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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda
Trial Chamber II - Chambre II

OR: ENG.

Before: Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal Hossain Khan

Registrar: Mr. Agwu U. Okali

Decision of: 21 May 1999

ICTR
CRIMINAL REGISTRY
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THE PROSECUTOR
versus
CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-T

JUDGEMENT

The Office of the Prosecutor:

Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton
Ms. Holo Makwaia

Counsel for Clément Kayishema:

Mr. André Ferran
Mr. Philippe Moriceau

Counsel for Obed Ruzindana:

Mr. Pascal Besnier
Mr. Willem Van der Griend

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: JOHN M. KIXEYE
SIGNATURE: ..... DATE: 26-5-1999

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I. INTRODUCTION

1.1 The Tribunal and its Jurisdiction

1. This Judgement is rendered by Trial Chamber II of the International Tribunal for the prosecution of persons responsible for the serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 (the Tribunal). The Judgement follows the Indictment and the joint trial of Clement Kayishema and Obed Ruzindana.

2. The Tribunal was established by the United Nations Security Council's Resolution 955 of 8 November 1994.[1] After official investigations, the Security Council found indications of wide spread violations of international humanitarian law and concluded that the situation in that country in 1994 constituted a threat to international peace and security within the meaning of Chapter VII of the United Nations Charter, thus giving rise to the establishment of the Tribunal.

3. The Tribunal is governed by its Statute (the Statute), annexed to the Security Council Resolution 955, and by its Rules of Procedure and Evidence (the Rules), adopted by the Judges on 5 July 1995 and amended subsequently.[2] The Judges of the Tribunal, currently fourteen in all, are selected by the General Assembly and represent the principal legal systems of the world.

4. The *ratione materiae* jurisdiction of the Tribunal is set out in Articles 2, 3 and 4 of the Statute. Under the Statute, the Tribunal is empowered to prosecute persons who are alleged to have committed Genocide, as defined in Article 2, persons responsible for Crimes Against Humanity, as defined in Article 3 and persons responsible for serious violations of Article 3 Common to the Geneva Conventions of 12 August 1949 on the

[1] UN Doc. S/RES/955 of 8 Nov. 1994.

Protection of Victims of War, and of Additional Protocol II thereto of 8 June 1977, a crime defined under Article 4 of the Tribunal's Statute.[3] Article 8 of the Statute provides that the Tribunal has concurrent jurisdiction with national courts over which, however, it has primacy. The temporal jurisdiction of the Tribunal is limited to acts committed from 1 January 1994 to 31 December 1994.

5. Finally, the Statute stipulates that the Prosecutor, who acts as a separate organ of the Tribunal, is responsible for the investigation and prosecution of the perpetrators of such violations. The Prosecutor is assisted by a Deputy Prosecutor, a team of senior trial attorneys, trial attorneys, and investigators based in Kigali, Rwanda.

[2] The Rules were successively amended on 12 Jan. 1996, 15 May 1996, 4 Jul. 1996, 5 Jun. 1997 and 8 Jun. 1998.
[3] The provisions of these offences are detailed in Part IV of the Judgement, entitled The Law.

1.2 The Indictment

The amended Indictment, against the accused persons, is reproduced, in full, below.

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

CASE NO: ICTR-95-1-1 (sic)

THE PROSECUTOR OF THE TRIBUNAL

AGAINST

CLEMENT KAYISHEMA
OBED RUZINDANA

[Registry date stamped
11 April 1997]

First Amended Indictment

Richard J. Goldstone, Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to his authority under Article 17 of the Statute of the International Criminal Tribunal for Rwanda (Tribunal Statute), charges:

1. This indictment charges persons responsible for the following massacres which occurred in the *Prefecture* of Kibuye, Republic of Rwanda:

    1.1 The massacre at the Catholic Church and the Home St. Jean complex in Kibuye town, where thousands of men, women and children were killed and numerous people injured around 17 April 1994.

    1.2 The massacre at the Stadium in Kibuye town, where thousands of men, women and children were killed and numerous people injured on about 18 and 19 April 1994.

1.3 The massacre at the Church in Mubuga, where thousands of men, women and children were killed and numerous people injured between about 14 and 17 April 1994.

1.4 The massacres in the area of Bisesero, where thousands of men, women and children were killed and numerous people injured between about 10 April and 30 June 1994.

THE MASSACRES SITES

2. The Republic of Rwanda is divided into eleven *Prefecture*s. These eleven *Prefecture*s are further divided into communes. The *Prefecture* of Kibuye consists of nine communes. The massacres which form the basis of the charges in the indictment occurred in the *Prefecture* of Kibuye, in Gitesi, Gishyita and Gisovu communes.

3. The first massacre site addressed in this indictment, namely, the Catholic Church and Home St. Jean complex, is located in Kibuye town, Gitesi commune, on a piece of land which is surrounded on three sides by Lake Kivu. A road runs past the entrance to the Catholic Church and Home St. Jean complex. The Catholic Church is visible from the road. The Home St. Jean is behind the Church and is not visible from the road.

4. The second massacre site addressed to in this indictment, the Stadium, is located near the main traffic circle in Kibuye town, Gitesi Commune. The town's main road runs past the Stadium. Immediately behind the Stadium is a high hill.

5. The third massacre site addressed in this indictment, the Church of Mubuga, is located in Gishyita Commune. Gishyita Commune is located in the southern part of Kibuye *Prefecture*. The Church in Mubuga is located approximately 20 kilometres from Kibuye town.

6. The fourth massacre site addressed in this indictment is the area of Bisesero. The area of Bisesero extends through two communes in the *Prefecture* of Kibuye: Gishyita and Gisovu. Bisesero is an area of high rolling hills, located in the southern portion of Kibuye *Prefecture*. The hills are very large, and are often separated by deep valleys.

BACKGROUND

7. The structure of the executive branch, and the authority of the members therein, is set forth in the laws of Rwanda. In the *Prefecture*, the Prefect is the highest local representative of the government, and is the trustee of the State Authority. The Prefect has control over the government and its agencies throughout the *Prefecture*.

8. In each commune within a *Prefecture* there exists the council of the commune, which is led by the *Bourgmestre* of that Commune. The *Bourgmestre* of each commune is nominated by the Minister of the Interior and appointed by the President. As representative of the executive power, the *Bourgmestre* is subject to the hierarchical authority of the Prefect, but, subject to this authority, the *Bourgmestre* is in charge of governmental functions within his commune.

9. The Prefect is responsible for maintaining the peace, public order, and security of persons and goods within the *Prefecture*. In fulfilling his duty to maintain peace, the Prefect can demand assistance from the army and the *Gendarmerie Nationale*. The *Bourgmestre* also has authority over those members of the *Gendarmerie Nationale* stationed in his *commune*.

10. The *Gendarmerie Nationale* is an armed force established to maintain the public order and execute the laws. It is lead by the Minister of Defence, but can exercise its function of safeguarding the public order at the request of the competent national authority, which is the *Prefect*. The *Gendarmerie Nationale* has an affirmative duty to report to the *Prefect* information which has a bearing on the public order, as well as a duty to assist any person who, being in danger, requests its assistance. From January - July 1994, there were approximately 200 gendarmes in the *Prefecture* of Kibuye.

11. The members of the executive branch also have control over the communal police. Each commune has Police Communale, who are engaged by the *Bourgmestre* of the commune. Normally the *Bourgmestre* has exclusive authority over the members of the Police Communale. In case of public calamities, however, the *Prefect* can claim the policemen of the Police Communale and place them under his direct control.

12. The Interahamwe, an unofficial paramilitary group composed almost exclusively of extremist Hutus, had significant involvement in the events charged in this indictment. The National Revolutionary Movement for Development (MRND) party created the members of the Interahamwe as a military training organisation for MRND youth and based the members of the Interahamwe's leadership on the MRND's own structure, with leaders at the national, prefectoral, and communal levels. There was no official link between the Interahamwe and the Rwandan military, but members of the Army and Presidential Guard trained, guided and supported the Interahamwe. Occasionally, members of the Army or Presidential Guard participated in Interahamwe activities.

13. On 6 April 1994, the airplane carrying then-president of Rwanda Juvenal Habyarimana crashed during its approach into Kigali airport in Rwanda. Almost immediately, the massacre of civilians began throughout Rwanda. During that time, individuals seeking Tutsis were able to focus their activities on specific locations because Tutsis, who believed themselves to be in danger, often fled in

large numbers to perceived safe areas such as churches and communal buildings. This practice, which was widely known, was based on the fact that in the past Tutsis who had sought refuge in such places had not been attacked. Thus, during the period of time relevant to this indictment, groups of people seeking refuge in the same area were most likely predominantly Tutsis.

14. Also, during the times relevant to this indictment, the Rwandan government required all Rwandans to carry, at all times, identity cards that designated the bearer's status as Hutu, Tutsi, Twa or "naturalised". Individuals seeking Tutsis could identify their targets simply by asking individuals to show their identification card.

GENERAL ALLEGATIONS

15. All acts of (sic) omissions by the accused set forth in this indictment occurred during the period of 1 January 1994 to 31 December 1994 and in the territory of the Republic of Rwanda.

16. In each paragraph charging genocide, a crime recognised by Article 2 of the Tribunal Statute, the alleged acts or omissions were committed with intent to destroy, in whole or in part, an ethnic or racial group.

17. In each paragraph charging crimes against humanity, crimes recognised by Article 3 of the Tribunal Statute, the alleged acts or omissions were part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds.

18. At all times relevant to this indictment, the victims referred to in this indictment were protected under Article 3 common to the Geneva Conventions and by the Additional Protocol II thereto.

19. At all times relevant to this indictment, there was an internal armed conflict occurring within Rwanda.

20. At all times relevant to this indictment, Clement Kayishema was Prefect of Kibuye and exercised control over the *Prefecture* of Kibuye, including his subordinates in the executive branch and members of the Gendarmerie Nationale.

21. Each of the accused is individually responsible for the crimes alleged against him in this indictment, pursuant to Article 6 (1) of the Tribunal Statute. Individual responsibility includes planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation and execution of any of the crimes referred to in Articles 2 to 4 of the Tribunal Statute.

22. In addition, Clement Kayishema is also or alternatively individually responsible as a superior for the criminal acts of his subordinates in the administration, the Gendarmerie Nationale, and the communal police with respect to each of the crimes charged, pursuant to Article 6 (3) of the Tribunal Statute. Superior individual responsibility is the responsibility of a superior for the acts of his subordinate if he knew or had reasons to know that his subordinate was about to commit such criminal acts or had done so and failed to take the necessary and reasonable measures to prevent such acts, or to punish the perpetrators thereof.

THE ACCUSED

23. **Clement Kayishema** was born in 1954 in Bwishyura Sector, Gitesi Commune, Kibuye *Prefecture*, Rwanda. Kayishema's father was Jean Baptiste Nabagiziki, and his mother was Anastasie Nyirabakunzi. He was appointed to the position of Prefect of Kibuye on 3 July 1992, and assumed his responsibility as Prefect soon after. **Clement Kayishema** acted as Prefect of Kibuye until his departure to Zaire in July 1994. He is believed to be currently in Bukavu, Zaire.

24. **Obed Ruzindana** is believed to have been borne around 1962 in Gisovu Sector, Gisovu Commune, Kibuye Prefecture, Rwanda. **Ruzindana's** father was Elie Murakaza. **Obed Ruzindana** was a commercial trader in Kigali during the time period in which the crimes alleged in this indictment occurred. He is believed to be currently somewhere in Zaire.

The Massacre at the Catholic Church and Home St. Jean

COUNTS 1-6

25. By about 17 April 1994, thousands of men, women and children from various locations had sought refuge in the Catholic Church and Home St. Jean complex (the Complex) located in Kibuye town. These men, women and children were unarmed and were predominantly Tutsis. They were in the complex seeking protection from attacks on Tutsis which had occurred throughout the *Prefecture* of Kibuye.

26. Some of the people who sought refuge in the Complex did so because Clement Kayishema ordered them to go there. When Clement Kayishema ordered people to the Complex, he knew or had reason to know that an attack on the complex was going to occur.

27. After people gathered in the Complex, the Complex was surrounded by persons under Clement Kayishema's control, including members of the *Gendarmerie Nationale*. These persons prevented the men, women and children within the

Complex from leaving the Complex at a time when Clement Kayishema knew or had reason to know that an attack on the Complex was going to occur.

28. On about 17 April 1994, Clement Kayishema ordered members of the Gendarmerie Nationale, communal police of Gitesi *commune*, members of the *Interahamwe* and armed civilians to attack the Complex, and personally participated in the attack. The attackers used guns, grenades, machetes, spears, cudgels and other weapons to kill the people in the Complex.

29. The attack resulted in thousands of deaths and numerous injuries to the people within the complex. (Attachment A contains a list of some of the individuals killed in the attack, members of the Gendarmerie Nationale, the Interahamwe and armed civilians searched for and killed or injured survivors of the attack.

30. Before the attack on the Complex, Clement Kayishema did not take measures to prevent an attack, and after the attack Clement Kayishema did not punish the perpetrators.

31. By these acts and omissions, Clement Kayishema is criminally responsible for:

Count 1: GENOCIDE, a violation of Article 2 (3) (a) of the Tribunal Statute;

Count 2: CRIMES AGAINST HUMANITY, a violation of Article 3 (a) (murder) of the Tribunal Statute;

Count 3: CRIMES AGAINST HUMANITY, a violation of Article 3 (b) (extermination) of the Tribunal Statute;

Count 4: CRIMES AGAINST HUMANITY, a violation of Article 3 (i) (other inhumane acts) of the Tribunal Statute;

Count 5: A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, a violation of Article 4 (a) of the Tribunal Statute; and

Count 6: A VIOLATION OF ADDITIONAL PROTOCOL II, a violation of Article 4 (a) of the Tribunal Statute.

The Massacre at the Stadium in Kibuye Town

COUNTS 7 – 12

32. By about 18 April 1994, thousands of men, women and children from various locations had sought refuge in the Stadium located in Kibuye town. These men, women and children were unarmed and were predominantly Tutsis. They were in

the Stadium seeking refuge from attacks on Tutsis which had occurred throughout the *Prefecture* of Kibuye.

33. Some of the people who sought refuge in the Stadium did so because Clement Kayishema ordered them to go there. When Clement Kayishema ordered people to go to the Stadium, he knew or had reason to know that an attack on the Stadium was going to occur.

34. After people gathered in the Stadium, the Stadium was surrounded by persons under Clement Kayishema's control, including members of the Gendarmerie Nationale. These persons prevented the men, women and children within the Stadium from leaving the Stadium at a time when Clement Kayishema knew or had reason to know that an attack on the Complex (sic) was going to occur.

35. On or about 18 April 1994, Clement Kayishema, went to Stadium and ordered the Gendarmerie Nationale, the communal police of Gitesi Commune, the members of the Interahamwe and armed civilians to attack the Stadium. Clement Kayishema initiated the attack himself by firing a gun into the air. In addition, Clement Kayishema personally participated in the attack. The attackers used guns, grenades, pangas, machetes, spears, cudgels and other weapons to kill the people in the Stadium. There were survivors of the attack on 18 April 1994. During the night of 18 April 1994 and the morning of 19 April 1994 gendarmes surrounding the Stadium prevented the survivors from leaving. The attack on the Stadium continued on 19 April 1994. Throughout the attacks, men, women and children attempting to flee the attacks were killed.

36. The two days of attacks resulted in thousands of deaths and numerous injuries to the men, women and children within the Stadium (Attachment B contains a list of some of the individuals killed in the attacks).

37. Before the attacks on the Stadium Clement Kayishema did not take measures to prevent an attack from occurring, and after the attacks Clement Kayishema did not punish the perpetrators.

38. By these acts and omissions Clement Kayishema is criminally responsible for:

Count 7: GENOCIDE, a violation of Article 2 (3) (a) of the Tribunal Statute;

Count 8: CRIMES AGAINST HUMANITY, a violation of Article 3 (a) (murder) of the Tribunal Statute;

Count 9: CRIMES AGAINST HUMANITY, a violation of Article 3 (b) (extermination) of the Tribunal Statute;

Count 10: CRIMES AGAINST HUMANITY, a violation of Article 3 (i) (other inhumane acts) of the Tribunal Statute;

Count 11: A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, a violation of Article 4 (a) of the Tribunal Statute; and

Count 12: A VIOLATION OF ADDITIONAL PROTOCOL II, a violation of Article 4 (a) of the Tribunal Statute.

The Massacre at the Church in Mubuga

COUNTS 13 - 18

39. By about 14 April 1994, thousands of men, women and children congregated in the Church in Mubuga, Gishyita Commune. These men, women and children were predominantly Tutsis. They were in the church seeking refuge from attacks on Tutsis which had occurred throughout the *Prefecture* of Kibuye.

40. After the men, women and children began to congregate in the Church, Clement Kayishema visited the Church on several occasions. On or about 10 April Clement Kayishema brought gendarmes, under his control, to the Church. These gendarmes prevented the men, women and children within the church from leaving.

41. On or about 14 April 1994 individuals, including individuals under Clement Kayishema’s control, directed members of the Gendarme Nationale, communal police of Gishyita commune, the Interahamwe and armed civilians to attack the Church. In addition, each of them personally participated in the attacks. The attackers used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the people in the Church. Not all the people could be killed at once, so the attacks continued for several days. Both before and during these attacks persons under Clement Kayishema's control, including members of the Gendarmerie Nationale and communal police, prevented the men, women and children within the church from leaving.

42. The attacks resulted in thousands of deaths and numerous injuries to the men, women and children within the Church (Attachment C contains a list of some of the victims killed in the attacks).

43. Before the attacks on the Church in Mubuga, Clement Kayishema did not take measures to prevent the attacks, and after the attacks Clement Kayishema did not punish the perpetrators.

