *Akayesu,* Judgement, AC, para. 467.
[559] *See, e.g.,* BLACK'S LAW DICTIONARY p. 1019 (6th ed. 1990); United States MODEL PENAL CODE § 210.2 ("...criminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life."); Canada CRIMINAL CODE R.S.C. 1985, Ch. C-46 s. 229 ("Culpable homicide is murder (a) where the person who causes the death of a human being (i) means to cause his death, or (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not."); New South Wales CRIMES ACT (1900) s. 18 ("(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.").
[560] *See, e.g.,* France NOUVEAU CODE PENAL, art. 221-3 (Le meurtre commis avec préméditation constitue un assassinat) ; Rwanda CODE PENAL, art. 312 (Le meurtre commis avec préméditation ou guet-apens est qualifié assassinat); CODE PENAL DE BURKINA FASO 1996, art. 318 (L'homicide commis volontairement est qualifié meurtre. Tout meurtre commis avec préméditation ou guet-apens est qualifié assassinat.); NOUVEAU CODE PENAL DU SENEGAL, art. 281 (Tout meurtre commis avec préméditation ou guet-apens est qualifié assassinat.); Belgium CODE PENAL, art. 394 (Le meurtre commis avec préméditation est qualifié assassinat.); CODE PENAL DE HAITI, art. 241 (Tout meurtre commis avec préméditation ou guet-apens est qualifié assassinat.).

for the existence of this custom.[561] In contrast, the Trial Chambers in *Bagilishema* and *Kayishema and Ruzindana* adopted the higher standard of premeditation because it is more consistent with a bilingual interpretation of the Statute and because, where there is any doubt, matters of interpretation should be decided in favour of the Accused.[562] Faced with this divergence, the Chamber has undertaken a review of this issue.

336. When interpreting a term in the Statute, the Chamber begins with its ordinary meaning.[563] Where a difference in meaning exists between the two equally authoritative versions of the Statute, the Chamber applies the well-established principle of interpretation embodied in Article 33(4) of the Vienna Convention on the Law of Treaties, which directs that when interpreting a bilingual or multilingual instrument the meaning which best reconciles the equally authoritative texts shall be adopted.[564]

337. The Chamber notes that *assassinat* is a specific form of murder requiring premeditation, and thus is more precise than the English reference to "murder". The Chamber finds that it is possible to harmonise the meaning of the two texts by requiring premeditation. This result is in accord with the general principles that

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561 *Musema*, Judgement, TC, para. 214; *Rutaganda*, Judgement, TC, para. 79; *Akayesu*, Judgement, TC, para. 588.

562 *Bagilishema*, Judgement, TC, paras. 84-85; *Kayishema and Ruzindana*, Judgement, TC, paras. 138-139. *See also Ntakirutimana,* Judgement, TC, footnote 1151, para. 808 (citing to *Bagilishema* and *Akayesu* for the "requisite intent").

563 *See generally* Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 31(1) ["Vienna Convention"]; *Akayesu*, Judgement, AC, para. 478; *Prosecutor v. Bagosora*, Case No. ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Theoneste Bagasora and 28 Others, AC, 8 June 1998, paras. 28-29; *Kayishema and Ruzindana*, Judgement, TC, para. 139; *Aleksovski*, Judgement, AC, para. 98; *Jelisic*, Judgement, AC, para. 35; *Tadic*, Judgement, AC, para. 282.

564 *See generally* Vienna Convention, art. 33(4) ("Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."). *Blaskic*, Judgement, TC, para. 326 (applying Vienna Convention, art. 33(4)); *Kayishema and Ruzindana*, Judgement, TC, para. 139 (considering the two versions of the Statute together to ascertain the meaning). The Chamber notes that this interpretive rule is also applied in bilingual domestic systems. *See, e.g.,* Hong Kong Interpretation and General Clauses Ordinance Cap. 1 Section 10B (3) ("Where a comparison of the authentic texts of an Ordinance discloses a difference of meaning which the rules of statutory interpretation ordinarily applicable do not resolve, the meaning which best reconciles the texts, having regard to the object and purposes of the Ordinance, shall be adopted."); *R. v. Proulx*, [2000] 1 S.C.R. 61 (Canada), para. 95 ("In conformity with a long-standing principle of interpretation, to resolve the conflict between the two official versions, we have to look for the meaning common to both.").

criminal statutes should be strictly construed and that any ambiguity should be interpreted in favour of the accused.[565]

338. A contextual analysis of the Statute further supports this conclusion, because both the English and French versions of the Statute employ terms in Article 3(a) that denote a higher level of intention than is required for the crimes in Article 2(2)(a). By their ordinary meaning, the English term murder (crime against humanity) has a higher intent than killing (genocide), just as the French term *assassinat* (crime against humanity) requires a higher intention than *meurtre* (genocide). In Article 4(a) the term "murder" is paired with "*meurtre*", again suggesting that on the basis of the French text, murder as a crime against humanity requires a higher mental element.

339. For these reasons, the Chamber considers that it is premeditated murder (*assassinat*) that constitutes a crime against humanity in Article 3(a) of the Statute. Premeditation requires that, at a minimum, the accused held a deliberate plan to kill prior to the act causing death, rather than forming the intention simultaneously with the act. The prior intention need not be held for very long; a cool moment of reflection is sufficient. The Chamber observes that the requirement that the accused must have known that his acts formed part of a wider attack on the civilian population generally suggests that the murder was pre-planned. The Chamber emphasises that the accused need not have premeditated the murder of a particular individual; for crimes against humanity it is sufficient that the accused had a premeditated intention to murder civilians as part of the widespread or systematic attack on discriminatory grounds.

b. Extermination

340. Extermination may be differentiated from murder in that it is directed against a population rather than individuals. The material element of extermination is killing that constitutes or is part of a mass killing of members of a civilian population. The

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[565] This is consistent with the Tribunal's approach to the difference in meaning between "killing" and "meurtre" in Article 2(2)(a) of the Statute. *Kayishema and Ruzindana*, Judgement, AC, para. 151; *Bagilishema*, Judgement, TC, para. 57; *Musema,* Judgement, TC, para. 155; *Rutaganda*, Judgement, TC, para. 50; *Kayishema and Ruzindana*, Judgement, TC, para. 103; *Akayesu*, Judgement, TC, para. 501.

scale of the killing required for extermination must be substantial. Responsibility for a single or a limited number of killings is insufficient. [566]

341. This Tribunal has held that extermination may encompass intentional, reckless, or grossly negligent killing.[567] The ICTY approach, in contrast, has been to equate the mental elements of murder (not premeditated) and extermination.[568] Neither the ICTR or ICTY Appeals Chamber has yet addressed this inconsistency. This Trial Chamber is of the view that, in the absence of express authority in the Statute or in customary international law, international criminal liability should be ascribed only on the basis of intentional conduct.[569] Accordingly, the Chamber finds that the mental element for extermination is the intent to perpetrate or participate in a mass killing.

c. Torture

342. In *Akayesu*, the Trial Chamber relied on the definition of torture found in the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.[570] The ICTY Appeals Chamber has since explained that while the definition contained in the Convention Against Torture is reflective of customary international law in relation to the obligations of states, it is not identical to the definition of torture as a crime against humanity.[571] In particular, the ICTY Appeals Chamber has confirmed that, outside the framework of the Convention Against Torture, the "public official" requirement is not a requirement under customary international law in relation to individual criminal responsibility for torture as a crime against humanity.[572]

343. Therefore, the Chamber concludes that torture as a crime against humanity is the intentional infliction of severe physical or mental pain or suffering for prohibited

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[566] *Ntakirutimana,* Judgement, TC, paras. 813-814; *Vasiljevic*, TC, paras. 227, 232.
[567] *Bagilishema*, Judgement, TC, para. 89; *Kayishema and Ruzindana*, Judgement, TC, para. 144.
[568] *See, e.g., Krstic*, Judgement, TC, para. 495.
[569] The Chamber notes that the perpetrator's intention may be inferred from his conduct or the surrounding circumstances.
[570] *Akayesu*, Judgement, TC, paras. 593-595. *See* UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46 (1984), 1465 U.N.T.S. 85 ["Convention Against Torture"].
[571] *Kunarac*, Judgement, AC, paras. 146-148.
[572] *Kunarac*, Judgement, AC, para. 148.

purposes including: obtaining information or a confession; punishing, intimidating or coercing the victim or a third person; or discriminating against the victim or a third person.[573] There is no requirement that the conduct be perpetrated solely for one of the prohibited aims.[574]

d. Rape

344. The *Akayesu* Judgement enunciated a broad definition of rape which included any physical invasion of a sexual nature in coercive circumstance and which was not limited to forcible sexual intercourse.[575] The Appeals Chamber of the ICTY, in contrast, affirmed a narrower interpretation defining the material element of rape as a crime against humanity as the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator.[576] Consent for this purpose must be given voluntarily and freely and is assessed within the context of the surrounding circumstances.[577]

345. While this mechanical style of defining rape was originally rejected by this Tribunal, the Chamber finds the comparative analysis in *Kunarac* to be persuasive and thus will adopt the definition of rape approved by the ICTY Appeals Chamber. In doing so, the Chamber recognises that other acts of sexual violence that do not satisfy this narrow definition may be prosecuted as other crimes against humanity within the jurisdiction of this Tribunal such as torture, persecution, enslavement, or other inhumane acts.

346. The mental element for rape as a crime against humanity is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim.[578]

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[573] *Kvocka*, Judgement, TC, para. 140; *Furundzija*, Judgement, TC, para. 162; *Celebici,* Judgement, TC, para. 470.
[574] *Celebici,* Judgement, TC, para. 470. *See also Kunarac*, Judgement, TC, para. 486.
[575] *Akayesu*, Judgement, TC, para. 598. *See also Musema*, Judgement, TC, para. 226.
[576] *Kunarac*, Judgement, AC, paras. 127-128.
[577] *Kunarac*, Judgement, AC, paras. 127, 128, 130.
[578] *Kunarac*, Judgement, AC, paras. 127-128.

e. Persecution

347. In *Kupreskic*, a Trial Chamber of the ICTY summarised the material element of persecution as "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5."[579] This definition was adopted and applied by an ICTR Trial Chamber in *Ruggiu*.[580]

348. Persecution may take diverse forms and does not necessarily require a physical act.[581] Article 7(2)(g) of the ICC Statute explains that "'[p]ersecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".[582] The ICC Elements of Crimes states, similarly, that the relevant part of the material element of persecution is:

> 1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
>
> 2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.[583]

349. Acts of persecution must be evaluated in context, by looking at their overall cumulative effects.[584] In accordance with customary international law, persecution may include acts enumerated under other sub-headings of crimes against humanity, such as murder or deportation, when they are committed on discriminatory grounds.[585] Persecution may also involve a variety of other discriminatory acts, not enumerated elsewhere in the Statute, involving serious deprivations of human rights.[586]

350. The act of persecution must have been committed on political, racial, or religious grounds. Unlike the other enumerated crimes against humanity, persecution

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[579] *Kupreskic,* Judgement, TC, para. 621. *See also Kordic and Cerkez*, Judgement, TC, para. 195.
[580] *Ruggiu*, Judgement, TC, para. 21.
[581] *Kupreskic,* Judgement, TC, para. 568; *Tadic*, Judgement, TC, para. 707.
[582] ICC Statute, art. 7(2)(g).
[583] *Report, First Session 3-10 September 2002*, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC-ASP/1/3 and Corr.1), Part II B, art. 7(1)(h)(1) and (2) (footnote omitted).
[584] *Krstic*, Judgement, TC, para. 535; *Kordic and Cerkez*, Judgement, TC, para. 199; *Kupreskic,* Judgement, TC, para. 622.
[585] *Kupreskic,* Judgement, TC, paras. 607, 615.
[586] *Kordic and Cerkez*, Judgement, TC, para. 194; *Kupreskic,* Judgement, TC, para. 615.

requires a discriminatory intent.[587] This Chamber observes that the enumerated grounds of discrimination for persecution in Article 3(h) of the Statute do not include national or ethnic grounds, which are included in the list of discriminatory grounds for the attack contained in the chapeau of Article 3.

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[587] *Akayesu*, Judgement, AC, paras. 464, 468.

## C. Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II Thereto (Article 4 of the Statute)

351. Counts 7, 9, and 13 of the Indictment charge the Accused with 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.

352. Pursuant to Article 4 of the Statute of the Tribunal, the Tribunal has the power to prosecute persons who "committed or ordered to be committed" serious violations of Common Article 3 and of Additional Protocol II. According to Article 4 of the Statute, such violations include, but are not 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;
>
> (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 recognized as indispensable by civilised peoples;
>
> (h) Threats to commit any of the foregoing acts.

*1. Article 4 of the Statute and the Principle of* Nullum Crimen Sine Lege

353. This Tribunal has already determined that Common Article 3 and Additional Protocol II were applicable in Rwanda in 1994 as a matter of convention and custom.[588] Rwanda became a party to the Geneva Conventions of 1949 on 5 May 1964 through succession[589] and, through ratification, to the Additional Protocol II thereto on 19 November 1984.[590] Moreover, the Article 4 offences named in the Indictment constituted crimes under the laws of Rwanda in 1994.[591] The Chamber therefore finds that Common Article 3 and Additional Protocol II were in force in Rwanda in 1994 and that the application of Article 4 of the Statute to the situation in Rwanda during the Tribunal's temporal jurisdiction would not violate the *nullum crimen sine lege* principle.

*2. The Nature of the Conflict*

354. Common Article 3 and Additional Protocol II are expressly applicable to conflicts of a non-international character. The Chamber, therefore, must answer whether the conflict in Rwanda in 1994 was of such a character as to fall within the scope of application of these provisions and, consequently, within the ambit of Article 4 of the Statute of the Tribunal.

355. Common Article 3 prescribes: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, … [certain] provisions…." Therefore, Common Article 3 is applicable to any non-international armed conflict within the territory of a state party. In general, non-international armed conflicts referred to in Common Article 3 are conflicts with armed forces on either side engaged in hostilities that are, according to the International Committee of the

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[588] *Bagilishema*, Judgement, TC, para. 98; *Musema*, Judgement, TC, para. 242; *Rutaganda*, Judgement, TC, para. 90; *Kayishema and Ruzindana*, Judgement, TC, paras. 156-157, *Akayesu*, Judgement, TC, para. 617.

[589] The Geneva Conventions of 1949 entered into force for Rwanda with a retroactive effect as from 1 July 1962, the date of Rwanda's independence. *See* www.icrc.org/ihl.nsf.

[590] *See* www.icrc.org/ihl.nsf.

[591] *See, e.g., Kayishema and Ruzindana*, Judgement, TC, para. 157; *Akayesu*, Judgement, TC, para. 617.

Red Cross ("ICRC"), "in many respects similar to an international war, but take place within the confines of a single country."[592]

356. Additional Protocol II, by its own terms, develops and supplements Common Article 3 "without modifying its existing conditions of application".[593] Its Article 1, however, expands on Common Article 3 in as much as it sets out that Additional Protocol II covers non-international armed 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."[594]

357. Classification of a conflict as one to which Common Article 3 and/or Additional Protocol II applies depends on an analysis of the objective factors set out in the respective provisions.[595]

*3.* Ratione Personae: *Perpetrators*

358. Article 4 of the Statute provides that the Tribunal "shall have the power to prosecute persons committing or ordering to be committed serious violations of [Common Article 3 and Additional Protocol II]." The Appeals Chamber of this Tribunal recently pointed out that "Article 4 makes no mention of a possible delimitation of classes of persons likely to be prosecuted under this provision."[596]

359. Common Article 3 and Additional Protocol II similarly do not specify classes of potential perpetrators, rather they indicate who is bound by the obligations imposed thereby. In the case of Common Article 3, that is "each Party to the conflict".[597] The

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[592] INTERNATIONAL COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949 COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR p. 36 (1958) ["GENEVA CONVENTIONS COMMENTARY"].

[593] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1 ["Additional Protocol II"].

[594] Additional Protocol II, art. 1.

[595] *See, e.g., Bagilishema*, Judgement, TC, para. 101; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 p. 1351 (1987) ["ADDITIONAL PROTOCOL II COMMENTARY"].

[596] *Akayesu*, Judgement, AC, para. 435.

[597] *See* Common Article 3.

ICRC *Commentary* on Additional Protocol II simply says that the field of application *ratione personae* includes "those who must, within the meaning of the Protocol, conform to certain rules of conduct with respect to the adversary and the civilian population."[598]

360. Indeed, further clarification in respect of the class of potential perpetrators is not necessary in view of the core purpose of Common Article 3 and Additional Protocol II: the protection of victims.[599] In the view of the ICTR Appeals Chamber, the protections of Common Article 3 imply effective punishment of perpetrators, whoever they may be.[600] In its Judgement in the *Akayesu* case, the Appeals Chamber held that the Trial Chamber erred on a point of law when it restricted the application of Common Article 3 to a certain category of perpetrators.[601] Specifically, the category of persons in question in the Trial Chamber's Judgement consisted of members of the armed forces "under the military command of either of the belligerent parties, [and] ... individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts."[602]

361. The ICTR Appeals Chamber rejected the notion of a requisite link between the perpetrator and one of the parties to the conflict: "... such a special relationship is not a condition precedent to the application of Common Article 3 and, hence, of Article 4 of the Statute."[603] The Appeals Chamber expounded its reasoning as follows:

> The Appeals Chamber is of the view that the minimum protection provided for victims under common Article 3 implies necessarily effective punishment on persons who violate it. Now, such punishment must be applicable to everyone without discrimination, as required by the principles governing individual criminal responsibility as laid down by the Nuremberg Tribunal in particular. The Appeals Chamber is therefore of the opinion that international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a

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[598] ADDITIONAL PROTOCOL II COMMENTARY p. 1359.
[599] *See Akayesu*, Judgement, AC, para. 442.
[600] *See Akayesu*, Judgement, AC, para. 443.
[601] *Akayesu*, Judgement, AC, paras. 444-445.
[602] *See Akayesu*, Judgement, AC, para. 444; *Akayesu*, Judgement, TC, para. 631.
[603] *See Akayesu*, Judgement, AC, para. 444.

> violation of common Article 3 under the pretext that they did not belong to a specific category.[604]

362. In view of the foregoing, criminal responsibility for acts covered by Article 4 of the Statute does not depend on any particular classification of the alleged perpetrator.

*4.* Ratione Personae: *Victims*

363. Common Article 3 extends its protection to "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause".[605] The ICRC *Commentary* explains this provision as follows:

> ... Article 3 has an extremely wide field of application and covers members of the armed forces as well as persons who do not take part in the hostilities. In this instance, however, *the Article naturally applies first and foremost to civilians—that is to people who do not bear arms.*[606]

364. Additional Protocol II applies to "all persons affected by an armed conflict".[607] The ICRC *Commentary* includes in this category "persons who do not, or no longer take part in hostilities".[608] Article 4(1) of Additional Protocol II further specifies that its guarantees extend to "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities".[609]

365. In essence, both Common Article 3 and Additional Protocol II protect persons not taking an active part in the hostilities.[610] The ICTY Appeals Chamber emphasised that Common Article 3 covers "*any* individual not taking part in the hostilities".[611] This is also the position taken by this Tribunal.[612]

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[604] *Akayesu*, Judgement, AC, para. 443.
[605] Common Article 3.
[606] GENEVA CONVENTIONS COMMENTARY p. 40 (emphasis added).
[607] Additional Protocol II, art. 2(1).
[608] ADDITIONAL PROTOCOL II COMMENTARY p. 1359.
[609] Additional Protocol II, art. 4(1).
[610] *See Akayesu*, Judgement, TC, para. 629.
[611] *Celebici*, Judgement, AC, para. 420 (emphasis in original).
[612] *See Bagilishema*, Judgement, TC, paras. 103-104; *Musema*, Judgement, TC, para. 280; *Rutaganda*, Judgement, TC, para. 101; *Kayishema and Ruzindana*, Judgement, TC, para. 179; *Akayesu*, Judgement, TC, para. 629. *See also* L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT p. 231 (2d ed.

366. The question to be answered simply is whether, at the time of the alleged offence, the alleged victim was directly taking part in the hostilities.[613] If the answer is negative, the alleged victim was a person protected by Common Article 3 and Additional Protocol II.[614] To take a direct part in hostilities means, for the purposes of these provisions, to engage in acts of war that strike at personnel or equipment of the enemy armed forces.[615]

*5.* Ratione Loci

367. Once the conditions for applicability of Common Article 3 and Additional Protocol II are satisfied, their scope extends throughout the territory of the state where the hostilities are taking place without limitation to the "war front" or to the "narrow geographical context of the actual theatre of combat operations".[616]

*6. The Nexus Between the Alleged Violation and the Armed Conflict*

368. For an offence to fall within the scope of Article 4 of the Statute of the Tribunal, the Chamber must find that there existed a nexus between the alleged breach of Common Article 3 or Additional Protocol II and the underlying armed conflict.[617] This requirement is best understood upon appreciation of the purpose of Common Article 3 and Additional Protocol II. The purpose of the said provisions is the protection of people as victims of internal armed conflicts,[618] not the protection of

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2000) ("In a non-international conflict civilians are protected by [Common] Article 3 ... which ... applies to civilians as well as those *hors de combat*.").

[613] *See Bagilishema*, Judgement, TC, para. 104; *Musema*, Judgement, TC, para. 279; *Rutaganda*, Judgement, TC, para. 100; *Kayishema and Ruzindana*, Judgement, TC, para. 179; *Akayesu*, Judgement, TC, para. 629. *See also Tadic*, Judgement, TC, para. 615.

[614] *See Tadic*, Judgement, TC, para. 615.

[615] *Bagilishema*, Judgement, TC, para. 104; *Musema*, Judgement, TC, para. 279; *Rutaganda*, Judgement, TC, para. 100. *See also* ADDITIONAL PROTOCOL II COMMENTARY p. 1453.

[616] *See Bagilishema*, Judgement, TC, para. 101; *Musema*, Judgement, TC, paras. 283-284; *Rutaganda*, Judgement, TC, paras. 102-103; *Kayishema and Ruzindana*, Judgement, TC, paras. 182-183; *Akayesu*, Judgement, TC, paras. 635-636. *See also Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, AC, 2 October 1995, para. 69; ADDITIONAL PROTOCOL II COMMENTARY pp. 1359-1360.

[617] *See Bagilishema*, Judgement, TC, para. 105; *Musema*, Judgement, TC, para. 259; *Rutaganda*, Judgement, TC, para. 104; *Kayishema and Ruzindana*, Judgement, TC, para. 185; *Akayesu*, Judgement, TC, para. 643. This is also the position taken by the ICTY. *See, e.g., Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, AC, para. 70.

[618] *See Kayishema and Ruzindana*, Judgement, TC, para. 189.

people against crimes unrelated to the conflict, however reprehensible such crimes may be.

369. Whether the requisite nexus existed at the time of the alleged offence is a matter for determination on the evidence presented. It has been the position of this Tribunal and of the ICTY that the nexus requirement is met if the alleged offence is "closely related to the hostilities" or is "committed in conjunction with" them.[619]

*7. Serious Violation*

370. Article 4 of the Statute grants the Tribunal jurisdiction over *serious* violations of Common Article 3 and Additional Protocol II. This Tribunal has stated that a serious violation within the meaning of Article 4 is a breach of a rule protecting important values with grave consequences for the victim.[620] On this basis, the Tribunal has determined that the acts enumerated in Article 4 of the Statute constitute serious violations of Common Article 3 and Additional Protocol II, entailing individual criminal responsibility.[621] This Trial Chamber concurs with this position.

371. Consequently, should the Prosecutor prove that any of the acts set out in Article 4 of the Statute occurred, the Chamber will consider such act to constitute a serious violation within the meaning of Article 4.

*8. Specific Violations*

372. The Indictment charges the Accused with causing violence to life, health and physical or mental well-being of persons, including murder and torture, and causing

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[619] *See Bagilishema*, Judgement, TC, para. 105; *Musema*, Judgement, TC, para. 260; *Rutaganda*, Judgement, TC, para. 104; *Kayishema and Ruzindana*, Judgement, TC, para. 186; *Akayesu*, Judgement, TC, para. 643 (...[I]t has not been proved beyond reasonable doubt that the acts ... were committed in conjunction with the armed conflict."). This is also the position taken by the ICTY. *See, e.g., Kunarac*, Judgement, AC, para. 58; *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, AC, para. 70 ("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.").

[620] *See Bagilishema*, Judgement, TC, para. 102; *Musema*, Judgement, TC, para. 286; *Rutaganda*, Judgement, TC, para. 106; *Kayishema and Ruzindana*, Judgement, TC, para. 184; *Akayesu*, Judgement, TC, para. 616. This position is based on a decision of the ICTY Appeals Chamber where the Tribunal stated that "the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim." *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, AC, para. 94.

[621] *See Musema*, Judgement, TC, para. 288; *Rutaganda*, Judgement, TC, para. 106; *Kayishema and Ruzindana*, Judgement, TC, para. 184; *Akayesu*, Judgement, TC, para. 616.

outrages upon personal dignity of women, including rape and sexual assault, acts covered by Article 4(a) and (e) of the Statute, respectively. In light of its factual findings, the Chamber will limit its discussion of the specific violations to murder and torture.

373. Murder under Article 4 refers to the intentional killing of another which need not be accompanied by a showing of premeditation. The Chamber reaches this conclusion having considered the use of the term "*meurtre*" as opposed to "*assassinat*" in the French version of the Statute.[622]

374. Torture under Article 4 has the same essential elements as those set forth for torture as a crime against humanity.[623]

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[622] *See supra* paras. 334-339.
[623] *Kunarac,* Judgement, TC, paras. 465, 497, *aff'd Kunarac*, Judgement, AC, paras. 144, 156. For the elements of torture *see supra* paras. 342-343.

**D. Individual Criminal Responsibility**

375. The Indictment charges the Accused with criminal responsibility under Article 6(1) and Article 6(3) of the Statute for genocide, crimes against humanity, and serious violations of Common Article 3 and Additional Protocol II. In addition, the Indictment charges the Accused with criminal responsibility for the crime of genocide under Article 2(3) of the Statute.

*1. Responsibility Under Article 6(1) of the Statute*

376. Article 6(1) addresses criminal responsibility for unlawful conduct of an accused and is applicable to all three crimes.[624] Article 6(1) provides as follows:

> 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.

377. Article 6(1) reflects the principle that criminal liability is not incurred solely by individuals who physically commit a crime, but also extends to those who participate in and contribute to a crime in other ways, following principles of accomplice liability.[625]

378. Pursuant to Article 6(1), a crime within the Tribunal's jurisdiction must have been completed before an individual's participation in that crime will give rise to criminal responsibility.[626] Article 6(1) does not criminalize *inchoate* offences, which

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[624] The Chamber finds that all forms of criminal participation and responsibility under Article 6 are applicable to violations of Article 4 of the Statute even though that provision states that the Tribunal shall have the power to prosecute persons "committing or ordering to be committed" serious violations of Common Article 3 and Additional Protocol II. This language in Article 4 can be explained by its *verbatim* incorporation from Common Article 3 of the four Geneva Conventions. Article 6(1) and Article 6(3) both expressly apply to Articles 2 through 4 and reflect that an individual is criminally responsible if he plans, instigates, orders, commits, aids and abets, or as a superior fails to prevent or punish the violations of international criminal law codified in the Statute. Article 1 also states that the Tribunal has the power to prosecute persons criminally responsible for the violations in accordance with the provisions of the Statute. Thus, in light of Articles 1 and 6, the Tribunal has the authority to prosecute all forms of criminal responsibility for violations of Article 4.