44. By these acts and omissions Clement Kayishema is criminally responsible for:

Count 13: GENOCIDE, a violation of Article 2 (3) (a) of the Tribunal Statute;

Count 14: CRIMES AGAINST HUMANITY, a violation of Article 3 (a) (murder) of the Tribunal Statute;

Count 15: CRIMES AGAINST HUMANITY, a violation of Article 3 (b) (extermination) of the Tribunal Statute;

Count 16: CRIMES AGAINST HUMANITY, a violation of Article 3 (i) (other inhumane acts) of the Tribunal Statute;

Count 17: A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, a violation of Article 4 (a) of the Tribunal Statute; and

Count 18: A VIOLATION OF ADDITIONAL PROTOCOL II, a violation of Article 4 (a) of the Tribunal Statute.

The Massacres in the Area of Bisesero

COUNTS 19-24

45. The area of Bisesero spans over two communes of the Kibuye *Prefecture*. From about 9 April 1994 through 30 June 1994, thousands of men, women and children sought refuge in the area of Bisesero. These men, women and children were predominantly Tutsis and were seeking refuge from attacks on Tutsis which had occurred throughout the *Prefecture* of Kibuye.

46. The area of Bisesero was regularly attacked, on almost a daily basis, throughout the period of about 9 April 1994 through about 30 June 1994. The attackers used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis in Bisesero. At various times the men, women and children seeking refuge in Bisesero attempted to defend themselves from these attacks with stones, sticks and other crude weapons.

47. At various locations and times throughout April, May and June 1994, and often in concert, Clement Kayishema and Obed Ruzindana brought to the area of Bisesero members of the Gendarmerie Nationale, communal police of Gishyita and Gisovu communes, Interahamwe and armed civilians, and directed them to attack the people seeking refuge there. In addition, at various locations and times, and often in concert, Clement Kayishema and Obed Ruzindana personally attacked and killed persons seeking refuge in Bisesero.

48. The attacks described above resulted in thousands of deaths and numerous injuries to the men, women and children within the area of Bisesero (Attachment D contains a list of some of the individuals killed in the attacks).

49. Throughout this time, Clement Kayishema did not take measures to prevent the attacks, and after the attacks Clement Kayishema did not punish the perpetrators

50. By these acts and omissions Clement Kayishema and Obed Ruzindana are criminally responsible for:

Count 19: GENOCIDE, a violation of Article 2 (3) (a) of the Tribunal Statute;

Count 20: CRIMES AGAINST HUMANITY, a violation of Articles 3(a) (murder) of the Tribunal Statute;

Count 21: CRIMES AGAINST HUMANITY, a violation of Article 3(b) (extermination) of the Tribunal Statute;

Count 22: CRIMES AGAINST HUMANITY, a violation of Article 3(1) (other inhumane acts) of the Tribunal Statute;

Count 23: A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, a violation of Article 4 (a) of the Tribunal Statute; and

Count 24: A VIOLATION OF ADDITIONAL PROTOCOL II, a violation of Article 4 (a) of the Tribunal Statute.

1996
Arusha, Tanzania

Signed
Richard J. Goldstone
Prosecutor

This rearranged version conforms to the Order of Trial Chamber II in its decision of 10 April 1997 on the indictment of 28 November 1995 confirmed by the Honourable Judge Pillay and amended on 29 April 1996, to serve as the Indictment for the accused Clement Kayishema and Obed Ruzindana in the case ICTR 95-1-I.

1.3 The Accused

Clement Kayishema

6. According to Clement Kayishema's (Kayishema), own testimony, he was born into a Hutu family in the Bwishyura Sector, Kibuye *Prefecture* in Rwanda, in 1954. His father was a teacher and later worked as a janitor in a hospital. Subsequently, he was hired as the commune secretary and was finally appointed judge at the Canton Tribunal. His mother and seven siblings were uneducated farmers.

7. In 1974, Kayishema was appointed registrar in Kagnagare Canton Tribunal. The following year he was granted a scholarship to attend the faculty of medicine of the National University of Rwanda, in Butare. Upon graduation, he practiced general medicine and surgery. In 1984, he was sent by the Rwandan Government to work as a doctor in an Ugandan refugee camp. From 1986 to 1991, he held the position of medical director of the hospital of Nyanza. He was then transferred to the Kibuye hospital.

8. Kayishema married a Rwandan woman by the name of Mukandoli, in 1987 with whom he had two children. Mukandoli holds a degree in education science from the National University of Rwanda, with a specialization in psychology.

9. Kayishema joined the Christian Democratic Party (PDC), whose motto was "work, justice and fraternity," in April 1992. On 3 July 1992, Kayishema was appointed the *Prefect* of Kibuye *Prefecture*. This occurred at a time when the multiparty system came into effect in Rwanda. He was re-appointed to his post, after the death of the President in 1994, by the Interim Government.

Obed Ruzindana

10. According to the testimony of witnesses, Obed Ruzindana (Ruzindana) was born in 1962 into a wealthy Hutu family in Gisovu Commune, Kibuye *Prefecture*, Rwanda. His father, Elie Murakaza, had been a *Bourgmestre* in the Mugonero Commune, where

the family resided. Murakaza and, by extension, his family were well known and respected in the community.

11. Ruzindana left his home in Kibuye for Kigali in 1986-1987 and engaged in transporting merchandise out of Rwanda and importing goods into the country. He employed four drivers and by all accounts became a successful businessman in his own right.

12. In 1991 he married a woman whom he had known since childhood. Mrs. Ruzindana testified that although both her parents were Tutsi, her father's identity card indicated that he was a Hutu. According to Mrs. Ruzindana it was possible to "pay" to change one's ethnicity on the identity card. Two children were born from this union in 1991 and 1993. Ruzindana and his family lived in Remera, Kigali until the tragic events of 1994 when they returned to Ruzindana's parents' home in Mugonero.

1.4 Procedural Background of the Case

Pre-trial

13. Kayishema and Ruzindana were initially charged in the original Indictment submitted by the Prosecutor, Richard Goldstone,[4] on 22 November 1995 together with six other suspects. The charges included conspiracy to commit genocide, Genocide and Crimes Against Humanity and violations of Common Article 3 and Additional Protocol II. The Indictment was confirmed by Judge Navanethem Pillay on 28 November 1995. Judge Pillay ordered that the Indictment be amended on 6 May 1996 to remove the conspiracy charges. It should be noted that a second Indictment was brought against Ruzindana on 17 June 1996, the trial of which is still pending. That Indictment was confirmed by Judge Tafazzal H. Khan on 21 June 1996.

14. Kayishema was arrested on 2 May 1996 in Zambia and transferred to the United Nations Detention Unit Facility (the UNDF) in Arusha, on 26 May 1996. His initial appearance was held on 31 May 1996 before Trial Chamber I. Kayishema, represented by Mr. André Ferran, of the bar of Montpellier, France, and Philippe Moriceau of the bar of Montpellier, France, pleaded not guilty to all of the charges.

15. Ruzindana was arrested on 20 September 1996 in Nairobi, Kenya and transferred to the UNDF on 22 September 1996. His initial appearance was held on 29 October 1996 before the Trial Chamber II. Ruzindana, represented by Mr. Pascal Besnier, of the bar of Paris, France, and Mr. Willem Van der Griend of the Bar of Rotterdam, the Netherlands, pleaded not guilty to all of the charges. The Chamber set a date for trial for 20 February 1997 while reserving the right to join with Kayishema.

16. At the pretrial stage, the Trial Chamber received and decided many written motions from the Parties. Some of the more pertinent ones are detailed below.

[4] On 1 October 1996, Louise Arbour succeeded Richard Goldstone as Prosecutor of the Tribunal.

17. Kayishema filed a preliminary Motion on 26 July 1996 in which he requested the annulment of the proceedings, and consequently, his provisional release. The Parties were heard on 5 November 1996 and the Defence request was rejected. Kayishema filed a further Motion on 23 October 1996 for postponement of the trial in order to enable him to prepare his case. The Prosecutor did not oppose the Motion but on 5 November 1996, filed a Motion for joinder of Kayishema and Ruzindana. The Tribunal ordered the joinder of the two accused. The trial date for Kayishema consequently was postponed to the trial date set for Ruzindana, which as mentioned above was 20 February 1997.[5]

18. On 30 December 1996 Ruzindana filed a preliminary Motion objecting to the form of the Indictment and against joinder of his case with that of Kayishema based on various alleged procedural difficulties with the Indictment and the warrant of arrest. The request for annulment of the two Indictments and for his release was rejected as was the objection to the joinder.

19. On 27 March 1997, the Prosecution brought a Motion for leave to sever and to join in a superseding Indictment and to amend the superseding Indictment in the cases against Kayishema, Gérard Ntakirutimana, and Ruzindana on the grounds of involvement in a same transaction. The Chamber rejected the Motion because the Prosecutor did not offer any evidence that demonstrated the nature of the common scheme.

20. Kayishema brought another Motion on 7 March 1997 calling for the application of Article 20(2) and (4)(b) (Rights of the accused) of the Statute of the Tribunal by the Prosecution. The Defence further requested the Prosecution to divulge and limit its number of lawyers, consultants, assistants and investigators working on the case. The Chamber ruled[6] that the rights of the accused and equality between the parties should not be confused with the equality of means and resources. The Chamber concluded that the

[5] Decision on the joinder of the Accused and Setting the Date for Trial, the Prosecutor v. Clément Kayishema, Case No. ICTR-95-1-T, 6 November 1996.

[6] Order on the Motion by the Defence Counsel for Application of Article 20 (2) and (4) (b) of the Statute of the International Tribunal for Rwanda, the Prosecutor v. Clément Kayishema, Case No. ICTR-95-1-T, Obed Ruzindana, Case No. ICTR-96-10-T, 5 May 1997.

Defence had not proved any violation of the rights of the accused as provided in Article 20(2) and (4)(b) of the Statute.

Trial

21. On 11 April 1997 the trial of Kayishema and Ruzindana commenced before Trial Chamber II, composed of Judge William H. Sekule, presiding, Judge Yakov A. Ostrovsky and Judge Tafazzal H. Khan, based on the First Amended Indictment filed with the Registry on that day. The Prosecution team consisted of Mr. Jonah Rahetlah, Ms. Brenda Sue Thornton, and Ms. Holo Makwaia. Kayishema was represented by Mr. Andre Ferran and Mr. Philippe Moriceau. Mr. Pascal Besnier and Mr. Van der Griend formed the Defence team for Ruzindana. The Prosecution completed its case on 13 March 1998, having called a total of 51 witnesses and having tendered into evidence over 350 exhibits.

22. The Prosecution filed a Motion on 18 February 1998, pursuant to Rule 73 of the Rules, requesting the Trial Chamber to order the uninterrupted continuation of the trial of the accused and the consultation of both Parties in respect of the scheduling of this continuation. The Chamber was of the view that pursuant to Article 20(4)(b) of the Statute, the accused should be accorded adequate time and facilities for the preparation of their case.[7]

23. The Defence commenced their case on 11 May 1998 and closed on 15 September 1998. It should be noted that at the conclusion of the Prosecution's case, the Defence requested an adjournment in order to prepare its case. In the interest of justice, the Trial Chamber granted the Defence Teams a generous two-month adjournment to prepare. The Defence presented a total of twenty-eight witnesses, sixteen of whom testified on behalf of accused, Ruzindana, seven for Kayishema and five for both accused persons. Kayishema testified on his own behalf. Over 59 Defence exhibits were admitted.

24. The Prosecutor presented closing argument from 21 October to 28 October 1998, Ruzindana's Defence from 28 October to 2 November 1998 and Kayishema's Defence from 3 to 16 November 1998. The Prosecutor presented the argument in rebuttal on 17 November 1998. The case was adjourned the same day for deliberation by the Trial Chamber.

25. During the trial, numerous written and oral motions were heard. On 17 April 1997, the Defence challenged the credibility of a witness, where the oral testimony varied from the previous written statement taken by the prosecutor's investigators. The Chamber opined that variation may occur at times for appreciable reasons without giving cause to disregard the statement in whole or in part.[8] The Chamber ordered that when counsel perceives there to be a contradiction between the written and oral statement of a witness, Counsel should raise such question by putting to the witness the exact portion in issue to enable the witness to explain the discrepancy before the Tribunal. Counsels should then mark the relevant portion and submit it as an exhibit if they find that the contradiction or discrepancy raised was material to the credibility of the witness concerned.

26. On 9 July 1997, Ruzindana filed a Motion pursuant to Rule 75 of the Rules seeking protective measures for potential witnesses noting that this protection should not extend to providing immunity from prosecution by an appropriate authority. The Trial Chamber[9] granted the Motion. A Motion filed by Kayishema seeking general

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[7] Decision on the Prosecution Motion for Directions for the Scheduling of the Continuation of the Trial of Clément Kayishema and Obed Ruzindana on the Charges as Contained in the Indictment No. ICTR-95-1-T, 12 March 1998.

[8] Order on the Probative Value of Alleged Contradiction between the Oral and Written Statement of A Witness During Examination, the Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 17 April 1997.

[9] Decision on the Motion for the Protection of Defence Witnesses, the Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 6 October 1997.

protective measures for witnesses who would testify on his behalf was also granted by the Chamber in its Decision on 23 March 1998.[10]

27. On 12 March 1998 the Prosecutor filed a Motion requesting the Trial Chamber to order the Defence to comply with the provisions of rules 67(A)(ii) and 67(C) of the Rules of Procedure and Evidence. The Prosecutor submitted that if the Defence intended to offer the defence of alibi, it should notify the Prosecution as early as practicable but in any event prior to the commencement of the trial. The Chamber opined that Kayishema should make the necessary disclosure immediately if they intend to rely upon the defence of alibi or special defence. However, the Defence filed a joint Motion on 30 April 1998 requesting the Trial Chamber to interpret the notion of 'defence of alibi' and 'special defence' as stipulated in Rule 67 of the Rules of Procedure and Evidence. The Chamber dismissed the Defence Motion on the ground that it can not define rule 67 of the Rules in an abstract form without a specific problem to address. [11]

28. Due to the Defence's continued non compliance with Rule 67(A)(ii) of the Rule of Procedure and Evidence, the Prosecution filed another Motion on 11 August 1998, seeking, *inter alia*, an order prohibiting the Defence of Kayishema from invoking the Defence of alibi or any special Defence. The Defence responded that, under Rule 67(B), failure of the Defence to notify the Prosecutor of the Defence of alibi or any special Defence as required by rule 67(A)(ii), does not limit the right of the accused to raise the Defence of alibi or special Defence. The Trial rejected the Defence's reasons for not providing details noting that the accused himself could have provided at least some details. The Chamber therefore reiterated its previous decision on this matter.[12]

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[10] Decision on the Motion for the Protection of Defence Witnesses, the Prosecutor v. Cl9ment Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 23 February 1998.

[11] Decision on the Prosecution Motion for An Order Requesting Compliance by the Defence with Rules 67 (A)(ii) and 67(C) of the Rules, the Prosecutor v. Cl9ment Kayishema and Obed Ruzindana, 15 June 1998.

[12] Decision on the Prosecution Motion for A Ruling on the Defence Continued non Compliance with Rule 67 (A) (ii) and with the Written and Oral Orders of the Trial Chamber, the prosecutor v. Cl9ment Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 3 September 1998.

29. On 22 June 1998, the Prosecution filed a Motion, seeking for a ruling that evidence of a Defence expert witness, a psychiatrist, be ruled inadmissible. The Chamber noted that it is important to observe the rights of the accused to a fair trial guaranteed under the provisions of Article 20 of the Statute in particular 20(4)(e) which provides that the accused shall have the rights to obtain the attendance of witnesses on his or her behalf. The expert was heard.[13]

30. On 19 August 1998, the Chamber dismissed a Motion filed by the Defence requesting to re-examine witness DE. The Trial Chamber found that the case of Kayishema would not suffer prejudice in the absence of additional evidence from this witness and rejected the Motion. [14]

[13] Decision on the Prosecution Motion Request to Rule Inadmissible the Evidence of Defence Expert Witness, Dr. Pouget, the Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 29 June 1998.

[14] Decision on the Defence Motion for the Re-examination of Defence Witness DE, the Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 19 August 1998.

II. Historical Context of the 1994 Events in Rwanda

31. It is necessary to address the historical context within which the events unfolded in Rwanda in 1994, in order to understand fully the events alleged in the Indictment and the evidence before the Trial Chamber. We will not engage in a lengthy examination of the geo-political or historical difficulties faced by Rwanda as a number of reports and other publications have been written on these issues to which interested persons can refer.

32. The Trial Chamber is of the opinion that an attempt to explain the causal links between the history of Rwanda and the suffering endured by this nation in 1994 is not appropriate in this forum and may be futile. It is impossible to simplify all the ingredients that serve as a basis for killings on such a scale. Therefore, the account presented below is a brief explanation of issues related to the division of ethnic groups in Rwanda, a brief history of Rwanda's post-independence era, including a look at the 1991 Constitution, the Arusha Accords, and the creation of militias.

33. The Trial Chamber has chosen to relay the events using neutral language and, where necessary, to discuss the cross-examination of the Prosecution witnesses. The summary is based exclusively on the evidence presented to this Trial Chamber and no reference has been made to sources or materials that do not constitute a part of the record of the present case.

The Question of Ethnicity in Rwanda

34. In 1994, apart from some foreign nationals, there were three officially recognised ethnic groups living in Rwanda, the Hutus, the Tutsis and the Twas. The Hutus constituted the overwhelming majority of the population. The Rwandan use of the term "ethnicity" requires some explanation because according to Prosecution witness, André Guichaoua, Professor of Sociology and Economics at the University of Lille, France, all Rwandans share the same national territory, speak the same language, believe in the same myths and share the same cultural traditions. The Trial Chamber opines that these shared

characteristics could be tantamount to a common ethnicity. Thus, it is recognised that prior to the colonisation of Rwanda, by Germany and later Belgium, the line separating the Hutus and Tutsis was permeable as the distinction was class-based. In other words, if a Hutu could acquire sufficient wealth, he would be considered a Tutsi.

35. This begs the question of how it became possible permanently to seal a person into one category after the Belgian colonisation. The Belgians instituted a system of national identification cards bearing the terms Hutu, Tutsi and Twa, under the category of ethnicity, which were used for administrative purposes in 1931. Although prior to the arrival of the European colonisers the Rwandans had referred to themselves as Hutus, Tutsis or Twas, it was after this point that the group identity solidified and this former sociological categorisation became a means of ethnic identification. From its inception, the identification card has been used to facilitate discrimination against one group or another in Rwanda, be it in the implementation of an ethnic based quota system in educational and employment opportunities or in implementing a policy of genocide as was done in 1994.

36. For decades some claimed that Hutus and Twas were the original inhabitants of Rwanda and that Tutsis were "people from the Nile."[15] During cross-examination Guichaoua deposed that this idea has never been proven scientifically and that no one "category of occupants has more legitimacy than others."[16] Nonetheless, certain Hutu politicians have periodically used this concept to legitimise their call for "Hutu Power" and to incite hatred and division amongst the Rwandan population, as outlined below.

A Brief Glance at the Post-Independence Era

37. In 1959, shortly prior to gaining independence, Rwanda witnessed the beginnings of intense ethnic tensions. During that year a number of Tutsi chiefs, farmers and other persons were massacred and their houses were set ablaze. Thousands of other Tutsis were forced to flee to neighbouring countries. Guichaoua stated that the deterioration of

[15] Pros. exh. 103A, p. 8.
[16] *Ibid.*

ethnic relations could be attributed to the legacy of Tutsi favouritism by the colonial powers.

The First Republic

38. The country's first President, Gregoire Kayibanda, was elected in 1962 at which time the Hutu movements began to display their radicalisation more openly. Professor Guichaoua testified that anti-Tutsi movements had become so hostile that by 1963, 200,000 to 300,000 Tutsis sought refuge in neighbouring countries. Between 1962 and 1966 there were repeated attempts by armed Tutsi groups (labelled *Inyenzi* -- cockroach) to regain power through incursions organised from neighbouring countries, mainly from Burundi. According to Professor Guichaoua, because an incursion in December 1963 reached the gates of Kigali, a hunt for Tutsis ensued throughout the country thereafter. The worsening tensions led to the consolidation of power by "the radical Hutu elements and helped to suppress the deep divisions within the regime in power which was increasingly marked by the personal and authoritarian style of government of President Kayibanda."[17]

39. President Kayibanda's attempt to maintain his hold on power is evident from the institution of a *de facto* single-party system in Rwanda in 1965. His party, the Republican Democratic Movement (MDR-PARMEHUTU) eliminated the Tutsi parties as well as other Hutu parties such as the Association for the Social Advancement of the Masses (APROSOMA). Factional political divisions, based on regions of origin from within the country, added further strain on the ethnic-base difficulties at that time. A new sense of supremacy, based on the existence of a legitimate majority population was fostered and contributed to the massacres of the Tutsis that occurred in Rwanda and Burundi in 1972-73. Thus, the inability of the First Republic to overcome ethnic tensions lead to its downfall and the assassination of President Kayibanda.

[17] Pros. exh. 103A, p. 12.

The Second Republic

40. On 5 July 1973, the Chief of Staff, Major Juvenal Habyarimana, a native of Gisenyi *Prefecture*, seized power in a *coup d'etat*. His then Chief of Security, Alexis Kanyarengwe "implemented a strategy of political and ethnic tension, aimed at making the *coup d'etat*" seem necessary for restoring order to the country. Although the 1973 coup was interpreted as "simply settling scores between rival factions"[18] and having nothing to do with ethnic tensions, those in power encouraged the Hutus to chase away their Tutsi friends and colleagues from educational establishments and places of employment. Again, like in 1959, many Tutsis died at the hands of Hutu assailants and thousands of others fled the country. This brought about the advent of Rwanda's Second Republic.

41. Two years later, in 1975, the National Revolutionary Movement for Development (MRND) was created to replace the MDR. At its helm was President Habyarimana. This party controlled the country until the time of the tragic events in 1994. In 1978, President Habyarimana declared that the Hutu-Tutsi problem would be solved by ensuring that all Rwandans, from birth, were members of the MRND. Compulsory and exclusive membership in this party effectively erased any distinction between the party and the State. Habyarimana also promised that all segments of society would be ensured representation in high ranking government posts, taking into account its percentage in the total population. Of course this idea inherently contained a quota system that would further frustrate the efforts in reconciling ethnic difficulties.

42. For the next few years the Habyarimana government focused its efforts on issues of development. According to Professor Guichaoua, throughout the late 1970s and a part of the 1980s this government's efforts met with undeniable success in terms of low national debt, maintaining macroeconomic balances, monetary stability, food self-sufficiency, etc. Also during this time, the government re-introduced the system of *umuganda* -- the Rwandan concept of communal work -- meant to promote the value of organised or

[18] *Ibid*., p. 15. Professor Guichaoua cited to a proclamation following the coup by commander Theoneste Lizinde, which made no reference to the ethnic confrontations.

spontaneous solidarity (mutual help among neighbours) among the people living in the hills.[19] Additionally, "the social cohesion of this peasant state and the submission of the peasantry to an extremely authoritarian and constraining order was due largely to a policy which succeeded in establishing a weakly differentiated social system."[20] Thus the misplaced belief and confidence the Rwandans had in their leadership, that existed during the colonial era, was put to use once again in 1994.

43. Despite this economic success and the government's ability to bring its citizens together to engage in community work, the largely agrarian population of Rwanda did not benefit. Rwandans began to protest the inequities, noticing the nepotism and widespread corruption in the government. The quota system mentioned above was another source of difficulties for the population. As gross social inequalities persisted and with other economic problems and food shortages that arose in 1988-89, the time was ripe for Tutsis outside the country to attempt to regain power once more.

44. On a number of occasions members of the Tutsi diaspora had attempted to return to Rwanda, only to be stopped at the boarder by claims that the small country could not absorb the returnees. For example, in 1982, when Uganda expelled various categories of refugees, Rwanda responded by closing its borders, refusing assistance to the thousands in need and only later allowing a small fraction of the Tutsi refugees to enter and resettle. Following these incidents, the thousands of Rwandans that remained in the neighbouring countries of Burundi, Tanzania, Uganda and Zaire began to pressure the world community and these governments to find a solution to their plight.

45. The Rwandan Patriotic Front (the RPF) was created as a response to the Tutsi Diaspora's frustration with the international community's minimal attention to the emotionally charged refugee problem. In October 1990, the RPF launched an attack into northeastern Rwanda from Uganda. This attack was supported by, *inter alia*, the majority of Tutsis living abroad and brought an intense period of diplomatic negotiations which

[19] *Ibid.*, p. 16.
[20] *Ibid.*, p. 18.

produced some noticeable results. For instance, by November 1990, the system of ethnic based scholastic and professional quotas was officially abolished and in December the Rwandan government declared an amnesty for certain prisoners. By March 1991 a cease-fire was called. Certain elements of the then Rwandan government however, were not eager to begin the process and therefore ensured that some of the more significant promises made were not implemented with due haste. Additionally, the extreme violence targeting the Tutsi population, especially in rural areas, continued unabated. Therefore, the RPF continued its strategy of a protracted war. Nevertheless, attempts were made at a democratic transition between 1991 and 1993.

The 1991 Constitution and Multi-Partism

46. Francois Nsanzuwera, a Rwandan scholar, testified that the 1991 Rwandan Constitution replaced the single party system with a multiparty system. It entrusted the National Assembly and the President of the Republic with legislative and executive power, respectively. The Constitution however did not render the President of the Republic accountable to the National Assembly.

47. The officially recognised parties were forbidden to use paramilitary forces (Article 26) and were granted access to the official media. Thereafter, the following parties were created: the *Mouvement Democratique République* (MDR), the *Parti Libéral* (PL), the *Parti Social-democrate* (PSD), the *Parti Democrate-chrétien* (PDC) and the *Coalition pour la Défense de la République* (CDR).

48. With the advent of multi-party politics, a very distinctive constitutional and administrative *status quo* would have purportedly manifested itself in Rwanda. This was the view of Professor Guibal, a titular Professor of constitutional and administrative law, Montpellier University, France. He was commissioned by the Defence to produce a report on the constitutional landscape of Rwanda, based upon the laws promulgated and in effect during and prior to the events of 1994.[21]

49. It was Professor Guibal's opinion that as a result of the multi-partyism that emerged after the 1991 Constitution, the traditional delineation of the branches of Government was not discernible. Thus, there was no clear separation of powers between the executive, judiciary and central and regional administration. Rather, the witness testified, the constitutional framework that existed after 1991 was one that was delineated on a party-political basis also. Consequently, a dichotomy of hierarchies and relationships would have emerged throughout, and even transcended the branches of Government – one on an administrative level and one on a party political basis.

50. Professor Guibal then went on to describe the theoretical consequence of the system that existed in Rwanda, when faced with the events and turmoil of 1994. He was of the opinion that such a paradigm of multi-partyism, when confronted with these chaotic and unstable times, would have become a system of *crisis* multi-partyism. The Chamber was informed that such crisis multi-partyism would arise as pivotal governmental figures were moved to resolve the turmoil and conflicts upon party-political lines, rather than by the delineated constitutional means.

The Arusha Accords

51. Nsanzuwera testified that the Rwandan government and the RPF signed the Arusha Accords on 4 August 1993 in Arusha, Tanzania in order to bring about a peaceful settlement to the political and military crisis in Rwanda. The Accords constituted a compilation of several agreements and protocols previously signed, concerning notably cease-fire and power sharing between the warring factions. 47 articles of the 1991 Constitution were replaced by the provisions of the Arusha Accords, including articles on power sharing and the entrusting of additional power to the Prime Minister and certain organs of the government.

The Creation of Militias

52. While the negotiations for peace and power sharing were underway in Arusha, the MRND and the CDR stepped up their efforts to recruit members, especially from the

[21] What follows is a synopsis of this report and Professor Guibal's testimony on 27 and 28 May 1998.

youth segment of the population. Both the MRND and the CDR, two Hutu based parties, intensified their efforts to fortify membership in their youth organisations known as the *Interahamwe* and the *Impuzamugambi*, respectively. Within a short period of time these recruits were converted to paramilitary forces. The parties ensured that the young recruits, made up mostly of former soldiers, gendarmes and prisoners, were militarily trained and indoctrinated. All these activities were carried out in direct violation of Article 26 of the 1991 Constitution and with the knowledge of the then Minister of Internal Affairs who was entrusted with the duty to suspend the activities of any political party for such activities.

53. By the end of 1993 CDR speeches, broadcast from government owned radio stations, referred to the Tutsis and Hutus from the opposition parties as collaborators of the RPF. These speeches encouraged the militias to target Tutsis in their daily acts of vandalism. Between 1992 and 1994 there were claims that the militias were supported by certain member of the military and the Presidential Guard. During this period many members of the judiciary were said to have turned a blind eye to the criminal acts of the militias either because they supported their activities or out of fear of reprisals. Assassination attempts, some of which were successful, were made on the lives of certain judges or magistrates who sought to carry out their duties faithfully. According to Nsanzuwera, by that time some claimed that members of the militias had become more powerful than members of the armed forces. As indicated in the parts that follow, the militias did in fact play a substantial role in the 1994 Genocide that occurred in this country.

Conclusion

54. The ethnic tensions were used by those in power in 1994 to carry out their plans to avoid power sharing. The responsible parties ignored the Arusha Accords and used the militias to carry out their genocidal plan and to incite the rest of the Hutu population into believing that all Tutsis and other persons who may not have supported the war against the RPF were in fact RPF supporters. It is against this backdrop that of thousands of people were slaughtered and mutilated in just three short months.

III. EVIDENTIARY MATTERS

3.1 Equality of Arms

55. The notion of equality of arms is laid down in Article 20 of the Statute. Specifically, Article 20(2) states, ". . . the accused shall be entitled to a fair and public hearing. . . ." Article 20(4) also provides, ". . . the accused shall be entitled to the following minimum guarantees, in full equality. . . ," there then follows a list of rights that must be respected, including the right to a legal counsel and the right to have adequate time and facilities to prepare his or her defence.

56. Counsel for Kayishema filed a Motion, on 13 March 1997, calling for the application of Rule 20(2) and 20(4).[22] The Defence submitted that in order to conduct a fair trial, full equality should exist between the Prosecution and the Defence in terms of the means and facilities placed at their disposal. To this end, the Defence requested the Chamber to order the disclosure of the number of lawyers, consultants, assistants and investigators that had been at the disposal of the Prosecution since the beginning of the case. The Motion also requested the Chamber to order the Prosecutor to indicate the amount of time spent on the case and the various expenditures made. Finally, the Motion called upon the Chamber to restrict the number of assistants utilised by the Prosecution during trial to the same number as those authorised for the Defence.

57. On the first two points raised by the Defence (request for information on the Prosecutor's resources), the Prosecution submitted that the information requested by Defence was not public and was intrinsically linked to the exercise of the Prosecutor's mandate, in accordance with Article 15 of the Statute.[23]

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[22] Motion by the Defence Counsel for Kayishema Calling for the Application by the Prosecutor of Article 20(2) and 20(4)(b) of the Statute. Filed with the Registry, 13 March 1997. The issue was raised again by Mr. Ferran in his closing arguments, Trans., 3 Nov 1998, from p. 30.

[23] The Prosecution's response to the Motion was filed with the Registry on 29 April 1997 and additional information was filed on 5 May 1997.

58. On the third point (request to limit the number of assistants to the Prosecutor), the Prosecution submitted that Article 20 of the Statute establishes an equality of *rights*, rather than an equality of *means and resources*.

59. The Chamber considered that the Defence did not prove any violation of the rights of the accused as laid down in Article 20(2) and 20(4).[24] The Chamber considered that the Defence should have addressed these issues under Article 17(C) of the Directive on Assignment of Defence Counsel (Defence Counsel Directive). This provision clearly states

> the costs and expenses of legal representation of the suspect or accused necessarily and reasonably incurred shall be covered by the Tribunal *to the extent that such expenses cannot be borne by the suspect or the accused because of his financial situation.* [emphasis added]

60. This provision should be read in conjunction with Article 20(4)(d) of the Statute which stipulates that legal assistance shall be provided by the Tribunal, ". . . *if* he or she does not have sufficient means to pay for it." [emphasis added]. Therefore, at this juncture, the Trial Chamber would reiterate its earlier ruling on this Motion that the rights of the accused should not be interpreted to mean that the Defence is entitled to same means and resources as the Prosecution. Any other position would be contrary to the *status quo* that exists within jurisdictions throughout the world and would clearly not reflect the intentions of the drafters of this Tribunal's Statute.

61. The question of equality of arms was verbally raised on other occasions. The Defence Counsel complained, for example, of the impossibility to verify the technical and material data about Kibuye *Prefecture* submitted by the Prosecution.[25] However, the Trial Chamber is aware that investigators, paid for by the Tribunal, was put at the disposal of the Defence. Furthermore, Article 17(C) establishes that any expenses incurred in the preparation of the Defence case relating, *inter alia*, to investigative costs are to be met by the Tribunal. The Trial Chamber is satisfied that all of the necessary

[24] Order on the Motion by the Defence Counsel for Application of Article 20(2) and (4)(b) of the Statute, 5 May 1997.

provisions for the preparation of a comprehensive defence were available, and were afforded to all Defence Counsel in this case. The utilisation of those resources is not a matter for the Trial Chamber.

62. Counsel for Kayishema also raised the issue of lack of time afforded to the Defence for the preparation of its case.[26] In this regard the Trial Chamber notes that Kayishema made his initial appearance before the Tribunal on 31 May1996, Counsel having been assigned two days prior. The trial began on 11 April 1997 and the Defence did not commence its case until 11 May 1998, almost two years after the accused's initial appearance. As such, the Trial Chamber is satisfied that sufficient time was accorded to both Parties for the preparation of their respective cases.

63. Specifically, on the time designated for the preparation of the closing arguments, the Defence expressed further dissatisfaction.[27] Having expressed his opinion that "the trial has been fair," Counsel for Kayishema however went on to submit that the eight days allowed him to prepare for his closing arguments was inequitable in light of the one month time frame afforded to the Prosecution. However, the Chamber pronounced itself on this issue from the bench when it was declared,

> . . . for the record, I think the parties . . . agreed that the presentation of oral argument and filing of the relevant documents will be done within a time frame . . . So the concept of either one party being given one month does not arise . . [I]t was discussed openly with the understanding that each and every respective party had some work to do . . . That is the defence could prepare its own case . . . right from the word go . . . (President of the Chamber)[28]

64. Moreover, were any particular issues of dispute or dissatisfaction to have arisen, the Trial Chamber should have been seized of these concerns in the appropriate manner and at the appropriate time. A cursory reference in the closing brief, and a desultory

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[25] Defence Closing Brief for Kayishema, 16 Oct. 1998, p. 3.
[26] *Ibid.*, p. 2-3.
[27] See Mr. Ferran's closing arguments, Trans., 3 Nov. 1998, pp. 54-55.
[28] Trans., 3 Nov. 1998, pp. 55-56.

allusion in Counsel's closing remarks is not an acceptable mode of raising the issue before the Chamber.