[625] *Kayishema and Ruzindana*, Judgement, AC, para. 185. *See also Musema*, Judgement, TC, para. 114; *Rutaganda*, Judgement, TC, para. 33; *Kayishema and Ruzindana*, Judgement, TC, paras. 196-197; *Akayesu*, Judgement, TC, para. 473.

[626] *Kayishema and Ruzindana*, Judgement, AC, paras. 186, 187; *Musema*, Judgement, TC, paras. 115-116; *Rutaganda*, Judgement, TC, paras. 34, 35, 43; *Akayesu*, Judgement, TC, paras. 473, 482.

are punishable only for the crime of genocide pursuant to Article 2(3)(b), (c), and (d).[627]

379. To satisfy Article 6(1), an individual's participation must have *substantially* contributed to, or have had a *substantial* effect on, the completion of a crime.[628]

a. Forms of Participation

(i) Planning

380. "Planning" envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime.[629] The level of participation in the planning must be substantial such as actually formulating the criminal plan or endorsing a plan proposed by another.[630]

(ii) Instigating

381. "Instigating" refers to urging, encouraging, or prompting another person to commit a crime.[631] Instigation need not be direct and public.[632] Proof is required of a causal connection between the instigation and the commission of the crime.[633]

(iii) Ordering

382. "Ordering" refers to a situation where an individual has a position of authority and uses that authority to order – and thus compel – another individual, who is subject to that authority, to commit a crime.[634] Criminal responsibility for ordering the commission of a crime under the Statute implies the existence of a superior-

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[627] *Musema*, Judgement, TC, para. 115; *Rutaganda*, Judgement, TC, para. 34; *Akayesu*, Judgement, TC, para. 473.
[628] *Kayishema and Ruzindana*, Judgement, AC, paras. 186, 198; *Ntakirutimana*, Judgement, TC, para. 787; *Bagilishema*, Judgement, TC, paras. 30, 33; *Musema*, Judgement, TC, para. 126; *Rutaganda*, Judgement, TC, para. 43; *Kayishema and Ruzindana*, Judgement, TC, paras. 199, 207; *Akayesu*, Judgement, TC, para. 477.
[629] BLACK'S LAW DICTIONARY p. 1150 (6th ed. 1990) (defining "plan"); *Rutaganda*, Judgement, TC, para. 37.
[630] *Bagilishema*, Judgement, TC, para. 30.
[631] *Bagilishema*, Judgement, TC, para. 30; *Akayesu*, Judgement, TC, para. 482.
[632] *Akayesu*, Judgement, AC, paras. 478-482.
[633] *Bagilishema*, Judgement, TC, para. 30.
[634] *Bagilishema*, Judgement, TC, para. 30; *Rutaganda*, Judgement, TC, para. 39; *Akayesu*, Judgement, TC, para. 483.

subordinate relationship between the individual who gives the order and the one who executes it.[635]

(iv)Committing

383. "Committing" refers to the direct personal or physical participation of an accused in the actual acts which constitute the material elements of a crime under the Statute.[636]

(v) Aiding and Abetting in the Planning, Preparation, or Execution

384. The terms "aiding" and "abetting" refer to distinct legal concepts.[637] The term "aiding" means assisting or helping another to commit a crime, and the term "abetting" means encouraging, advising, or instigating the commission of a crime.[638] However, the terms "aiding" and "abetting" are frequently employed together as a single broad legal concept,[639] as is the case in this Tribunal.

385. In the Tribunal's jurisprudence, "aiding and abetting" refers to all acts of assistance that lend encouragement or support to the commission of a crime.[640] This encouragement or support may consist of physical acts, verbal statements, or, in some cases, mere presence as an "approving spectator".[641] Except in the case of the "approving spectator," the assistance may be provided before or during the

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[635] *Bagilishema,* Judgement, TC, para. 30; *Rutaganda*, Judgement, TC, para. 39; *Akayesu*, Judgement, TC, para. 483.
[636] *Kayishema and Ruzindana*, Judgement, AC, para. 187; *Tadic*, Judgement, AC, para. 188.
[637] *See Akayesu*, Judgement, TC, para. 484. *See generally* MEWETT & MANNING ON CRIMINAL LAW p. 272 (3rd ed. 1994); BLACK'S LAW DICTIONARY p. 69 (7th ed. 1999) (defining "aid and abet"), *quoting* Wharton's Criminal Law § 29 (15th ed. 1993). *See, e.g.,* The Criminal Code, R.S.C. 1985, ch. C-46, § 21(b),(c) (Canada) (treating aiding and abetting separately).
[638] *See Ntakirutimana*, Judgement, TC, para. 787; *Akayesu*, Judgement, TC, para. 484; SMITH & HOGAN, CRIMINAL LAW p. 144 (10th ed. 2002) (quoting Oxford English Dictionary); MEWETT & MANNING ON CRIMINAL LAW p. 272 (3rd ed. 1994); BLACK'S LAW DICTIONARY p. 69 (7th ed. 1999) (defining "aid and abet"), *quoting* Wharton's Criminal Law § 29 (15th ed. 1993).
[639] MEWETT & MANNING ON CRIMINAL LAW p. 272 (3rd ed. 1994) (noting that aiding and abetting are "almost universally used conjunctively").
[640] *Kayishema and Ruzindana*, Judgement, AC, para. 186; *Ntakirutimana*, Judgement, TC, para. 787; *Bagilishema*, Judgement, TC, paras. 33, 36; *Musema*, Judgement, TC, paras. 125-126; *Kayishema and Ruzindana*, Judgement, TC, paras. 200-202; *cf. Akayesu*, Judgement, TC, para. 484.
[641] *Kayishema and Ruzindana*, Judgement, AC, paras. 201-202; *Kayishema and Ruzindana*, Judgement, TC, para. 198; *Aleksovski*, Judgement, TC, para. 63.

commission of the crime, and an accused need not necessarily be present at the time of the criminal act.[642]

386. Criminal responsibility as an "approving spectator" does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct.[643] The authority of an individual is frequently a strong indication that the principal perpetrators will perceive his presence as an act of encouragement.[644] Responsibility, however, is not automatic, and the nature of the accused's presence must be considered against the background of the factual circumstances.[645]

b. *Mens Rea*

387. An individual who "commits" a crime as a principal perpetrator must possess the requisite *mens rea* for the underlying crime.[646]

388. In cases involving a form of accomplice liability, the *mens rea* requirement will be satisfied where an individual acts intentionally and with the awareness that he is influencing or assisting the principal perpetrator to commit the crime.[647] The accused need not necessarily share the *mens rea* of the principal perpetrator; the accused must be aware, however, of the essential elements of the principal's crime including the *mens rea*.[648]

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[642] *Bagilishema*, Judgement, TC, para. 33; *Rutaganda*, Judgement, TC, para. 43; *Kayishema and Ruzindana*, Judgement, TC, para. 200; *Akayesu*, Judgement, TC, para. 484. Physical presence during the commission of the crime was traditionally the distinguishing factor between aiding and abetting, which required presence, and other forms of complicity such as counselling and procuring. *See generally* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW p. 429 (3rd ed. 1999).

[643] *Bagilishema*, Judgement, TC, para. 36; *Aleksovski*, Judgement, TC paras. 64-65.

[644] *Aleksovski*, Judgement, TC, para. 65.

[645] *Kvocka*, Judgement, TC, para. 257; *Aleksovski*, Judgement, TC, paras. 64-65. *See, e.g., Akayesu*, Judgement, TC, para. 693 (authority and prior words of encouragement); *Tadic*, Judgement, TC, para. 690 (presence and previous active role in similar acts by the *same* group).

[646] *Kayishema and Ruzindana*, Judgement, AC, para. 187.

[647] *Kayishema and Ruzindana*, Judgement, AC, para. 186; *Bagilishema*, Judgement, TC, para. 32; *Kayishema and Ruzindana*, Judgement, TC, para. 201.

[648] *Kayishema and Ruzindana*, Judgement, TC, para. 205. *See also Aleksovski*, Judgement, AC, para. 162; *Vasiljevic*, Judgement, TC, para. 71; *Krnojelac*, Judgement, TC, paras. 75, 90; *Kvocka*, Judgement, TC, paras. 255, 262; *Kunarac*, Judgement, TC, para. 392; *Furundzija*, Judgement, TC, para. 249. *But see Ntakirutimana*, Judgement, TC, para. 787 (stating that aiding and abetting under Article 6(1) required proof that an accused possessed the *mens rea* of the underlying crime, for

7368

389. In the case of the "approving spectator", the individual must know that his presence would be seen by the perpetrator of the crime as encouragement or support.[649] The requisite *mens rea* may be established from the circumstances including prior like behaviour, failure to punish, or verbal encouragement.[650]

*2. Responsibility Under Article 2(3) of the Statute*

390. Article 2(3) lists the forms of criminal responsibility that are applicable to the crime of genocide under the Statute, namely genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.

391. The Chamber notes that an overlap exists between "genocide" in Article 2(3)(a) and "committing" in Article 6(1), and between "complicity" in Article 2(3)(e) and forms of accomplice liability in Article 6(1).[651] This redundancy can be explained by the drafters' *verbatim* incorporation into the Statute of Article III of the Genocide Convention.[652]

392. The Prosecutor charged the Accused with committing genocide, as discussed in section V.A. hereof, as well as with direct and public incitement to commit genocide and with complicity in genocide. The Chamber will limit its present discussion to complicity in light of its decision to disregard for vagueness the paragraphs supporting the direct and public incitement count.[653]

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example, the specific intent of genocide); *Akayesu*, TC, paras. 485, 547. The Chamber notes that these cases do not provide any justification for treating the *mens rea* requirement for aiding and abetting under Article 6(1) differently than that for complicity in genocide, which does not require proof of the *mens rea* of the underlying crime.

[649] *Bagilishema*, Judgement, TC, para. 36.

[650] *Bagilishema*, Judgement, TC, para. 36.

[651] *Krstic*, Judgement, TC, para. 640.

[652] *Krstic*, Judgement, TC, para. 640. This overlap was notably eliminated in the ICC Statute where all forms of criminal responsibility, even those uniquely applicable to genocide, are listed in Article 25. *See* ICC Statute, art. 25.

[653] *See supra* para. 61.

7367

393. Having taken into consideration the general meaning of complicity in the common and civil law, as well as the domestic law of Rwanda, prior jurisprudence has defined the term complicity as aiding and abetting, instigating, and procuring.[654]

394. In the view of the Chamber, there is no material distinction between complicity in Article 2(3)(e) of the Statute and the broad definition accorded to aiding and abetting in Article 6(1).[655] The Chamber further notes that the *mens rea* requirement for complicity to commit genocide in Article 2(3)(e)[656] mirrors that for aiding and abetting and the other forms of accomplice liability in Article 6(1).[657]

395. Therefore, complicity to commit genocide in Article 2(3)(e) refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide. The accused must have acted intentionally and with the awareness that he was contributing to the crime of genocide, including all its material elements.

396. In this case, Count 1 charges the Accused with criminal responsibility for committing genocide on the basis of Articles 6(1) and 6(3) of the Statute. This count seeks to hold the Accused responsible as a principal perpetrator, an accomplice, and a superior. If Count 1 is understood to encompass a charge of accomplice liability, Count 3 of the Indictment would be superfluous, as it charges the identical underlying criminal conduct as complicity to commit genocide under Article 2(3)(e).

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[654] *Bagilishema,* Judgement, TC, paras. 69-70; *Musema,* Judgement, TC, paras. 177, 179; *Akayesu*, Judgement, TC, paras. 533, 535, 537. Reference to the Rwandan Penal Code is relevant in determining whether the principle of *nullum crimen sine lege* has been violated. However, the Chamber finds no compelling reason for explicitly defining a legal term in its Statute, which is drawn *verbatim* from an international instrument, by reference to a particular national code.

[655] *Akayesu*, Judgement, TC, para. 546 (noting that "aiding and abetting" in Article 6(1) "are similar to the material elements of complicity"). *See also Krstic*, Judgement, TC, para. 640; *Report of the Ad Hoc Committee on Genocide 5 April to 10 May 1948*, UN GAOR, Economic and Social Council, 7th Sess., Supp. No. 6, Doc. E 794 (26 May 1948), p. 8 ("The United States representative stated that, in agreeing to the inclusion of 'complicity' in this Article, he understood it to refer to accessoryship before and after the fact and to aiding and abetting in the commission of crimes enumerated in this Article").

[656] *See Bagilishema*, Judgement, TC, para. 71; *Musema*, Judgement, TC, paras. 180-181; *Akayesu*, Judgement, TC, para. 545.

[657] *Kayishema and Ruzindana*, Judgement, AC, para. 186; *Bagilishema*, Judgement, TC, para. 32; *Kayishema and Ruzindana*, Judgement, TC, paras. 201, 205. *See also Aleksovski*, Judgement, AC, para. 162; *Vasiljevic*, Judgement, TC, para. 71; *Krnojelac*, Judgement, TC, paras. 75, 90; *Kvocka*, Judgement, TC, paras. 255, 262; *Kunarac*, Judgement, TC, para. 392; *Furundzija*, Judgement, TC, para. 249.

397. Where a count does not specify a particular form of criminal participation under Article 6(1), the Chamber may consider the charge under the appropriate form within the limits of the Indictment and fair notice.[658] The Chamber is mindful that the commission of a crime and complicity in that crime are alternative charges.[659] Where a count seemingly charges both direct and accomplice liability under Article 6(1) and another count specifically alleges complicity for the identical criminal acts, the Chamber will narrow the scope of the broader count so as to eliminate any overlap.

398. Therefore, the Chamber finds that the reference to Article 6(1) in Count 1 of the Indictment refers only to direct criminal participation by "committing" and that all other forms of accomplice liability should be properly considered under Count 3, which charges complicity to commit genocide for the identical underlying criminal conduct.

*3. Responsibility Under Article 6(3) of the Statute*

399. Article 6(3) of the Statute concerns the criminal responsibility of a superior for failure to prevent or punish the criminal acts of his subordinates and is broadly applicable to all three crimes. Article 6(3) provides as follows:

> The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

400. Under Article 6(3), a civilian or military superior, with or without official status, may be held criminally responsible for crimes committed by subordinates under his effective control.[660] The following three elements must be satisfied to establish this form of criminal responsibility: (a) the existence of a superior-subordinate relationship; (b) the superior's knowledge or reason to know that the criminal act was about to be or had been committed; and (c) the superior's failure to

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[658] *Kunarac*, Judgement, TC, para. 388.
[659] *Bagilishema*, Judgement, TC, para. 67; *Musema* Judgement, TC, para. 175; *Akayesu*, Judgement, TC, para. 532.
[660] *Bagilishema*, Motifs de l'Arrêt, AC, paras. 50, 51; *Kayishema and Ruzindana*, Judgement, AC, para. 294; *Musema*, Judgement, TC, para. 148. *See also Celebici*, Judgement, AC, paras. 192-196.

take necessary and reasonable measures to prevent the criminal act or punish the perpetrator.[661]

a. Superior-Subordinate Relationship

401. A superior-subordinate relationship requires a formal or informal hierarchical relationship where a superior is senior to a subordinate.[662] The relationship is not limited to a strict military command style structure.[663]

402. The superior must possess the power or authority, either *de jure* or *de facto*, to prevent or punish an offence committed by his subordinates.[664] The Trial Chamber must be satisfied that the superior had effective control over the subordinates at the time the offence was committed.[665] Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders.[666] This requirement is not satisfied by a simple showing of an accused individual's general influence.[667]

b. *Mens Rea:* Knowing or Having Reason to Know

403. The imposition of criminal responsibility under Article 6(3) requires proof that the superior knew or had reason to know that his subordinates were committing or had committed a crime within the jurisdiction of the Tribunal.[668]

404. Criminal liability based on superior responsibility will not attach on the basis of strict liability simply because an individual is in a chain of command with authority

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[661] *Bagilishema*, Judgement, TC, para. 38; *Celebici*, Judgement, AC, paras. 189-198, 225-226, 238-239, 256, 263. *See also Kunarac*, Judgement, TC, para. 395.
[662] *Celebici*, Judgement, AC, para. 303 ("The Appeals Chamber understands the necessity to prove that the perpetrator was the 'subordinate' of the accused, not to import a requirement of *direct* or *formal* subordination but to mean the relevant accused is, by virtue of his or her position, senior in some sort of formal or informal hierarchy to the perpetrator.").
[663] *Bagilishema*, Motifs de l'Arrêt, AC, para. 56 (rejecting the notion that there must be a "*de jure*-like" relationship).
[664] *Bagilishema*, Motifs de l'Arrêt, AC, para. 50; *Kayishema and Ruzindana*, Judgement, AC, para. 294; *Celebici*, Judgement, AC, para. 192.
[665] *Bagilishema*, Motifs de l'Arrêt, AC, para. 50; *Kayishema and Ruzindana*, Judgement, AC, para. 294; *Celebici*, Judgement, AC, para. 266.
[666] *Bagilishema*, Motifs de l'Arrêt, AC, para. 50; *Celebici*, Judgement, AC, para. 266.
[667] *Celebici*, Judgement, AC, paras. 266, 303.
[668] *Bagilishema,* Judgement, TC, para. 45; *Kayishema and Ruzindana*, Judgement, TC, para. 225.

7364

over a given geographic area.[669] While the individual's position in the command hierarchy is considered a significant indicator that the superior knew or had reason to know about the actions of his subordinates, knowledge will not be presumed from the status alone.[670]

405. A superior will be found to possess or will be imputed with the requisite *mens rea* sufficient to incur criminal responsibility where: (i) the superior had actual knowledge, established through direct or circumstantial evidence, that his subordinates were about to commit, were committing, or had committed, a crime under the Statute;[671] or (ii) the superior possessed information providing notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such offences were about to be committed, were being committed, or had been committed, by subordinates.[672]

c. Failing to Prevent or Punish

406. A superior incurs criminal responsibility only for failing to take "necessary and reasonable measures" to prevent or punish crimes under the Statute committed by subordinates. These measures have been described as those that are within a superior's "material possibility" even if the superior lacks the "formal legal competence" to take such measures.[673] The degree of the superior's effective control guides the assessment of whether the individual took reasonable measures to prevent, stop, or punish a subordinate's crimes.[674]

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[669] *Bagilishema*, Judgement, TC, paras. 44-45; *Akayesu*, Judgement, TC, para. 489 ("[I]t 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.").
[670] *Bagilishema*, Judgement, TC, para. 45.
[671] *Bagilishema*, Judgement, TC, para. 46; *Celebici*, Judgement, TC, paras. 384-386.
[672] *Bagilishema*, Motifs de l'Arrêt, AC, para. 28; *Celebici*, Judgement, AC, paras. 239, 241. *See also Bagilishema*, Judgement, TC, para. 46, *citing Celebici*, Judgement, TC, paras. 390-393; *Kayishema and Ruzindana*, Judgement, TC, para. 228. The Appeals Chamber in *Celebici* explained that the information must simply be in "the possession of" the superior, and that "it is not required that he actually acquainted himself with the information." *Celebici*, Judgement, AC, para. 239. Moreover, the information may be of a general nature such as the violent nature of a subordinate. *Id.*, para. 238. The information may also be written or oral and need not be a particular format or a formal report. *Id.*
[673] *Kayishema and Ruzindana*, Judgement, AC, para. 302, *citing Celebici*, Judgement, TC, para. 395.
[674] *Bagilishema*, Judgement, TC, para. 48; *Kayishema and Ruzindana*, Judgement, TC, para. 228.

407. The obligation to prevent or punish is not a set of alternative options.[675] If a superior is aware of the impending or on-going commission of a crime, necessary and reasonable measures must be taken to stop or prevent it.[676] A superior with such knowledge and the material ability to prevent the commission of the crime does not discharge his responsibility by opting simply to punish his subordinates in the aftermath.[677]

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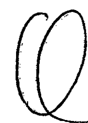
[675] *Bagilishema*, Judgement, TC, para. 49.
[676] *Bagilishema*, Judgement, TC, para. 49.
[677] *Bagilishema*, Judgement, TC, para. 49.



## E. Cumulative Charges and Convictions

### *1. Cumulative Charges*

408. The Defence asserted that the Accused was improperly cumulatively charged for conduct arising out of a single incident.[678] The propriety of cumulative charges was confirmed by the Appeals Chamber in *Musema*.[679]

### *2. Cumulative Convictions*

409. In *Musema*, the Appeals Chamber also held that multiple criminal convictions under different statutory provisions, but based on the same conduct, are permissible if each statutory provision involved has a materially distinct element not contained in the other.[680] The Appeals Chamber explained that an element is materially distinct from another if it requires proof of a fact not required by the other.[681]

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[678] Defence Closing Brief pp. 19-21, 73, 74.

[679] *Musema*, Judgement, AC, para. 369, *quoting Celebici*, Judgement, AC, para. 400 ("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."). *See also Bagilishema*, Judgement, TC, paras. 108-109.

[680] *Musema*, Judgement, AC, paras. 361, 363. In formulating this approach, the Appeals Chamber adopted the test and reasoning announced by the ICTY Appeals Chamber in *Celebici. See Musema, Judgement*, AC, para. 363 ("The Appeals Chamber confirms that this is the test to be applied with respect to multiple convictions arising under ICTR Statute. The Appeals Chamber further endorses the approach of the *Celebici* Appeal Judgement, with regard to the elements of the offences to be taken into consideration in the application of this test. ") (citing *Celebici*, Judgement, AC, paras. 412-413).

[681] *Musema*, Judgement, AC, para. 365.

7361

## VI. LEGAL FINDINGS

### A. Criminal Responsibility

410. The Indictment charges the Accused with criminal responsibility based on Articles 2(3), 6(1), and 6(3) of the Statute. The Chamber will determine whether the Accused bears criminal responsibility as a superior under Article 6(3) or for ordering under Article 6(1) in this section. The Chamber will assess the Accused's criminal responsibility pursuant to Articles 2(3) and 6(1), except for ordering, in its subsequent legal findings.

411. The Indictment alleges that the Accused had *de jure* and/or *de facto* authority over militiamen, in particular *Interahamwe*, and other persons, including members of the Rwandan Armed Forces, commune police, and other government agents.[682] Based on his alleged authority, the Prosecutor asserts that the Accused is criminally responsible for the crimes committed at Ruhanga church, Musha church, Mabare mosque, and Mwulire Hill as well as the crimes committed against Victims A through H and J.

412. The Prosecutor posited that the Accused had *de jure* authority in April 1994 because he was appointed to parliament, allegedly served as MRND Chair for Kigali-Rural, and allegedly formed several political parties.[683] The Chamber recalls that the Prosecutor did not establish that the Accused served as an MRND Chair during the relevant events and that she submitted no evidence that the Accused held a *de jure*

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[682] The Prosecutor has also advanced a novel theory that the Accused must be held criminally responsible as a superior of the *Interahamwe* based on the "*de son tort* principle". Prosecution Closing Brief paras. 122-124. The Prosecutor explains that "if in the absence of lawful warrant or authority a meddlesome stranger elects to intermeddle in matters of no concern to him, he will be forbidden from escaping responsibility for any wrongs that resulted from his involvement in the transaction in question by simply claiming to have no authority." *Id.* para. 122. The Prosecutor notes that "this principle follows from the theory of intermeddling and is grounded in plain common sense." *Id.* The Chamber notes that the sole legal support that the Prosecutor has advanced in support of her theory is an allusion to the law of succession and a citation to Black's Law Dictionary, which discusses this concept in the context of civil liability for a person who acts as an executor of a will without lawful authority. The Chamber finds that the Prosecutor has advanced no relevant authority to justify the application of her unusual theory based curiously on intermeddling in the execution of a will to impose international criminal responsibility on a superior for the acts of his subordinates. Such a theory would run counter to the essential requirement of effective control.

[683] Prosecution Closing Brief para. 112.

7360

leadership role in any other party. The Chamber did find that the Accused was appointed to the transitional parliament. However, the Prosecutor did not establish the scope and nature of a parliamentarian's authority at that time or demonstrate that this position gave the Accused *de jure* authority over militiamen and other persons. The Prosecutor, therefore, did not establish that the Accused exercised any *de jure* authority over the perpetrators of the crimes committed in Bicumbi and Gikoro communes.

413. The Prosecutor also asserted that the Accused exercised *de facto* authority over the principal perpetrators of the crimes committed in Bicumbi and Gikoro based on his influence in the community as illustrated, for example, by: (i) his more than twenty years of service as bourgmestre ending in 1993; (ii) the support and good will he enjoyed from the majority of the community based on his prior good works; (iii) his "promotion" to serve in parliament for the Kigali-Rural prefecture; (iv) his continued public presence alongside the new bourgmestre, Rugambarara, and many people's belief that he was still the bourgmestre; (v) his alleged role as chairman of the MRND party in Kigali-Rural; (vi) his alleged close connections to President Habyarimana and other high government officials; and (vii) his wealth.[684] From its factual findings the Chamber recalls that the Accused was widely viewed as an important and influential personality. However, the Chamber also recalls that the Prosecutor failed to prove the extent, nature, and effect of any personal or political connections.

414. The Prosecutor also submitted that in a number of instances the Accused appeared to be "commanding" or "coordinating" principal perpetrators, thus demonstrating his effective control over them.[685] In particular, Prosecution Witnesses VAK, VA, and VM stated that the Accused led the massacres at Mabare mosque and

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[684] Prosecution Closing Brief paras. 113-114.
[685] Prosecution Closing Brief paras. 115-116.

Musha church.[686] In addition, there were various instances where the Accused appeared to have given orders or permission to kill or rape Tutsis.[687]

415. The Chamber emphasises that the Prosecutor's theory, which is similar to the approach taken and rejected in *Musema*,[688] fails to take full account of the correct legal standard. A superior-subordinate relationship is established by showing a formal or informal hierarchical relationship involving an accused's *effective control* over the direct perpetrators. A simple showing of an accused's general influence in the community is insufficient to establish a superior-subordinate relationship.[689]

416. The assertions of Witnesses VA, VM, and VAK that the Accused commanded the attacks are only bare conclusions which lack adequate detail to reliably substantiate that the Accused possessed effective control. Moreover, the Chamber notes that witnesses who are outside of or unfamiliar with an alleged formal or informal hierarchy do not necessarily provide the best indication of an individual's actual superior authority.[690] Other than general evidence of the Accused's influence, there is no credible or reliable evidence detailing the specific nature of the superior-subordinate relationship between the Accused and any of the known perpetrators, including those to whom he gave instructions or encouragement to rape and kill. Absent this type of evidence, there is no concrete indication that the Accused had actual authority over the principal perpetrators.

417. The Chamber finds that the evidence of the Accused's influence in this case does not sufficiently demonstrate that he was a superior in some formal or informal

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[686] Prosecution Closing Brief para. 115; Testimony of VAK, T. 15 March 2001 pp. 92-93 (Mabare mosque); Testimony of VA, T. 7 March 2001 pp. 57-58, 105 (Musha church); Testimony of VM, T. 6 March 2001 pp. 90, 91, 99, 144 (Musha church).

[687] Testimony of VV, T. 29 March 2001 pp. 8-9; Testimony of VAM, T. 13 March 2001 pp. 31-32, 96, 99, 100; Testimony of VAK, T. 15 March 2001 p. 92; Testimony of VAV, T. 20 March 2001 p. 28; Testimony of VP, T. 4 December 2000 p. 93.