3.2 Reliability of Eyewitnesses

65. Unlike the leaders of Nazi Germany, who meticulously documented their acts during World War II, the organisers and perpetrators of the massacres that occurred in Rwanda in 1994 left little documentation behind. Thus, both Parties relied predominantly upon the testimony of witnesses brought before this Chamber in order to establish their respective cases.

66. A majority of the Prosecution witnesses were Tutsis who had survived attacks in Kibuye *Prefecture* (survivor witnesses), in which both accused allegedly participated. As such the Defence presented Dr. Régis Pouget to address the Trial Chamber on the credibility of eyewitness testimonies generally and, more specifically, upon the reliability of testimony from persons who had survived attacks having witnessed violent acts committed against their families, friends and neighbours.[29]

67. The Prosecution contested the submission of the report, submitting that it was unnecessary and without probative value.[30] Nevertheless, the Trial Chamber, in exercising its discretion on this issue, received the report and heard the testimony of Dr. Pouget between 29 June and 2 July 1998.

Eyewitness Testimonies Generally

68. The issue of identification is particularly pertinent in light of the defence of alibi advanced by the accused. The report prepared by Dr. Pouget and submitted on behalf of the Defence suggests that eyewitnesses often are not a reliable source of information.

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[29] Def. exh. 59, Report on the Crowd Psychology. Dr. Pouget has been , *inter alia*, Professor of Psychiatry and Psychology, Director of Education, Montpellier University, France; and the appointed expert in psychology for Nimes and Montepellier Courts of Appeal, France.

[30] Motion by the Prosecutor that Evidence of a Defence Expert Witness, Dr. Pouget, be Ruled Inadmissible Pursuant to Article 19(1) of the Statute and Rules 54 and 89 of the Rules.

69. In order to support such a conclusion, Dr. Pouget proffered a number of reasons. It was his opinion, for example, that people do not pay attention to what they see yet, when uncertain about the answer to a question, they often give a definite answer nonetheless. He went on to describe various other, common-place factors that may affect the reliability of witness testimony generally. He observed, *inter alia*, that the passage of time often reduces the accuracy of recollection, and how this recollection may then be influenced either by the individual's own imperfect mental process of reconstructing past events, or by other external factors such as media reports or numerous conversations about the events.

70. The Chamber does not consider that such general observations are in dispute. Equally, the Chamber concurs with Dr. Pouget's assertion that the corroboration of events, even by many witnesses, does not necessarily make the event and/or its details correct. However, the Trial Chamber is equally cognisant that, notwithstanding the foregoing analysis, all eyewitness testimony cannot be simply disregarded out-of-hand on the premise that it *may* not be an exact recollection. Accordingly, it is for the Trial Chamber to decide upon the reliability of the witness' testimony in light of its presentation in court and after its subjection to cross-examination. Thus, whilst corroboration of such testimony is not a guarantee of its accuracy, it is a factor that the Trial Chamber has taken into account when considering the testimonies.

71. Similarly, prior knowledge of those identified is another factor that the Trial Chamber may take into account in considering the reliability of witness testimonies. For example, in the Tanzanian case of *Waziri Amani v. Republic*[31] the accused called into question his identification by witnesses. The Court of Appeals held that,

> if at the end of his (the witness') examination the judge is satisfied that the quality of identification is good, for example, when the identification was made by a witness after a long period of observation or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, we think, he could in those circumstances safely convict on the evidence of identification.

The case of *United States v. Telafaire*[32] also offers persuasive guidance on the other factors which may be taken into account. Firstly, the court in *Telafaire* held that the trier of fact must be convinced that the witness had the capacity and an adequate opportunity to observe the offender. Secondly, the identification of the accused by the witness should be the product of his own recollection and, thirdly, the trier of fact should take into consideration any inconsistency in the witness's identification of the accused at trial. Finally, it was held that the general credibility of the witness – his truthfulness and opportunity to make reliable observations – should also be borne in mind by the trier of fact.

72. The Trial Chamber, in its examination of the evidence, has been alive to these various approaches and, where appropriate, has specifically delineated the salient considerations pertinent to its findings.

Survivors as Witnesses

73. The report of Dr. Pouget, an expert in the field of psychology, address the reliability of testimony from those who have witnessed traumatic events. It was his opinion that strong emotions experienced at the time of the events have a negative effect upon the quality of recollection. During traumatic events, he expounded, the natural defensive system either prevents the retention of those incidents or buries their memories so deep that they are not easily, if at all, accessible.

74. This is the view of the expert Defence witness. However, as the Prosecutor highlighted, other views do exist. She produced, for example, other academic views which stated that stressful conditions lead to an especially vivid and detailed recollection of events.[33] What is apparent to the Trial Chamber is that different witnesses, like different academics, think differently.

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[31] 1980 TLR 250, 252.
[32] 469 F.2d 552 (D.C. Cir. 1972).
[33] An article by Ann Maass and Gautier Kohnken, in the Law and Human Behaviour Journal, vol. 13, no. 4, 1989, was shown to the witness and discussed in cross-examination. Trans., 2 Jul. 1998, p. 104.

75. The Chamber is aware of the impact of trauma on the testimony of witnesses. However, the testimonies cannot be simply disregarded because they describe traumatic and horrific realities. Some inconsistencies and imprecision in the testimonies are expected and were carefully considered in light of the circumstances faced by the witnesses.

3.3 Witness Statements

76. The Parties raised apparent discrepancies or omissions that arose with regard to certain evidence when the witnesses' written statements were juxtaposed with their testimony given orally in Court. These written statements were drafted after the witnesses were interviewed by Prosecution investigators as part of the investigative process. Alleged inconsistencies were raised in relation to both Prosecution and Defence witnesses. The procedure adopted by the Trial Chamber for dealing with apparent inconsistencies was expounded during the hearing of evidence by Prosecution witness A. There, the Trial Chamber ordered that an alleged inconsistency be put to the witness and the witness be offered an opportunity to explain. In light of this explanation, if Counsel asserted that the inconsistency remained, the Counsel would mark the relevant portion of the witness statement and submit it as an exhibit for consideration by the Trial Chamber. Both Prosecution and Defence Counsel submitted such exhibits.[34]

77. The witness statements are not automatically evidence before the Trial Chamber *per se*. However, the statements may be used to impeach a witness. Where the relevant portion of the statement has been submitted as an exhibit, this portion will be considered by the Trial Chamber in light of the oral evidence and explanation offered by the witness. The Chamber is mindful that there was generally a considerable time lapse between the events to which the witnesses testified, the making of their prior statements, and their testimony before the Trial Chamber. However, notwithstanding the above, inconsistencies may raise doubt in relation to the particular piece of evidence in question or, where such inconsistencies are found to be material, to the witnesses' evidence as a whole.

78. Whether or not the explanation by the witness is enough to remove the doubt is determined on a case-by-case basis considering the circumstances surrounding the inconsistency and the subsequent explanation. However, to be released from doubt the

[34] See Pros. exh. 350A, 350B and 350C.

Trial Chamber generally demands an explanation of substance rather than mere procedure. For example, a common explanation provided by witnesses was that the interviewing investigator did not accurately reflect in the written statement what the witness said. Although such an explanation may well be true, particularly considering the translation difficulties, in the absence of evidence that corroborates the explanation, it is generally not enough to remove doubt. Indeed, it is not for the Trial Chamber to search for reasons to excuse inadequacies in the Prosecution's investigative process.

79. Conversely, where the witness provides a convincing explanation of substance, perhaps relating to the substance of the investigator's question, then this may be sufficient to remove the doubt raised.

80. Doubts about a testimony can be removed with the corroboration of other testimonies. However, corroboration of evidence is not a legal requirement to accept a testimony. This Chamber is nevertheless aware of the importance of corroboration and considered the testimonies in this light. This notion has been emphasised in the Factual Findings of this Judgement.

3.4 Specificity of the Indictment

Introduction

81. The Indictment, in setting out the particulars of the charges against the accused, refers to events "around" and "about" a specific date, or between two specified dates. Kayishema is charged separately for massacres at the sites of the Catholic Church and Home St. Jean, the Stadium in Kibuye and Mubuga Church. Paragraphs 28, 35 and 41 of the Indictment detail these massacres as occurring on or about the 17, 18 and 14 April 1994 respectively. The fourth crime site for which both Kayishema and Ruzindana are charged is the Bisesero area between 9 April and 30 June. The question arises, therefore, as to whether sufficient certainty exists to enable an adequate defence to be advanced, thus to ensure the right of the accused to a fair trial.

The Allegations in Relation to the Massacres in the Bisesero Area

82. The Trial Chamber considers it appropriate to distinguish between the first three sites in the Indictment, and the charges raised in respect of the Bisesero area. The exact dates on which massacres occurred at the Catholic Church and Home St. Jean, the Stadium and Mubuga Church were identified in the course of the trial by the Prosecution's case-in-chief. Accordingly, the findings made by this Chamber are set out below in the Factual Findings Part.

83. The Chamber is aware of the difficulties of raising a defence where all of the elements of the offence are not precisely detailed in the Indictment. The difficulties are compounded because the alibi defence advanced by both accused persons does not remove them from the Bisesero vicinity at the time in question. The accused in the *Tadic* case faced similar difficulties.[35] In that instance the Trial Chamber observed the near impossibility of providing a 24-hour, day-by-day, and week-by-week account of the accused's whereabouts for an alibi defence which covers a duration of several months. The Trial Chamber is of the opinion that this is a substantive issue.

[35] *Prosecutor v. Dusko Tadic*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-T, 7 May 1997, para. 533. (*Tadic* Judgement.)

84. Nevertheless, it is important to note here that throughout the trial the burden of proving each material element of the offence, beyond a reasonable doubt, has remained firmly on the Prosecution. Whilst, *prima facie*, the accused should be informed in as greater detail as possible of the elements of the offence against them, such details will necessarily depend on the nature of the alleged crimes. The Trial Chamber finds that during its case-in-chief the Prosecution did focus upon various sites throughout the Bisesero region, but because of the wide-ranging nature of the attacks no further specificity was possible in the Indictment.

85. It is unnecessary, however, for the Prosecution to prove an exact date of an offence where the date or time is not also a material element of the offence. Whilst it would be preferable to allege and prove an exact date of each offence, this can clearly not be demanded as a prerequisite for conviction where the time is not an essential element of that offence.[36] Furthermore, even where the date of the offence is an essential element, it is necessary to consider with what precision the timing of the offence must be detailed. It is not always possible to be precise as to exact events; this is especially true in light of the events that occurred in Rwanda in 1994 and in light of the evidence we have heard from witnesses. Consequently, the Chamber recognises that it has balanced the necessary practical considerations to enable the Prosecution to present its case, with the need to ensure sufficient specificity of location and matter of offence in order to allow a comprehensive defence to be raised.

86. However, because of the foregoing observations, the Trial Chamber opines that where timing is of material importance to the charges, then the wording of the count should lift the offence from the general to the particular.[37] In this respect, the Trial Chamber notes that the *ratione temporis* of this Tribunal extends from 1 January 1994 to 31 December 1994, and the Indictment only refers only to events that occurred in the

[36] See, the *Tadic* Judgement, para. 534 and the cases cited therein.

[37] See, for example, the Canadian cases of, *G.B., A.B. and C.S. v. R.* (1990) 2 S.C.R. 30, and *R v. Colgan* (1986) 30 C.C.C. (3d) 193 (Court of Appeal), where Monnin C.J.M. found an offence specified as occurring at some point within a six year period to be sufficiently precise.

Bisesero area between the 9 April and 30 June. In fact, during its case-in-chief, and with the more precise definition of massacre sites within the Bisesero area, the Prosecution was able to pinpoint specific periods during which the alleged events occurred. Therefore, the date need only be identified where it is a material element of the offence and, where it is such a necessary element, the precision with which such dates need be identified varies from case to case. In light of this, the Trial Chamber opines that the lack of specificity does not have a bearing upon the otherwise proper and complete counts, and it did not prejudice the right of the accused to a fair trial.

IV. THE LAW

4.1 GENOCIDE

87. Article 2(2) of the ICTR Statute reads:

> *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.*

The above definition reproduces Articles II and III of the Genocide Convention of 1948 and Article 17 of the International Law Commission Report 1996, Draft Code of Crimes Against the Peace and Security of Mankind (ILC Draft Code of Crimes).

88. The concept of genocide appeared first in the International Military Tribunal (Nuremberg) Judgement of 30 September and 1 October 1946, referring to the destruction of groups. The prohibition of genocide then was recognised by the General Assembly of the United Nations as a principle of international law. Resolution 260(A)(III) of 9 December 1948, adopting the Draft Genocide Convention, crystallised into international law the prohibition of that crime. The Genocide Convention became widely accepted as an international human rights instrument. Furthermore, the crime of genocide is considered part of international customary law and, moreover, a norm of *jus cogens*.

89. The definition of the crime of genocide was based upon that of crimes against humanity, that is, a combination of "extermination and persecutions on political, racial or religious grounds" and it was intended to cover *"the intentional destruction of groups in whole or in substantial part"* (emphasis added). The crime of genocide is a type of crime against humanity. Genocide, however, is different from other crimes against humanity. The

essential difference is that genocide requires the aforementioned specific intent to exterminate a protected group (in whole or in part) while crimes against humanity require the civilian population to be targeted as part of a widespread or systematic attack. There are instances where the discriminatory grounds coincide and overlap. This scenario is detailed in the present Judgement, in the Part VII on Cumulative Charges.

90. For the crime of genocide to be committed, two elements are required, namely, the *mens rea*, the requisite specific intent, and the *actus reus*, the prohibited act or omission.

4.1.1 The Mens Rea

91. A distinguishing aspect of the crime of genocide is the specific intent *(dolus specialis*) to destroy a group in whole or in part. The *dolus specialis* applies to all acts of genocide mentioned in Article 2(a) to (e) of the Statute, that is, all the enumerated acts must be committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.' It is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder.[38] The Trial Chamber opines that for the crime of genocide to occur, the *mens rea* must be formed prior to the commission of the genocidal acts. The individual acts themselves, however, do not require premeditation; the only consideration is that the act should be done in furtherance of the genocidal intent.

92. Under Article 6(3) of the Statute, the superior is criminally responsible for the acts committed by his subordinates 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.

Proof of the Requisite Intent

93. Regarding the assessment of the requisite intent, the Trial Chamber acknowledges that it may be difficult to find explicit manifestations of intent by the perpetrators. The perpetrator's actions, including circumstantial evidence, however may provide sufficient evidence of intent. The Commission of Experts in their Final Report on the situation in

[38] Virginia Morris & Michael Scharf, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 167 (1998)

Rwanda also noted this difficulty. Their Report suggested that the necessary element of intent can be inferred from sufficient facts, such as the number of group members affected.[39] The Chamber finds that the intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action.[40] In particular, the Chamber considers evidence such as the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing. Furthermore, the number of victims from the group is also important. In the Report of the Sub-Commission on Genocide, the Special Rapporteur stated that "the relative proportionate scale of the actual or attempted destruction of a group, by any act listed in Articles II and III of the Genocide Convention, is strong evidence to prove the necessary intent to destroy a group in whole or in part."[41]

94. It is also the view of the Chamber that although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation. Morris and Scharf note that "it is virtually impossible for the crime of genocide to be committed without some or indirect involvement on the part of the State given the magnitude of this crime."[42] They suggested that "it is unnecessary for an individual to have knowledge of all details of the genocidal plan or policy." The Chamber concurs with this view.

Destruction of a Group

95. The perpetrator must intend to destroy a group in whole or in part. This begs the question of what constitutes the "destruction of a group." The Prosecution suggests that the term should be broadly interpreted and encompass acts that are undertaken not only with the intent to cause death but also includes acts which may fall short of causing

[39] Cited in Bassiouni, in THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, p. 524, and UN AND RWANDA, 1993-6, p. 432, para. 166.
[40] Wisconsin International Law Journal, 243 (1996).
[41] UN Doc. E/CN.4/Sub.2/1985/6, p. 16, para. 29.
[42] Morris & Scharf, *supra*, p. 168.

death.[43] In the *Akayesu* Judgement, acts of sexual violence, which occurred in Taba Commune were found to form an integral part of the process of destruction, specifically, targeting Tutsi women and contributing to their destruction and the destruction of the Tutsi as a group.[44] The Trial Chamber concurs with this view and that of the International Law Commission (ILC) which stated that "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe."[45]

Whole or in Part

96. Another aspect for consideration is that the intent to destroy the group must be "in whole or in part." The ILC stated that "the crime of Genocide by its very nature requires the intention to destroy at least a substantial part of a particular group."[46] In the Report of the Sub-Commission on Genocide, the Special Rapporteur stated that "in part" would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership. Hence, both proportionate scale and total number are relevant.[47]

97. The Trial Chamber opines, therefore, that "in part" requires the intention to destroy a considerable number of individuals who are part of the group. Individuals must be targeted due to their membership of the group to satisfy this definition.

A National, Ethnical, Racial or Religious Group

98. The intent must exist to "destroy a national, ethnical, racial or religious group, as such." Thus, the acts must be directed towards a specific group on these discriminatory grounds. An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others). A racial

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[43] Prosecutor's Brief, 9 Oct. 1998, p. 30.
[44] *Akayesu* Judgement, para. 731.
[45] ILC Draft Code of Crimes, p. 42, para. 8.[Throughout the text, page citations to the International Law Commission (ILC) Report 1996 may refer to the Internet version at http://www.un.org/law/ilc/reports/196/chap02.htm]
[46] *Ibid*.
[47] Mr. Whitaker, in UN Doc. E/CN.4/Sub.2/1985/6, p. 16, para. 29.

group is based on hereditary physical traits often identified with geography. A religious group includes denomination or mode of worship or a group sharing common beliefs.

Destroying in whole or in part a National, Ethnical, Racial or Religious Group as Such

99. This phrase speaks to specific intent (the requisite *mens rea*). The "destroying" has to be directed at the group *as such*, that is, *qua group*, as stipulated in Article 2(2) of the Statute.

4.1.2 Actus Reus

100. Article 2(2)(a) to (e) of the ICTR Statute and Article II (a) to (e) of the Genocide Convention lists acts which, if committed with the specific intent, amount to genocide.

Killing Members of the Group

101. Article 2(2)(a) of the Statute, in the English language version, states that genocide means the act of "killing" committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The French language version refers to *meurtre*, a term that requires the additional mental element of intent.

102. The Parties in their closing remarks addressed the differences between the English and French versions. The Prosecutor submitted that the term *meurtre* has a legal meaning in French law, that is, a deliberate homicide, whereas the term "killing" is merely the act of causing the death to another.[48] The Prosecutor contended that the language used in the English version is more flexible and would permit, if the need arises, a broadening of the meaning or interpretation.[49] The Defence teams submitted that "*meurtre*" should be applied, as it was in the *Akayesu* Judgement. The Defence submitted that where doubt exists then, as a general principle of criminal law, that doubt should be interpreted in favour of the accused.

103. The Trial Chamber agrees that if a doubt exists, for a matter of statutory interpretation, that doubt must be interpreted in favour of the accused. Therefore, the

[48] Trans., 21 Oct. 1998, p. 91.
[49] *Ibid.*

relevant act under Article 2(2)(a) is "*meurtre*," that is, unlawful and intentional killing. The Trial Chamber notes, however, that all the enumerated acts must be committed with intent to destroy a group in whole or in part. As stated by the ILC the enumerated acts "are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. They are not the type of acts that would normally occur by accident or even as a result of mere negligence . . . the definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act."[50] Hence, there is virtually no difference between the two as the term "killing" is linked to the intent to destroy in whole or in part.

104. The Chamber observes that the *Akayesu* Judgement does not fully define the term "killing."[51] It is the opinion of the Trial Chamber that there is virtually no difference between the term "killing" in the English version and "*meurtre*" in the French version of Article 2 (2)(a) of the Statute within the context of genocidal intent. Hence "killing" or "meurtre" should be considered along with the specific intent of genocide, that is, the intent to destroy in whole or in part, a national, ethnical, racial or religious group as such.

Causing Serious Bodily or Mental Harm to Members of the Group

105. Pursuant to Article 2(2)(b) of the Statute states "causing serious bodily or mental harm to members of the group."

106. This phrase, which is not defined by the Statute, was the subject of contention during the closing submissions of the Parties. The Prosecution submitted that "causing a bodily or a mental harm" means: to undertake an action that might cause injury to the physical and mental fullness, the total being of a person; that a human being is to be considered as a whole with structures and elements functioning in concert and harmony; that the term "serious" is applicable to both the bodily and the mental part of a person and is dependant upon the extent to which the physical body or mental well being is injured.

[50] ILC Draft Code of Crimes, p. 42, (commenting upon sub-paragraph (a) to (e) of Article 17).
[51] Paras. 500 – 501, p. 206.

107. The Prosecution submitted that serious harm may include impact on one or more elements of the human structure, which disables the organs of the body and prevents them from functioning as normal. To this end, the harm caused need not bring about death but causes handicap such that the individual will be unable to be a socially useful unit or a socially existent unit of the group. The Prosecution submitted that blows and wounds inflicted would constitute serious harm when they are so violent or have such intensity that they immediately cause the malfunctioning of one or many essential mechanisms of the human body. The Prosecution also submits that non-physical aggressions such as the infliction of strong fear or strong terror, intimidation or threat are also serious mental harm.[52]

Serious Bodily Harm

108. The phrase serious bodily harm should be determined on a case-by-case basis, using a common sense approach. In the *Akayesu* Judgement, it was held that serious bodily harm does not necessarily mean harm that is permanent or irremediable.[53] The *Akayesu* Judgement further held that acts of sexual violence, rape, mutilations and interrogations combined with beatings, and/or threats of death, were all acts that amount to serious bodily harm.[54] The Trial Chamber concurs with these determinations.

109. It is the view of the Trial Chamber that, to large extent, "causing serious bodily harm" is self-explanatory. This phrase could be construed to mean harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.

Serious Mental Harm

110. The phrase "serious mental harm" should also be determined on a case-by-case. The Prosecution submits that there is no prerequisite that mental suffering should be the result of physical harm. The Prosecution relies upon the commentary offered in the

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[52] Rahetlah, submission, 21 October 1998, pp. 114 to 121.
[53] *Akayesu* Judgement, para 502.
[54] *Akayesu* Judgement, paras 706-07 and 711-12.

Preparatory Committee's Definition of Crimes that suggests that serious mental harm should include "more than minor or temporary impairment on mental faculties."[55] The Prosecution suggested that the inflicting of strong fear or terror, intimidation or threat may amount to serious mental harm.

111. The Defence teams submitted that the serious bodily and mental harm alleged by the Prosecution was merely a consequence of attempts to kill and did not amount to genocidal offences in themselves. It argued that the Prosecution witnesses who had been wounded did not demonstrate that the perpetrators had intention to cause serious bodily or mental harm. The Defence contends therefore, that there was intention to cause murder and not to cause serious bodily or mental harm.

112. The Chamber considers that an accused may be held liable under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental harm in pursuit of the specific intention to destroy a group in whole or in part.

113. The Chamber opines that "causing serious mental harm" should be interpreted on a case-by-case basis in light of the relevant jurisprudence.

Deliberately Inflicting on the Group Conditions of Life Calculated to Bring About its Physical Destruction in Whole or in Part

114. Article 2(2)(c) of the Statute covers the act of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." The Prosecution submits that Article 2(2)(c) applies to situations likely to cause death regardless of whether death actually occurs and allows for the punishment of the perpetrator for the infliction of substandard conditions of life which, if left to run their coarse, could bring about the physical destruction of the group.[56]

[55] Prosecutor's Closing Brief, 9 Oct. 1998, p. 26.
[56] Prosecutor's Closing Brief, 9 October 1998, p.28.

115. The Trial Chamber concurs with the explanation within the Draft Convention, prepared by the U.N. Secretariat which interpreted this concept to include circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion.[57]

116. It is the view of the Trial Chamber that "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," includes methods of destruction which do not immediately lead to the death of members of the group. The Chamber adopts the above interpretation.[58] Therefore the conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part.

Imposing Measures Intended to Prevent Births Within the Group

117. Article 2(2)(d) of the Statute covers the act of imposing measures intended to prevent births within the group. The Trial Chamber concurs with the explanation provided in the *Akayesu* Judgement.

Forcibly Transferring Children of the Group to Another

118. Article 2(2)(e) of the Statute covers the act of forcibly transferring children of the group to another. The Trial Chamber concurs with the explanation provided in the *Akayesu* Judgement.

[57] Nehemiah Robinson, the Genocide Convention: A Commentary (1960), p. 123.
[58] Robinson, *supra*, pp. 63-64.

4.2 CRIMES AGAINST HUMANITY

119. Article 3 of the ICTR Statute states:

> 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) Prosecutions;*
>
> *i) Other inhumane acts.*

120. Crimes against humanity were prosecuted at the Nuremberg trials. The Charter of the International Military Tribunal of Nuremberg[59] in its Article 6(c) (Annex to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement)), describes the crimes against humanity as follows:

> …namely murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian populations, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

121. Crimes against humanity were also applied under Article II of Law No. 10 of the Control Council Law[60] and went through a gradual evolution in the domestic

[59] Law No. 10 of the Control Council for Germany.
[60] International Law Reports (ILR), vol. 36, p. 31.

cases of *Eichmann*,[61] *Barbie*,[62] and *Touvier*. More recently, crimes against humanity have been applied in the International Criminal Tribunals for both Rwanda and the Former Yugoslavia.

4.2.1 The Attack

122. The enumerated crimes must be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The attack is the event in which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation. The elements of the attack effectively exclude from crimes against humanity, acts carried out for purely personal motives and those outside of a broader policy or plan; a position which was adopted by the Defence.

Widespread or Systematic

123. The attack must contain one of the alternative conditions of being widespread or systematic.[63] A widespread attack is one that is directed against a multiplicity of victims.[64] A systematic attack means an attack carried out pursuant to a preconceived policy or plan. Either of these conditions will serve to exclude isolated or random inhumane acts committed for purely personal reasons.[65]

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[61] 36 ILR.

[62] 125 ILR.

[63] Despite the French text containing the conjunctive 'and' instead of the disjunctive 'or' between the terms widespread or systematic, the Trial Chamber is in no doubt that the correct interpretation is the disjunctive. The matter has already been settled in the *Akayesu* Judgement and needs no further debate here.

[64] The ILC Draft Code of Crimes explained "large scale" (the term used in place of 'widespread') to mean acts that are "directed against a multiplicity of victims." Article 18, para. 4 of commentary.

[65] The ILC Draft Code of Crimes defines systematic as "meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude random acts that were not committed as part of a broader plan or policy." Article 18, para. 3 of commentary.

The Policy Element

124. For an act of mass victimisation to be a crime against humanity, it must include a policy element. Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan. Additionally, the requirement that the attack must be committed against a "civilian population" inevitably demands some kind of plan and, the discriminatory element of the attack is, by its very nature, only possible as a consequence of a policy.

125. Who or what must instigate the policy? Arguably, customary international law requires a showing that crimes against humanity are committed pursuant to an action or policy of a State. However, it is clear that the ICTR Statute does not demand the involvement of a State. Guidance on this issue may be gained from the ILC who, in the Draft Code of Crimes, stated that crimes against humanity are inhumane acts "instigated or directed by a Government or by any organisation or group."[66] The ILC explains that this requirement was,

> intended to exclude the situation in which an individual commits an inhumane act whilst acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or an organisation…The instigation or direction of a Government or any group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of the State.[67]

126. The Trial Chamber concurs with the above view and finds that the Tribunal's jurisdiction covers both State and non-State actors. As *Prefect*, Kayishema was a State actor. As a businessman Ruzindana was a non-State actor. To have jurisdiction over either of the accused, the Chamber must be satisfied that their actions were instigated or directed by a Government or by any organisation or group.

[66] ILC Draft Code of Crimes Article 18.
[67] ILC Draft Code of Crimes Art. 18 para. 5 of commentary.

Civilian Population

127. Traditionally, legal definitions of 'civilian' or 'civilian population' have been discussed within the context of armed conflict. However, under the Statute, crimes against humanity may be committed inside or outside the context of an armed conflict. Therefore, the term civilian must be understood within the context of war as well as relative peace. The Trial Chamber considers that a wide definition of civilian is applicable and, in the context of the situation of Kibuye *Prefecture* where there was no armed conflict, includes all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilians would include, for example, members of the FAR, the RPF, the police and the Gendarmerie Nationale.

128. With regard to the targeting of any civilian population, the Trial Chamber concurs with the finding in the *Tadic* decision that the targeted population must be predominantly civilian in nature but the presence of certain non-civilians in their midst does not change the character of that population.[68]

129. In any event, the Defence teams did not challenge the assertion that the victims of the alleged attacks were civilians. And, the Prosecution submitted that the victims in the four massacre sites were farmers, teachers and those seeking refuge from the attacks.

Discriminatory Grounds

130. The Statute contains a requirement additional to both the Nuremberg Charter and the ICTY Statute; that the attack be committed on national, political, ethnic, racial or religious grounds. The Prosecution submits that the discrimination at issue was based on ethnic or, alternatively, political grounds.[69] The Prosecution asserted that the discrimination was on ethnic grounds because the victims were Tutsis and political grounds because the Tutsis were accomplices or supporters of the RPF. The

[68] *Tadic* Judgement, at para 638.
[69] Prosecutor's Closing Brief, p. 42.

Defence did not contest that the Tutsis were considered an ethnic group.[70] Political grounds include party political beliefs and political ideology.

131. The Prosecution submit that it is the intent of the perpetrator to discriminate against a group that is important rather than whether the victim was, in fact, a member of that targeted group. In this regard there are two issues for the Chamber to address. Firstly, in a scenario where the perpetrator's intention is to exterminate the Tutsi group and, in furtherance of this intent, he kills a Belgium Priest who is protecting the Tutsi, the Trial Chamber opines that such an act would be based on discrimination against the Tutsi group.

132. The second relevant scenario is where the perpetrator attacks people on the grounds and in the *belief* that they are members of a group but, in fact, they are not, for example, where the perpetrator believes that a group of Tutsi are supporters of the RPF and therefore accomplices. In the scenario, the Trial Chamber opines that the Prosecution must show that the perpetrator's belief was objectively reasonable - based upon real facts - rather than being mere speculation or perverted deduction.

The Mental Element

133. The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. The Defence for Ruzindana submitted that to be guilty of crimes against humanity the perpetrator must know that there is an attack on a civilian population and that his act is part of the attack.[71] This issue has been addressed by the ICTY where it was stated that the accused must have acted with knowledge of the broader context of the attack;[72] a view which conforms to the wording of the Statute of the International Criminal Court (ICC) Article 7.

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[70] For detailed discussion regarding ethnicity see the Historical Context Part of the Judgement.

[71] Closing Arguments at p. 26.

[72] *Tadic* Judgement, at para. 656, "therefore in addition to the intent to commit the underlying offence the perpetrator must know of the broader context in which his acts occur."

134. The Trial Chamber agrees with the Defence. Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused. This requirement further compliments the exclusion from crimes against humanity of isolated acts carried out for purely personal reasons.

4.2.2 The Crimes

135. Article 3 entitles the International Criminal Tribunal for Rwanda to prosecute persons responsible for crimes enumerated within the Statute. The crimes must be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The crimes themselves need not contain the three elements of the attack (i.e. widespread or systematic, against any civilian population, on discriminatory grounds), but must form *part of* such an attack. Indeed, the individual crimes contain their own specific elements. For an accused to be found guilty under crimes against humanity the Prosecution must prove that the accused is responsible for one of the crimes charged pursuant to Article 6(1) and/or 6(3) of the Statute. The following crimes are charged in the Indictment: murder, extermination and other inhumane acts.

Murder

136. The Prosecution charges Kayishema with crimes against humanity for murder in Counts 2, 8, 14 and 20 of the Indictment, and Ruzindana with crimes against humanity for murder in Count 20 of the Indictment.

137. Article 3(a) of the English version of the Statute uses the term "murder," whilst the French version of the Statute uses the term "*assassinat*."[73] The use of these terms has been the subject of some debate because the *mens rea* for murder, as it is defined in most common law jurisdictions, includes but does not require premeditation; whereas, in most civil law systems, premeditation is always required for *assassinat.*[74] The *Akayesu* Judgement, which is the only case to have addressed the issue, stated that customary international law dictates that it is the act of murder that constitutes a crime against humanity and not *assassinat.* In *Akayesu*, the Chamber held that there were sufficient reasons to assume that the French version of the Statute suffers from an error in translation.[75] The Defence argued, *inter alia*, that the *Akayesu* solution of an error in translation was too simple and not convincing as both the French and the English versions of the Statute are originals. According to the Defence, murder was meant to be the equivalent of *assassinat*. However, the Prosecution argued that premeditation was not a necessary element and suggested that the "unlawful killing of a human being as the result of the perpetrator engaging in conduct which was in reckless disregard for human life" is enough.

138. The Trial Chamber agrees with the Defence. When interpreting a term from one language to another, one may find that there is no equivalent term that corresponds to all the subtleties and nuances. This is particularly true with legal terms that represent jurisprudential concepts. Here, the *mens rea* for murder in common law overlaps with both *meurtre* and *assassinat* (that is, a *meurtre aggravé*) in civil systems.[76] The drafters chose to use the term *assassinat* rather than *meurtre.* As a matter of interpretation, the intention of the drafters should be followed so far as

[73] Indeed, the Statute, Article 2(2)(a)(Genocide) refers to "killing" – "*meurtre*" in French, while Article 4(a) refers to "murder" – "*meurtre*" in French.

[74] Nouveau Code P9nal, Article 221-3 "Le meurtre commis avec pr9meditation constitute un assassinat. Il est puni de la r9clusion criminelle < perpetuit9. […]"

[75] *Akayesu* Judgement, at para. 588.

[76] For example, at the high end of murder the *mens rea* corresponds to the *mens rea* of *assassinat*, i.e., unlawful killing with premeditation. Conversely, at the low end of murder where mere intention or recklessness is sufficient and premeditation is not required, the *mens rea* of murder corresponds to the *mens rea* of *meurtre*.

possible and a statute should be given its plain meaning.[77] Since the concepts of murder and *assassinat* can correspond to one another, in the opinion of this Trial Chamber, there is no need to change the wording of the Statute. Although it may be argued that, under customary international law, it is murder rather than *assassinat* that constitutes the crime against humanity (a position asserted by the Chamber in the *Akayesu* Judgement), this court is bound by the wording of the ICTR Statute in particular. It is the ICTR Statute that reflects the intention of the international community for the purposes of trying those charged with violations of international law in Rwanda. Furthermore, the ICTR and ICTY Statutes did not reflect customary international law at the time of drafting. This is evident by the inclusion of the need for an armed conflict in the ICTY Statute and the inclusion of the requirement that the crimes be committed with discriminatory intent in the ICTR Statute. Accordingly, it may be presumed that the drafters intended to use *assassinat* alongside murder. Indeed, by using *assassinat* in French, the drafters may have intended that only the higher standards of *mens rea* for murder will suffice.[78]

139. If in doubt, a matter of interpretation should be decided in favour of the accused; in this case, the inclusion of premeditation is favourable to the accused. The Chamber finds, therefore, that murder and *assassinat* should be considered together in order to ascertain the standard of *mens rea* intended by the drafters and demanded by the ICTR Statute. When murder is considered along with *assassinat* the Chamber finds that the standard of *mens rea* required is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool

[77] Notably the text was drafted in English and French, both being original and authentic. The Statute was then translated into the four remaining official UN languages. Therefore, between English and French there was no translation. Accordingly, there can be no 'error in translation' as such; there can only be a mistake in the drafting of an original text. Notably, the term used in the ICTY Statute is also *assassinat* (ICTY Statute Article 5(a)).