[688] As in this case, several Prosecution witnesses in *Musema* testified that the Accused, a tea factory director, "was perceived as a figure of authority and considerable influence in the region," was "'very well respected' in the locality", "occupied an important position in Rwanda", "was considered to have the same powers as a *Prefet*" and was seen sitting with officials at political meetings. *Musema*, Judgement, TC, para. 868. Based on the evidence, the Trial Chamber in *Musema* found that the Accused was "a figure of authority and someone who wielded considerable power in the region", but nonetheless found that the evidence was not sufficient to show that the Accused exercised *de jure* or *de facto* authority over the population of his prefecture. *Musema*, Judgement, TC, para. 881.

[689] *Bagilishema*, Motifs de l'Arrêt, AC, para. 50; *Celebici*, Judgement, AC, paras. 266, 303; *Kvocka,* Judgement, TC, paras. 439, 440; *Musema*, Judgement, TC, para. 881.

7358

hierarchy with effective control over the known perpetrators. Additionally, the Prosecutor presented insufficient evidence to establish beyond a reasonable doubt that the Accused had the material ability to prevent the crimes in Bicumbi or Gikoro or to punish the known perpetrators.

418. As the Prosecutor did not establish the existence of a superior-subordinate relationship, it is unnecessary to consider whether the Accused knew or had reason to know about the criminal acts of the principal perpetrators or whether he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

419. The Chamber therefore finds that the Accused cannot be held responsible for the crimes charged in the Indictment under Article 6(3) of the Statute or for ordering under Article 6(1).

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[690] *See, e.g., Kvocka,* Judgement, TC, paras. 431-440.

7357

## B. Genocide and Complicity to Commit Genocide

420. Count 1 of the Indictment charges:

> By his acts referred to in paragraphs 3.7 to 3.16 above, **Laurent SEMANZA** is responsible for killing and the 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,** stipulated in Article 2(3)(a) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

421. Count 3 of the Indictment charges:

> By his acts in relation to the events described in paragraphs 3.7 to 3.16 above, **Laurent SEMANZA** 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 TO COMMIT GENOCIDE** stipulated in Article 2(3) of the Statute of the Tribunal as a crime, attributed to him by virtue of Article 6(1) and punishable in reference to Articles 22 and 23 of the same Statute.

### *1. Genocide in Bicumbi and Gikoro Communes*

422. The Chamber took judicial notice of the fact that: "Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa".[691] Accordingly, it has been established for the purposes of this case that the Tutsi in Rwanda were an "ethnical" group.

423. The Chamber also took judicial notice that

> [t]he following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994. There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to

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[691] *Prosecutor v. Semanza*, Case No. ICTR-97-20-I, Decision on Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, TC, 3 November 2000, Annex A, para. 1. *See* Annex II, Part A, para. 1.

persons perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity."[692]

424. Based on the factual findings concerning the killings that took place at the four sites in Bicumbi and Gikoro communes enumerated in the Indictment, namely, Ruhanga church, Musha church, Mwulire Hill, and Mabare mosque, the Chamber holds that the situation demonstrates that soldiers, *Interahamwe*, and other principal authors of the killings were engaged in furthering the general campaign to kill persons identified as Tutsi that was prevalent throughout Rwanda at that time. Moreover, because the killings that occurred at the four sites named in this Indictment were systematically directed against Tutsi civilians, the Chamber infers that the principal perpetrators acted with the intent to destroy the Tutsi ethnical group, as such. Therefore, the Chamber finds that genocide was committed in Bicumbi and Gikoro communes.

*2. Musha Church*

425. In its factual findings regarding paragraph 3.11 of the Indictment, the Chamber has found that before the killings, on 8 or 9 April 1994, the Accused, along with Bisengimana and others, went to Musha church to assess the situation. Following his assessment, the Accused was overheard telling Bisengimana that the church had to be burned to kill the refugees inside. The Chamber has found that soldiers, gendarmes, and *Interahamwe* killed a large number of Tutsi civilian refugees at Musha church on 13 April 1994. On that date, the Accused gathered additional *Interahamwe* for the attack on Musha church. The attackers showered the church and the substantial number of Tutsi refugees who had gathered there with gunfire and grenades. The attackers fired a rocket-propelled grenade at the wall of the church so that they could enter and continue the killings and assault upon the Tutsi refugees.

426. The Chamber finds that the Accused provided substantial assistance to the principal perpetrators of the genocide by gathering *Interahamwe* for the attack on Musha church and by directing the attackers to kill the Tutsi refugees at the church.

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[692] *Semanza*, Decision on Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, Annex A, para. 2. *See* Annex II, Part A, para. 2.

427. The Accused's intent is evident from the context in which he committed his acts that provided substantial assistance to the principal perpetrators. The specific acts of the Accused must be viewed in the context of the then existing state of attacks that took place against civilian persons identified as Tutsi at various sites in Bicumbi and Gikoro communes. The Chamber has found that the Accused was present at various sites, including Musha church, Mwulire Hill, and Mabare mosque in April 1994, where a substantial number of Tutsi civilians was systematically massacred on account of their identification as Tutsi.[693] The Accused, having been present at these massacre sites, knew that the principal perpetrators of the killings were killing Tutsi based on their ethnical identification. This knowledge provides evidence of the Accused's intent for complicity to commit genocide.

428. The Chamber also finds that the Accused acted with the knowledge of the intent of the primary perpetrators who killed Tutsi at the following sites: Musha church, Mwulire Hill, and Mabare mosque. Accordingly, the Chamber finds that the Accused's actions at those sites were executed with the intent to aid and abet the principal perpetrators of the killings at those sites.

429. In addition to having knowledge of the genocidal intent of the principal perpetrators at the various massacre sites in Bicumbi and Gikoro communes, the Chamber finds that the Accused possessed an independent intent to destroy the Tutsi ethnical group, as such. The trial record provides clear and unequivocal evidence of the Accused's genocidal intent at the time of the massacres at Musha church. The Chamber has inferred the Accused's specific intent to aid and abet in the commission of genocide from his actions and from his words. On 8 or 9 April 1994, the Accused told Bisengimana that the church had to be burned to kill the predominantly Tutsi refugees inside. In addition, the Accused's specific intent to destroy the Tutsi group, as such, is reflected by the fact that he instructed soldiers to separate Hutu from Tutsi, who were then killed by gunfire and grenades. Moreover, the Chamber infers the Accused's genocidal intent from the statement he made to the principal attackers after they had completed the killings at Mabare mosque on 12 April 1994: "We came to

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[693] *See Semanza*, Decision on Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, Annex A, para. 2. *See* Annex II, Part A, para. 2.

assist you, and I believe that those who have not been killed would not be able to resist you. Go and find them and exterminate them."

430. The Chamber finds that in gathering *Interahamwe* for the attack on refugees at Musha church, the Accused provided substantial assistance, and thereby aided and abetted the principal perpetrators in committing the acts of genocide that occurred there. In addition, it was immediately after the direction of the Accused that the attackers killed the Tutsi refugees after they had been separated from the Hutus. By reason of the foregoing acts, coupled with his specific intent, the Chamber finds that the Accused aided and abetted in the massacres at Musha church, as described above.

*3. Mwulire Hill*

431. In its factual findings regarding paragraph 3.12 of the Indictment, the Chamber has found that the Accused "participated" in the killings at Mwulire Hill on 18 April 1994 by arriving armed and bringing along with him soldiers, *Interahamwe*, and their "equipment" to the site, and by firing his weapon into a crowd of predominantly Tutsi refugees at the football field located near the sector office. Although the Chamber has found that the Accused fired his weapon into the crowd of refugees, the Prosecutor failed to provide proof beyond a reasonable doubt about any serious bodily or mental harm or killing that may have resulted from the Accused's firing into the crowd. However, the Chamber finds that the Accused again provided substantial assistance to the principal attackers by bringing soldiers and *Interahamwe* and their "equipment" to Mwulire Hill. Moreover, the Chamber finds that the Accused was still operating with the same specific intent, within the same context, and with the knowledge that his acts contributed substantial assistance to the principal perpetrators of the attacks that predicated his participation in killings that took place at Musha church on 13 April 1994.

432. Moreover, by bringing the *Interahamwe* and their "equipment" to the site where a large-scale massacre of Tutsi refugees was already under way, the Accused provided substantial assistance to the genocidal enterprise undertaken by the assailants who were killing Tutsi at Mwulire Hill. The Accused provided additional *Interahamwe* and their equipment, the very instruments that assured the commission of the genocidal massacre that was unfolding on Mwulire Hill.

433. For such forms of participation, together with his genocidal intent, the Chamber finds the Accused to be criminally responsible for complicity in genocide for aiding and abetting the principal perpetrators who killed members of the Tutsi ethnic group at Mwulire Hill.

*4. Mabare Mosque*

434. The Chamber has also found with respect to paragraph 3.13 of the Indictment that the Prosecutor proved beyond a reasonable doubt that the Accused was armed and present on 12 April 1994 during the killings of Tutsi refugees at Mabare mosque. The Chamber finds that the Accused incurs no criminal liability with respect to the killings and injuries that occurred at Mabare mosque. The Accused's presence alone at the time of the killings at Mabare mosque does not give rise to criminal liability.

*5. Conclusion With Respect to Count 1 and Count 3*

435. In conclusion, the Chamber finds that the Accused aided and abetted the principal perpetrators who killed Tutsi because of their ethnic identification as such. The Chamber has found that the Accused: (1) gathered *Interahamwe* to assist in the killings that took place at Musha church on 13 April 1994; (2) participated in the separation of Tutsi from Hutu refugees at Musha church on 13 April 1994 and directed the killing of the Tutsi refugees; and (3) participated in the killings at Mwulire Hill on 18 April 1994 by bringing soldiers and *Interahamwe* to assist in the killings. For such forms of participation, coupled with his genocidal intent, and applying the previously pronounced legal standards and factual findings, the Chamber finds the Accused guilty, beyond a reasonable doubt, of complicity in genocide, as charged in Count 3 of the Indictment.

436. The Chamber finds that the nature of the participation of the Accused is most accurately described as that of an accomplice rather than a principal perpetrator. Because Counts 1 and 3 of the Indictment arise out of the same factual allegations, the Chamber holds that the Accused may be criminally liable only as an accomplice and not as a principal perpetrator, as charged in Count 1 of the Indictment. Therefore, the Chamber finds the Accused guilty on Count 3 and not guilty on Count 1.

## C. Direct and Public Incitement to Commit Genocide

437. In Count 2 of the Indictment the Prosecutor charged the Accused as follows:

> By his acts in relation to the events described in paragraphs 3.7 and 3.8 above, **Laurent SEMANZA** did directly and publicly incite to kill and cause serious bodily or mental injury to members of the Tutsi population with the intent to destroy, in whole or in part, an ethnic group as such, and has thereby committed **DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE** stipulated in Article 2(3) of the Statute of the Tribunal as a crime, attributed to him by virtue of Article 6(1) and punishable in reference to Articles 22 and 23 of the same Statute.

438. Because the Chamber has found that the allegations in paragraphs 3.7 and 3.8 of the Indictment are too vague to maintain a criminal charge, they are disregarded, and no criminal liability may attach on account of such allegations. Moreover, were the Chamber to consider the factual allegations contained in paragraphs 3.7 and 3.8 of the Indictment, the Chamber would nevertheless find that the evidence is insufficient to sustain the allegations. Therefore, the Chamber finds the Accused not guilty on Count 2.

## D. Crimes Against Humanity

### *1. General Elements*

439. The Accused is charged with the following crimes against humanity: murder (Counts 4, 12, and 14), rape (Counts 8 and 10), torture (Count 11), persecution (Count 6), and extermination (Count 5).

440. As explained in the legal section above, the Prosecution is required to prove that all crimes against humanity are committed as part of a widespread or systematic attack on a civilian population on the enumerated discriminatory grounds.

441. The Chamber took judicial notice of the fact that there was a widespread or systematic attack in Rwanda:

> The following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994 [sic]. There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there was a large number of deaths of persons of Tutsi ethnic identity.[694]

442. The Chamber is now in a position to make a more specific legal finding. In light of the judicially noticed facts, the factual findings made in relation to the internal armed conflict in Rwanda,[695] and the evidence of massacres of civilians between 6 April 1994 and 31 July 1994,[696] the Chamber finds that there were massive, frequent, large scale attacks against civilian Tutsis in Bicumbi and Gikoro communes. These attacks were carried out by groups of attackers and were directed against large numbers of victims on the basis of their Tutsi ethnicity. The Chamber thus finds beyond a reasonable doubt that at all relevant times there was a widespread attack on the Tutsi civilian population of Bicumbi and Gikoro communes on ethnic grounds. Having found that the attack was widespread, the Chamber need not consider whether it was also systematic.

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[694] *Semanza*, Decision on Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, Annex A, para. 2. *See* Annex II, Part A, para. 2.
[695] *See supra* para. 281.
[696] *See* chapter IV hereof.

443. The Defence argued that the Prosecutor must also prove that the crimes against humanity were committed to advance a war effort in an internal armed conflict because such allegations are contained in the Indictment.[697] The Chamber sees no merit in this argument because there is no legal requirement in the Statute that crimes against humanity be committed in connection with an armed conflict.

*2. Count 4: Murder*

444. Count 4 of the Indictment charges:

> By his acts in relation to the events described in paragraphs 3.7 to 3.16 above, Laurent SEMANZA 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 stipulated in Article 3(a) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

445. In light of its factual and legal findings, the Chamber will not consider the allegations in paragraphs 3.7, 3.8, 3.9, 3.10, 3.15, and 3.16.[698] The Chamber has made factual findings in relation to paragraphs 3.11 through 3.14 about the Accused's participation in massacres at Musha church, Mabare mosque, and Mwulire Hill.

a. Musha Church (paragraph 3.11)

446. After considering the evidence adduced in support of paragraph 3.11, the Chamber has found that on 13 April 1994, the Accused gathered *Interahamwe* to participate in the massacre of Tutsi refugees at Musha church and that he directed the assailants to separate the Tutsi refugees from the Hutu refugees and to kill only the Tutsis.

447. The Chamber finds that the perpetrators at Musha church murdered the refugees. The Chamber further finds that these murders were premeditated, in particular because the attackers who arrived with the Accused brought their weapons and because the attackers listened to the Accused's directions to kill the Tutsi refugees. In light of the various attacks on Tutsis in the Bicumbi and Gikoro region during the

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[697] Defence Closing Brief p. 116.

month of April 1994, the Chamber finds that this attack formed part of the widespread attack and that the attackers at Musha church were aware that their actions in murdering Tutsi refugees formed part of the widespread attack. Therefore, the Chamber finds that the principal perpetrators committed murder as a crime against humanity.

448. The Chamber also finds that the Accused's act of gathering *Interahamwe* to the church substantially supported the principal perpetrators in their acts of premeditated murder. Shortly after the refugees began to gather at the church, the Accused visited the site and expressed an intention to kill the refugees. The Chamber thus finds that in gathering the *Interahamwe* for the massacre at the church, the Accused acted intentionally and with the awareness that he was assisting the principal perpetrators to commit the crimes of murder at Musha church as part of the widespread attack on the civilian population in the region on ethnic grounds. The Chamber finds that the Accused was aware of what would occur when he gathered *Interahamwe* for the massacre at the church because the previous day he had been at Mabare mosque where *Interahamwe* had participated in the murders of refugees.

449. The Chamber also finds that the Accused encouraged and supported the murder of the refugees by ordering the separation of Tutsi from Hutu refugees, by assisting in identifying Tutsi refugees to be murdered, and by directing *Interahamwe* and soldiers to kill them. The Chamber finds that these acts substantially contributed to the premeditated murder of the refugees because the assailants executed the Accused's instructions shortly after he gave them. The Accused's personal involvement in the identification of Tutsi refugees and his direction to kill them reflects that he acted intentionally and with the awareness that he was assisting the principal perpetrators to commit murder as a crime against humanity.

450. The Chamber therefore concludes beyond a reasonable doubt that the Accused aided and abetted the principal perpetrators in committing premeditated murder of the Tutsi refugees at Musha church and is therefore criminally responsible for a crime against humanity.

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[698] *See supra* paras. 50, 51, 52, 54, 61.

b. Mwulire Hill (paragraph 3.12)

451. In its factual findings concerning paragraph 3.12, the Chamber has found that the Accused brought *Interahamwe* and soldiers and their "equipment" to the massacre of the refugees at Mwulire Hill on 18 April 1994 and that he shot at the refugees gathered there.

452. The Chamber finds that on 18 April 1994, the principal perpetrators murdered a large number of civilian refuges on Mwulire Hill. The Chamber is further satisfied that the principal perpetrators acted with premeditation, as evidenced by the daily attacks mounted against the refugees from 8 April 1994 until the final assault on 18 April 1994. On the basis of the totality of the evidence, demonstrating a series of attacks against Tutsi civilians throughout the Bicumbi and Gikoro communes during the month of April 1994, the Chamber also finds that the principal perpetrators acted with the knowledge that, by murdering large numbers of Tutsi civilians, their actions formed part of the widespread attack on the civilian population on discriminatory grounds. The Chamber thus finds that the principal perpetrators committed murder as a crime against humanity at Mwulire Hill.

453. The Chamber finds that the Accused's acts of bringing *Interahamwe*, soldiers, and their weapons to the massacre provided substantial support to the principal perpetrators who were murdering the Tutsis civilians at Mwulire hill. It is significant that the refugees were finally vanquished on 18 April 1994 after the Accused brought *Interahamwe* and armed soldiers to participate in a massive assault on them. The Chamber finds that in bringing the *Interahamwe* and soldiers to participate in the attack, the Accused acted intentionally and with the awareness that he was assisting the principal perpetrators to commit the crimes. The Accused's earlier presence at Mabare mosque and his participation in the Musha church massacre demonstrate that he was aware that bringing *Interahamwe*, soldiers, and weapons to the massacre would assist in the murders and that he knew that these murders formed part of a widespread attack on the civilian Tutsi population.

454. The Chamber has also found that the Accused fired a gun into the crowd of refugees. On the available evidence, the Chamber is not convinced that the Accused personally murdered any refugee. Nevertheless, this act strongly supports the

conclusion that the Accused was intentionally acting to assist the principal perpetrators in murdering the refugees and that he did so with full knowledge of the consequences of his actions.

455. The Chamber therefore finds beyond a reasonable doubt that the Accused aided and abetted the premeditated murder of Tutsi civilians at Mwulire Hill on 18 April 1994, and that he is therefore criminally responsible for a crime against humanity.

c. Mabare Mosque (paragraph 3.13)

456. In relation to paragraph 3.13, the Chamber has found that the Accused, armed with a small shotgun, was present during the killing of refugees at Mabare mosque on 12 April 1994. After the massacre, the Accused then told the *Interahamwe* that "we came to assist you".

457. The Chamber notes that the Prosecutor failed to prove that the Accused used his firearm, or that he actually assisted the attackers in any other manner such as transporting weapons or reinforcements. The Chamber is not satisfied that the Accused's statement uttered after the attack provides sufficient evidence of his criminal participation in the massacres. The Chamber recalls that assistance only gives rise to criminal liability under the Statute if it is substantial. Therefore in the absence of specific evidence as to the exact nature of the assistance that the Accused purported to give, the Chamber has no basis on which to find that it was substantial. The Prosecutor adduced no evidence capable of demonstrating that the Accused's influence and presence at the massacre site during the attack had a substantial effect on the massacre.

458. After the killings, the Accused stated that "I believe that those who have not been killed would not be able to resist you. Go and find them and exterminate them". However, there was no evidence that any further killings took place as a result of the Accused's direction.

459. Therefore, the Chamber cannot ascribe criminal responsibility to the Accused for crimes against humanity in relation to the crimes that occurred at Mabare mosque.

d. Conclusion: Count 4

460. The Chamber therefore finds beyond a reasonable doubt that the Accused aided and abetted the principal perpetrators of the murders at Musha church and at Mwulire Hill. However, for the reasons explained below, a conviction will not be entered on Count 4 because it is an included offence in Count 5 (extermination as a crime against humanity).

*3. Count 5: Extermination*

461. Count 5 charges:

> By his acts in relation to the events described in paragraphs 3.7 to 3.16 above, Laurent SEMANZA 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 stipulated in Article 3(b) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

462. In light of its factual and legal findings, the Chamber will not consider the allegations in paragraphs 3.7, 3.8, 3.9, 3.10, 3.15, and 3.16.[699] The Chamber has made factual and legal findings in relation to paragraphs 3.11 through 3.14 about the Accused's participation in massacres at Musha church, Mabare mosque, and Mwulire Hill. The Chamber notes, however, that the Accused was not proved to have made a substantial contribution to the killings at Mabare mosque.

463. The material element of extermination is the mass killing of a substantial number of civilians. In foregoing legal findings, the Chamber has found that the Accused aided and abetted the principal perpetrators of the murders of civilians at Musha church and Mwulire Hill. The Chamber is not, however, in a position to make a specific finding of the number of deaths at either the Musha church or the Mwulire Hill massacres. The Chamber recalls that a substantial number of refugees were killed at Musha church. One witness recalled seeing around 100 bodies at this site. The Chamber also recalls that on 18 April 1994 there were up to 10,000 refugees at Mwulire Hill and that after the attack the hill was full of corpses. On the basis of the

[699] *See supra* paras. 50, 51, 52, 54, 61.

reliable and credible evidence of these two massacres, the Chamber is satisfied that the element of mass killing has been proven beyond a reasonable doubt. The Chamber finds that the scale of killings at these two massacres is sufficient to be termed extermination. The Chamber therefore finds that the principal perpetrators committed extermination as a crime against humanity.

464. The Chamber has found that the Accused intentionally aided and abetted the principal perpetrators at Musha church and Mwulire Hill with the knowledge that he was assisting them to commit murder as a crime against humanity. On the same evidence, and in light of the scale of these events, the Chamber is further satisfied that the Accused also acted to assist the principals to commit extermination as a crime against humanity with the necessary knowledge and awareness. Having regard to the totality of the evidence, and in particular the Accused's attendance at various massacre sites and his personal statements, the Chamber is convinced beyond a reasonable doubt that the Accused acted intentionally to assist the principal perpetrators to commit extermination as a crime against humanity.

465. Accordingly, the Chamber finds that the Accused is individually criminally responsible for aiding and abetting extermination as a crime against humanity. However, for the reasons expressed in his separate opinion, Judge Dolenc considers that it would be impermissible to convict on Count 5 because of the apparent ideal concurrence of the crime charged therein with the crime of complicity in genocide charged in Count 3. The Chamber, by a majority, finds the Accused guilty on Count 5.

*4. Count 6: Persecution*

466. Count 6 charges:

> By his acts in relation to the events described in paragraphs 3.7 to 3.16 above, Laurent SEMANZA is responsible for the PERSECUTION of civilians on political, racial or religious grounds 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 stipulated in Article 3(h) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

467. In support of the charge of persecution, the Prosecutor has relied on paragraphs 3.7 to 3.16, which allege that the Accused participated in killing, causing serious bodily and mental harm, and raping civilians. The Indictment specifies, at paragraph 3.14, that the massacres targeted the Tutsi ethnic group.

468. In its factual findings, the Chamber has found that the Accused participated in killing civilians, mainly of Tutsi ethnicity, at Musha church and Mwulire Hill, but did not find that the Accused participated in any rapes at these sites. In light of its factual and legal findings, the Chamber will not address the allegations in paragraphs 3.7, 3.8, 3.9, 3.10, 3.15, and 3.16.[700]

469. The material element of persecution is the severe deprivation of fundamental rights on discriminatory grounds. The Chamber considers that it is obvious that killing is a severe violation of the fundamental right to life,[701] which could form the material element of persecution if the killings are perpetrated on discriminatory grounds.

470. The Indictment charges that the Accused committed persecution on political, racial, or religious grounds. The Chamber notes that the Prosecution Closing Brief did not advance any argument that the persecution was committed on racial or religious grounds and that, moreover, there was no evidence to support such grounds.[702] The Closing Brief does, however, advance the new argument that the persecution was ethnically based. Since this ground was not alleged in the Indictment, and is not a ground of persecution enumerated in the Statute, the Chamber will not take it into consideration.

471. The Prosecutor has submitted that the persecutory acts were committed on political grounds against moderate Hutus and others sympathetic to the Tutsi.[703] However, the Prosecutor failed to demonstrate that this is a "political" group. The Chamber further observes that there is nothing in the concise statement of the facts that suggests that any killings were committed on political grounds. After reviewing

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[700] *See supra* paras. 50, 51, 52, 54, 61.
[701] Universal Declaration of Human Rights, G.A. Res. 217A (III), UN Doc A/810, p. 71 (1948), art. 3; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), p. 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3, art. 6.
[702] Prosecution Closing Brief paras. 73-78.
[703] Prosecution Closing Brief paras. 77-78.

the evidence, noting in particular the separation of Tutsis from Hutus at Musha church and the public and private statements of the Accused, the Chamber concludes that the primary target of the killings was the Tutsi ethnic group. There is insufficient evidence on the record to explain the reasons for the deaths of Hutus during these attacks. This finding is, moreover, consistent with the Prosecutor's own characterization of the killings and the Chamber's legal findings concerning the counts of genocide.

472. Therefore, the Chamber finds that the Prosecutor failed to prove that the Accused is criminally responsible for persecution as a crime against humanity.

*5. Count 8: Rape*

473. Count 8 charges:

> By his acts in relation to the events described in paragraphs 3.15 and 3.16 above, Laurent SEMANZA is responsible for the RAPE 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 stipulated in Article 3(g) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

474. In light of the Chamber's finding that paragraphs 3.15 and 3.16 provide insufficient notice to the Accused, the Chamber finds the Accused not guilty on Count 8. Moreover, the Prosecutor has not satisfied the Chamber that the Accused is responsible for any rapes, other than the rape of Victim A charged in Count 10.

*6. Count 10: Rape*

475. Count 10 charges:

> By his acts in relation to the events described in paragraph 3.17 above, Laurent SEMANZA is responsible for the RAPE of Victim A and Victim B as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, and has thereby committed CRIMES AGAINST HUMANITY stipulated in Article 3(g) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

476. The Chamber has found, in relation to paragraph 3.17 of the Indictment, that the Accused, in the presence of commune and military authorities, addressed a crowd and asked them how their work of killing the Tutsis was progressing and then encouraged them to rape Tutsi women before killing them. Immediately thereafter, one of the men from the crowd had non-consensual sexual intercourse with Victim A, who was hiding in a nearby home. The Chamber has found that Victim B was killed by two other men from this crowd, but has had insufficient evidence to draw any conclusions about whether she had also been raped.

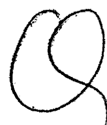
477. The Chamber finds beyond a reasonable doubt that Victim A was raped by one of the assailants who heard the Accused encouraging the crowd to rape Tutsi women. In light of the generalized instructions about raping and killing Tutsis, the ethnic group targeted by the widespread attack, and the fact that the assailant arrived at Victim A's hiding place with two others who then killed Victim B, the Chamber finds that this rape was part of the widespread attack against the civilian Tutsi population and that the assailant was so aware. The Chamber therefore finds that the principal perpetrator committed rape as a crime against humanity.

478. Having regard, *inter alia*, to the influence of the Accused and to the fact that the rape of Victim A occurred directly after the Accused instructed the group to rape, the Chamber finds that the Accused's encouragement constituted instigation because it was causally connected and substantially contributed to the actions of the principal perpetrator. The assailant's statement that he had been given permission to rape Victim A is evidence of a clear link between the Accused's statement and the crime. The Chamber also finds that the Accused made his statement intentionally with the awareness that he was influencing the perpetrator to commit the crime.