[78] Of course, in common law, there is no crime of unlawful killing that provides for a higher standard of *mens rea* than that of murder. Therefore, even if the drafters intended that only the standard of *mens rea* for *assassinat* would suffice, the drafters would still need to use the term murder in English.

moment of reflection.[79] The result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events.

140. The accused is guilty of murder if the accused, engaging in conduct which is unlawful:

1. causes the death of another;
2. by a premeditated act or omission;
3. intending to kill any person or,
4. intending to cause grievous bodily harm to any person.

Thus, a premeditated murder that forms part of a widespread or systematic attack, against civilians, on discriminatory grounds will be a crime against humanity. Also included will be extrajudicial killings, that is "unlawful and deliberate killings carried out with the order of a Government or with its complicity or acquiescence."[80]

Extermination

141. The Prosecution charges Kayishema with crimes against humanity for extermination in Counts 3, 9, 15 and 21 of the Indictment, and Ruzindana with crimes against humanity for extermination in Count 21 of the Indictment.

142. The crime of extermination was not specifically defined in the Statute or the Nuremberg Charter. Indeed, there is very little jurisprudence relating to the essential elements of extermination. In the *Akayesu* Judgement, Chamber I considered that extermination is a crime that by its very nature is directed against a group of individuals and differs from murder in that it requires an element of mass destruction that is not required for murder.[81] The Prosecution asserted that there is no need for a defined number of people to die for the killing to rise to an act of extermination; it is determined on a case-by-case basis even though there is the need for a numerical

[79] This explanation conforms to the French jurisprudence of the criminal court and to the United States Supreme Court case law.
[80] See Amnesty International's 14 Point Program for the Prevention of Extrajudicial Executions.
[81] *Akayesu* Judgement, at para. 591.

requirement.[82] Notably, Akayesu was found guilty of extermination for ordering the killing of sixteen people.[83] The Chamber agrees that the difference between murder and extermination is the scale; extermination can be said to be murder on a massive scale. The Defence did not address the numerical question but argues that "the essence of extermination lies in the fact that it is an indiscriminate elimination."[84]

143. Cherif Bassiouni states that extermination is murder on a massive scale and may include unintentional killing:

> Extermination implies intentional and unintentional killing. The reason for the latter is that mass killing of a group of people involves planning and implementation by a number of persons who, though knowing and wanting the intended result, may not necessarily know their victims. Furthermore, such persons may not perform the *actus reus* that produced the deaths, nor have specific intent toward a particular victim.[85]

The ICC Statute (Article 7(2)(b)), offers an illustrative rather than definitive statement regarding extermination: "Extermination includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population."

144. Having considered the above, the Chamber defines the requisite elements of extermination:

> The actor participates in the mass killing of others or in the creation of conditions of life that lead to the mass killing of others, through his act(s) or omission(s); having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and; being aware that his act(s) or omission(s) forms part of a mass killing event; where, his act(s) or omission(s) forms part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

145. The term "mass", which may be understood to mean 'large scale,' does not command a numerical imperative but may be determined on a case-by-case basis

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[82] Prosecutor's Closing Brief, at p. 36.
[83] *Akayesu* Judgement, at para 735-744.
[84] Ruzindana Closing Argument, at p. 8.

using a common sense approach. The actor need not act with a specific individual(s) in mind.

146. The act(s) or omission(s) may be done with intention, recklessness, or gross negligence. The 'creation of conditions of life that lead to mass killing' is the institution of circumstances that ultimately causes the mass death of others. For example: Imprisoning a large number of people and withholding the necessities of life which results in mass death; introducing a deadly virus into a population and preventing medical care which results in mass death. Extermination includes not only the implementation of mass killing or the creation of conditions of life that leads to mass killing, but also the planning thereof. In this event, the Prosecutor must prove a nexus between the planning and the actual killing.

147. An actor may be guilty of extermination if he kills, or creates the conditions of life that kills, a single person providing the actor is aware that his act(s) or omission(s) forms part of a mass killing event.[86] For a single killing to form part of extermination, the killing must actually form part of a mass killing event. An 'event' exists when the (mass) killings have close proximity in time and place.

Other Inhumane Acts

148. The Prosecution charges Kayishema with crimes against humanity for other inhumane acts in Counts 4, 10, 16 and 22 of the Indictment, and Ruzindana with crimes against humanity for other inhumane acts in Count 22 of the Indictment.

149. Since the Nuremberg Charter, the category 'other inhumane acts' has been maintained as a useful category for acts not specifically stated but which are of comparable gravity. The importance in maintaining such a category was elucidated

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[85] Cherif Bassiouni, Crimes Against Humanity in International Law (Martinus Nijhoff Publishers 1992).

[86] For example, if ten FAR officers fire into a crowd of 200 Tutsis, killing them all. FAR officer X is a poor shot and kills only a single person, whereas officer Y kills 16. Because both X and Y participated in the mass killing and were both aware that their actions formed part of the mass killing event, they will both be guilty of extermination.

by the ICRC when commenting on inhumane treatment contained in Article 3 of the Geneva Conventions,

> It is always dangerous to try to go into too much detail – especially in this domain. However much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise.[87]

150. Other inhumane acts include those crimes against humanity that are not otherwise specified in Article 3 of the Statute, but are of comparable seriousness. The ICC Statute (Article 7(k)), provides greater detail than the ICTR Statute to the meaning of other inhumane acts: "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." The ILC commenting on Article 18 of its Draft Code of Crimes states

> The Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which may constitute crimes against humanity. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity.

151. The Chamber notes the International Law Commission's commentary. In relation to the Statute, other inhumane acts include acts that are of similar gravity and seriousness to the enumerated acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, or persecution on political, racial and religious grounds. These will be acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity. The Prosecution must prove a nexus between the inhumane act and the great suffering or serious injury to mental or physical health of the victim. The Chamber agrees with

[87] ICRC COMMENTARY ON THE GENEVA CONVENTIONS p. 54.

the Prosecution submission that the acts that rise to the level of inhumane acts should be determined on a case-by-case basis.[88]

152. The Defence asserts that for an accused to be found guilty of mental harm, there must be a direct relation between the assailant and the victim.[89] The Prosecution on the other hand suggests that victims have suffered mental harm amounting to other inhumane acts due to them having witnessed atrocities for which the accused is responsible. For example, in relation to Count 4 the Prosecution submits,

> [w]ith respect to serious mental harm, six survivors testified (and the survivors of all the other massacres testified) that they witnessed family members and friends being killed. As established by the evidence, Tutsi civilians were placed in an environment of fear and desperation and were forced to witness the killing and the severe injuring of friends, family and other Tutsi civilians. The killings were brutal in manner. The people saw carnage and heard the people singing exterminate them, exterminate them.…The Prosecutor submits that such an environment inherently causes serious mental harm.[90]

153. The Chamber is in no doubt that a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends. However, to find an accused responsible for such harm under crimes against humanity, it is incumbent on the Prosecution to prove the *mens rea* on the part of the accused. Indeed, as stated above, inhumane acts are, *inter alia,* those which *deliberately* cause serious mental suffering. The Chamber considers that an accused may be held liable under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental suffering on the third party, or where the accused knew that his act was likely to cause serious mental suffering and was reckless as to whether such suffering would result. Accordingly, if at the time of the act, the accused was unaware of the third party bearing witness to his act, then he cannot be held responsible for the mental suffering of the third party.

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[88] Prosecutor's Closing Brief, p. 37.
[89] See, Ruzindana's Closing Arguments, pp. 38-41.
[90] Prosecutor's Closing Brief, p. 80. See also pp. 93, 101, 105 and 134.

154. In summary, for an accused to be found guilty of crimes against humanity for other inhumane acts, he must commit an act of similar gravity and seriousness to the other enumerated crimes, with the intention to cause the other inhumane act, and with knowledge that the act is perpetrated within the overall context of the attack.

4.3 VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL II, THERETO

155. Pursuant to Article 4 of the Statute, the Trial Chamber shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 Common to the Four Geneva Conventions of 1949 (Common Article 3) for the protection of War Victims, and Additional Protocol II thereto of 1977 (Protocol II).

4.3.1 Customary Law

156. The Trial Chamber is cognisant of the ongoing discussions, in other forums, about whether the above-mentioned instruments should be considered customary international law that imposes criminal liability for their serious breaches. In the present case, such an analysis seems superfluous because the situation is rather clear. Rwanda became a party to the Conventions of 1949 on 5 May 1964 and to Protocol II on 19 November 1984. These instruments, therefore, were in force in the territory of Rwanda at the time when the tragic events took place within its borders.

157. Moreover, all the offences enumerated in Article 4 of the Statute, also constituted crimes under the laws of Rwanda. The other Party to the conflict, the RPF, also had stated to the International Committee of the Red Cross (ICRC) that it was bound by the rules of international humanitarian law. Therefore, there is no doubt that persons responsible for the breaches of these international instruments during the events in the Rwandan territories in 1994 could be subject to prosecution.

158. Thus, the question before the Trial Chamber is not about the applicability of these instruments in a general sense, but to what extent they are applicable in the instant case. In order to answer this question, a more detailed legal analysis of these instruments as well as the historical background to their adoption is necessary.

4.3.2 Historical Background of Common Article 3

159. The Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, convened by the Swiss Federal Council, was held in Geneva from 21 April to 12 August 1949 (the Conference). The Conference was seized by the working documents that passed through the many preparatory stages. After four months of continuous debate, the Conference established the first, second, third and fourth Geneva Conventions.[91]

160. From the very beginning, it was understood that these four Conventions could be applicable only in international armed conflicts. However, the ICRC proposed at the Conference to apply these Conventions to non-international armed conflicts as well. The proposal of the ICRC was rejected as a result of almost universal opposition by the states.

161. During the debate on this issue, special attention was focused on the fourth Geneva Convention. For a long period, it was considered evident that civilians would remain outside hostilities. The ICRC recognised that "when the Second World War broke out, civilians were not provided with effective protection under any convention or treaty."[92]

162. It was emphasised by the ICRC that the Fourth Convention represented "an important step forward in written international law in the humanitarian field."[93] Therefore, in the opinion of the ICRC, it was necessary to apply it to internal armed conflicts as well. However, from the point of view of the delegations such an application could entail not only political but also technical difficulties.

163. Thus, the situation at the Conference was rather complicated. On the one hand, the idea of the ICRC to apply the four Geneva Conventions to internal armed conflicts had

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[91] "First Convention," "second Convention," "third Convention" and "fourth Convention" mean, respectively, the Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked members of Armed Forces at Sea of 12 August 1949; the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

[92] The Geneva Convention of 12 August 1949, Commentary, IV Geneva Convention, p. 3. (ICRC Pub., 1958). Hereafter, "Commentary on IV Geneva Convention, ICRC".

[93] *Ibid.*, p. 9.

been treated by many delegations as unfriendly attempts to interfere in the internal affairs of the states and to protect all forms of insurrections, rebellion, anarchy and the break-up of states and even plain brigandage. On the other hand, there was an understanding of the necessity to aid the victims of internal conflicts, the horrors of which sometimes surpass the horrors of international wars by reason of the fratricidal hatred they engender.[94]

164. The Conference rejected a considerable number of the alternative drafts on this issue and, as a result of lengthy and tremendous efforts, succeeded in approving Common Article 3 as it appears now in the four Geneva Conventions. Pursuant to this Article, each Party to a non-international conflict is bound to apply certain provisions as a minimum. The words "as a minimum" must be understood in the sense that the applicable provisions represent a compulsory minimum. At the same time, the Parties were encouraged not to limit themselves to the provided minimum. They were invited, in accordance with Common Article 3, "to endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention."

165. On this occasion, the ICRC pointed out: "To borrow the phrase of one of the delegates, Article 3 is like a 'Convention in miniature.' It applies to non-international conflicts only and will be the only Article applicable to them until such time as a special agreement between the Parties has brought into force between them all or part of the other provisions of the Convention." [95]

4.3.3 Historical Background of Additional Protocol II

166. After the Conference in 1949, the idea to improve the situation with the protection of the victims of internal conflicts remained on the agenda. As a result of compromise, Common Article 3 was not drafted in a very clear way and there were practical difficulties with its application. Moreover, in light of the number and scale of armed conflicts that occurred in different parts of the world the need to improve the protection of the civilian population during armed conflicts became more urgent. In this respect, the

[94] ICRC comments on Additional Protocol II. See the ICRC website, (visited 6 May. 1999) <http://www.icrc.org>.
[95] Commentary on IV Geneva Convention, p. 34.

ICRC found it necessary to emphasise that "the development of arms and the increased radius of action given to armed forces by modern inventions have made it apparent that, notwithstanding the ruling theory, civilians were certainly 'in the war', and exposed to the same dangers as the combatants – and sometimes worse."[96]

167. In light of such circumstances, the ICRC began to prepare a new conference, which took place in 1977. One of the main purposes of this conference was to improve the protection of the civilian population during armed conflicts. Two Protocols additional to the Geneva Conventions of 1949 were adopted as a result of this conference. Protocol I deals with international armed conflict and Protocol II with non-international armed conflict. Commenting recently on the general problems in implementing the fourth Geneva Convention, the ICRC noted that this Convention "contains no detailed provisions for the protection of the civilian population against the dangers caused by military operations such as aerial bombardments and shelling. This gap was later filled by Protocol I Additional to the Geneva Conventions."[97] Similarly, Protocol II had to supplement Common Article 3 in order to improve the protection of civilians in internal armed conflicts.

168. One of the very important supplements of Protocol II to Common Article 3 is Part IV entitled "Civilian Population." In this Part the Protocol provides not only for the protection of "individual civilians," but directly addresses the issue of the protection of the "civilian population." Article 13 of Additional Protocol II states, "the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations." This part contains six detailed Articles providing for the protection of objects indispensable to the survival of the civilian population, protection of works and installations containing dangerous forces, protection of cultural objects and places of worship, prohibition of forced movement of civilians, activities of relief societies et cetera.

[96] Preliminary remarks of the ICRC to the Geneva Conventions of August 12, 1949, p. 17.
[97] Report by ICRC Meeting of Experts, Geneva, 27-29 October 1998, p. 2. See the ICRC website (visited 29 Dec. 1998) <http://www.icrc.org>.

4.3.4 The Test of Applicability of Common Article 3 and Additional Protocol II

Introduction

169. The Trial Chamber is of the opinion that in order for an act to breach Common Article 3 and Protocol II, a number of elements must be shown. It must be established that the armed conflict in Rwanda in this period of time was of a non-international character. There must also be a link between the accused and the armed forces. Further, the crimes must be committed *ratione loci* and *ratione personae*. Finally, there must be a nexus between the crime and the armed conflict.

The Trial Chamber shall, therefore, consider each of these elements in turn.

The Nature of the Armed Conflict

170. Both international instruments, Common Article 3 and Protocol II, were in force in 1994 in Rwanda. Therefore, it is proper to consider them together taking into account that Protocol II "develops and supplements Common Article 3 without modifying its existing conditions of application."[98] The general criteria in Protocol II for determining whether armed conflict is of a non-international character was one of the important supplements. An armed conflict which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups, in accordance with Protocol II, should be considered as a non-international armed conflict. This requirement reflects the essential distinction between an international armed conflict, conducted by two or more States, and non-international armed conflict conducted by a State and another armed force which does not qualify as a State.

171. Certain types of internal conflicts, which fall below a minimum threshold, are not recognised by Article 1(2) of Protocol II as non-international armed conflict, namely, "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature." The remaining criteria define the necessary characteristics of the dissident armed forces or other organised armed groups, which must:

[98] See Art. 1 of Additional Protocol II.

1. be under responsible command;
2. exercise control over part of the territory of the State;
3. carry out sustained and concerted military operations, and
4. be able to implement the Protocol.

172. Thus, in the present case, all material requirements existed to consider the situation in Rwanda, during April, May, June and July 1994, as an armed conflict, not of an international character. This conflict took place in the territory of Rwanda between governmental armed forces (Forces Armées Rwandaises – the FAR) and the dissident armed forces (Rwandese Patriotic Front – the RPF). These dissidents, under the responsible command of General Kagame, exercised control over part of the territory of Rwanda and were able to carry out sustained and concerted military operations as well as to implement Common Article 3 and Protocol II.

A Link Between the Accused and the Armed Forces

173. In accordance with Article 6 of the ICTR Statute, 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." Article 4 of the Statute especially provides for prosecuting persons for serious violations of Common Article 3 and Protocol II. Therefore, the question is whether the accused falls within the class of persons who may be held responsible for serious violations of these international instruments.

174. Violations of Common Article 3 and Protocol II could be committed during, or as a result of, military operations. This means that the Parties to an armed conflict should be responsible for such breaches. In the instant case, this would constitute the FAR and the RPF. The ability of the RPF as a dissident armed force to implement legally binding international instruments is considered in Protocol II as a fundamental criteria in order to recognise the non-international character of the armed conflict. The ability of the governmental armed forces to comply with the provisions of such instruments is axiomatic. In the instant case, the two armies were well organised and participated in the military operations under responsible military command. Therefore, based on Article 6(1) of the ICTR Statute, it could be concluded that the appropriate members of the FAR

and RPF shall be responsible individually for violations of Common Article 3 and Protocol II, if factually proven.