479. The Chamber finds beyond a reasonable doubt that the Accused instigated the rape of Victim A as a crime against humanity. Therefore, the Chamber finds the Accused guilty on Count 10.

*7. Count 11: Torture*

480. Count 11 charges:



> By his acts in relation to the events described in paragraphs 3.17 and 3.18 above, Laurent SEMANZA is responsible for the TORTURE of Victim A, Victim B and Victim C as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, and has thereby committed CRIMES AGAINST HUMANITY stipulated in Article 3(f) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3) and punishable in reference to Articles 22 and 23 of the same Statute.

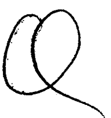
a. Victims A and B

481. The Chamber has found, in relation to paragraph 3.17 of the Indictment, that the Accused, in the presence of commune and military authorities, encouraged a crowd to rape Tutsi women before killing them. The Chamber has found that Victim A was raped immediately thereafter by one of the men from this crowd. The Chamber has found that Victim B was killed by two other men from this crowd, but has had insufficient evidence to draw any conclusions about whether she had also been raped or tortured.

482. Noting, in particular, the extreme level of fear occasioned by the circumstances surrounding the event and the nature of the rape of Victim A, the Chamber finds that the perpetrator inflicted severe mental suffering sufficient to form the material element of torture. It is therefore unnecessary to determine whether this rape also inflicted *severe physical* pain or suffering, for which the Prosecutor only adduced evidence of the fact that non-consensual intercourse occurred.

483. The Chamber finds that the rape was committed on the basis of discrimination, targeting Victim A because she was a Tutsi woman. The Chamber recalls that severe suffering inflicted for the purposes of discrimination constitutes torture and, therefore, finds that the principal perpetrator tortured Victim A by raping her for a discriminatory purpose.

484. The Chamber also finds that the torture formed part of the widespread attack on the civilian population since the victim was raped because she was a Tutsi, the ethnicity targeted by the attack. The Chamber finds that the perpetrator was aware of the larger context of his actions, since he acknowledged that he was acting on the encouragement of the Accused to rape women as part of their broader work of killing Tutsis and he knew that others from the crowd were similarly targeting Tutsis for rape



and murder. The Chamber therefore finds that the principal perpetrator committed torture as a crime against humanity.

485. The Chamber finds that by encouraging a crowd to rape women because of their ethnicity, the Accused was encouraging the crowd to inflict severe physical or mental pain or suffering for discriminatory purposes. Therefore, he was instigating not only rape, but rape for a discriminatory purpose, which legally constitutes torture. The Chamber finds that his words were causally connected to and substantially contributed to the torture of Victim A because immediately after the Accused made his remarks to the crowd, the assailant went to a nearby home and tortured Victim A by raping her because she was a Tutsi woman. The Chamber notes that the Accused's general influence in the community and the fact that his statements were made in the presence of commune and military authorities gave his instigation greater force and legitimacy. The Chamber finds that the Accused acted intentionally and with the awareness that he was influencing others to commit rape for a discriminatory purpose as part of a widespread attack on the civilian population on ethnic grounds. Therefore, the Chamber finds that the Accused is criminally responsible for instigating torture as a crime against humanity.

b. Victim C (Rusanganwa)

486. The Chamber found, in relation to paragraph 3.18 of the Indictment, that on 13 April 1994, the Accused, in the presence of Bourgmestre Bisengimana, intentionally inflicted serious injuries on Victim C, Rusanganwa, during questioning. The Accused asked Rusanganwa when the *Inkotanyi* were going to arrive, and the victim responded that he did not know. The Accused then inflicted injuries upon Rusanganwa with a machete, resulting in his death. On this basis, the Chamber finds that the physical and mental pain and suffering were severe. The Chamber also finds that the Accused acted with the aim of obtaining information from the victim. The intentional nature of the Accused's conduct is demonstrated by his search for Rusanganwa in the crowd and the nature of his question concerning the RPF advance.

487. The Accused's torture of Rusanganwa occurred during the attack at Musha church, where a large number of Tutsis were killed and which has already been determined to have been part of the widespread attack. The Chamber finds that the

torture of Rusanganwa to obtain information about the RPF advance similarly formed part of the widespread attack and that the Accused had such knowledge. Therefore, the Chamber finds that the Accused committed torture as a crime against humanity.

c. Conclusion Count 11

488. On the basis of the foregoing, the Chamber finds that the Accused is individually criminally responsible for torture as a crime against humanity as a principal perpetrator in relation to Victim C and for instigating the torture of Victim A. The Chamber therefore finds the Accused guilty on Count 11.

*8. Count 12: Murder*

489. Count 12 charges:

> By his acts in relation to the events described in paragraphs 3.17 and 3.18 above, Laurent SEMANZA is responsible for the MURDER of Victim B and Victim C as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, and has thereby committed CRIMES AGAINST HUMANITY stipulated in Article 3(a) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

a. Victim B

490. In the factual and legal findings in relation to paragraph 3.17 of the Indictment, the Chamber has found that the Accused instigated a crowd to kill Tutsi women after raping them. Immediately after the Accused's address, two men from the crowd killed Victim B, who was hiding in a nearby house.

491. The Chamber finds that the principal perpetrators acted with premeditated intention in purposefully seeking out a Tutsi female victim pursuant to the Accused's instruction and then killing her. From the generalized nature of the Accused's instructions and the principal's knowledge that one of their co-attackers was committing crimes against another female Tutsi victim at the same place, the Chamber finds that the principals knew that these acts formed part of the widespread attack on the Tutsi civilian population. Therefore, the Chamber finds that the principal perpetrators committed murder as a crime against humanity by killing Victim B.

492. The Chamber finds that the Accused's instruction constituted instigation because his words were causally connected to and substantially contributed to the killing of Victim B. In reaching this conclusion the Chamber has noted, *inter alia*, that the principal perpetrators were present during the Accused's statement and that they immediately attacked female Tutsi victims as specified by the Accused. The Chamber finds that the Accused made his statement with the awareness and intention that his words would influence the crowd to commit murder as a crime against humanity. The Chamber therefore finds that the Accused is criminally responsible for instigating the principal perpetrators to commit murder as a crime against humanity.

b. Victim C (Rusanganwa)

493. The Chamber also recalls its factual findings in relation to paragraph 3.18, in which it has concluded that the Accused intentionally inflicted serious injuries on Rusanganwa, resulting in his death. The Accused looked for Rusanganwa and found him within a large crowd of people, demonstrating the premeditated nature of his conduct. The Chamber finds that by repeatedly striking Rusanganwa with a machete, even after the completion of the questioning, the Accused was acting with a premeditated intent to kill. The Chamber has already found that these actions formed part of the widespread discriminatory attack on the civilian Tutsi population and that the Accused had such knowledge. Therefore, the Chamber finds that the Accused is criminally responsible for the murder of Rusanganwa as a crime against humanity.

c. Conclusion Count 12

494. Therefore, the Chamber finds beyond a reasonable doubt that the Accused is criminally responsible for murder as a crime against humanity for instigating the murder of Victim B and for personally committing the murder of Rusanganwa. The Chamber accordingly finds the Accused guilty on Count 12.

*9. Count 14: Murder*

495. Count 14 charges:

> By his acts in relation to the events described in paragraph 3.19 above, Laurent SEMANZA is responsible for the MURDER of Victim D, Victim E, Victim F, Victim G, Victim H and Victim J as part of a widespread or systematic attack

> against a civilian population on political, ethnic or racial grounds, and has thereby committed CRIMES AGAINST HUMANITY stipulated in Article 3(a) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 2(2) and 2(3) of the same Statute.

496. The Chamber has found that the Accused told a group of *Interahamwe* that a particular Tutsi family had not yet been killed and that no Tutsi should survive. Shortly thereafter, the *Interahamwe* searched for, located, and killed four members of the said family and two neighbours.

497. The Chamber finds that the principal perpetrators followed the Accused's instructions and intentionally searched for the family, four members of which they then killed along with two neighbours. The Chamber therefore finds that these killings were intentional and premeditated. The Chamber finds that these murders formed part of the widespread attack, and that the principal perpetrators were so aware, since the subjects were clearly targeted because of their Tutsi ethnicity and because one member of the family was alleged to have been among the Tutsis who were defending themselves at Mwulire Hill. The Chamber, therefore, finds that the principal perpetrators committed murder as a crime against humanity.

498. The Chamber is convinced that the Accused's statements were causally connected to and contributed substantially to the commission of the murders of both the family and their neighbours who were hiding in the same field. The Prosecutor established that at least one of the killers, Antoine Rutikanga, was present when the Accused made the statement. A few hours after the Accused gave his instructions, the principal perpetrators searched for the family named by the Accused, killing four of its members and two neighbours. The Chamber finds that the Accused made his statements with the awareness and intent that his words would influence the principal perpetrators to commit murder as a crime against humanity.

499. The Chamber accordingly finds that the Accused is individually criminally responsible for instigating the murders of Victims D, E, F, G, H, and J as a crime against humanity and is therefore guilty on Count 14.

*10. Intra-Article 3 Cumulative Convictions*

a. Cumulative Convictions of Murder and Extermination by Killing

500. The Accused has been found individually criminally responsible for murder and extermination as crimes against humanity in respect of the same factual circumstances, namely the massacres at Musha church and Mwulire Hill. Applying the test set out in *Musema*, the Chamber finds that murder and extermination as crimes against humanity each require proof of an element that is not required for the other crime. Murder as a crime against humanity as defined by the Statute has the element of premeditation, which is not required for killings which form extermination. Extermination, on the other hand, has an element of mass killing, which is not required for murder. Thus, the two crimes are legally distinct.

501. Cumulative convictions based on the same facts are permissible when the crimes have distinct elements, as they serve to describe the full culpability of the Accused and to provide a complete picture of his criminal conduct.[704] However, the Chamber takes note of the recent instruction of the ICTY Appeals Chamber that the distinct elements test for permissible cumulative convictions should not be applied mechanically or blindly. The ICTY Appeals Chamber has urged that care is needed in applying the elements test so as to avoid prejudice to the accused.[705]

502. The single distinguishing element of murder as a crime against humanity in the Statute is the requirement that it be committed with premeditation. Faced with an ambiguity between the English and French versions of the Statute, the Chamber adopted the higher mental element of premeditation, *inter alia*, because it was more consistent with a bilingual interpretation of the Statute and because it was apparently more favourable to the Accused.[706] The Chamber observes, however, that in this case the net result of the application of this higher mental element is that the Accused now faces cumulative convictions for murder and extermination.

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[704] *Kunarac*, Judgement, AC, para. 169.
[705] *Kunarac*, Judgement, AC, paras. 168-174.
[706] *But see Musema*, Judgement, TC, para. 214; *Rutaganda*, Judgement, TC, para. 79; *Akayesu*, Judgement, TC, para. 588; *Vasiljevic*, Judgement TC, para. 205; *Kvocka*, TC, para. 132; *Krstic*, Judgement, TC, para. 485; *Kordic,* Judgement, TC, para. 235; *Blaskic,* Judgement, TC, para. 216; *Jelisic*, Judgement, TC, para. 51.

503. The Chamber observes, moreover, that the elements of murder and extermination by means of direct killing are not substantially different. Premeditation, which requires planning, preparation, or at least a cool moment of reflection,[707] is not legally required for extermination by killing. However, it is difficult to imagine how a person could intend to perpetrate a mass killing of members of a civilian population with knowledge that this formed part of a wider attack on discriminatory grounds, without a level of intent very closely approaching or identical to premeditation. In practical terms, the same facts are used to prove the mental element of murder as are used to prove the mental element for extermination by killing. It therefore cannot be said that the elements of each of the crimes are *materially* distinct.[708]

504. In this case, where the murder and extermination are based on identical facts of premeditated killings and on the same mode of participation, convicting for both counts would not provide a better or more complete description of the entire criminal culpability of the Accused.

505. The Chamber thus considers that, in the circumstances of this case, the crimes against humanity of murder and extermination constitute the same core offence and that murder is best understood to be an included offence in the crime of extermination committed by killing. Two convictions on the basis of ideal concurrence of crimes are not justified in these circumstances. The Chamber will, therefore, not enter a conviction for murder as a crime against humanity charged in Count 4.

b. Cumulative Convictions of Rape and Torture by Rape

506. The Accused has been found to have instigated both rape and torture as crimes against humanity on the basis of the same facts. Applying the *Musema* test, the Chamber has carefully considered the elements of crimes against humanity of rape and torture. The ICTY Appeals Chamber in *Kunarac* concluded that convictions for both crimes on the basis of the same facts are permissible because rape and torture each contain one materially distinct element not contained in the other; rape requires sexual penetration, while torture requires that harm be inflicted for a prohibited

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[707] *Kayishema and Ruzindana*, Judgement, TC, para. 139.
[708] *Kayishema and Ruzindana*, Judgement, TC, para. 633.

purpose.[709] Therefore, both convictions will be entered in order to give a complete picture of the Accused's criminal conduct.

c. Cumulative Convictions of Murder and Torture

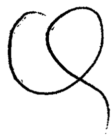
507. The Accused has been found criminally responsible for both torture and murder in relation to Rusanganwa. Applying the *Musema* test, it is clear that torture and murder as crimes against humanity have distinct elements. Torture is the infliction of severe pain and suffering for a prohibited purpose, while murder is the premeditated killing of the victim. When acts of torture lead to the killing of the victim, the culpable torturous conduct remains of such great independent importance that it must be reflected in the cumulative conviction on both crimes. In the circumstances of this case, where Rusanganwa died as a result of the torture, both convictions must stand in order to properly describe the totality of the Accused's culpable conduct.

d. Cumulative Convictions of Murder

508. The Chamber observes that the Prosecutor employed an inconsistent methodology, charging the Accused with three separate, yet overlapping, counts of murder as a crime against humanity. The Chamber considers that, as a starting point, one count should ordinarily represent a single crime. The nature of international crimes dictates that one crime may encompass a continuing or repeated pattern of actions that are logically connected by factors including time, place, victims, co-perpetrators, method, position of authority, mode of participation, motives, or intention, and which thereby form part of the same transaction.

509. In making the legal finding for Count 5, the Chamber has found that the Accused incurred criminal responsibility for aiding and abetting extermination in relation to the killings of a large number of refugees at Musha church. The Accused has also been found responsible in Count 12 for personally committing the murder of Victim C during the extermination at Musha church. The Chamber finds that although both of these crimes are based on the events at Musha church on 13 April 1994, they

[709] *Kunarac*, Judgement, AC, para. 179.



are actually premised on different subsets of facts. The Accused's responsibility for extermination was based on aiding and abetting the principal perpetrators in the massacre at Musha church. Responsibility for the murder of Victim C was based on the Accused's personal participation in seeking out, torturing, and killing Rusanganwa at the same site during the extermination.

510. In this instance, the Chamber is of the view that both convictions may stand in order to describe the totality of the Accused's culpable behavior at Musha church.

## E. Article 3 Common to the Geneva Conventions and Additional Protocol II Thereto

511. Counts 7, 9, and 13 charge the Accused with serious violations of Common Article 3 and Additional Protocol II under Article 4 of the Statute.

512. At the threshold, the Prosecutor must prove the following three elements beyond a reasonable doubt: (1) that a non-international armed conflict existed on the territory of the concerned state; (2) that the victims were not taking part in the hostilities at the time of the alleged violation; and (3) that a nexus existed between the Accused's alleged crimes and the non-international armed conflict. If these three elements are proved, the Chamber will then assess whether a specific violation of Common Article 3 or Additional Protocol II occurred.

513. In light of its findings, the Chamber will assess only Counts 7, 9, and 13 in the context of the alleged violations occurring at Musha church (paragraph 3.11), Mwulire Hill (paragraph 3.12), and Mabare mosque (paragraph 3.13), as well as the alleged violations committed against Rusanganwa (paragraph 3.18) and Victims A and B (paragraph 3.17).

### *1. Existence of a Non-International Armed Conflict*

514. Based on its findings with respect to paragraph 3.4.2 of the Indictment, the Chamber finds beyond a reasonable doubt that during the relevant period, an armed conflict of a non-international character existed on the territory of Rwanda.[710]

### *2. Victims*

515. The Chamber recalls that Rusanganwa, Victims A and B, and the victims at Musha church, Mwulire Hill, and Mabare mosque were not taking part in the hostilities at the time of the alleged offences. In reaching this conclusion, the Chamber has fully considered the suggestions of the Defence that armed RPF infiltrators

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[710] *See Prosecutor v. Semanza*, Case No. 97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, TC, 3 November 2000, para. 48, Annex A, para. 3. *See* Annex II, Part A, para. 3.

provoked the attacks or were involved in the fighting. This contention is not supported, however, by any credible or reliable evidence. Moreover, the Chamber emphasises that the possible presence of combatants within groups of refugees does not deprive those who are non-combatants of their protected status.

*3. Nexus to the Non-International Armed Conflict*

516. A majority of the Chamber finds that the relevant crimes charged against the Accused in Counts 7, 9, and 13 were closely related to the hostilities; Judge Ostrovsky dissents from the finding of nexus discussed herein for the reasons set out in his separate opinion. In Counts 7, 9, and 13, the Prosecutor averred that the Accused committed the alleged crimes "in the course of a non-international armed conflict". The Chamber understands this phrase as meaning that the alleged crimes had a nexus to the armed conflict.

517. A nexus exists between the alleged offence and the non-international armed conflict when the alleged offence is closely related to the hostilities. In determining whether the requisite close relation exists, the Chamber agrees with the following observation of the ICTY Appeals Chamber in *Kunarac*:

> [T]he existence of armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit [the offence], his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established … that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.[711]

518. In the Chamber's opinion, the ongoing armed conflict between the Rwandan government forces and the RPF, which was identified with the Tutsi ethnic minority in Rwanda, both created the situation and provided a pretext for the extensive killings and other abuses of Tutsi civilians. The Chamber recalls that in this case the killings began in Gikoro and Bicumbi communes, shortly after the death of President Habyarimana, when the active hostilities resumed between the RPF and government forces. Civilians displaced by the armed conflict, as well as those fearing the increasing violence in their localities, who were mostly Tutsi, sought refuge at sites

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[711] *Kunarac*, Judgement, AC, para. 58.

such as Mabare mosque, Musha church, and Mwulire Hill, or went into hiding, such as Victims A and B.

519. In the Chamber's opinion, certain civilian and military authorities, as well as other important personalities, exploited the armed conflict to kill and mistreat Tutsis in Bicumbi and Gikoro. Rwandan government soldiers and gendarmes played an active role in the attacks against the concentrated refugee populations at Musha church, Mabare mosque, and Mwulire Hill. The participation of armed soldiers and gendarmes in the massacres substantially influenced the manner in which the killings were executed. The evidence reflects that these attacks generally involved a number of armed soldiers, gendarmes, *Interahamwe* militiamen, and commune authorities. The involvement of military officials and personnel in the killings of local Tutsi civilians tied these killings to the broader conflict.

520. The Accused participated in these operations by gathering or bringing *Interahamwe* militiamen and soldiers to the attacks. He also worked in tandem with the soldiers and *Interahamwe* to identify and kill Tutsi civilian refugees. The Chamber also recalls that with soldiers and high ranking military and commune officials at his side, the Accused asked a crowd how their work of killing the Tutsis was progressing and encouraged them to rape Tutsi women before killing them.

521. The armed conflict also substantially motivated the attacks perpetrated against Tutsi civilians in Bicumbi and Gikoro. During the massacre at Musha church, the Chamber recalls, the Accused specifically sought out Rusanganwa, who was a prominent Tutsi, and questioned him about the RPF advance. When Rusanganwa did not provide any information, the Accused struck him with a machete contributing to his death. Moreover, as the RPF army advanced toward Bicumbi and Gikoro, the killings of Tutsi civilians in these two communes intensified. This is illustrated in particular by the Mwulire Hill massacre, where the refugees had successfully defended themselves between 8 and 18 April 1994 from daily attacks. The Chamber recalls, however, that on 18 April 1994, as the RPF army neared the commune, the Accused brought *Interahamwe* and armed soldiers to Mwulire Hill to participate in a massive assault, which decisively defeated the refugees' resistance and resulted in the massacre of most of the civilians there.

522. The Accused's participation in the military operations conducted against civilian refugees and, in particular, his attempt to elicit information concerning the advance of the enemy army reveal that his conduct was closely related to the hostilities. The Chamber therefore has no doubt that a nexus existed between the Accused's alleged offences and the armed conflict in Rwanda.

*4. Specific Violations of Common Article 3 and Additional Protocol II*

a. Count 7: 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

523. Count 7 of the Indictment charges:

> By his acts in relation to the events described in paragraphs 3.4 (subparagraphs 3.4.1 to 3.4.3), 3.6 and 3.9 to 3.16 in particular, Laurent SEMANZA 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 rape, torture, mutilations or any form of corporal punishment, and has thereby committed SERIOUS VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS of 12 August 1949, for the PROTECTION OF WAR VICTIMS, particularly paragraph (1)(a), and of ADDITIONAL PROTOCOL II thereto of 8 June 1977, particularly Article 4(2)(a), stipulated in Article 4(a) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

524. The Accused is charged with serious violations of Common Article 3 and Additional Protocol II in relation to his acts at Musha church (paragraph 3.11), Mwulire Hill (paragraph 3.12), and Mabare mosque (paragraph 3.13).

(i) Musha Church (paragraph 3.11)

525. The Accused gathered and brought *Interahamwe* to participate in the killings of hundreds of Tutsi refugees at Musha church and instructed *Interahamwe* and soldiers to separate the Tutsi refugees from the Hutu refugees and to kill the Tutsis.

526. The *actus reus* of "murder" requires that the perpetrator engage in the intentional killing of civilians. The Chamber finds beyond a reasonable doubt that the perpetrators at Musha church engaged in the intentional killing of civilians as

evidenced by the killing of the Tutsi civilians on the Accused's directions after their separation from the Hutu refugees.

527. The Chamber finds that the Accused's acts of gathering *Interahamwe* to participate in the massacre provided substantial support to the killing of civilians at Musha church because the assailants brought by the Accused engaged in the killings. The Chamber also finds that in gathering the *Interahamwe* for the massacre at the church, the Accused acted intentionally and with the awareness that he was assisting the principal perpetrator to commit the crimes. The Chamber finds that the Accused was aware of what would occur when he gathered the *Interahamwe* because the previous day he had been at Mabare mosque where *Interahamwe* had participated in the killings. In addition, before going to Musha church, he urged people in a crowd to rape and kill Tutsi women.

528. The Chamber also finds that the Accused encouraged and supported the murder of civilians when he instructed soldiers to separate Tutsi from Hutu refugees, assisted in identifying Tutsi refugees to be murdered, and then directed the *Interahamwe* and soldiers to kill the refugees. The Chamber finds that these acts substantially contributed to the murder of these civilian refugees because the assailants executed the directions shortly after the Accused gave them, and the Accused personally pointed out specific civilian Tutsi refugees who were then killed. The Chamber also finds that the Accused's personal and integral involvement in the identification of Tutsis and his directions given to the assailants reflect that he acted intentionally and with the awareness that he was assisting the principal perpetrators to commit the crime.

(ii) Mwulire Hill (paragraph 3.12)

529. The Accused brought *Interahamwe* and soldiers to the decisive attack on the Tutsi civilians at Mwulire Hill on 18 April 1994 and shot into a crowd of refugees.

530. The Chamber finds beyond a reasonable doubt that the perpetrators at Mwulire Hill engaged in the intentional killing of Tutsi civilian refugees.

531. The Chamber finds that the Accused's acts of bringing *Interahamwe*, soldiers, and their "equipment" to the massacre provided substantial support to the murder of

Tutsi civilians because these assailants engaged in the killings which only occurred on a large scale during this attack. The Chamber also finds that in bringing the *Interahamwe* and soldiers to the attack, the Accused acted intentionally and with the awareness he was assisting the principal perpetrators in committing the crimes. The Accused's earlier presence at Mabare mosque and his participation in the Musha church massacre demonstrate that he was aware that bringing *Interahamwe*, soldiers, and their "equipment" to Mwulire Hill would assist in the killings.

532. The Chamber also found that the Accused fired his weapon into a crowd of refugees. On the available evidence, the Chamber is not convinced that the Accused thereby personally killed or injured any refugee. However, this act further reflects that the Accused acted intentionally to assist the principal perpetrators in murdering the refugees and that he did so with full knowledge of the consequences of his actions.

(iii)Mabare Mosque (paragraph 3.13)

533. The Accused was armed and present during the massacre at Mabare mosque and afterwards told the attackers that "we came to assist" and urged the attackers to seek out and exterminate those who had not been killed.

534. The Prosecutor did not prove that the Accused used his firearm or actually assisted the attackers, for example, by bringing weapons or reinforcements. The Chamber is not satisfied that the Accused's statement, "we came to assist you", uttered after the attack, provides sufficient evidence of his criminal participation in the massacre. The Chamber recalls that assistance only gives rise to criminal liability under the Statute where it is substantial. Therefore, in the absence of specific evidence as to the exact nature of the assistance the Accused purported to give, the Chamber has no basis for determining that it was substantial. Moreover, the Prosecutor provided no evidence that would definitively indicate that the Accused's mere presence or his statements at the end of the massacre had a substantial effect on the execution of the massacre or any further killings.

(iv)Conclusion: Count 7

535. The Chamber finds beyond a reasonable doubt that the Accused aided and abetted in the intentional murders committed at Musha church and Mwulire Hill. The

majority, Judge Ostrovsky dissenting for reasons set out in his separate opinion, finds that these acts constitute violations of Article 4(a) of the Statute.

536. Judge Williams is of the view that based on the law and the facts a conviction should be entered on this Count for the reasons stated herein. However, for the reasons expressed in his separate opinion, Judge Dolenc considers that it would be impermissible to convict on Count 7 because of the apparent ideal concurrence of the crime charged therein with the crime of complicity in genocide charged in Count 3. Therefore, by a majority, no conviction will be entered for Count 7.

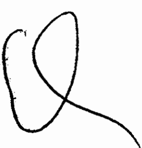
b. Count 9: Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault

537. Count 9 of the Indictment charges:

> By his acts in relation to the events described in paragraphs 3.4 (subparagraphs 3.4.1 to 3.4.3), 3.6, 3.14, 3.15 and 3.16, Laurent SEMANZA is responsible for causing outrages upon personal dignity of women, including humiliating and degrading treatment, rape, sexual abuse and other forms of indecent assault, in the course of a non-international armed conflict, and has thereby committed SERIOUS VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS of 12 AUGUST 1949 for the PROTECTION OF WAR VICTIMS particularly paragraph (1)(c), and of ADDITIONAL PROTOCOL II thereto of 8 June 1977, particularly Article 4(2)(e), stipulated in Article 4(e) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

538. The Accused is charged with serious violations of Common Article 3 and Additional Protocol II for his conduct in relation to acts of rape and sexual violence allegedly occurring at Musha church (paragraph 3.11), Mwulire Hill (paragraph 3.12), and Mabare mosque (paragraph 3.13).

539. The Chamber recalls that the Prosecutor failed to introduce any evidence of the occurrence of rape or other forms of sexual violence at these sites. Therefore, the Chamber finds the Accused not guilty on Count 9.



c. Count 13: 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

540. Count 13 of the Indictment charges:

> By his acts in relation to the events described in paragraphs 3.4 (subparagraphs 3.4..1 to 3.4.3), 3.6, 3.17 and 3.18 above Laurent SEMANZA is responsible for causing violence to the life, health and physical or mental well-being of Victim A, Victim B and Victim C in the course of a non-international armed conflict, including murder as well as cruel treatment; to wit rape, torture and mutilations, and has thereby committed SERIOUS VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS of 12 August 1949 for the PROTECTION OF WAR VICTIMS, particularly paragraph (1) (a), and of ADDITIONAL PROTOCOL II thereto of 8 June 1977, particularly Article 4(2)(a), stipulated in Article 4(a) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

541. The Accused is charged with serious violations of Common Article 3 and Additional Protocol II for his acts in relation to the alleged violations committed against Victims A and B (paragraph 3.17) and Rusanganwa (paragraph 3.18).