175. Thus, individuals of all ranks belonging to the armed forces under the military command of either of the belligerent Parties fall within the class of perpetrators. If individuals do not belong to the armed forces, they could bear the criminal responsibility only when there is a link between them and the armed forces. It cannot be disregarded that the governmental armed forces are under the permanent supervision of public officials representing the government who had to support the war efforts and fulfil a certain mandate. On this issue, in the *Akayesu* Judgement, Trial Chamber I was correct to include in the class of perpetrators, "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."[99]

176. Thus, the Trial Chamber is of the opinion that the laws of war apply not only to the members of the armed forces but, in certain cases, to civilians as well, if so established factually. In this case, the accused persons could fall within the class of individuals who may be held responsible for serious violations of Common Article 3 and Protocol II. Violations of these international instruments could be committed outside the theatre of combat. For example, the captured members of the RPF may be brought to any location within the territory of Rwanda and could be under the control or in the hands of persons who are not members of the armed forces. Therefore, every crime should be considered on a case-by-case basis taking into account the material evidence presented by the Prosecution. In other words, the evidence needs to show, beyond a reasonable doubt, that there was a link between the accused and the armed forces.

Ratione Personae

177. Two distinct issues arise with respect to personal jurisdiction over serious violations of Common Article 3 and Protocol II. In addition to the class of perpetrators, which has been considered above, the issue of the class of victims should be addressed.

[99] *Akayesu* Judgement, para. 631.

178. It is delineated in paragraph 1 of the Indictment that, "thousands of men, women, and children were killed and numerous people injured" at the four sites in the *Prefecture* of Kibuye between about 10 April and 30 June 1994. It was added in paragraphs 25, 32, 39 and 45 of the Indictment that "these men, women and children were unarmed and were predominantly Tutsis."

179. On the basis of the definition of the civilian population contained in Article 50 of Additional Protocol I, the conclusion could be made that the victims of the massacres which occurred at the four sites, referred to in the Indictment, qualify as the civilian population. This definition stipulates, "the civilian population comprises all persons who are civilians." The first paragraph of the same Article indicates that, "a civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol." Each of these Articles enumerates the various types of combatants. Therefore, in accordance with this definition, for the purpose of protection of victims of armed conflict, all persons who are not combatants might be considered civilians.

180. On this basis, the ICRC comes to the following conclusion: "Thus the Protocol adopted the only satisfactory solution, which is that of a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces."[100] It should be noted that there is a certain distinction between the terms "civilians" and "civilian population." There are civilians who accompany the armed forces or are attached to them. Civilians could even be among combatants who take a direct part in the hostilities. There is clear confirmation of this fact in Protocol II which stipulates that, "civilians shall enjoy the protection afforded by this part unless and for such time as they take a direct part in the hostilities."[101] However, the civilian population as such does not participate in the armed conflict. Article 50 of Protocol I emphasises,

[100] COMMENTARY ON THE ADDITIONAL PROTOCOLS (Jean Pictet, ed.) (ICRC, Martinus Nijhoff Publishers, Geneva, 1987), p. 610, section 1913.
[101] Additional Protocol II, Art. 13(3).

"the presence within the civilian population of individuals who do not come within the definition of civilian does not deprive the population of its civilian character."[102]

181. It is generally known that the civilian population is unarmed and is not in any way drawn into the armed conflict. The Chamber also takes into account the fact that the Defence did not challenge the civilian status of the victims. Whether there is a material averrment for charges involving Article 4 of the Statute is a question of findings which is addressed in Part VI of the Judgement.

Ratione Loci

182. In spite of the fact that there is no clear provision on applicability *ratione loci* either in Common Article 3 or Protocol II, the juridical situation is rather clear. The Chamber has to recall that two Parties in the armed conflict were legally bound by the provisions of these international instruments. Therefore, in accordance with requirements of international public law, these instruments should be applicable in the whole territory of Rwanda. Moreover, in Article 4 of Protocol II, which in principle reproduces Common Article 3, there is a clear indication that the enumerated criminal acts "shall remain prohibited at any time and in any place whatsoever." Therefore, it is unnecessary that serious violations of Common Article 3 and Protocol II occur in the actual theatre of operations. Captured persons, for example, could be brought to other locations of the territory, but despite this relocation, they should be treated humanely. The expression "at any time whatsoever" means that the temporal factor does not assume a narrow interpretation. This approach was confirmed by the ICTY Appeal Chamber in its decision on jurisdiction in the *Tadic* Judgement wherein it was held that,

> . . . the geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of Common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking an active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations.[103]

[102] Additional Protocol I, Article 50(3).

[103] ICTY Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 69.

183. The Appeal Chamber also remarked in this paragraph that "like Common Article 3, it explicitly protects all persons who do not take a direct part or who have ceased to take part in the hostilities…Article 2(1) [of Protocol II] provides 'this Protocol shall be applied […] to all persons affected by an armed conflict as defined in Article 1'." After quoting Article 2(2) of Protocol II about persons who have been deprived of their liberty the Appeals Chamber noted that "under this last provision the temporal scope of the applicable rules clearly reaches beyond the actual hostilities…*The nexus required is only a relationship between the conflict and the deprivation of liberty,* not that the deprivation occurred in the midst of battle."[Emphasis added]. On the basis of the foregoing, the Appeal Chambers came to the conclusion that in case of internal conflict, until a peaceful settlement is achieved, international humanitarian law continues to apply in the whole territory under the control of a Party, whether or not actual combat takes place there and the crimes committed in these circumstances should be considered as crimes "in the context of an armed conflict."[104] Thus, the Appeals Chamber found that the alleged crimes should not be considered in the narrow geographical and temporal framework and should be understood as crimes committed in the context of an armed conflict if there is a relationship between this conflict and the offence.

Serious Violations

184. The competence of the Chamber is limited to serious violations of Common Article 3 and Protocol II. Article 4 of the ICTR Statute states that the persons committing or ordering to be committed *serious violations* of Common Article 3 and Protocol II should be prosecuted. The Chamber finds that this is a qualitative limitation of its competence and the phrase "serious violations" should be interpreted as breaches involving grave consequences. The list of prohibited acts, which is provided in Article 4 of the ICTR Statute, as well as in Common Article 3 and in Article 4 of Protocol II, undeniably should be recognised as serious violations entailing individual criminal responsibility.

[104] *Ibid.* para. 70.

Nexus Requirement Between the Armed Conflict and the Crime

185. It is important to establish whether all the crimes committed during the non-international armed conflict should be considered as crimes connected with serious violations of Common Article 3 and Protocol II. The Chamber is of the opinion that only offences, which have a nexus with the armed conflict, fall within this category. If there is not a direct link between the offences and the armed conflict there is no ground for the conclusion that Common Article 3 and Protocol II are violated.

186. The jurisprudence in this area of the law requires such a link between the armed conflict and the offence. The ICTY Trial Chamber in the Judgement of *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* (*Celebic∞* Judgement) stated that "there must be an obvious link between the criminal act and the armed conflict."[105] The same point of view is reflected in the *Tadic* Judgement. In *Tadic,* the Trial Chamber remarked that "the only question to be determined in the circumstances of each individual case was whether the offences were closely related to the armed conflict as a whole."[106] In the *Akayesu* Judgement, the Trial Chamber found that ". . .it has not been proved beyond reasonable doubt that the acts perpetrated by Akayesu …were committed in conjunction with the armed conflict." Such a conclusion means that, in the opinion of that Chamber, such a connection is necessary.

187. This issue was discussed recently at the first session of the Preparatory Commission for the International Criminal Court (16 to 26 February 1999). From the point of view of the participants, war crimes would occur if the criminal conduct took place in the context of and was associated with the armed conflict.[107]

188. Thus 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 established *factually*. No test, therefore, can be defined *in abstracto*. It is for the Trial Chamber, on a case-by-case basis, to adjudge on the facts

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[105] *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo,* Case No. IT-96-21-T, 16 Nov. 1998, para. 193.
[106] *Tadic* Judgement, para. 573.
[107] The Second Discussion Paper (PCNICC/1999/WGE/RT.2).

submitted as to whether a nexus existed. It is incumbent upon the Prosecution to present those facts and to prove, beyond a reasonable doubt, that such a nexus exists.

189. The nexus requirement between the offence and the armed conflict is of crucial significance, taking into account that Common Article 3 and Protocol II are designed to protect the victims of the armed conflict. War crimes are inevitably connected with violations of Common Article 3 and Protocol II. Whether there is a nexus between the alleged crimes and the armed conflict in the instant case is an issue of legal findings which will be addressed in Part VI of the Judgement. At this stage it should be highlighted that the consideration of the applicability of the provisions of Common Article 3 and Protocol II would be proper if such a nexus is established.

Conclusion

190. It remains for the Chamber to make a finding in the context of the events alleged in the Indictment with regard to the culpability of the accused under Article 4 of the ICTR Statute. This will be addressed in the Legal Findings Part of the Judgement.

4.4 CRIMINAL RESPONSIBILITY, ARTICLES 6(1) AND 6(3)

4.4.1 Individual Responsibility – Article 6(1)

191. The Indictment sets out in its General Allegations (paragraph 21) that both Kayishema and Ruzindana, pursuant to Article 6(1) of the Tribunal's Statute, are individually responsible for the execution of crimes referred to in Articles 2 to 4 of the same Statute. Whilst the Chamber will examine the specific charges raised in the Indictment below, it must first address the inherent requirement that the accused be individually responsible for the commission of these crimes. In this respect the Statute adopts a wide scope of inclusion. Article 6(1) states

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation and execution of the crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

192. The Parties addressed the Chamber with regard to the interpretation and application of this paragraph to the events in question. Accordingly, it is necessary to consider the degree of participation required in the crimes delineated in Articles 2 to 4 of the Statute. Only then, and in light of the factual findings set out below, is it possible to identify whether either Ruzindana or Kayishema are individually criminally responsible pursuant to Article 6(1).

193. Before addressing the requisite elements necessary to find individual criminal responsibility under Article 6(1), the Trial Chamber will first examine the issue of statutory construction raised by Counsel for Ruzindana.

194. The Defence focused upon a very specific interpretation of Article 6(1). They contended that the modes of participation, "planning, instigation, ordering, committing", should be read cumulatively, but separately from, "aiding and abetting".[108] Only such a

[108] Defence closing arguments, read from written brief submitted by Mr. Van der Griend on behalf of Ruzindana, on 28 October 1998 ("Closing Brief for Ruzindana"), p. 45. In the Closing Brief for

position, it was submitted, would give full weight to the drafters use of "or" within the Article. Furthermore, because "abetting" and "instigating" have the same meaning, to avoid concurrence it was posited that "aiding and abetting" should also be read cumulatively despite the ruling in the *Akayesu* Judgement.

195. The Trial Chamber is of the opinion that the interpretation submitted by the Defence would not only offend common sense, but would also be contrary to the findings of the Chamber in the *Celebici* Judgement, where it stated categorically,

> . . . that individuals may be held criminally responsible for their participation in the commission of offences in *any* of the several capacities is in clear conformity with general principles of criminal law. As concluded by the Trial Chamber II in the *Tadic* Judgement, there can be no doubt that this corresponds to the position under customary international law.[109] [emphasis added]

196. Similar reasoning is found in the *Akayesu* Judgement where the Chamber remarked, "Article 6(1) covers *various* stages of the commission of a crime."[110] [emphasis added]. Trial Chamber I in the *Akayesu* Judgement also held that, "aiding and abetting" were not synonymous, thus could separately give rise to individual responsibility. After stating these principles the Chamber in *Akayesu* proceeded to find the accused guilty of nine counts pursuant to one or more of the modes of participation expressed in Article 6(1).

197. The Trial Chamber can see no reason to depart from these logical and well-founded expressions of international law. Therefore, if any of the modes of participation delineated in Article 6(1) can be shown, and the necessary *actus reus* and *mens rea* are evidenced, then that would suffice to adduce criminal responsibility under this Article.

Ruzindana, counsel at once urged this cumulative reading, and then endorsed its disjunctive formulation adopted by the *Akayesu* Judgement, p. 45. The Chamber enunciates its view here for the purpose of clarity.

[109] *Celebici* Judgement, para 321. See also the cases and conventions cited therein.

[110] *Akayesu* Judgement, para. 473. See also para. 484 where Trial Chamber I reads "aiding and abetting" disjunctively.

198. The Trial Chamber is of the opinion that, as was submitted by the Prosecution, there is a further two stage test which must be satisfied in order to establish individual criminal responsibility under Article 6(1). This test required the demonstration of (i) participation, that is that the accused's conduct contributed to the commission of an illegal act, and (ii) knowledge or intent, that is awareness by the actor of his participation in a crime.[111]

199. The first point of this test, the *actus reus* of participation, was considered in great detail by Trial Chamber I in the *Akayesu* Judgement and by the ICTY in the *Tadic* Judgement.[112] It is now firmly established that for the accused to be criminally culpable his conduct must have been proved, beyond a reasonable doubt, to have contributed to, or have had an effect on, the commission of the crime.[113] What constitutes the *actus reus* and the requisite contribution inevitably varies with each mode of participation set out in Article 6(1).[114] What is clear is that the contribution to the undertaking be a substantial one, and this is a question of fact for the Trial Chamber to consider.

200. It is not presupposed that the accused must be present at the scene of the crime, nor that his contribution be a direct one. That is to say, in light of the decision rendered in the *Furundzjia* Judgement and the jurisprudence set out therein, the role of the individual in the commission of the offence need not always be a tangible one. This is particularly pertinent where the accused is charged with the "aiding" or "abetting" of a crime. In *Furundzija* it was held, ". . . an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity."[115]

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[111] Prosecution Closing Brief, p. 17. This test was drawn from the *Tadic* Judgement applying identical provisions in Article 7(1) of the ICTY Statute.
[112] See, respectively, paras. 480-484, and paras. 673-674 and 688-692.
[113] See *Tadic* Judgement, para. 673-674; *Celebici* Judgement, para. 326; *Akayesu* Judgement, para. 473-475; *Furundzija* Judgement, para. 235; and the authorities cited therein.
[114] See *Akayesu* Judgement, paras. 480-485.
[115] *Furundzija* Judgement, para 207.

201. This Chamber concurs. The presence of such a spectator need not be a *conditio sine qua non* for the principal. Therefore, subject to the caveat that the accused knew the effect that his presence would have, he may be found responsible under Article 6(1) for such a contribution to the commission of any of the offences specified in the Tribunal's Statute.

202. This jurisprudence extends naturally to give rise to responsibility when the accused failed to act in breach of a clear duty to act. The question of responsibility arising from a duty to act, and any corresponding failure to execute such a duty is a question that is inextricably linked with the issue of command responsibility. This is because under Article 6(3) a clear duty is imposed upon those in authority, with the requisite means at their disposal, to prevent or punish the commission of a crime. However, individual responsibility pursuant to Article 6(1) is based, in this instance, not on the duty to act, but from the encouragement and support that might be afforded to the principals of the crime from such an omission.[116]

203. In view of such a broad scope of participation that may give rise to responsibility under Article 6(1), there must be a clear awareness that this participation will lead to the commission of a crime.[117] The Trial Chamber has set out, in Chapter 5.1 of this Judgement, that the clear objective of the atrocities occurring throughout Rwanda and the Kibuye *Prefecture,* in 1994, was to destroy the Tutsi population. The perpetrators of these crimes, therefore, were united in this common intention. On this point, the Chamber in the *Celebici* Judgement declared that where,

> . . . a plan exists, or where there otherwise is evidence that members of a group are acting with a common criminal purpose, all those who knowingly participate in, and directly and substantially contribute to, the realisation of this purpose may be held criminally responsible . . and . . .[d]epending upon the facts of a given situation, the culpable individual may, under such circumstances, be held

[116] See the *Akayesu* Judgement where the accused's failure to oppose the killings, in light of his authoritative position, was found to constitute a form of tacit encouragement, para. 705.

[117] What constitutes a crime is defined by the Tribunal's Statute. Therefore, only the actual commission of a crime will suffice, except for that of genocide where it is specifically stated that an 'attempt' to commit genocide will give rise to criminal responsibility, Article 2(3)(d) of the Statute.

> criminally responsible either as a direct perpetrator of, or as an aider and abettor to, the crime in question.[118]

204. The Trial Chamber concludes, therefore, that the members of such a group would be responsible for the result of any acts done in furtherance of the common design where such furtherance would be probable from those acts.

205. Thus, the accused need not necessarily have the same *mens rea* as the principal offender. Whilst knowledge or intention will give rise to individual responsibility under Article 6(1), the distinction is only of importance in distinguishing whether the accused aids or abets a crime or is a co-perpetrator.[119]

206. Such a requirement of *mens rea* refutes the contention by Counsel for Kayishema that the burden of proof is reversed when the *actus reus* for responsibility, under this Article, arises through the failure to perform an act. The Prosecution must prove that the accused was aware that his failure to act would contribute to the commission of a crime.

207. In short, therefore, the Chamber finds that each of the modes of participation may, independently, give rise to criminal responsibility. The Prosecution must prove that through his mode of participation, whether it be by act(s) or omission(s), the accused contributed substantially to the commission of a crime and that, depending on the mode of participation in question, he was at least aware that his conduct would so contribute to the crime.

4.4.2 Command Responsibility – Article 6(3)

208. The Indictment further alleges that Kayishema was, "also or alternatively individually responsible for the criminal acts of his subordinates". In this respect, Article 6(3) is pertinent. It states,

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[118] *Celebici* Judgement, para. 328.
[119] See *Furundzija* Judgement, paras. 250-257.

> 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.[120]

Ruzindana is not charged under Article 6(3).