(i) Victims A and B (paragraph 3.17)

542. The Accused, in the presence of commune and military authorities, addressed a crowd and asked them how their work of killing the Tutsis was progressing, and then encouraged them to rape Tutsi women before killing them. Three men from this crowd came to the nearby house where Victims A and B were hiding. One of these assailants had non-consensual sexual intercourse with Victim A. Two others took Victim B outside where she was killed.

543. The *actus reus* of rape is non-consensual sexual penetration. The Chamber finds that Victim A was raped by one of the assailants who heard the Accused encourage the crowd.

544. The *actus reus* of torture involves the intentional infliction of severe mental or physical pain for the purpose of obtaining information or a confession; or punishing, intimidating or coercing the victim or a third person; or discriminating, on any ground, against the victim or a third person. The Chamber also notes that an act of rape may constitute torture if committed for a prohibited purpose.

545. The Chamber finds that the rape of Victim A constitutes torture because the assailant raped her because she was a Tutsi, which is a discriminatory purpose. In particular, the Chamber notes that the perpetrator acted intentionally and with this prohibited purpose because he acknowledged the Accused's discriminatory instructions to rape Tutsi women as part of their broader work of killing Tutsis.

546. Prosecution Witness VV heard Victim B scream that she preferred that the two attackers who took her outside kill her and that, when the witness left the house after the assailants had left, she found Victim B dead. There is insufficient evidence to establish whether Victim B was raped or tortured. The Chamber finds, however, that Victim B was intentionally murdered by the two men.

547. The Chamber finds that the Accused's encouragement to the crowd to rape Tutsi women as part of their work of killing Tutsis had a substantial effect on the rape and torture of Victim A and the murder of Victim B. The assailants, who perpetrated the acts, heard the Accused speak and immediately afterwards committed the acts. The admission by Victim A's assailant, who heard the Accused speak, that he had authorisation to rape her indicates that he was acting on Accused's directions to rape Tutsi women. The Chamber also notes that the Accused's general influence in the community and the fact that he made the statement in the presence of commune and military authorities gave his encouragement greater force and seeming legitimacy.

548. The Chamber also finds that in encouraging the crowd, the Accused acted intentionally and with the awareness that he was contributing to the commission of the crimes by the principal perpetrators. The Accused's discussion with the crowd about their progress of killing Tutsis reflects that he was aware that this crowd would engage in criminal acts.

(ii) Rusanganwa (paragraph 3.18)

549. During the Musha church massacre, the Accused and Bisengimana, the bourgmestre of Gikoro, specifically sought out Rusanganwa and questioned him about the RPF advance. When Rusanganwa did not provide any information, the Accused repeatedly struck him with a machete. The Chamber finds that by these acts, the Accused tortured Rusanganwa by inflicting serious physical pain with the aim of obtaining information about the RPF advance. The intentional nature of the Accused's

conduct is demonstrated by his seeking out Rusanganwa for questioning and using the machete for inflicting serious injury shortly after Rusanganwa's negative response to the question.

550. The Chamber also finds that the Accused intentionally contributed to the killing of Rusanganwa. In the Chamber's opinion, the Accused's infliction of blows with a machete reflects that he intended to kill Rusanganwa.

(iii)Conclusion: Count 13

551. The Chamber finds beyond a reasonable doubt that the Accused instigated the rape and torture of Victim A and the murder of Victim B and that the Accused committed torture and intentional murder of Rusanganwa. The majority, Judge Ostrovsky dissenting for reasons set out in his separate opinion, finds that these acts constitute violations of Article 4(a) of the Statute.

552. Judge Williams is of the view that based on the law and the facts a conviction should be entered on this Count for the reasons stated herein. However, for the reasons expressed in his separate opinion, Judge Dolenc considers that it would be impermissible to convict on Count 13 because of the apparent ideal concurrence of the crime charged therein with rape, torture, and murder as crimes against humanity charged in Counts 10, 11, and 12. Therefore, by a majority, no conviction will be entered for Count 13.

## VII. THE VERDICT

553. For the reasons set out in this Judgement, having considered all the evidence and arguments, the Trial Chamber finds in respect of the Accused as follows.

Unanimously:

Count 1: NOT GUILTY of Genocide

Count 2: NOT GUILTY of Direct and Public Incitement to Commit Genocide

Count 3: GUILTY of Complicity in Genocide

Count 4: NOT GUILTY of Crimes Against Humanity (Murder)

Count 6: NOT GUILTY of Crimes Against Humanity (Persecution)

Count 8: NOT GUILTY of Crimes Against Humanity (Rape)

Count 9: NOT GUILTY of Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Article 4(e) of the Statute)

Count 10: GUILTY of Crimes Against Humanity (Rape)

Count 11: GUILTY of Crimes Against Humanity (Torture)

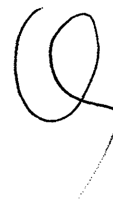
Count 12: GUILTY of Crimes Against Humanity (Murder)

Count 14: GUILTY of Crimes Against Humanity (Murder)

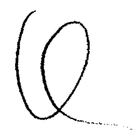
By a majority:

Count 5: GUILTY of Crimes Against Humanity (Extermination) (Judge Dolenc dissenting)

Count 7: NOT GUILTY of Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Article 4(a) of the Statute) (Judge Williams dissenting)



Count 13: NOT GUILTY of Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Article 4(a) of the Statute) (Judge Williams dissenting)



# VIII. SENTENCING

554. Having found the Accused guilty, the Chamber now turns to the question of sentencing. The appropriate sentence serves to further the goals of retribution, deterrence, stigmatization, rehabilitation, protection of society, and national reconciliation. Pursuant to Articles 22 and 23 of the Statute and Rule 101 of the Rules, the Chamber will take into account the gravity of the offences and the individual circumstances of the Accused, as well as any other aggravating or mitigating circumstances, and the general practice regarding prison sentences in the courts of Rwanda. The Chamber will also give credit to the Accused for the period he was detained in custody pending trial. Pursuant to the decision of the Appeals Chamber, the Trial Chamber will reduce the sentence for the violation of the Accused's rights during pre-trial detention.[712]

## A. Gravity of the Offences

555. The penalty must, first and foremost, be commensurate with the gravity of the offence.[713] All of the crimes in the Statute are crimes of an extremely serious nature, rising to the level of international prohibition. Thus, in assessing the gravity of the offence, the Chamber ought to go beyond the abstract gravity of the crime to take into account the particular circumstances of the case, as well as the form and degree of the participation of the Accused in the crime.

556. The Chamber has found the Accused guilty of participating in genocide and extermination, murder, rape, and torture as crimes against humanity. These are, by definition, crimes of the most serious gravity, which affect the very foundations of society and shock the conscience of humanity. Through his participation in these crimes, the Accused contributed to the harming and killing of many civilian Tutsi.

557. With the exception of his personal participation in the torture and murder of Rusanganwa, the Accused was not a principal perpetrator of the other crimes for

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[712] *Semanza v. Prosecutor,* Case No. ICTR-97-20-A, Decision, AC, 31 May 2000.

[713] Statute, art. 23(2). *Musema*, Judgement, AC, para. 382; *Akayesu*, Judgement, AC, para. 413; *Kambanda*, Judgement, AC, para. 125; *Kupreskic*, Judgement, AC, para. 442; *Celebici*, Judgement, AC, para. 731; *Aleksovski*, Judgement, AC, para. 182.

which he has been found guilty, nor was he found to be in a position of hierarchical authority. The Accused has been convicted of complicity in genocide, of aiding and abetting extermination as a crime against humanity, and of instigating the murder of seven people and the rape and torture of one victim. The Accused's acts of complicity, aiding and abetting, and instigating are crimes of indirect participation.

558. The Prosecutor submitted that the Accused should be sentenced to life imprisonment.[714] The Prosecutor argued that the murder of a single person is sufficient to warrant the imposition of the maximum sentence and stressed that she could have brought hundreds of counts against the Accused, one for each person killed in the massacres.[715] The Prosecutor urged that anything less than a life sentence would diminish the value of the lives of the victims and will attract cynicism towards international criminal tribunals.[716]

559. Considering the totality of the evidence, the Chamber is not convinced that a life sentence is necessary to reflect the gravity of the crimes of which the Accused has been found guilty. The penalty of life imprisonment, the highest penalty available at this Tribunal, should be reserved for the most serious offenders.[717] The principle of gradation in sentencing requires the Chamber to differentiate criminal conduct on the basis of its gravity.[718] Having regard to the nature of the offences, and the role and the degree of participation of the Accused, the Chamber does not consider that the criminal acts of the Accused deserve the highest sentence.

### *1. Sentencing Ranges*

560. The Chamber has also taken into consideration the sentencing practice in the Rwandan courts, as evidenced by the penalties for similar crimes prescribed in the Rwandan Penal Code and the Organic Law,[719] as well as the sentencing practices of

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[714] Prosecution Closing Brief paras. 156-157.
[715] Prosecution Closing Brief paras. 159-160; T. 17 June 2002 pp. 173-174.
[716] Prosecution Closing Brief paras. 142-144.
[717] Article 77 of the ICC Statute provides for a fixed term sentence not exceeding thirty years and for life imprisonment only when justified by the extreme gravity of the crime and the circumstances of the Accused.
[718] *Musema*, Judgement, AC, paras. 381-382; *Ntakirutimana*, Judgement, TC, para. 884.
[719] Loi Organique n° 08/96 du 30/08/96 Sur L'organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises a partir du 1er Octobre 1990, Journal Officiel n° 17 du 1/9/1996 (Rwanda).

this Tribunal and of the ICTY. In doing so, the Chamber has not lost sight of its overarching obligation to tailor the sentence to the gravity of the crime and to the individual circumstances of the offender.[720]

561. The Rwandan Penal Code provides for fixed term sentences of up to a maximum of twenty years' imprisonment or, exceptionally, up to thirty years' imprisonment in cases of concurrent offences.[721] The most serious crimes, such as murder, may be punished by life imprisonment or death.[722] Rape is generally punishable by a sentence of five to ten years, which may be doubled for certain prescribed aggravating elements such as the young age of the victim, the position of authority of the accused, or the severity of the physical harm.[723] The Code specifically provides that accomplices may be subject to the same penalties as the principal authors of the crime.[724] The Rwandan Organic Law indicates that, even for genocide and crimes against humanity, the ordinary Penal Code sentences shall apply with certain modifications, which include heightened penalties of death and life imprisonment, respectively, for Categories 1 and 2 perpetrators.[725]

562. The Chamber has also examined the sentencing practice of this Tribunal and of the ICTY. The Chamber notes that the practice of awarding a single sentence for the totality of an accused's conduct makes it difficult to determine the range of sentences for each specific crime. Notwithstanding this difficulty, it is possible to ascertain general ranges of sentences which may provide useful guidance to the Chamber in determining the appropriate sentence in this case.

563. Principal perpetrators convicted of either genocide or extermination as a crime against humanity, or both, have been punished with sentences ranging from fifteen

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[720] *Celebici*, Judgement, AC, paras. 717, 719 ("[T]he Appeals Chamber notes that as a general principle such comparison is often of limited assistance. While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results. They are therefore not reliable as the *sole* basis for sentencing an individual.").
[721] C. Pén. arts. 35, 93 (Rwanda).
[722] *See, e.g.*, C. Pén. arts. 311-317 (Rwanda).
[723] C. Pén. arts. 360, 361 (Rwanda).
[724] C. Pén. art. 89 (Rwanda).
[725] Loi Organique n° 08/96 du 30/08/96 Sur L'organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises a partir du 1er Octobre 1990, Journal Officiel n° 17 du 1/9/1996, art. 14 (Rwanda).

years' imprisonment[726] to life imprisonment.[727] Secondary or indirect forms of participation have generally resulted a lower sentence. For example, Georges Ruggiu received a twelve year sentence for incitement to commit genocide after a plea of guilty,[728] and Elizaphan Ntakirutimana received a ten year sentence for aiding and abetting genocide, with a special emphasis on his advanced age.[729]

564. In the jurisprudence of the two Tribunals, rape as a crime against humanity has resulted in specific sentences between twelve years[730] and fifteen years.[731] Torture as a crime against humanity has been punished with specific sentences between five years[732] and twelve years.[733] Murder as a crime against humanity has been punished by specific fixed term sentences ranging from twelve years[734] to twenty years.[735] In other cases, convictions for these crimes have formed part of a single sentence of a fixed term or of life imprisonment for the totality of the conduct of the Accused.

## B. Aggravating Factors

565. The Prosecutor alleged several aggravating factors for the Chamber to consider in determining the appropriate sentence.[736] The Chamber notes, however, that only those matters that have been proved beyond a reasonable doubt may be considered in aggravation of the sentence.[737]

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[726] *Serushago*, Sentence, TC, p. 15.
[727] *Musema*, Judgement, TC, para. 1008; *Rutaganda*, Judgement, TC, para. 473; *Kayishema and Ruzindana*, Sentence, TC, para. 27; *Akayesu*, Sentence, TC, p. 13; *Kambanda*, Judgement, TC, p. 28.
[728] *Ruggiu*, Judgement, TC, p. 19.
[729] *Ntakirutimana*, Judgement, TC, paras. 898, 906, 921.
[730] *Kunarac*, Judgement, TC, para. 882.
[731] *Akayesu*, Sentence, TC, p. 13.
[732] *Simic*, Sentencing Judgement, TC, para. 122.
[733] *Kunarac*, Judgement, TC, para. 882.
[734] *Kupreskic*, Judgement, AC, para. 439 (Jospovic was originally sentenced at trial to fifteen years for persecution, murder, and inhumane acts as crimes against humanity. On appeal, this sentence was reduced to twelve years.).
[735] *Tadic*, Judgement in Sentencing Appeals, AC, para. 58 (Sentence for murder as a crime against humanity reduced from twenty-five years to twenty years on appeal.).
[736] Prosecution Closing Brief para. 156.
[737] *Ntakirutimana*, Judgement, TC, para. 893; *Celebici*, Judgement, AC, para. 763.

*1. Criminal Acts Not Alleged in the Indictment*

566. The Prosecutor submitted that the Chamber should consider allegations of criminal activity by the Accused, which were not charged in the Indictment, as aggravating factors in sentencing.[738] The Prosecutor argued that the following allegations should be considered: (i) the Accused personally killed a Tutsi woman in gruesome circumstances at Muymbu health centre; (ii) the Accused had captives crawl on their knees to be beheaded by a machete-wielding executioner at Muyumbu health centre; (iii) the Accused drove a vehicle over the bodies of wounded people; (iv) the Accused ordered "his" *Interahamwe* to shoot Tutsis who were seeking refuge at his home; and (v) the Accused threatened to have a victim's nose cut off during an interrogation.

567. The ICTY Appeals Chamber has allowed that allegations of criminal activity not specifically pleaded in the indictment may be considered as aggravating factors when the accused has received sufficient notice, when the Prosecution makes a specific request for a factual finding in relation to the additional crimes, and when these allegations have been proven beyond a reasonable doubt.[739]

568. The evidence of the Accused's criminal activity advanced by the Prosecutor in aggravation of the Accused's sentence, but not included in the Indictment, was led during the testimony of Prosecution Witnesses VAQ,[740] VM,[741] and VI.[742] No objections that these allegations were outside the scope of the Indictment were raised by the Defence at the time when this evidence was led. The Defence cross-examined these witnesses about the allegations,[743] which the Accused refuted during his testimony,[744] and to which the Defence referred in its Closing Brief.[745] Therefore, it is clear that the Accused had notice of the substance of the allegations. The Prosecution

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[738] Prosecution Closing Brief para. 156.
[739] *Celebici*, Judgement, AC, para. 763.
[740] T. 14 March 2001 pp. 76-85.
[741] T. 6 March 2001 p. 100; T. 7 March 2001 p. 19.
[742] T. 15 November 2000 pp. 64-67.
[743] T. 15 November 2000 pp. 86-87; T. 7 March 2001 p. 19; T. 14 March 2001 pp. 93, 102, 106, 110-112; T. 15 March 2001 pp. 4-12, 23-37.
[744] T. 18 February 2002 pp. 70, 124-125; T. 28 February 2002 p. 98; T. 27 February 2002 pp. 114-115.
[745] Defence Closing Brief pp. 91-93.

Closing Brief specifically requests the Chamber to consider the allegations as aggravating factors.[746]

569. However, the Chamber is not satisfied that the Accused was put on notice that additional crimes within the jurisdiction of the Tribunal, but not charged in the Indictment, could be considered as aggravating factors in relation to his eventual sentence. No such indication was made by the Prosecutor prior to her Closing Brief. It is a matter of fundamental importance that the Defence ought to be able to focus its attention on the crimes contained within the Indictment. Ordinarily, crimes not charged in the Indictment are not relevant to the proceedings.

570. It would circumvent the proper course of justice to rely on allegations of further uncharged criminality to increase the sentence of the Accused. Where the Prosecutor has reliable evidence of criminal activity falling within the jurisdiction of the Tribunal, then she may choose to include those matters in the indictment against an accused. Where such matters arise only during the trial, the Prosecutor may request to have the indictment amended to include the new allegations. Having failed to include these crimes in the Indictment, the Prosecutor should not be permitted to achieve a similar effect by having them considered as aggravating factors.[747] In these circumstances, the Chamber will not place any reliance on criminal acts outside the scope of the Indictment and on which it has not made any factual findings.

*2. The Number of Deaths*

571. The Prosecutor also submitted that the number of victims is an aggravating factor.[748] Since the number of victims is an element of extermination as a crime against humanity, the Chamber already considered it in assessing the gravity of the offence of extermination and cannot also consider it as an aggravating factor in

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[746] Prosecution Closing Brief para. 156.

[747] *Kunarac*, Judgement, TC, para. 850 ("Either the Prosecutor should charge such conduct as an offence, or, where it is not directly related to another charged offence, she should desist from citing such conduct as an aggravating factor. The Trial Chamber understands that the multiplicity of humanitarian law violations committed during an armed conflict as part of a common criminal scheme often cannot be succinctly captured in an indictment. Considerations of fairness to the accused and judicial economy, however, outweigh the wish to have each and every crime committed during a war brought to light and adjudged in whatever way – that is something which this International Tribunal simply cannot do.").

[748] Prosecution Closing Brief para. 156.

sentencing for extermination.[749] However, the number of victims may be an aggravating factor in relation to genocide, a crime with no numeric minimum of victims. The Chamber, therefore, considers the number of victims killed as a result of the Accused's conduct at Musha church and Mwulire Hill as an aggravating factor in determining the appropriate sentence for complicity in genocide.

### 3. *The Conduct of the Defence*

572. The Prosecutor also urged the Chamber to consider that the "defence was conducted in a rather abusive fashion, in a manner that exacerbated the situation to the point that such would constitute aggravating circumstances."[750] In particular, the Prosecutor alleged that Defence Expert Witness Ndengejeho perpetuated dangerous stereotypes by testifying that Tutsi culture was based on lying.[751] The Chamber does not consider that either this testimony or the allegedly abusive conduct of the Defence is an aggravating factor in this case.

### 4. *Influence of the Accused*

573. The Chamber has, on its own initiative, also considered the influence and relative importance of the Accused in his commune as an aggravating factor. The Accused was a prominent and influential person in Bicumbi commune in 1994. Though he no longer held the post of bourgmestre, the Accused had been appointed to serve in the parliament that was to be established pursuant to the Arusha Accords, and he was still widely regarded in his locality as an influential person.[752] The Chamber was not satisfied that the Accused held any hierarchical position of superior responsibility over persons in his community. Nevertheless, the Accused's prominence and influence made it more likely that others would follow his negative example.[753] The Chamber thus considers this to be an aggravating factor.

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[749] *Ntakirutimana*, Judgement, TC, para. 893; *Vasiljevic*, Judgement, TC, paras. 277-278; *Simic*, Sentencing Judgement, TC, para. 62; *Todorovic*, Sentencing Judgement, TC, para. 57.
[750] T. 17 June 2002 pp. 170-171.
[751] T. 17 June 2002 pp. 170-171.
[752] *See supra* paras. 303, 304.
[753] *Simic*, Sentencing Judgment, TC, para. 67; *Kunarac*, Judgement, TC, para. 863.

**C. Mitigating Factors**

574. The Defence submitted that a number of factors relating to the personal circumstances of the Accused and the violation of the Accused's rights should mitigate his sentence.[754] Mitigating factors must be proved on a balance of probabilities.[755]

575. The Defence argued that the Accused's detention caused grave, though unspecified, prejudice to his family, whom the Accused greatly missed.[756] The Defence further submitted that the Accused was also a victim in the events of 1994, having lost his property and two of his daughters.[757] In the circumstances of this case, the Chamber does not consider these arguments as mitigating factors relevant to sentencing.

576. The Defence also submitted that the detention of the Accused has affected his health.[758] The Chamber has reviewed the statements of Dr. Belai, the Medical Officer of the Tribunal, dated 4 December 2000[759] and 6 December 2000,[760] and his confidential medical report filed on 6 December 2000, which revealed no serious health consideration and which found the Accused sufficiently healthy to stand trial. In these circumstances, the Chamber finds that the health condition of the Accused does not bear on sentencing.

577. The Defence submitted that the twenty years of development efforts by the Accused should be considered in deciding on the appropriate sentence.[761] The Chamber has noted the evidence from both Prosecution and Defence witnesses that the Accused was a successful bourgmestre in Bicumbi over a twenty year period. The Chamber heard that the Accused brought prosperity and development to his region.

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[754] Defence Closing Brief pp. 166-167.
[755] *Ntakirutimana*, Judgment, TC, para. 893; *Vasiljevic*, Judgement, TC, para. 272; *Sikirica*, Sentencing Judgement, TC, para. 110; *Simic*, Sentencing Judgment, TC, para. 40; *Kunarac*, Judgment, TC, para. 857.
[756] Defence Closing Brief p. 166.
[757] Defence Closing Brief p. 167.
[758] Defence Closing Brief p. 166.
[759] T. 4 December 2000 pp. 27-29.
[760] T. 6 December 2000 pp. 39-41, 44.
[761] Defence Closing Brief p. 166.

The Chamber thus considers the prior character and accomplishments of the Accused in mitigation of his sentence.

578. The Accused also submitted that his low level of command should be considered in mitigation.[762] The Chamber has already considered the role of the Accused in assessing the gravity of the offence. In this case, where the Accused has not been convicted of any crime based on superior responsibility, there is no reason to consider his level of command within an hierarchy. Such an argument is relevant when considering convictions for ordering, pursuant to Article 6(1), or for superior responsibility, pursuant to Article 6(3).

*1. Reduction of Sentence for Violation of Rights*

579. The Appeals Chamber found that prior to his surrender to the Tribunal the Accused suffered a violation of his right to be informed promptly of the nature of the charges against him when he was detained in custody for approximately eighteen days before being informed of the nature of the charges brought against him by the Prosecutor.[763] On a second occasion, the Accused was detained for a further period of eighteen days, before being informed of the nature of the charges, but the Appeals Chamber found this second violation to be less serious since he had already been informed in substance of the nature of the charges during his first period of detention.[764] The Appeals Chamber also found a violation of his right to challenge the lawfulness of his detention, when his writ of *habeas corpus* was not heard by the Chamber.[765] The Appeals Chamber, however, found that the Accused's counsel had not acted with the necessary diligence in bringing the matter before the Chamber and that, since the desired results were achieved shortly thereafter, the Accused suffered no material prejudice from the failure to address the motion.[766] Therefore, the Appeals Chamber held:

> [T]hat for the violation of his rights, the Appellant is entitled to a remedy which shall be given when judgement is rendered by the Trial Chamber, as follows:

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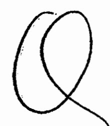
[762] Defence Closing Brief p. 167.
[763] *Semanza v. Prosecutor,* Case No. ICTR-97-20-A, Decision, AC, 31 May 2000, para. 87.
[764] *Semanza*, Decision, AC, 31 May 2000, para. 90.
[765] *Semanza*, Decision, AC, 31 May 2000, para. 114.
[766] *Semanza*, Decision, AC, 31 May 2000, paras. 121, 124.



(a) If he is found not guilty, the Appellant shall be entitled to financial compensation;

(b) If he is found guilty, the Appellant's sentence shall be reduced to take into account the violation of his rights, pursuant to Article 23 of the Statute.[767]

580. The Chamber has fully considered the nature of these violations. The total period of the violation of the Accused's right to be promptly informed of the charges lasted approximately thirty-six days, while the violation of his right to challenge his detention was found not to cause material prejudice. Considering the importance of these fundamental rights, the Chamber finds that it is appropriate to reduce the Accused's sentence by a period of six months.

581. In its Closing Brief, the Defence raised further violations of the Accused's rights. The Defence proposed that the failure of the Tribunal to provide written translation of all documents into Kinyarwanda for the Accused during trial violated his right to defend himself in a language that he understands.[768] The Chamber considers this argument to be unconvincing. The language rights of the Accused are set out in Article 20(4)(a), (b), and (f) of the Statute and Rule 3(B) and (E) of the Rules. In this case, the Accused, who has an understanding of French,[769] was provided with the free assistance of a Kinyarwanda interpreter for the entire trial proceeding, including his testimony. Many of the important documents were read onto the record and translated into Kinyarwanda for the benefit of the Accused. The Registry is responsible for facilitating, in consultation with the Defence, the timely translation of documents into Kinyarwanda, and the Defence has not made any showing that the Registry has failed to translate any particular document for which a request had been made. Moreover, pursuant to the request of the Defence, the Registry hired a private contractor to provide additional translation services for the Accused. This contractor was arrested by the Tanzanian authorities,[770] and the Defence asserts that this

[767] *Semanza*, Decision, AC, 31 May 2000, p. 34.
[768] Defence Closing Brief p. 167.
[769] *See, e.g.*, T. 16 February 1998 p. 19 ("Today I can speak in French, I can express myself in French, but later on I prefer to use my native tongue, my mother tongue, which is Kinyarwanda… Yes, I wish to speak in French today."); T. 23 September 1999 p. 18; T. 18 June 1999 pp. 6-11; T. 25 April 2001 p. 167; T. 7 July 2000 p. 7 ("He is not really very, very proficient in French, but even if they were translated into the French language, that would be okay.").
[770] T. 22 November 2001 p. 3.

discouraged other potential translators from working for the Defence. The Chamber does not see any merit in this unsupported assertion. The Defence has not made any specific argument that the failure to translate any particular document prejudiced the Accused's right to defend himself. Thus, the Chamber finds that there has been no breach of the Accused's language rights which would warrant compensation at sentencing.

582. The Defence also submits that the Accused's right to be tried without undue delay has been violated by the long delays in proceedings and the frequent sanctioning of the Defence by the Trial Chamber.[771] As evidence of the delay caused by the Prosecution, the Defence argues that the Prosecutor amended the Indictment three times and that the Prosecutor brought rebuttal witnesses. In the context of this case, the Chamber does not consider either of these arguments to be persuasive. The Rules provide for the amendment of indictments, and the Prosecutor did so in this case with the leave of the Chamber under the Rules.[772] Moreover, it was the failure of the Defence to provide the alibi notice, as required by Rule 67, that precipitated the Chamber's decision to grant leave for the Prosecution rebuttal in respect of the alibi.[773] In considering the totality of the time spent by the Accused in pre-conviction custody, the Chamber finds that the period between transfer and conviction is indeed regrettable. However, having considered this total period within the context of the complexity of the case, the number of other defendants before the Tribunal, the limited resources of the Tribunal, and the delays occasioned by the Defence, the Chamber does not find that there has been a violation of the Accused's right to be tried without undue delay.

*2. Credit for Time Served*

583. The Accused was originally arrested in Cameroon on 26 March 1996, pursuant to an international arrest warrant issued by the Office of the Public Prosecutor of

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[771] Defence Closing Brief p. 167.
[772] *See supra* para. 6.
[773] *Prosecutor v. Semanza,* Case No. ICTR-97-20-T, Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence and the Prosecutor's Supplementary Motion for Leave to Call Rebuttal Evidence, TC, 27 March 2002.

Rwanda. Since that time, the Accused has been detained in custody, first in Cameroon, and then at the United Nations Detention Facility in Arusha.

584. Pursuant to Rule 101(D), the Accused is entitled to credit for the period during which he was detained in custody pending surrender and trial. The Chamber considers that this period also covers the periods during which the Accused was detained solely on the basis of the Rwandan warrant of arrest, because this warrant was based on the same allegations that form the subject matter of this trial.[774] In such circumstances, fairness requires that account be taken of the total period the Accused spent in custody. Therefore, as of 15 May 2003, the Accused is entitled to credit for time served of seven years, one month, and nineteen days.

## D. Conclusion

### *1. Genocide and Extermination (Counts 3 and 5)*

585. For the reasons explained in the foregoing analysis, the Chamber finds that the appropriate sentence for the Accused for complicity in genocide (Count 3) and for aiding and abetting extermination as a crime against humanity (Count 5) is two terms of fifteen years' imprisonment. Since these crimes are based on identical sets of facts, the massacres at Musha church and Mwulire Hill, the sentences for these two counts will run concurrently.

### *2. Rape, Torture, Murder (Counts 10, 11, 12, and 14)*

586. The Accused has been convicted of rape (Count 10), torture (Count 11), and murder (Count 12) as crimes against humanity on the basis of two distinct factual events. The rape conviction is premised on the Accused's instigation of a crowd to rape Tutsi women before killing them. This is the same factual foundation as part of the torture count and part of the murder count. The counts of torture and murder also encompass the Accused's personal participation in the torture and murder of Rusanganwa. Since these three counts are based on connected events, the Chamber considers that the sentences for these counts should run concurrently.

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[774] *Tadic*, Judgement in Sentencing Appeals, AC, para. 38.

587. The Accused has also been convicted of a separate count of murder as a crime against humanity (Count 14) in relation to his instigation of a group of *Interahamwe* resulting in six deaths. This event was also part of the same widespread attack as the other crimes against humanity and is similar in nature to the instigation portion of Count 12. Because of the close relationship between the instigation and the substance of Count 12, the Chamber also considers that the sentence for Count 14 should be served concurrently with Counts 10, 11, and 12.

588. The sentences for Counts 10, 11, 12, and 14 shall be:

Count 10: instigating rape as a crime against humanity - seven years' imprisonment

Count 11: instigating torture by rape and personally committing torture as a crime against humanity - ten years' imprisonment

Count 12: instigating one murder and personally committing one murder - ten years' imprisonment

Count 14: instigating murder of six persons - eight years' imprisonment

589. The concurrent sentences for Counts 10, 11, 12, and 14 shall be served consecutively to the concurrent sentences for Counts 3 and 5.

*3. Conclusion*

590. Therefore, the total sentence shall be twenty-five years' imprisonment. This sentence will be reduced by six months to compensate the Accused for the violations of his rights. The Accused's final sentence is twenty-four years and six months imprisonment.

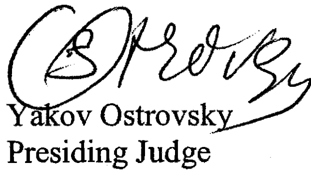
591. Credit for time served has been calculated as seven years, one month, and nineteen days. Therefore, as of 15 May 2003, there will remain seventeen years, four months, and eleven days in the Accused's sentence.

592. In accordance with Rules 102(A) and 103, the Accused shall remain in the custody of the Tribunal pending transfer to the State where he will serve his sentence.

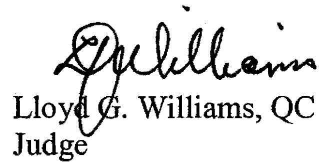
593. Judge Ostrovsky and Judge Dolenc append their separate opinions to this Judgement.

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

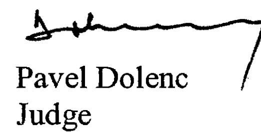
Arusha, 15 May 2003.



Yakov Ostrovsky
Presiding Judge



Lloyd G. Williams, QC
Judge



Pavel Dolenc
Judge

(*Seal of the Tribunal*)

ICTR-97-20-T
15-5-2003
(7306-7289)

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International Criminal Tribunal for Rwanda

Tribunal Pénal International pour le Rwanda

UNITED NATIONS

NATIONS UNIES

TRIAL CHAMBER III

Original: English

**Before Judges:** Yakov Ostrovsky, Presiding
Lloyd G. Williams, QC
Pavel Dolenc

**Registrar:** Adama Dieng

**Date:** 15 May 2003

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**THE PROSECUTOR**

**v.**

**LAURENT SEMANZA**

**Case No. ICTR-97-20-T**

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# Separate Opinion of Judge Yakov Ostrovsky Concerning Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II

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**Counsel for the Prosecution:**

Chile Eboe-Osuji

**Counsel for the Defence:**

Charles Acheleke Taku
Sadikou Ayo Alao

1. I fully agree with and share in the Judgement with the exception of the Majority's view that Article 4(a) of the Tribunal's Statute was violated. This article coincides with Article 4(2)(a) of Additional Protocol II which reproduces without substantial changes Article 3 common to the Geneva Conventions ("Common Article 3").

2. Thus, from the point of view of the Majority, there was a serious violation of Common Article 3 and Additional Protocol II. These two international instruments enumerate the violations of the laws or customs of war, which were determined to be war crimes in Article 6 of the Nuremberg Charter.

3. In my opinion, the Majority position on this issue is not grounded in law and is, furthermore, not supported by the Chamber's factual findings.

## A. Background

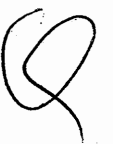
4. Counts 7, 9, and 13 charge the Accused with serious violations of Common Article 3 and Additional Protocol II under Article 4 of the Statute of the Tribunal.

5. In light of the Chamber's factual and legal findings, I agree to assess Counts 7, 9, and 13 in the context of the events occurring at Musha church (paragraph 3.11), Mwulire Hill (paragraph 3.12), and Mabare mosque (paragraph 3.13) ["three sites"]. I also agree to assess the alleged violations committed against Rusanganwa (paragraph 3.18) and Victims A and B (paragraph 3.17).

6. The Chamber established that the victims at the three sites and the other above-mentioned crimes were Tutsi refugees, who were not taking part in the non-international armed conflict, which existed on the territory of Rwanda during the relevant period covered by the Indictment.

7. The Chamber also established that these Tutsi refugees were victims of the policy of genocide that was unleashed in the country after the death of the President on 6 April 1994.

8. The fundamental question that must be answered is whether these civilians became the victims, not only of genocide and of certain crimes against humanity, but also of the armed conflict.



9. Pursuant to Common Article 3, each party to a conflict is bound to apply certain provisions for the protection of war victims. In accordance with Article 1 of Additional Protocol II, the parties in the armed conflict on the territory of Rwanda, during the relevant period covered by the Indictment, were the Rwandan governmental armed forces, the FAR, and the dissident armed forces, the RPF. Violation by one of the parties of the laws or customs of war inevitably means a breach of Common Article 3 and Additional Protocol II, which comprise these laws and customs.

**B. Protection of the Civilian Population**

10. The preamble of Additional Protocol II emphasises the need to ensure a better protection for the victims of internal armed conflict. In practice, it means that the parties in the conflict should conduct military operations so as not to affect the civilian population. Therefore, Common Article 3 and Additional Protocol II intend to protect the victims of an internal conflict, and not simply to protect all individuals from crimes unrelated to the conflict. This principle is confirmed by Additional Protocol II, which states that "[t]he civilian population and individual civilians shall enjoy general protection *against the dangers arising from military operations*."[1]

11. Therefore, the purpose of Additional Protocol II is to ensure better protection for victims of internal armed conflict. The protection of the civilian population against its own authorities is a different matter which is not covered by Common Article 3 and Additional Protocol II. This protection does fall within the scope of numerous related international human rights instruments.

12. During wartime different crimes may be committed, but not all of them relate to international humanitarian law. The Trial Chamber in *Aleksovski* noted: "not all unlawful acts occurring during an armed conflict are subject to international humanitarian law. Only those acts sufficiently connected with the waging of hostilities are subject to the application of this law."[2]

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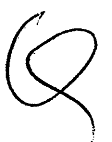
[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13 (emphasis added).
[2] *Aleksovski,* Judgement, TC, para. 45.



13. In this respect, it is important to recall a statement of the International Committee of the Red Cross, that in wartime international humanitarian law coexists with human rights law, and a state at war cannot use the armed conflict as a pretext for ignoring the provisions of human rights law.[3]

**C. Nexus as a Main Requirement**

14. In view of the foregoing, the jurisprudence of the ICTR and ICTY use the term "nexus" as a main requirement in order to determine whether crimes committed during an armed conflict constitute war crimes. It has been the position of this Tribunal and the ICTY that the nexus requirement is met if the alleged offence is "closely related to the hostilities", or is "committed in conjunction with armed conflict", or is "a part of it." The wording could be different, but the main criterion is to establish that the offence is committed as a result of a violation of the laws or customs of war during an internal armed conflict. This is the real meaning of the term "nexus".

15. As the Judgment in *Kayishema and Ruzindana* makes clear:

> the term "nexus" should not be understood as something vague and indefinite. A direct connection between the alleged crimes, referred to in the Indictment, and the armed conflict should be factually established. No test therefore can be defined *in abstracto*.[4]

16. For example, in *Rutaganda*, it was not sufficient for the Prosecutor to simply allege in a general manner that the *Interahamwe* orchestrated massacres as part of their support for the Rwandan Armed Forces and that, *ipso facto*, the acts of the Accused, who held a leadership position in that organization, also formed part of this support.[5] Indeed, even though the Chamber accepted that there was a link between the genocide and the armed conflict, the Chamber still demanded proof beyond a

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[3] *Report by ICRC, Meeting of Experts, Geneva 27-29 October 1998*, p. 2.
[4] *Kayishema and Ruzindana*, Judgement, TC, para. 188.
[5] *Rutaganda*, Judgement, TC, paras. 442-444.

reasonable doubt that the Accused's specific acts were committed in conjunction with the armed conflict.[6]

17. The Trial Chamber, in *Akayesu*, did not find that the accused's acts were committed in conjunction with the armed conflict even though he provided "limited assistance" to the military on their arrival in Taba commune by allowing them to use his office, setting up radio communications, and providing reconnaissance.[7]

18. These examples in the Tribunal's jurisprudence clearly demonstrate that even in the cases when an accused had a minor connection to the military or one of the warring parties, a nexus is not established automatically.

19. In the Judgment, the Majority enumerates the Accused's criminal acts. Such an approach is not justified without showing the nexus between each criminal act and the armed conflict. The Trial Chamber in *Tadic* stated that: "For an offence to be a violation of international humanitarian law, [the] Trial Chamber needs to be satisfied that *each* of the alleged acts was in fact closely related to the hostilities."[8]

20. The same idea is reflected by the Appeals Chamber in *Akayesu*, when it was recognized that the main requirement is the existence of a "close nexus" between a violation and the armed conflict.[9]

21. Therefore, at the threshold, it must first be established whether the genocidal massacres at the three sites and the alleged crimes committed against Rusanganwa and Victims A and B constitute war crimes or, in other words, whether there is a nexus between these crimes and the armed conflict.

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[6] *Rutaganda*, Judgement, TC, paras. 442-444; *see also Musema*, Judgement, TC, para 974; *Kayishema and Ruzindana*, Judgement, TC, para. 619.

[7] *Akayesu*, Judgement, TC, paras. 641-643. While the Appeals Chamber in *Akayesu* disagreed with the Trial Chamber's holding that an accused must have link with one of the warring parties, it did not however overturn the Trial Chamber's finding that the Prosecutor did not prove beyond a reasonable doubt that the Accused's acts were committed in conjunction with the armed conflict.

[8] *Tadic* Judgement, TC, para. 573.

[9] *Akayesu*, Judgement, AC, para. 444.

## D. Nature of the Internal Armed Conflict

22. In determining whether the requisite nexus exists, the Majority agrees in paragraph 518 with the following observation of the Appeals Chamber in *Kunarac*:

> [T]he existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit [the offence], his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established . . . that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.[10]

23. I also agree with this observation of the Appeals Chamber. However, in my view, there is nothing in this observation which relates to our case and supports a finding that a nexus exists between the crimes under our consideration and the armed conflict.

24. Furthermore, both sentences of the Appeals Chamber are not quoted in their entirety. As to the first sentence, its full text is the following:

> The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.[11]

25. Thus, the Appeals Chamber underlines the impact of the armed conflict on the perpetrators of crimes. In *Kunarac*, the crime was committed in specific circumstances when "the three accused, in their capacity as soldiers, took an active part in carrying out military tasks during the conflict, fighting on behalf of one of the parties to the armed conflict, namely the Serb side and that they therefore knew that an armed conflict was taking place."[12]

26. Consequently, the armed conflict was not causal to the commission of this crime, but played a substantial part in these soldiers' ability to commit a crime, in their decision to do it, in the manner in which it was committed, or the purpose for which it was committed.

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[10] *Kunarac*, Judgement, AC, para. 58.
[11] *Kunarac*, Judgement, AC, para. 58.
[12] *Kunarac*, Judgement, TC, para. 569.

27. As to the second sentence of the Appeals Chamber, a very important part of this sentence is omitted, namely that this statement is related to the specific crimes in *Kunarac*. In that case, the existence of a nexus was not questioned because during this armed conflict, "Muslim civilians were killed, raped, or otherwise abused *as a direct result* of the armed conflict, and because the armed conflict apparently offered blanket impunity to the perpetrators."[13]

28. Therefore, according to the Majority, because the Appeals Chamber acknowledged the existence of the nexus in *Kunarac*, the requisite nexus also exists in our case despite the fact that our Accused was not a combatant like the three Serb soldiers, and the circumstances in which he committed the crimes are completely different.

29. The existence of a nexus should not be proved in such a way. It is obvious that the statement of the Appeals Chamber with regard to a particular case must not be automatically applied to another case without any analysis showing that there is a ground for such an application.

30. Hence, it is clear that in *Kunarac* the crimes were committed by three soldiers in conjunction with the armed conflict and that the victims were Muslim civilians. In *Krnojelac*, the Trial Chamber took notice of the widespread and systematic attacks by the Serb forces against non-Serb civilian population.[14] Moreover, in *Tadic*, the Trial Chamber used even more clear language, considering the nature of such armed conflicts as an ethnic war.[15]

31. The character of the armed conflict in Rwanda was different. Having started the war in 1990, the RPF did not target any ethnicity. It was a war for power in the country. There is no evidence that there was a genocide in 1990, 1991, 1992, and 1993. The policy of genocide was unleashed only after 6 April 1994, and not by the RPF, and not against the RPF and its members.

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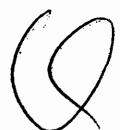
[13] *Kunarac*, Judgement, TC, para. 568. (emphasis added).
[14] *Krnojelac*, Judgement, TC, para. 61.
[15] *Tadic,* Judgement, TC, para. 574.



32. The evidence shows that this policy of genocide was unleashed by the Rwandan authorities against their own civilian population of a particular ethnicity. This crime was parallel to the armed conflict, but never intersected with it. This is why such a criminal policy is beyond the scope of Common Article 3 and Additional Protocol II, which aim to protect the victims of the armed conflict.[16] As the Trial Chamber in *Akayesu* stated: "it should be stressed that although the genocide against the Tutsi occurred concomitantly with the . . . conflict, it was, evidently, fundamentally different from the conflict."[17]

**E. Policy of Genocide**

33. As a result of this policy of genocide, the Tutsi civilians were attacked everywhere, including their traditional refuges where they sought sanctuary.

34. In accordance with the evidence, the main driving force of these attacks were young members of the MRND, the so-called "*Interahamwe*". The overwhelming majority of the attackers were Hutu civilians armed with traditional weapons. Very often, all the assailants were called *Interahamwe.*

35. In addition, as the human rights organization African Rights explains: "the *Interahamwe* were sent to rural areas not just to kill, but to force the local people to kill."[18] By one estimate, nearly half of the Hutu population of Rwanda participated in the genocide.[19]

36. This genocidal campaign was supported in different forms and to a different extent by governmental and local officials. In certain cases, these officials also involved gendarmes and soldiers in this genocidal campaign, which was approved by the mass media, some ministers, prefets, bourgmestres, and other influential persons.

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[16] *Kayishema and Ruzindana*, Judgement, TC, para. 621.
[17] *Akayesu*, Judgement, TC, para. 128.
[18] AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR, AND DEFIANCE p. xx (rev. ed. 1995).
[19] Elizabeth Neuffer, *Amid Tribal Struggles, Crimes Go Unpunished*, THE BOSTON GLOBE, 8 December 1996, p. A20.

### F. Massacres at the Three Sites

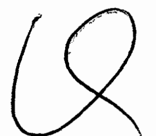
37. It is in light of the foregoing facts that the Chamber must consider what happened at the three sites where Tutsi civilians were attacked. Neither the RPF, the FAR, nor the military operations between them, had any link with the massacres at these sites. It is clear from the evidence that these massacres occurred as a result of the crime of genocide. *Interahamwe*, who attacked Tutsi civilians at all three sites, in certain cases were supported by the guns and grenades of some soldiers, who were not with the army in the field fighting against the RPF. According to the evidence, many of these soldiers "had fled from the battlefield".[20] The participation of these soldiers in the anti-Tutsi genocidal campaign, which appeared to be almost official in the country, does not, however, create a nexus between these crimes and the armed conflict because these soldiers were closely related, not to the armed conflict, but to the genocidal campaign and were part of it.

### G. Departure from the Requisite Nexus

38. Instead of proving the existence of a nexus between the Accused's crimes committed at the three sites and the armed conflict, the Prosecutor as well as the Majority oversimplify the matter. They interpret the war and its influence on the criminal situation in the country as the requisite nexus. Thus, they depart from the definition and understanding of this notion in the ICTR and ICTY jurisprudence.

39. In order to prove the existence of a nexus, the Majority states the following: the ongoing armed conflict between the Rwandan government forces and the RPF both created the situation and provided a pretext for the extensive killings and other abuses of Tutsi civilians (paragraph 518); the killing began in Gikoro and Bicumbi shortly after the death of President Habyarimana when the active hostilities resumed between the RPF and government forces (paragraph 518); the armed conflict was exploited for the killing and mistreatment of Tutsi in Bicumbi and Gikoro (paragraph 519); the armed conflict also substantially motivated the attacks perpetrated against the Tutsi civilians in Bicumbi and Gikoro (paragraph 521); as the RPF army advanced toward

[20] Testimony of Witness VN, T. 9 November 2000 p. 101.



Bicumbi and Gikoro, the killings of Tutsi civilians in these two communes intensified (paragraph 521).

40. Such statements oversimplify the matter. They only illustrate a motive for the commission of crimes and the environment in which these crimes were committed, but this has no impact on the proof necessary to show a violation of the laws or customs of war.

41. Indeed, I agree that there is a tangential relationship between the armed conflict and the crimes under consideration. It could be recognized that the armed conflict was used as a pretext to unleash and intensify the policy of genocide. It could also be said that this crime was committed under the cover and under the guise of the war that created favorable conditions for the implementation of the crime of genocide and encouraged the perpetrators of this crime.

42. However, these circumstances did not create a legal ground for the conclusion of the existence of a nexus between the massacres at the three sites and the armed conflict.

43. The clearest example of this oversimplification is when the Prosecutor states that any offence is a war crime as long as it was committed under the guise or under cover of the armed conflict.[21]

44. Such a superficial approach leads to a situation where it would not be necessary to consider each case on its merits because every crime automatically could be qualified as a war crime.

45. The third oversimplification is when the Prosecutor without any explanation states that the alleged offences constitute war crimes because, as indicated in Counts 7, 9, and 13, they occurred "in the course of a non-international armed conflict."

46. This language fails to properly allege nexus, which is an essential element necessary to establish a violation of Article 4 of the Statue. Apparently, according to this position, a crime merely needs to occur during an armed conflict to constitute a

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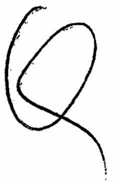
[21] T. 17 June 2002 p. 87.



war crime. As such, the Prosecutor has no need to introduce any evidence that these crimes were related to the armed conflict beyond the fact that they occurred during it.

47. Nonetheless, the Majority overlooks this deficiency in the Indictment by stating that: "[t]he Chamber understands this phrase as meaning that the alleged crimes had a nexus to the armed conflict" (paragraph 516). The Majority's observation and the Prosecutor's approach reveal that they are not accurately applying the requisite legal standard.

48. The fourth oversimplification of the matter is when the Prosecutor argues that the crimes of genocide and crimes against humanity as "'extremely serious crimes' ought to be sufficient to engage the application of the war crimes instruments in question, since these instruments forbid in the most extreme cases 'violence to the 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' of victims of armed conflict."[22]

49. The Prosecutor on the one hand recognizes in her closing argument that the "law requires a connection or nexus between violation and conflict."[23] On the other hand, the Prosecutor contradicts it in her Closing Brief believing that the nexus is not necessary and Common Article 3 and Additional Protocol II must be applicable because we are dealing with extremely serious crimes.

50. In this respect, it will be proper to recall the position of the Chamber, which recognized in paragraph 368, that the purpose of Common Article 3 and Additional Protocol II is the protection of people as victims of internal armed conflict, "not the protection of people against crimes unrelated to the conflict *however reprehensible such crimes may be*." (emphasis added).

**H. Applicability of Common Article 3 and Additional Protocol II**

51. There is a complete confusion in the position of the Prosecutor and the Majority with regard to the applicability of Common Article 3 and Additional Protocol II. In

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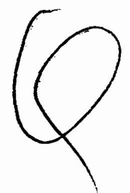
[22] Prosecution Closing Brief para. 103.



Counts 7, 9, and 13, the Prosecutor refers to certain provisions of these international instruments which provide criminal responsibility for crimes such as murder, cruel treatment, rape, and torture. I agree that at least some of these crimes were committed during the massacres of Tutsi civilians, as discussed in the Chamber's legal findings concerning genocide and crimes against humanity.

52. However, the Prosecutor and the Majority disregard that the provisions of these international instruments are applicable only where the crimes are committed as a result of the violations of the laws or customs of war, thus constituting a violation of the provisions of Common Article 3 and Additional Protocol II.

53. In paragraph 3.17 of the Indictment, the Prosecutor states that the Accused told a small group of men in Gikoro commune that before killing Tutsi women they must rape them. As a result, the inhabitants of Gikoro raped Victim A and killed Victim B. The Judgement's discussion on this matter explains everything about the rape and murder as well as the role of the Accused with regard to these particular crimes. What cannot be found, however, in this discussion is any attempt to show the existence of a nexus between these crimes and the armed conflict.

54. On the contrary, there is an acknowledgment that the rape of these Tutsi women by the three perpetrators is part of their broader work of killing Tutsi (paragraph 547). This admission shows that these Tutsi women have been tortured, raped, and murdered as a result of a widespread genocidal attack and that there is no nexus to the armed conflict.

55. A similar situation occurs with respect to Rusanganwa. During the massacre at Musha church, the Accused asked him when the RPF was going to arrive. He replied: "I am not God. I know neither the day nor the time." (paragraph 170). Every refugee could have been asked about it, and likely would have given the same answer. There is no evidence that Rusanganwa knew or could have known anything about the arrival of the RPF. There is also no evidence that he had any ties with the RPF allowing him to possess this kind of information. However, there is evidence that during the massacre the Accused and Bourgmestre Bisengimana killed Rusanganwa after

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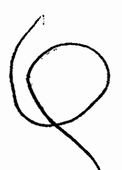
[23] T. 17 June 2002 p. 65.



inflicting severe injuries on him as a prominent Tutsi. In my opinion, this crime happened because of a genocidal intention, and not because Rusanganwa knew something about the RPF or some other subject. In this Judgement, there is also no attempt to show that there is a nexus between this particular crime and the armed conflict.

56. The Prosecutor, however, attempts to fill in this lacuna with respect to Rusanganwa and Victims A and B by stating in paragraphs 3.17 and 3.18 of the Indictment that the Accused intended the acts described in these two paragraphs to be part of a non-international armed conflict against the RPF. However, there is no evidence to confirm that this was the Accused's belief. Furthermore, it is necessary to have factual confirmation of the existence of the requisite nexus. The beliefs of the Accused or somebody else cannot be taken as proof of this requirement.

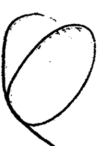
57. Therefore, in accordance with the evidence, these crimes were committed as a result of genocide. There is no evidence that these crimes were committed because of a violation of the laws or customs of war.

58. In such circumstances, Common Article 3 and Additional Protocol II are not applicable, and this is an error of law when the Prosecutor and the Majority apply the provisions of these international instruments to offences which are not war crimes.

59. This indisputable principle of law is disregarded in the Indictment when in paragraph 3.4.2, the Prosecutor asserts that Common Article 3 and Additional Protocol II protect civilians without recognising that civilians are protected by these international instruments only against war crimes, and not against all crimes that could be committed during war. Unfortunately, the Majority agrees with the Prosecutor's erroneous position by applying the provisions of Common Article 3 and Additional Protocol II to crimes that have no nexus to the armed conflict.

**I. Defects in the Majority Position**

60. There are some additional defects in the Majority's position that deserve to be addressed.



61. The Majority's reference to the Accused's participation in military operations conducted against civilian refugees (paragraph 522) is not correct. The genocidal attacks against Tutsi civilians cannot be qualified as a military operation. It is obvious that the Accused did not participate in any military operations between the RPF and the FAR. In any case, there is no such evidence.

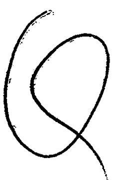
62. The Majority states that civilians were displaced by the armed conflict and because of fears of the increasing violence in their localities (paragraph 518). This general assertion does not properly reflect the real situation. The Tutsi civilians, who became victims, were not displaced by the armed conflict. They were displaced because genocidal killers were seeking them.

63. The Majority also states that Rwandan government soldiers played an active role in the attacks against the concentrated refugee populations at Musha church, Mabare mosque, and Mwulire Hill (paragraph 518). Such an assertion is not supported by the Chamber's factual findings.

64. According to the Chamber's factual findings, soldiers were not among the assailants at Mabare mosque. The attacks against Tutsi civilians at Mwulire Hill started on 8 April 1994. The evidence shows that Tutsi refugees were attacked daily until 18 April 1994. During these ten days, the Tutsis were attacked without the participation of the soldiers. Only on 18 April 1994, when there were about 10,000 refugees, the Accused pursuant to the evidence brought *Interahamwe*, soldiers, and their equipment in a red Toyota pickup truck to participate in final attack. From the evidence, the role of the soldiers appears to be overstated.

65. As to the massacre at Musha church, the role of the soldiers is also exaggerated. As it was indicated above, many people joined the anti-Tutsi genocidal campaign, which appeared to be based on official policy, and some soldiers who were not with army in the field fighting against the RPF also were involved. However, this is not a reason to overemphasise their role.

66. The attempt of the Majority to show the existence of a nexus by using exaggerated military references is not appropriate. Such terms as "military authorities", "military officials", "high ranking military", and "military operations," are not based as a rule



on the factual findings and cannot substitute for the necessary analysis required to prove the existence of a nexus between the war and the Accused's specific crimes.

67. In paragraph 522, the Majority refers to the attempt of the Accused "to elicit information concerning the advance of the enemy." Such a general assertion is not supported by the Chamber's factual finding. There is only one fact in the evidence: during the massacre at Musha church, the Accused asked Rusanganwa, a Tutsi teacher, when the RPF was going to arrive. Rusanganwa replied, "I am not God. I know neither the day nor the time." (paragraph 170). After that he was killed by the Accused and Bisengimana who showed by this act to all Tutsi inhabitants of Gikoro what could happen to those who were waiting for the arrival of the RPF. The Majority's interpretation of this fact goes too far because there is no evidence that Rusanganwa possessed any military information. In my view, he was tortured and killed simply as an eminent Tutsi.

68. In paragraph 522, at the end of the section discussing the nexus element, the Majority makes the following conclusion: "the Chamber therefore has no doubt that a nexus existed between the Accused's alleged offences and the armed conflict in Rwanda."

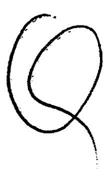
69. This conclusion is based on:

(a) Exaggerated military references which, as previously explained, are not appropriate and, in any case, do not prove the existence of nexus;

(b) Declarations of a general character which are not substantiated by proof and, moreover, are not supported by the Chamber's factual findings and arguments;

(c) The observation of the Appeals Chamber in *Kunarac* mentioned in paragraph 517 which, as previously explained, was interpreted by the Majority erroneously; and

(d) The phrases describing the influence of the armed conflict on the situation in the country which, as previously explained, do not satisfy the elements necessary to constitute war crimes, but may only illustrate a motive for the commission of genocidal crimes and the environment in which these crimes were committed.



70. When the Majority later considers the specific violations of Common Article 3 and Additional Protocol II, the abundant artificial military phraseology disappears, but a new problem arises.

71. The Majority enumerates the criminal acts committed by the Accused at the three sites as well as against Rusanganwa and Victims A and B.

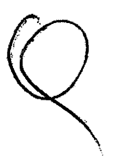
72. These criminal acts were already enumerated in previous chapters of the Judgement. The difference is that in the previous chapters, the Chamber established why certain of these acts constitute crimes against humanity and complicity in genocide.

73. When considering Common Article 3 and Additional Protocol II, the Majority does not seek to explain why these criminal acts also violate the provisions of these international instruments. The simple enumeration of these criminal acts without establishing a requisite nexus does not prove anything, even when these acts are enumerated many times.

74. In paragraph 535, the Majority makes the following conclusion: "The Chamber finds beyond a reasonable doubt that the Accused aided and abetted in the intentional murders committed at Musha church and Mwulire Hill." I agree with this conclusion, which was already made in the genocide and crimes against humanity legal findings. However, it is not shown why these criminal acts constituted also violations of Article 4(a) of the Statute, and, in my view, there is not even an attempt to prove that there is a nexus between these crimes and the armed conflict.

75. A similar situation exists in paragraph 551, where the Chamber finds beyond a reasonable doubt that the Accused instigated the rape and the torture of Victim A and the murder of Victim B and that the Accused committed torture and intentional murder against Rusanganwa. I agree that these crimes were committed, but again it is never shown why these crimes against humanity also constitute violations of Article 4(a) of the Statute dealing with war crimes. In particular, there is not even an attempt to prove that there is a nexus between these crimes and the armed conflict.

76. In such circumstances, when the nexus is not established between the criminal acts committed by the Accused and the armed conflict, there is no ground for the



applicability to these criminal acts of Article 4(a) of the Statute, which covers Common Article 3 and Article 4(2)(a) of Additional Protocol II.

77. The problem is that the Majority's position is not grounded in law and is not based on the facts and an analysis of the specific circumstances in which the Accused's criminal acts were committed. In this respect, the Appeals Chamber in *Kunarac* pointed out the following:

> In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as a part of or in the context of the perpetrator's official duties.[24]

78. The Majority did not address these and many other factors, which are of extreme importance in order to determine whether there was a nexus between the Accused's criminal acts and the armed conflict. The Majority's general and superficial approach towards this matter does not result in a conclusion that is grounded in law and in the factual findings.

### J. Conclusion

79. Considering the above, and based on all the evidence presented in this case, I came to the conclusion that it was not proved beyond a reasonable doubt that the criminal acts of the Accused were committed in direct conjunction with the armed conflict. These criminal acts had no direct connection with the military operations or with the victims of the armed conflict.

80. It was not proved that these criminal acts constitute, not only crimes against humanity and complicity in genocide, but also war crimes. Instead, the evidence clearly shows that Tutsi civilians became victims of these criminal acts as a result of a policy of genocide unleashed against them by the authorities of their own country.

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[24] *Kunarac*, Judgement, AC, para. 59.

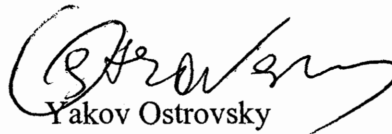
81. Therefore, it cannot be concluded that the material provisions of Common Article 3, Additional Protocol II, and Article 4(a) of the Statute have been violated in this particular case.

82. Thus, the question of the Accused's criminal responsibility for violations of these international instruments does not arise. As such, the Accused, in my opinion, does not incur liability under Counts 7, 9, and 13.

83. For all the above reasons, I respectfully submit this separate opinion.

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

Arusha, 15 May 2003.



Yakov Ostrovsky

Presiding Judge

(*Seal of the Tribunal*)

ICTR-97-20-T
15-5-2003
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International Criminal Tribunal for Rwanda

Tribunal Pénal International pour le Rwanda

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TRIAL CHAMBER III

Original: English

**Before Judges:** Yakov Ostrovsky, Presiding
Lloyd G. Williams, QC
Pavel Dolenc

**Registrar:** Adama Dieng

**Date:** 15 May 2003

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**THE PROSECUTOR**

**v.**

**LAURENT SEMANZA**

**Case No. ICTR-97-20-T**

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## Separate and Dissenting Opinion of Judge Pavel Dolenc

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**Counsel for the Prosecution:**

Chile Eboe-Osuji

**Counsel for the Defence:**

Charles Acheleke Taku
Sadikou Ayo Alao

## A. Introduction

1. In addressing cumulative charges and multiple convictions based on the same facts in this case, the Chamber has relied on the test articulated by the Appeals Chamber Judgement in *Musema*, which permits cumulative convictions when the different crimes have mutually distinct elements.[1] For the reasons set out in this separate opinion, I do not entirely agree with this approach. In my opinion, the criteria articulated and applied in *Musema* are too formalistic, and result in cumulative convictions in instances where they should not be allowed. Although the *Musema* test purports to limit cumulative convictions by requiring that each of the cumulative crimes has different elements, the practical result is that inter-article cumulative convictions for the three crimes in the Statute are always possible without any legal obstacle.

2. As a result, for reasons of apparent ideal concurrence of offences explained below, I would not enter a conviction either for extermination as a crime against humanity (Count 5), or for serious violations of Common Article 3 (Counts 7 and 13).

3. In the jurisprudence of the Tribunal and of the ICTY, the terms "crime" and "offence" are employed interchangeably to mean either the legal description of the crime or the factual occurrence of the prohibited behaviour or results. To avoid confusion, I will use the term "criminalisation" to denote the legal definition of the crime.

4. In this separate opinion I use the terms "ideal concurrence" and "real concurrence", which are well understood in civil law systems and which have been incorporated into the jurisprudence of the Tribunals. Real concurrence of offences arises when the accused commits more than one crime, either by violating the same criminalisation a number of times, or by violating a number of different criminalisations by separate acts. Apparent real concurrence may arise when a series of separate, but closely related, acts fulfil all the elements of a certain criminalisation, but are considered as a single, albeit continuing, crime. Ideal concurrence refers to the

situation whereby a single act or factual situation violates more than one criminalisation.[2] Apparent ideal concurrence of offences arises when a relationship of concurrence is resolved by the application of further analytical methods.

**B. The Formal Approach to Ideal Concurrence: Jurisprudence of the Two Ad Hoc Tribunals**

5. A review of the jurisprudence of both this Tribunal and the ICTY reveals that the question of cumulative convictions for ideal concurrence of offences has troubled trial chambers since the first cases and that the Tribunals' response has been far from uniform. This review will also demonstrate that there have been definite shifts in legal approaches in addressing these concerns. In the first Judgements, the ICTR limited the cumulation of convictions,[3] while the ICTY addressed cumulation only as a matter of sentencing.[4] In a second phase of development, the ICTY Appeals Chamber limited cumulation by applying a reciprocal speciality test.[5] This test was then adopted and applied by the ICTR Appeals Chamber.[6] In what I view as a third phase of development, the ICTY Appeals Chamber then warned that the reciprocal speciality test may not sufficiently address the adverse effects of cumulation of convictions in all circumstances.[7] I accept this conclusion and propose that additional substantive tests be considered.

6. From its first case, *Akayesu*, the Tribunal recognised that multiple convictions based on the same facts should be limited because of the potential prejudice to an accused. The Trial Chamber held that, in light of the prohibition against multiple jeopardy, multiple convictions for the same conduct are generally impermissible.[8] In order to limit the accumulation of multiple convictions, the Trial Chamber set forth

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[1] *Semanza,* Judgement and Sentence, ("Judgement") paras. 408, 409, *citing Musema*, Judgement, AC, paras. 361, 363, 369.
[2] *Kupreskic*, Judgement, TC, paras. 662.
[3] *See, e.g., Musema*, Judgement, TC, paras. 289-299; *Rutaganda*, Judgement, TC, paras. 108-119; *Kayishema and Ruzindana*, Judgement, TC, paras. 625-650; *Akayesu*, Judgement, TC, paras. 461-470.
[4] *See, e.g., Furundzija,* Judgement, TC, paras. 292, 296; *Celebici*, Judgement, TC, para. 1286; *Prosecutor v. Tadic,* Decision on Defence Motion on Form of the Indictment, IT-94-1-T, TC, 14 November 1995.
[5] *Celebici*, Judgement, AC, para. 412.
[6] *Musema*, Judgement, AC, paras. 361, 363.
[7] *Kunarac*, Judgement, AC, paras. 168-198.
[8] *Akayesu*, Judgement, TC, para. 462.

three circumstances where multiple convictions on the same facts are permissible: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did.[9] Multiple convictions, however, are not permissible when one offence is a lesser included offence of another, or when an accused is charged as a principal and as an accomplice in the commission of the same crime.[10]

7. In the *Kayishema and Ruzindana* Judgement, the majority of the Trial Chamber, Judge Khan dissenting, narrowed the *Akayesu* test by eliminating the need to consider the full description of the criminal conduct, and retaining the two other criteria. Pursuant to this approach, cumulative convictions were permitted where the offences have different elements or where the laws protect different social interests.[11] The Chamber specifically considered the cumulation of convictions for genocide and extermination as a crime against humanity and found that the legal elements of genocide generally differed from those of crimes against humanity, but that the violation of both may overlap in a particular factual scenario.[12] In the circumstances of the case, the Chamber found that genocide overlapped with murder and extermination as crimes against humanity because the same evidence established both counts.[13] Accordingly, the social interest protected by the three crimes was identical, and the elements were the same.[14] Murder and extermination as crimes against humanity were "subsumed" by the genocide, making all three the "same offence".[15] In such circumstances, concurrent convictions for all three crimes would be improper, untenable, and would amount to convicting twice for the same offence.[16]

8. In his dissenting opinion, Judge Khan considered that the cumulation of convictions for the same factual conduct was permissible, and that the consequence of

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[9] *Akayesu*, Judgement, TC, para. 468.
[10] *Akayesu*, Judgement, TC, para. 468.
[11] *Kayishema and Ruzindana*, Judgement, TC, para. 627.
[12] *Kayishema and Ruzindana,* Judgement, TC, para. 636.
[13] *Kayishema and Ruzindana*, Judgement, TC, para. 647.
[14] *Kayishema and Ruzindana*, Judgement, TC, paras. 641-643.
[15] *Kayishema and Ruzindana,* Judgement, TC, para. 648.
[16] *Kayishema and Ruzindana*, Judgement, TC, paras. 649-650.

concurrence of convictions should be considered only at sentencing.[17] He noted that while national courts differ, the international jurisprudence has consistently approached this question as one of sentencing.[18]

9. The Khan dissent followed a series of ICTY decisions and judgements, based on an early *Tadic* preliminary motion decision, which concluded that multiple charges and convictions based on ideal concurrence of crimes are generally permissible because cumulative convictions are at all relevant only "if and when matters of penalty fall for consideration."[19] According to the *Tadic* approach, the Prosecutor has wide discretion to charge multiple counts, either alternatively or cumulatively, for the same alleged conduct. The logical conclusion is that an accused may be convicted for multiple counts based on the same facts, but that the sentence will reflect the criminal conduct of the accused, rather than the "technicalities of pleading".[20]

10. The trial Judgements in *Rutaganda* and *Musema* agreed that it is permissible to convict an accused of two or more offences for the same conduct under certain circumstances. The Trial Chamber reiterated the *Akayesu* findings and concluded that the offences in the Statute have "disparate ingredients" and are aimed at protecting discrete interests.[21] At the same time, both Judgements endorsed the dissenting opinion of Judge Khan, particularly in relation to the importance of cumulative convictions in capturing the full extent of the crimes.[22]

11. In *Celebici*, the Appeals Chamber departed from the permissible approach adopted by a number of Trial Chambers, recognising that, for reasons of fairness to the accused, only distinct crimes may justify multiple convictions.[23] The Appeals

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[17] *Kayishema and Ruzindana*, Judgement, Separate and Dissenting Opinion of Judge Tafazzal Hossain Khan Regarding the Verdicts Under the Charges of Crimes Against Humanity/Murder and Crimes Against Humanity/Extermination, TC, para. 6.
[18] *Kayishema and Ruzindana*, Judgement, Separate and Dissenting Opinion of Judge Tafazzal Hossain Khan Regarding the Verdicts Under the Charges of Crimes Against Humanity/Murder and Crimes Against Humanity/Extermination, TC, paras. 12, 23.
[19] *Prosecutor v. Tadic,* Decision on Defence Motion on Form of the Indictment, IT-94-1-T, TC, 14 November 1995, para 17. *See also Celebici*, Judgment, TC, para. 1268.
[20] *Prosecutor v. Tadic,* Decision on Defence Motion on Form of the Indictment, IT-94-1-T, TC, 14 November 1995, para. 17.
[21] *Musema*, Judgement, TC, para. 297; *Rutaganda*, Judgement, TC, para. 117.
[22] *Musema*, Judgement, TC, para. 296; *Rutaganda*, Judgement, TC, para. 116.
[23] *Celebici*, Judgement, AC, para. 412. This test has been affirmed and applied in subsequent ICTY cases. *See, e.g., Kupreskic*, Judgement, AC, paras. 385-388; *Jelisic*, Judgement, AC, para. 82; *Vasiljevic*, Judgment, TC, paras. 265-266; *Krnojelac*, Judgement, TC, paras. 502-503; *Kvocka*,

Chamber concluded that cumulative convictions for ideal concurrence of crimes are permissible when they have materially distinct elements (the test of reciprocal speciality).[24] The Appeals Chamber found that it was not permissible to convict for the same violation for war crimes under Article 3 of the ICTY Statute and for violations of Geneva Conventions under Article 2 of that Statute because they do not have materially distinct contextual elements.[25] In such a case, the Appeals Chamber applied the principle of specificity, so that the more specific criminalisation applies.[26] The *Musema* Appeals Judgement adopted this test.[27]

12. However, even as the Appeals Chamber adopted the reciprocal speciality test in the *Celebici* judgement, two of the five judges on the panel considered that this approach was problematic.[28] Judges Hunt and Bennouna reasoned from the premise that, as a matter of principle, cumulative convictions for the same conduct should be avoided because they cause unjust prejudice to the accused.[29] They agreed that multiple convictions for the same conduct may be permissible when the competing criminalisations have mutual distinct material elements.[30] In the minority's opinion, however, this determination should be limited to the legal description of the accused's conduct *(actus reus* and *mens rea*), and should not focus on the contextual (legal prerequisite or chapeaux) elements of the crimes, because these general provisions bear no relevance either to the culpable conduct of the accused or to the victims.[31]

13. In the *Kunarac* case, the ICTY Appeal Chamber upheld the reciprocal speciality test adopted by the *Celebici* Appeals Judgement, applying it also to ideal concurrence

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Judgement, TC, paras. 213-215; *Krstic*, Judgement, TC, para. 664; *Kordic and Cerkez*, Judgement, TC, para. 814-818; *Kunarac*, TC, paras. 549-552.

[24] *Celebici*, Judgement, AC, para. 412.

[25] *Celebici*, Judgement, AC, paras. 423-427.

[26] *Celebici*, Judgement, AC, para. 413.

[27] *Musema*, Judgement, AC, paras. 361, 363.

[28] *Celebici*, Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, AC.

[29] *Celebici*, Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, AC, paras. 22, 23 (considering the prejudice of "the punishment and social stigmatization inherent in being *convicted* of a crime" and the impact on sentence, parole, early release, risk of increased sentence for subsequent convictions in another jurisdiction (emphasis in original)).

[30] *Celebici*, Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, AC, para. 24.

[31] *Celebici*, Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, AC, paras. 25-27, 33. *See also Kupreskic*, Judgement, TC, para. 699 ("In order to apply the

of war crimes under Article 3 and crimes against humanity under Article 5 of the ICTY Statute.[32] However, the Appeals Chamber cautioned that the test is "deceptively simple", and that it is difficult to apply in a way that is "conceptually coherent and promotes the interests of justice."[33] The Appeals Chamber recognized that cumulative convictions create a real risk of prejudice to the accused that is not cured by concurrent sentencing.[34] The Appeals Chamber concluded that the permissibility of multiple convictions ultimately turns on the intentions of the lawmakers, and found that the Security Council desired that all species of the crimes be "adequately described and punished".[35]

14. In my view, the jurisprudence of both ad hoc Tribunals establishes that, in principle, multiple convictions based on the same facts should be limited because of the risk of prejudice to the accused. Various chambers have articulated different tests intended to serve this limiting purpose. The reciprocal speciality approach, articulated in the Appeals Chamber Judgements in *Celebici* and *Musema*, is based on this very concern. However, in practice, this test does not really provide any limiting effect. I believe that this is the issue addressed by the *Kunarac* Appeals Chamber in its warning against a mechanical application of the test.

15. In my opinion, this dilemma is even more evident in the context of this Tribunal, insofar as each of the three sets of crimes in the ICTR Statute, genocide, crimes against humanity, and serious violations of Common Article 3 and Additional Protocol II, has different contextual elements. It must be recalled that the *Celebici* test was developed in response to multiple convictions based on Articles 2 and 3 of the ICTY Statute. Absurdly, the test created to *limit* multiple convictions at the ICTY results in blanket permission for inter-article cumulation of convictions at the ICTR, which only has a single war crimes article. In the *Musema* Judgement, the Appeals Chamber declined to confirm this obvious effect, which results from abandoning the

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principles on cumulation of offences set out above <u>specific offences</u> rather than diverse <u>sets of crimes</u> must be considered." (emphasis in original)).

[32] *Kunarac*, Judgement, AC, paras. 168-198.

[33] *Kunarac*, Judgement, AC, para. 172.

[34] *Kunarac*, Judgement, AC, para. 169.

[35] *Kunarac*, Judgement, AC, para. 178.

more restrictive *Akayesu* approach in favour of the *Celebici* reciprocal speciality test.[36]

16. This problem is exacerbated by the factual context of the crimes committed in Rwanda in 1994, where genocide, consisting of widespread and systematic attacks against Tutsi civilians, overlapped with armed conflict. In such circumstances, the very same factual context will necessarily satisfy all of the contextual elements of each of the three crimes. Thus, virtually every criminal act could be classified as a violation of three different contextual provisions.

17. In my view, such results are not consistent with basic principles of law. Logically, and pursuant to the civil law principle of *ultima ratio,* a lawmaker should repress socially harmful conduct or results through a single criminalisation only as a last resort. It is also an elementary principle of justice that an accused should be punished for his criminal conduct only once. To achieve this objective, the lawmaker should exclude from the legal description of the crime those particulars which may occur in specific cases but are not significant for the definition of the socially dangerous behaviour.

18. In this regard, I disagree with the conclusion that it was the intention of the Security Council to permit cumulative convictions.[37] The Statute is not a premeditated criminalisation of contemporary international criminal law, which evidences a desire to enable cumulative convictions for ideal concurrence of crimes; rather the Statute is an often awkward and overlapping assembly of three formerly independent crimes into a single Statute.[38] If the intention of the authors of the Statute was to permit cumulative convictions, contrary to the ordinary principles of logic, rationality, and justice, then this intention should have been clearly indicated. Moreover, if the Security Council really intended to permit cumulative convictions in order to reflect

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[36] *Musema*, Judgment, AC, para. 368.
[37] *See, e.g., Kunarac*, Judgement, AC, para. 178.
[38] *See Celebici*, Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, AC, paras. 21, 27.

the totality of a perpetrator's criminal conduct, then this objective is not achieved by concurrent sentencing for multiple convictions based on the same facts.[39]

19. Moreover, to dissect the complex factual circumstances of the Rwandan conflict in order to satisfy distinct contextual elements for the purposes of multiple convictions interferes with the principle that the verdict and sentence should reflect the *totality* of the accused's criminal conduct. In my view, it is more appropriate to consider these events, and an accused's participation in them, as a complete whole. Integral facts which do not directly satisfy an element of the selected crime may constitute aggravating circumstances. It serves no purpose, in my view, to convict an accused, on the basis of a single act, for genocide, crimes against humanity, *and* war crimes, for the sole purpose of demonstrating the three facets of the contextual situation.

### C. Substantive Approach to Ideal Concurrence

20. I believe that the concept of ideal concurrence of crimes is well understood, notwithstanding certain terminological differences between legal systems. Ideal concurrence of crimes may result in multiple convictions and penalties for the same conduct, which runs contrary to elementary principles of justice and may prejudice the accused. In particular, multiple convictions for the same conduct unfairly stigmatises an accused and may have adverse collateral consequences, such as increasing the sentence or diminishing the accused's eligibility for parole.[40]

21. The *Celebici/Musema* test takes a formal approach to ideal concurrence of offences, grammatically analysing the elements of the legal definitions of crimes,

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[39] If the single act is committed in a context which results in three separate convictions under each of the three crimes in the Statute, the result will, in most cases, be three concurrent sentences. In my view, this approach results in more lenient sentences and fails to reflect the totality of the context, since each of the sentences is assigned in ignorance of the other two crimes. For example, one sentence will reflect the accused's conduct in connection with the armed conflict, another sentence will reflect his conduct as part of the widespread attack, and the third will reflect his conduct as part of the genocide; no single concurrent sentence will reflect the totality of his conduct within the total context. On the other hand, if the factual and contextual circumstances are considered in their totality, resulting in a single appropriate conviction and sentence, then all relevant circumstances would be reflected in both the verdict and the sentence.

[40] *See, e.g., Celebici,* Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, AC, paras. 22, 23.

including the contextual elements, in the abstract. This approach fails to consider the importance of the apparently different elements, either in relation to the events in Rwanda or in the particular circumstances of the case. Such an approach cannot achieve an accurate assessment of whether the criminal definitions are really distinct. Since the expressed purpose of the *Celebici/Musema* test is to limit cumulative convictions to genuinely distinct crimes, I am of the view that the test is insufficient to achieve this purpose.

22. Therefore, I propose to articulate a more substantive analysis. In doing so, I have reasoned from the premise, already accepted in the jurisprudence of the Tribunal, that the verdict must fully reflect the entire culpable conduct of the accused. Cumulative convictions which exceed this objective are therefore unsound. Cumulative convictions, while theoretically permissible, should not be the norm; rather cumulative convictions based on ideal concurrence of offences should be the exception.

23. In principle, I agree that the starting point of the analysis should be a comparison of the different elements of the crimes in order to determine reciprocal speciality. I further agree that the contextual elements should be considered as part of this analysis. However, I believe that this comparison must include a substantive assessment of whether the contextual elements of each article are of such significance that they considerably change the nature or gravity of the crimes in question and therefore justify cumulative convictions for the ideal concurrence of crimes under several articles.[41] This additional criterion is particularly useful in the circumstances of Rwanda. As already noted, most culpable conduct in Rwanda in 1994 was committed in circumstances which fulfilled the contextual requirements of all three sets of crimes.

24. The tools for this substantive analysis are already present in the jurisprudence of the Tribunals. For example, the principle of consumption *(lex consumens derogat legi consumptae)* could also be applied as an additional method to determine the propriety

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[41] *See, e.g., Celebici,* Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, AC, para. 18 ("However, we do not believe that the interests identified by the Prosecution are so *genuinely different* that they justify cumulative convictions for otherwise identical criminal conduct.") (emphasis added).

of cumulative convictions for ideal concurrence.[42] Consumption refers to relationships between offences of the same kind, but of considerably different gravity, that are designed to protect the same or closely related social interests, but which differ in relation to particular elements. In such circumstances, the more grave crime consumes the lesser crime. Similarly, the more serious forms of participation consume the less serious forms, so that the direct commission of a crime would consume instigation or assistance and even forms of superior responsibility.

25. Subsidiarity, which has also been applied by both the ad hoc Tribunals, may also be useful in identifying circumstances of apparent ideal concurrence.[43] Pursuant to the principle *lex primaria derogat legi subsidiariae,* a less authoritative or "inferior" criminalisation only applies when the competing "superior" criminalisation is not applicable. This type of relationship may be expressly provided, for example by the use of "if not otherwise provided" or "other… acts", or may be inferred from the nature of the competing criminalisations.

26. The principle of inclusion may also provide some further assistance in certain circumstances. Where an accused's conduct violates two or more substantially different criminalisations, but where it would be unreasonable to render cumulative convictions because of the insignificance of the lesser crime, the principle of inclusion permits the less serious crime to be included in the more serious crime.

**D. Application of the Substantive Approach to the Facts**

27. In my view, genocide is a more specific crime than crimes against humanity or serious violations of Common Article 3 and Additional Protocol II. Accordingly, applying the principles of speciality and subsidiarity to competing criminalisations in ideal concurrence, the crimes constituting genocide should prevail over both of the other competing sets of crimes.

28. When faced with a situation of ideal concurrence of the accused's conduct that also fulfils all the contextual elements of all three sets of crimes, I would thus enter a

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[42] *See, e.g., Kunarac,* Judgement, AC, para. 170; *Kupreskic*, Judgement, TC, para. 688.

conviction for only genocide. By comparing the significance of the contextual elements of the three crimes, I consider that the genocidal purpose, to destroy a particular group of people on discriminatory grounds, is more important, stigmatizing, and far-reaching than the contextual elements of the other two crimes. In the context of Rwanda, genocide consumes crimes against humanity in relation to the same factual conduct committed on the same discriminatory grounds against the same civilian population. Genocide and crimes against humanity consume serious violations of Common Article 3 and Additional Protocol II based on the same facts committed against the same civilian population, because the link between the acts of the Accused and the armed conflict is of considerably less significance than the genocidal intent, or the widespread or systematic discriminatory attack against civilians.

29. In the present case, the Accused has been charged with six crimes based on identical allegations of criminal conduct at four massacre sites. The Chamber has found that he is criminally responsible for complicity in genocide (Count 3) and for aiding and abetting extermination (Count 5) on the basis of the same facts. The majority, relying on reciprocal speciality test in *Musema*, considers that inter-article ideal concurrence in this case is appropriate and finds the Accused responsible for both crimes. In my opinion, the genocidal contextual elements in Count 3 consume the reciprocally specific contextual elements of extermination as a crime against humanity in Count 5, because in the circumstances of this case, the genocide was the widespread discriminatory attack. I therefore would not enter a conviction for Count 5, because it is in apparent ideal concurrence with Count 3.

30. For the same reasons, I would not enter a conviction for violations of Common Article 3 at the massacre sites (Count 7) because, in the factual circumstances of this case, the genocide was linked to the armed conflict and the Accused's conduct at the site is fully described by Count 3. I also consider that the violations of Common Article 3 (Count 13) are in apparent ideal concurrence with the convictions for rape, torture, and murder as crimes against humanity (Counts 10, 11, 12). Accordingly, I do not support a conviction for Count 13.

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[43] *See, e.g., Kvocka*, Judgement, TC, para. 228 (finding that other inhumane acts under Article 5(i) a

## E. Apparent Real Concurrence of Crimes

31. Finally, I wish to address the issue of apparent real concurrence of crimes. Although I do not disagree with any part of the Judgement on this issue, I wish to express my opinion in order to highlight the importance of apparent real concurrence of crimes for future indictments and judgements.

32. The most common example of apparent real concurrence is a continuing offence, where each act in a series of separate but closely related acts fulfils all the elements of a certain criminalisation. In such circumstances, it is possible to regard the entire transaction, or series of repeated crimes, as a single crime. For these acts to be joined together, certain linking elements should be taken into account, such as the repetition of the same kind of crimes, the uniformity of the perpetrator's intent, the proximity in time between the acts, the location, the victim or class of victims, the object or purpose, and the opportunity. The construction of continuous offences is especially important in relation to the international crimes in our Statute, particularly in light of the nature of mass violations of basic human rights in Rwanda during a relatively short period of time.

33. In the Indictment, however, the Prosecutor has manipulated the principle of apparent real concurrence for no obvious purpose. For his participation in four separate massacres, the Accused is charged with eight separate counts, six based solely on the general massacres and two other counts based, in part, on his participation in the torture and murder of Rusanganwa. From the construction of the six general counts, it is obvious that the Prosecutor considers all four massacres as one continuing event, despite the fact that the Indictment alleges different forms of participation and different types of crimes, committed against multiple victims, at different times and locations. The Chamber accepts that in this case, the Accused's actions at all four massacres form a single crime. I agree with this conclusion, which is based on the linking elements enumerated above and in the Judgement.[44]

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have a subsidiary nature).

[44] Judgement, para. 508. Although the notion of the "transaction" defined in Rule 2 is not identical to the concept of a continuing offence, the same linking elements may be useful in determining whether a series of crimes is a continuing offence.

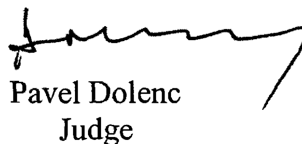
34. However, the charges of torture and murder as crimes against humanity in Counts 11 and 12 are less obvious, because they join two otherwise unrelated events involving different forms of participation against different victims at different sites: namely, the torture and murder of Rusanganwa on 13 April 1994 at Musha Church, and the instigation to rape and kill Tutsi women on the same day in Gikoro Commune.[45] These counts of torture and murder join these two separate underlying crimes without any indication of the Prosecutor's justification for this linkage. While charging is, in principle, a matter within the discretion of the Prosecutor, this discretion cannot be used in an arbitrary, illogical, or unfair manner. In my view, the Prosecutor's failure to logically organise and define the scope and nature of the counts in an indictment may result in prejudice to an accused, who must then organise his defence in response to a confusing and illogical indictment. In my view, such arbitrary charging is unsatisfactory and should not be permitted in the future.

## F. Conclusion

35. For the foregoing reasons, I would not enter a conviction for Counts 5, 7, or 13. Since the totality of the Accused's criminal conduct is already reflected in the remaining convictions, this acquittal would not affect the Accused's sentence.

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

Arusha, 15 May 2003.



Pavel Dolenc
Judge

*(Seal of the Tribunal)*

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[45] This problem is also apparent in Count 13 (Violations of Common Article 3), for which the Chamber has not entered a conviction.

## ANNEX I: THE INDICTMENT

## THIRD AMENDED INDICTMENT

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

**LAURENT SEMANZA**

with **GENOCIDE, DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE, COMPLICITY IN GENOCIDE, CRIMES AGAINST HUMANITY** and **SERIOUS VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS of 12 August 1949 AND OF ADDITIONAL PROTOCOL II THERETO of 8 June 1977**, all offenses committed in violation of Articles 2, 3 and 4 respectively of the Statute of the Tribunal.

### 2.THE ACCUSED

2.1 **Laurent SEMANZA** was born in 1944 in Musasa Commune, Kigali Rural Prefecture, Republic of Rwanda. The accused was Bourgmestre of Bicumbi Commune for twenty years, until being replaced by Juvenal RUGAMBARARA in 1993.

### 3. CONCISE STATEMENT OF THE FACTS

3.1 Unless specifically stated herein, the violations of International Humanitarian Law referred to in this indictment took place in Rwanda between the 1st of April and 31st of July 1994.

3.2 During the events referred to in this indictment, Tutsis, Hutus and Twas were identified as ethnic or racial groups.

3.3 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.

3.4 After the Rwandan Patriotic Front (RPF) attack of October 1990, the Rwandan Government policy was characterized by the identification of the Tutsis as the enemies to be defeated.

3.4.1 This policy defined the main enemy as the Tutsis from inside or outside the country, who wanted power, who did not recognize the achievement of the revolution of 1959, and who was seeking armed confrontation. The secondary enemy was defined as those who provided any kind of assistance to the main enemy. This latter category was considered as accomplices of RPF.

3.4.2 During the events referred to in this indictment, there was a non-international armed conflict in the territory of Rwanda between the Government of Rwanda and the Rwandan Patriotic Front (RPF). The victims referred to in this indictment were Tutsi civilians in Bicumbi and Gikoro communes. These were persons who were protected

under Article 3 common to the Geneva Conventions of 1949 and under Additional Protocol II thereto, and who were not taking active part in the conflict.

3.4.3 Laurent SEMANZA intended the attacks on these victims to be part of the non-international armed conflict because he believed that Tutsi civilians were enemies of the Government and/or accomplices of the RPF and that destroying them would contribute to the implementation of the Government policy against the enemies and the defeat of the RPF.

3.5 At the time of the events referred to in this indictment, the MRND (*Mouvement Republicain National pour le Developpement et la Democratie*) was one of the political parties in Rwanda. The members of the youth wing of the MRND were called *Interahamwe*. The majority of them went on to become paramilitary militiamen. During the events referred to in this indictment the term *Interahamwe* came to be applied civilians, regardless of their political or organizational affiliation, who attacked the Tutsi civilian population.

3.6 **Laurent SEMANZA** was Bourgmestre of BICUMBI commune for over twenty years. At the time of the events referred to in this indictment, the accused was a member of the Central Committee of the MRND. Furthermore, he was nominated as an MRND Representative to the National Assembly of the broad-based transitional government, which was to be established pursuant to the Arusha Accords. Consequently, he was a very influential person in his community, both in Bicumbi commune and in neighbouring GIKORO commune, and had *de facto* and/or *de jure* authority and control over militiamen, in particular *Interahamwe*, and other persons, including members of the Rwandan Armed Forces (FAR), communal police and other government agents. He used his influence and authority as an agent of the government to advance its war effort against the RPF.

3.7 Between 1991 and 1994, **Laurent SEMANZA** chaired meetings during which he made threatening remarks towards Tutsis and those who were not MRND members.

3.8 As of the beginning of 1994, **Laurent SEMANZA** chaired meetings to incite, plan and organize the massacres of the Tutsi civilian population.

3.9 As early as 1991, **Laurent SEMANZA** aided and participated in the distribution of weapons and the training of young MRND militiamen, the *Interahamwe* who were well structured, complementary and acted in concert with the Armed Forces in the non-international armed conflict above mentioned (sub-parag. 3.4.2), and continued to do so until 1994, inclusive. During the events referred to in this indictment, several of these militiamen were directly involved in the massacres of the Tutsi civilian population. Laurent SEMANZA intended these massacres to be in junction with the non-international armed conflict as stated in subparagraph 3.4.3 *supra*.

3.10 On or about 10 April 1994, **Laurent SEMANZA** worked in close cooperation with the Bourgmestre of Gikoro, Paul BISENGIMANA, to organize and execute the Ruhanga massacres, Gikoro commune, where thousands of persons had taken refuge to escape the killings in their sector.

3.11 Between 9 and 13 April 1994, **Laurent SEMANZA** worked in close cooperation with the Bourgmestre of Gikoro, Paul BISENGIMANA, to organize and execute the massacres at Musha church, Gikoro commune, where several hundred people had taken refuge to escape the killings in their sector. On or about 13 April 1994, Laurent SEMANZA led the attack on the refugees at the Musha church and personally participated in the killings.

3.12 Between 7 and 20 April 1994, **Laurent SEMANZA** organized and executed the massacres at Mwulire Hill, Bicumbi Commune, where several thousand people had taken refuge to escape the killings. On or about 16 and 18 April 1994, Laurent SEMANZA directed the attacks on the refugees at Mwulire Hill and personally participated in the killings.

3.13. On or about 12 April 1994, **Laurent SEMANZA** organized and executed the massacre at Mabare mosque, Bicumbi commune, where several hundred people had taken refuge to escape the killings. On or about 12 April 1994, **Laurent SEMANZA** directed the attacks on refugees at the Mabare mosque and personally participated in the killings.

3.14 The massacres referred to in paragraphs 3.8 through 3.13 above, included killing and causing serious bodily and mental harm, including rape and other forms of sexual violence, to members of the Tutsi ethnic group. Laurent SEMANZA intended these massacres to be part of the non-international armed conflict against the RPF because he believed the Tutsi refugees to be enemies of the Government and/or accomplices of the RPF as stated in paragraph 3.4.2 and 3.4.3 *supra*.

3.15 Between 6 April and 30 April, 1994, in Bicumbi and Gikoro Communes, Laurent SEMANZA instigated, ordered and encouraged militiamen, in particular *Interahamwe*, and other persons to rape Tutsi women or commit other outrages upon the personal dignity of Tutsi women, and such people did rape Tutsi women or commit other outrages upon the personal dignity of Tutsi women in response to the instigation, orders and encouragement of SEMANZA.

3.16 Between 6 April and 30 April, 1994, in Bicumbi and Gikoro Communes, Laurent SEMANZA had *de facto* and/or *de jure* authority and control over militiamen, in particular *Interahamwe*, and other persons, including members of the Rwandan Armed Forces (FAR), communal police and other government agents, and he knew or had reason to know that such persons were about to commit acts of rape or other outrages against the personal dignity of Tutsi women, and he failed to take necessary and reasonable measures to prevent such acts, which were subsequently committed. Laurent SEMANZA intended the acts described in Paragraphs 3.15 and 3.16 to be part of the non-international armed conflict against the RPF as stated in subparagraphs 3.4.2 and 3.4.3 *supra*.

3.17 Between April 7 and April 30 1994, Laurent SEMANZA spoke to a small group of men in Gikoro Commune. He told them that they had killed Tutsi women but that they must also rape them before killing them. In response to Semanza's words the same men immediately went to where two Tutsi women, Victim A and Victim B, had taken refuge. One of the men raped Victim A and two men raped and murdered Victim B. Laurent SEMANZA intended the acts described in this paragraph to be part

of the non-international armed conflict against the RPF as stated in subparagraphs 3.4.2 and 3.4.3 *supra*.

3.18 On or about 13 April 1994, in Musha Secteur, Gikoro Commune, Laurent SEMANZA and Paul BISENGIMANA interrogated a Tutsi man, Victim C, in order to obtain information about the military operations of the *Inkotanyi*, or RPF. During the time the interrogation was taking place, the RPF was advancing toward Gikoro and Bicumbi communes. Laurent SEMANZA and Paul BISENGIMANA each cut off one of Victim C's arms while they were interrogating him. Victim C died as the result of these injuries. Laurent SEMANZA intended the acts described in this paragraph to be part of the non-international armed conflict against the RPF as stated in subparagraphs 3.4.2 and 3.4.3 *supra*.

3.19 On or about 8 April 1994, Laurent SEMANZA met Juvenal RUGAMBARARA and a group of *Interahamwe* in front of a particular house in Bicumbi Commune. Laurent SEMANZA told the *Interahamwe* to search for and kill the members of a particular Tutsi family. Immediately thereafter, in Laurent SEMANZA's presence, Juvenal RUGAMBARARA also told the *Interahamwe* to locate and kill the same Tutsi family. A short time later the *Interahamwe* searched a field near the house and found and killed four members of the family; Victim D, Victim E, Victim F and Victim G, and also a neighbor, Victim H, and her baby, Victim J.

**CHARGES**

The violations of International Humanitarian Law referred to in this indictment were committed in the territory of the Republic of Rwanda between the 1st of April and the 31st of July 1994 and refer to the facts described in paragraphs 3.1 to 3.19 above.

For all the acts described 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 he knew or had reason to know that people acting under his authority and control were about to commit the said acts or had done so and he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

**COUNT 1**

By his acts referred to in paragraphs 3.7 to 3.16 above, **Laurent SEMANZA** is responsible for killing and the 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**, stipulated in Article 2(3)(a) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

**COUNT 2**

By his acts in relation to the events described in paragraphs 3.7 and 3.8 above, **Laurent SEMANZA** did directly and publicly incite to kill and to cause serious

bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, an ethnic group as such, and has thereby committed **DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE** stipulated in Article 2(3)(c) of the Statute of the Tribunal as a crime, attributed to him by virtue of Article 6(1) and punishable in reference to Articles 22 and 23 of the same Statute.

**COUNT 3**

By his acts in relation to the events described in paragraphs 3.7 to 3.16 above, **Laurent SEMANZA** 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 TO COMMIT GENOCIDE** stipulated in Article 2(3)(e) of the Statute of the Tribunal as a crime, attributed to him by virtue of Article 6(1) and punishable in reference to Articles 22 and 23 of the same Statute.

**COUNT 4**

By his acts in relation to the events described in paragraphs 3.7 to 3.16 above, **Laurent SEMANZA** 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** stipulated in Article 3(a) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

**COUNT 5**

By his acts in relation to the events described in paragraphs 3.7 to 3.16 above, **Laurent SEMANZA** 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** stipulated in Article 3(b) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

**COUNT 6**

By his acts in relation to the events described in paragraphs 3.7 to 3.16 above, **Laurent SEMANZA** is responsible for the **PERSECUTION** of civilians on political, racial or religious grounds 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** stipulated in Article 3(h) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

**COUNT 7**

By his acts in relation to the events described in paragraphs 3.4 (subparagraphs 3.4.1 to 3.4.3), 3.6 and 3.9 to 3.16 in particular, **Laurent SEMANZA** 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 rape, torture, mutilations or any form of corporal punishment, and has thereby committed **SERIOUS VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS** of 12 August 1949, for the **PROTECTION OF WAR VICTIMS**, particularly paragraph (1)(a), and of **ADDITIONAL PROTOCOL II** thereto of 8 June 1977, particularly Article 4(2)(a), stipulated in Article 4(a) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

**COUNT 8**

By his acts in relation to the events described in paragraphs 3.15 and 3.16 above, **Laurent SEMANZA** is responsible for the **RAPE** 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** stipulated in Article 3 (g) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

**COUNT 9**

By his acts in relation to the events described in paragraphs 3.4 (subparagraphs 3.4.1 to 3.4.3), 3.6, 3.14, 3.15 and 3.16, **Laurent SEMANZA** is responsible for causing outrages upon personal dignity of women, including humiliating and degrading treatment, rape, sexual abuse and other forms of indecent assault, in the course of a non-international armed conflict, and has thereby committed **SERIOUS VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS** of 12 August 1949, for the **PROTECTION OF WAR VICTIMS** particularly paragraph (1)(c), and of **ADDITIONAL PROTOCOL II** thereto of 8 June 1977, particularly Article 4(2)(e), stipulated in Article 4(e) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

**COUNT 10**

By his acts in relation to the events described in paragraph 3.17 above, **Laurent SEMANZA** is responsible for the **RAPE** of Victim A and Victim B as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, and has thereby committed **CRIMES AGAINST HUMANITY** stipulated in Article 3(g) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

**COUNT 11**

By his acts in relation to the events described in paragraphs 3.17 and 3.18 above, **Laurent SEMANZA** is responsible for the **TORTURE** of Victim A, Victim B and Victim C as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, and has thereby committed **CRIMES AGAINST HUMANITY** stipulated in Article 3(f) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

**COUNT 12**

By his acts in relation to the events described in paragraphs 3.17 and 3.18 above, **Laurent SEMANZA** is responsible for the **MURDER** of Victim B and Victim C as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, and has thereby committed **CRIMES AGAINST HUMANITY** stipulated in Article 3(a) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

**COUNT 13**

By his acts in relation to the events described in paragraphs 3.4 (subparagraphs 3.4.1 to 3.4.3), 3.6, 3.17 and 3.18 above **Laurent SEMANZA** is responsible for causing violence to the life, health and physical or mental well-being of Victim A, Victim B and Victim C in the course of a non-international armed conflict, including murder as well as cruel treatment; to wit rape, torture and mutilation, and has thereby committed **SERIOUS VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS** of 12 August 1949, for the **PROTECTION OF WAR VICTIMS**, particularly paragraph (1)(a), and of **ADDITIONAL PROTOCOL II** thereto of 8 June 1977, particularly Article 4(2)(a), stipulated in Article 4(a) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

**COUNT 14**

By his acts in relation to the events described in paragraph 3.19 above, **Laurent SEMANZA** is responsible for the **MURDER** of Victim D, Victim E, Victim F, Victim G, Victim H and Victim J as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, and has thereby committed **CRIMES AGAINST HUMANITY** stipulated in Article 3(a) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

Kigali, Rwanda 12-10-99

For the Prosecutor

Bernard A. Muna

Deputy Prosecutor

## ANNEX II: JUDICIAL NOTICE

### PART A

1. Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa.

2. The following state of affairs existed in Rwanda between 6 April 1994 and 17 July 1994. There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there was a large number of deaths of persons of Tutsi ethnic identity.

3. Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character.

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

5. Between 1 January 1994 and 17 July 1994, Rwanda was a state party to the Geneva Conventions of 12 August 1949 and their Additional Protocol II of 8 June 1977, having succeeded to the Geneva Conventions of 12 August 1949 on 5 May 1964 and having acceded to Protocols additional thereto of 1977 on 19 November 1984.

6. Before the introduction of multi-party politics in Rwanda in 1991, the office of the *Bourgmestre* was characterised by the following features:

   (a) The *Bourgmestre* represented executive power at the *commune* level.
   (b) The *Bourgmestre* was appointed and removed by the President of the Republic on the recommendation of the Minister of the Interior.
   (c) The *Bourgmestre* had authority over the civil servants posted in his *commune.*
   (d) The *Bourgmestre* had policing duties in regard to maintaining law and order.

### PART B

i. Décret-Loi no. 01/81 du 16 janvier 1981 relatif au recensement à la carte d'identité, au domicile et à la residence des Rwandais.

ii. Arrete ministeriel no. 01/03 du 19 janvier 1981 portant mesures d'execution du décret-Loi no. 01/81 du 16 janvier 1981 relatif au recensement à la carte d'identite, au domicile et à la résidence des Rwandais: J.O. no. 2 *bis* du 20 janvier 1981.

iii. Commission pour le memorial du génocide et des massacres au Rwanda, "Rapport préliminaire d'identification des sites du génocide et des massacres d'avril–juillet 1994 au Rwanda."

iv. UN Secretary-General, "Report on the situation of Human Rights in Rwanda" submitted by Mr. R Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of commission resolution E/DN.4/S-3/1 of 25 May 1994, 28 June 1994, pages 5, 6, 7, 8 and 17. UN Document

E/CD.4/1995/7.

v. UN Secretary General, 'Report on the situation of Human Rights in Rwanda' submitted by Mr. R. Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of commission resolution E/DN.4/S-3/1 of 25 May 1994, 18 January 1995. UN Document E/CD.4/1995/7.

vi. UN Secretary-General, "Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)". UN Document S/1994/1405, 9 December 1994.

vii. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on his mission to Rwanda, submitted by Mr. Bacre Waly Ndiaye, 8–17 April 1993, including as annex II the statement of 7 April 1993 of the Government of Rwanda concerning the final report of the independent International Commission of Inquiry on human rights violations in Rwanda since 1 October 1990. UN Document E/CN.4/1994/7/add.1, 11 août 1993.

viii. Rapport spécial du Secrétaire Général sur la Mission des Nations Unies pour l'assistance au Rwanda (MINUAR), le 20 avril 1994. UN Document S/1994/470.

ix. Report of the United Nations High Commission for Human Rights on his Mission to Rwanda of 11–12 May 1994, dated 19 May 1994. UN Document E/CN.4/S-3/3.

x. The United Nations and Rwanda 1993–1996. The United Nations Blue Books Series, Volume X (New York: Department of Public Information, United Nations, 1996).

## ANNEX III: LIST OF CITED JUDGEMENTS AND SENTENCES

Akayesu (ICTR)

*The Prosecutor v. Akayesu,* Case No. ICTR-96-4-T, Judgement, ICTR TC, 2 September 1998.

*The Prosecutor v. Akayesu,* Case No. ICTR-96-4-T, Sentence, ICTR TC, 2 October 1998.

*The Prosecutor v. Akayesu,* Case No. ICTR-96-4-A, Judgement, ICTR AC, 1 June 2001.

Aleksovski (ICTY)

*The Prosecutor v. Aleksovski,* Case No. IT-95-14/1-T, Judgement, ICTY TC, 25 June 1999.

*The Prosecutor v. Aleksovski,* Case No. IT-95-14/1-A, Judgement, ICTY AC, 24 March 2000.

Bagilishema (ICTR)

*The Prosecutor v. Bagilishema,* Case No. ICTR-95-1A-T, Judgement, ICTR TC, 7 June 2001.

*The Prosecutor v. Bagilishema,* Case No. ICTR-95-1A-A, Motifs de l'Arrêt, ICTR AC, 13 December 2002.

Blaskic (ICTY)

*The Prosecutor v. Blaskic,* Case No. IT-95-14-T, Judgement, ICTY TC, 3 March 2000.

Celebici (ICTY)

*The Prosecutor v. Delalic et al. (Celebici Case),* Case No. IT-96-21-T, Judgement, ICTY TC, 16 November 1998.

*The Prosecutor v. Delalic et al. (Celebici Case),* Case No. IT-96-21-A, Judgement, ICTY AC, 20 February 2001.

Furundzija (ICTY)

*The Prosecutor v. Furundzija,* Case No. IT-95-17/1-T, Judgement, ICTY TC, 10 December 1998.

Jelisic (ICTY)

*The Prosecutor v. Jelisic,* Case No. IT-95-10-T, Judgement, ICTY TC, 14 December 1999.

*The Prosecutor v. Jelisic,* Case No. IT-95-10-A, Judgement, ICTY AC, 5 July 2001.

Kambanda (ICTR)

*The Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, ICTR TC, 4 September 1998.

*Kambanda v. The Prosecutor*, Case No. ICTR-97-23-A, Judgement, ICTR AC, 19 October 2000.

Kayishema and Ruzindana (ICTR)

*The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgement, ICTR TC, 21 May 1999.

*The Prosecutor v. Kayishema and Ruzindana,* Case No. ICTR-95-1-T, Sentence, ICTR TC, 21 May 1999.

*The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgement, ICTR AC, 1 June 2001.

Kordic and Cerkez (ICTY)

*The Prosecutor v. Kordic and Cerkez,* Case No. IT-95-14/2-T, Judgement, ICTY TC, 26 February 2001.

Krnojelac (ICTY)

*The Prosecutor v. Krnojelac,* Case No. IT-97-25-T, Judgement, ICTY TC, 15 March 2002.

Krstic (ICTY)

*The Prosecutor v. Krstic,* Case No. IT-98-33-T, Judgement, ICTY TC, 2 August 2001.

Kunarac (ICTY)

*The Prosecutor v. Kunarac et al.,* Case No. IT-96-23-T & IT-96-23/1-T, Judgement, ICTY TC, 22 February 2001.

*The Prosecutor v. Kunarac et al.,* Case No. IT-96-23-A & IT-96-23/1-A, Judgement, ICTY AC, 12 June 2002.

Kupreskic (ICTY)

*The Prosecutor v. Kupreskic et al.,* Case No. IT-95-16-T, Judgement, ICTY TC, 14 January 2000.

*The Prosecutor v. Kupreskic et al.,* Case No. IT-95-16-A, Judgement, ICTY AC, 23 October 2001.

Kvocka (ICTY)

*The Prosecutor v. Kvocka et al.,* Case No. IT-98-30/1-T, Judgement, ICTY TC, 2 November 2001.

Musema (ICTR)

*The Prosecutor v. Musema,* Case No. ICTR-96-13-T, Judgement and Sentence, ICTR TC, 27 January 2000.

*Musema v. The Prosecutor,* Case No. ICTR-96-13-A, Judgement, ICTR AC, 16 November 2001.

Ntakirutimana (ICTR)

*The Prosecutor v. Elizaphan and Gerard Ntakirutimana,* Case No. ICTR-96-10-T & ICTR-96-17-T, Judgement and Sentence, ICTR TC, 21 February 2003.

Ruggiu (ICTR)

*The Prosecutor v. Ruggiu,* Case No. ICTR-97-32-I, Judgement and Sentence, ICTR TC, 1 June 2000.

Rutaganda (ICTR)

*The Prosecutor v. Rutaganda,* Case No. ICTR-96-3-T, Judgement and Sentence, ICTR TC, 6 December 1999.

Serushago (ICTR)

*The Prosecutor v. Serushago*, Case No. ICTR-98-39-S, Sentence, ICTR TC, 5 February 1999.

Sikirica (ICTY)

*The Prosecutor v. Sikirica et al.*, Case No. IT-95-8-S, Sentencing Judgement, ICTY TC, 13 November 2001.

Simic (ICTY)

*The Prosecutor v. Simic*, Case No. IT-95-9/2-S, Sentencing Judgement, ICTY TC, 17 October 2001.

Tadic (ICTY)

*The Prosecutor v. Tadic,* Case No. IT-94-1-T, Opinion and Judgement, ICTY TC, 7 May 1997.

*The Prosecutor v. Tadic,* Case No. IT-94-1-A, Judgement, ICTY AC, 15 July 1999.

*The Prosecutor v. Tadic*, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, ICTY AC, 26 January 2000.

Todorovic (ICTY)

*The Prosecutor v. Todorovic*, Case No. IT-95-9/1-S, Sentencing Judgement, ICTY TC, 31 July 2001.

Vasiljevic (ICTY)

*The Prosecutor v. Vasiljevic,* Case No. IT-98-32-T, Judgement, ICTY TC, 29 November 2002.