209. The principle of command responsibility is firmly established in international law, and its position as a principle of customary international law has recently been delineated by the ICTY in the *Celebici* Judgement.[121] The clear recognition of this doctrine is now reflected in Article 28 of the Rome Statute of the ICC.

210. The finding of responsibility under Article 6(1) of the Statute does not prevent the Chamber from finding responsibility additionally, or in the alternative, under Article 6(3). The two forms of responsibility are not mutually exclusive. The Chamber must, therefore, consider both forms of responsibility charged in order to fully reflect the culpability of the accused in light of the facts.

211. There were no submissions made by the Defence with regard to the legal underpinning of Article 6(3). As such, the Trial Chamber will consider the position advanced by the Prosecution concomitantly with its examination of the various elements that must be satisfied in order to establish criminal liability under the doctrine of command responsibility.

212. It is essential to consider first whether Kayishema, in his role as *Prefect*, is subject to the notion of command responsibility set out in Article 6(3). Secondly, it is incumbent upon the Chamber to consider who constitutes the subordinates over whom Kayishema would exercise command. In this respect it would also be necessary to clarify whether those subordinates must be under his *de jure* command, or if *de facto* subordination

[120] Hereafter, responsibility arising under this Article shall be referred to as "command responsibility", or "superior responsibility". The terms will be used interchangeably.

would suffice. Thirdly, the requisite degree of knowledge of the subordinate's actions required to establish command responsibility must also be considered. Finally, the Chamber must address the question of when an individual becomes responsible under this doctrine for failing to prevent a crime or punish the perpetration thereof.

Responsibility of a Non-Military Commander

213. The Prosecution submitted that the principle of superior responsibility applies not only to military commanders, but also extends to civilians in positions of authority.[122] The Chamber finds that the application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one. There are a number of reasons for this.

214. The construction of the Statute itself is clear. It makes no limited reference to the responsibility to be incurred by military commanders alone.[123] Rather, the more generic term of "superior" is used. The Chamber concurs with the observation in the *Celebici* Judgement that this generic term, coupled with its juxtaposition to the individual criminal responsibility of "Head[s] of State or Government" or "responsible Government officials" in Article 6(2), clearly reflects the intention of the drafters to extend this provision of superior responsibility beyond military commanders, to also "encompass political leaders and other civilian superiors in positions of authority."[124]

215. The jurisprudence also supports this interpretation. Before Trial Chamber I of this Tribunal, the former Prime Minister, Jean Kambanda, pleaded guilty to crimes against humanity and genocide by virtue, *inter alia*, of Article 6(3).[125] Similarly, Omar Serushago, a prominent local civilian and leader of the members of the *Interahamwe* in Gisenyi *Prefecture*, also pleaded guilty to crimes against humanity and genocide and

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[121] *Celebici* Judgement, paras. 333-343, in reference to the respective Article in the ICTY Statute.
[122] Closing Brief, p. 20.
[123] *C.f.* the specification of the responsibility of "military commanders" in Article 87 of Protocol I Additional to the Geneva Conventions 1949, (Jean Pictet ed.).
[124] *Celebici* Judgement, para. 356.
[125] *Prosecutor v. Jean Kambanda*, Judgement and Sentence, Case No.: ICTR 97-23-S (Eng.).

acknowledged responsibility for these crimes pursuant to Article 6(3).[126] In addition, the *Celebici* Judgement, which addressed this issue in great detail, highlighted the practice of the Military Tribunal for the Far East (Tokyo Tribunal), and the Superior Military Government Court of the French Occupation Zone in Germany, where senior politicians and even leading industrialists were charged with the commission of war crimes committed by their subordinates.[127]

216. The crucial question in those cases was not the civilian status of the accused, but of the degree of authority he exercised over his subordinates.[128] Accordingly the Chamber accepts the submission made by the Prosecution that a civilian in a position of authority may be liable under the doctrine of command responsibility. The Chamber will turn, therefore, to consider in what instances a civilian can be considered a superior for the purposes of Article 6(3), and the requisite "degree of authority" necessary to establish individual criminal culpability pursuant to this doctrine of superior responsibility.

Concept of Superior: de Jure and de Facto Control

217. This superior-subordinate relationship lies at the heart of the concept of command responsibility. The basis under which he assumes responsibility is that, if he knew or had reason to know that a crime may or had been committed, then he must take all measures necessary to prevent the crime or punish the perpetrators. If he does not take such actions that are within his power then, accordingly, he is culpable for those crimes committed. The Trial Chamber in *Celebici* set out the guiding principle in this respect, when it stated that, "[T]he doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates".[129] The Chamber then elaborated upon this principle by warning that, "[We] must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts."[130]

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[126] *Prosecutor v. Omar Serushago*, Judgement and Sentence, Case No.: ICTR 98-39-S (Eng.).
[127] *Ibid*, paras. 356-362.
[128] See the opinion of Judge Röling in the "Rape of Nanking" case, and the *Akayesu* Judgement, para. 491.
[129] *Celebici* Judgement, para. 376.
[130] *Ibid.*, para. 377.

218. In order to 'pierce the veils of formalism' therefore, the Chamber must be prepared to look beyond the *de jure* powers enjoyed by the accused and consider the *de facto* authority he exercised within Kibuye during April to July 1994. The position expounded by the ILC that an individual should only be responsible for those crimes that were within his legitimate legal powers to prevent,[131] does not assist the Trial Chamber in tackling the, 'realities of any given situation'. Therefore, in view of the chaotic situation that which prevailed in Rwanda in these pivotal months of 1994, the Chamber must be free to consider whether Kayishema had the requisite control over those committing the atrocities to establish individual criminal liability under Article 6(3), whether by *de jure* or *de facto* command.

219. A concentration upon the *de jure* powers of the *prefect* would assist neither Party. For example, focussing upon the *de jure* power of the *prefect* under the 1991 Constitution would be to prevent proper consideration of the Defence's case that the climate in Rwanda and the practical realities at that time were such that the *prefect* not only had no control over certain *de jure* subordinates, but also that he had no means to effectively prevent the atrocities that were occurring. Equally, a restricted view of the concept of superior to those exercising *de jure* control would not enable the Chamber to adequately consider the arguments of the Prosecution. She submitted that Kayishema exercised both legal command over those committing the massacres and *de facto* authority over these and other assailants such as the members of the *Interahamwe*.

220. This approach is also congruent with the *Celebici* case and the authorities cited therein.[132] For example, having examined the Hostage and High Command cases the Chamber in *Celebici* concluded that they authoritatively asserted the principle that, "powers of influence not amounting to formal powers of command provide a sufficient basis for the imposition of command responsibility." This Trial Chamber concurs.

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[131] ILC Draft Code of Crimes.
[132] *Celebici* Judgement, paras. 364-378.

221. Moreover, the Rome Statute for the ICC, having delineated the circumstances in which a military commander would incur responsibility as a superior, stipulates in Article 28(2) that all other superiors shall be criminally responsible for acts, "committed by subordinates under his or her *effective* control." [emphasis added].

222. Article 6 of this Tribunal's Statute is formulated in a broad manner. By including responsibility of all government officials, all superiors and all those acting pursuant to orders, it is clearly designed to ensure that those who are culpable for the commission of a crime under Articles 2 to 4 of the Statute cannot escape responsibility through legalistic formalities. Therefore, the Chamber is under a duty, pursuant to Article 6(3), to consider the responsibility of all individuals who exercised effective control, whether that control be *de jure* or *de facto*.

223. Where it can be shown that the accused was the *de jure* or *de facto* superior and that pursuant to his orders the atrocities were committed, then the Chamber considers that this must suffice to found command responsibility. The Chamber need only consider whether he knew or had reason to know and failed to prevent or punish the commission of the crimes if he did not in fact order them. If the Chamber is satisfied beyond a reasonable doubt that the accused ordered the alleged atrocities then it becomes unnecessary to consider whether he tried to prevent; and irrelevant whether he tried to punish.

224. However, in all other circumstances, the Chamber must give full consideration to the elements of 'knowledge' and 'failure to prevent and punish' that are set out in Article 6(3) of the Statute.

Knowledge of Subordinates' Actions

225. The *mens rea* in Article 6(3) requires that for a superior to be held criminally responsible for the conduct of his subordinates he must have known, or had reason to know, of their criminal activities. If it can be proven beyond a reasonable doubt that the

superior knew of the crimes that were being committed by those over whom he exercised control then the requisite *mens rea* is clearly established.

226. However, when we consider that individual responsibility arises when the superior "had reason to know" that a crime had or was about to be committed, the requisite *mens rea* is not so clear. The expansive approach to apportioning command responsibility in the cases following the Second World War was observed by the Trial Chamber in the *Celebici* Judgement. These cases first imposed a duty for the commander to know everything that occurred within his ambit of jurisdiction, and then imposed responsibility upon the commander for failure to fulfil that duty.[133] The Chamber in the *Celebici* case did not follow this reasoning. Instead it preferred it be proven that some information be available that would put the accused on notice of an offence and require further investigation by him.

227. On this issue, the Chamber finds the distinction between military commanders and other superiors embodied in the Rome Statute an instructive one.[134] In the case of the former it imposes a more active duty upon the superior to inform himself of the activities of his subordinates when he, "knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes." This is juxtaposed with the *mens rea* element demanded of all other superiors who must have, "[known], or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes."

228. The Trial Chamber agrees with this view insofar that it does not demand a *prima facie* duty upon a non-military commander to be seized of every activity of all persons under his or her control. In light of the objective of Article 6(3) which is to ascertain the individual criminal responsibility for crimes as serious as genocide, crimes against humanity and violations of Common Article 3 to the Geneva Conventions and Additional Protocol II thereto, the Chamber finds that the Prosecution must prove that the accused in

[133] See *Celebici* Judgement, para. 389, and the cases cited therein, particularly the *Hostage* case, the *Toyoda* case, and the *Pohl* case.

this case either knew, or consciously disregarded information which clearly indicated or put him on notice that his subordinates had committed, or were about to commit acts in breach of Articles 2 to 4 of this Tribunal's Statute.

Effective Control: Failure to Prevent or Punish a Crime

229. The principle of command responsibility must only apply to those superiors who exercise effective control over their subordinates. This material ability to control the actions of subordinates is the touchstone of individual responsibility under Article 6(3). The International Law Commission in its Draft Code went so far as to suggest that for a superior to incur criminal responsibility, he must have, "the legal competence to take measures to prevent or repress the crime *and* the material possibility to take such measures."[135] [emphasis added].

230. However, as the Chamber highlighted above, to give such prominence to the *de jure* power bestowed upon an individual is to provide justice to neither Party. There is a need to shed this legalistic formalism and to focus upon the situation which prevails in the given fact situation. Therefore, the Chamber prefers the position as set out in the *Celebici* Judgement where it was held that,

> . . . the superior have effective control over the persons committing the underlying violations of humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a *de facto* as well as a *de jure* character. . .[136]

231. Accordingly, the ability to prevent and punish a crime is a question that is inherently linked with the given factual situation. Thus, only in light of the findings which follow and an examination of the overall conditions in which Kayishema had to operate as *Prefect*, can the Chamber consider who were the subordinates to Kayishema from April to July 1994 and whether he exercised the requisite degree of control over

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[134] Article 28(1)(a), and 28(2)(a).
[135] ILC Draft Code of Crimes, pp. 38-39.
[136] *Celebici* Judgement, para. 378.

them in order to conclude whether he is individually criminally responsible for the atrocities committed by them.

V. FACTUAL FINDINGS

5.1 ALIBI

232. Both Kayishema and Ruzindana raised the defence of alibi to the charges levied against them. Both accused assert that they were not at the sites when any of the massacres occurred. The Trial Chamber shall consider the arguments advanced by Kayishema and Ruzindana below. Before examining the specifics of the alibi defences, however, it is first necessary to consider the procedural concerns that have accompanied their invocation.

5.1.1 Alibi Defence and Rule 67 of the Rules

The salient provisions of Rule 67 of the Rules state that,

> (A) As early as reasonably possible and in any event prior to the commencement of the trial:
>
> (ii) the defence shall notify the Prosecutor of its intent to enter:
>
> (a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi
>
> (B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on any of the above defences.

233. The requirement upon the Defence to disclose its intention to rely upon the defence of alibi reflects the well-established practice in the common law jurisdictions around the world.[137] It is a requirement necessary in many jurisdictions, and in the jurisdiction of this Tribunal, in order to allow the Prosecution to adequately prepare its case. Once the accused has raised the defence of alibi, the burden to prove this defence may or may not rest upon him depending upon the jurisdiction concerned. In some jurisdictions such as

[137] In this respect see Criminal Justice Act 1967 s.11 of England which specifically legislates to require disclosure of alibi prior to trial. Similar legislation exists in Canada, as well as certain states of the United States and Australia.

India, the burden of proof rests upon individuals, who plead the defence of alibi.[138] In several other jurisdictions as for example in South Africa, the burden of proof rests upon the Prosecution.[139]

234. In the instant case, the Trial Chamber holds that the burden of proof rests upon the Prosecution to prove its case beyond a reasonable doubt in all aspects notwithstanding that the Defence raised alibi. After all, the accused is presumed innocent until the Prosecution has proved his guilt under Article 20(3) of the Statute. The accused is only required to raise the defence of alibi and fulfil the specific requirements of Rule 67(A)(ii) of the Rules, which stipulates the necessary information required about the defence of alibi.

235. Under Rule 67 aforementioned, the Defence is required to notify the Prosecution about their intent to rely upon the defence of alibi. However, Counsel for Kayishema made absolutely no indication prior to the commencement of the trial of his intention to rely upon the defence of alibi, and Counsel for Ruzindana only submitted limited information with regard to the witnesses that he intended to call. The Prosecution filed a formal complaint by Motion in which it requested the Trial Chamber to order compliance with Rule 67(A)(ii) of the Rules.[140]

236. During the hearing, Kayishema was asked why, in light of the evidence he had heard against him, he had not raised his defence of alibi at an earlier stage. He stated that as far as the Office of the Prosecutor was concerned, the question was never asked of him. Furthermore, he raised the issue at the first opportunity with his Defence Counsel on 31 May 1996.

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[138] Section 103 of the Indian Evidence Act. Refer to Sakar on Evidence, vol. 2 (1993), 14th Ed, p. 1341.

[139] R v. Biya, (1952) 4 SA 514 (Appellate Division); Woolmington v. D.P.P. (1935) A.C. 462 (H.L.) and R v. Wood, Cr. App. R. 74, at 78 (1968) (English Law); Sekitoleko v. Uganda [1967] E.A. 531 (U) (Ugandan Law).

[140] In, Prosecutor v. Kayishema and Ruzindana, in the Decision on the Prosecution motion for a ruling on the Defence continued non compliance with Rule 67(A)(ii) and with the written and oral orders of the Trial Chamber, 3 Sept. 1998, Case No. International Criminal Tribunal for Rwanda-95-1-T.

237. The Trial Chamber has considered the failure of both Defence Counsels to act in accordance with Rule 67(A)(ii). In its Decision on the above Prosecution Motion, the Chamber ruled,

> . . . that where good cause is not shown, for the application of Rule 67(B), the Trial Chamber is entitled to take into account this failure when weighing the credibility of the defence of alibi and/or any special defences presented.[141]

238. The Trial Chamber notes that the Defence had ample time to prepare their client's defence and takes this on board in consideration of the timeliness of Counsel's notification of the Prosecution in accordance with Rule 67(A)(ii) of the Rules. This approach is congruent with those jurisdictions[142] facing similar difficulties in balancing the needs of the Prosecution with the Defendant's right to testify and present a defence.[143]

239. Counsel for the Defence constantly advanced the argument that the Prosecution's concern over the continued violations of this rule was unjustified in light of the Prosecution's late disclosure of witness lists.[144] However, all Parties to the proceedings had the opportunity to raise such lack of disclosure in the appropriate manner before this Chamber. Therefore, the Defence's failure to follow the Rules of Procedure and Evidence is unacceptable and serves neither the interests of the accused nor of justice. Furthermore, the Defence's observation that under Rule 85 the Prosecution may bring evidence to rebut the alibi, does not mitigate the aforementioned duty upon the Defence under Rule 67.[145] Moreover, the mere fact that the Prosecutor did not utilise Rule 85 to bring evidence in rebuttal will not have any bearing upon the Trial Chamber's assessment of the evidence presented. Thus, this Chamber will accord no extra weight to the accused's defence of alibi merely because the Prosecution did not call witnesses in rebuttal. Considering the Decision on the above Motion, in which the Trial Chamber

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[141] Decision on non-compliance, *Ibid*.

[142] For example, see Canada, R v. Dunbar and Logan, 68 C.C.C. (2d) 13 at pp. 62-3 (1982); R v. Cleghorn 3 S.C.R. 175 (1995), and Australia, Petty and Maiden v. R, 173 CLR (1991) where, although no inference could be taken from the Defendant's prior silence, where a differing explanation had been given then inferences could be drawn.

[143] Article 20 of the Statute.

[144] This was reiterated once again even in Mr. Ferran's rejoinder, Trans., 17 Nov. 1998, pp. 133-139.

ordered the compliance with Rules 67(A)(ii) and 67(B) and in light of the considerations discussed above, the Trial Chamber will, despite the non-compliance with its order and the defiance of the Defence Counsel, consider the defence of alibi advanced by both Kayishema and Ruzindana without prejudice to the accused.

5.1.2 Kayishema's Alibi Defence

240. The essence of Kayishema's alibi is that he was in hiding from the morning of Saturday 16 April 1994, to the morning of Wednesday 20 April 1994. These dates purportedly removed him from the scene of the massacres at Catholic Church, Home St. Jean Complex and the Stadium that occurred on 16, 17, 18, 19 April. It would also remove him from Mubuga Church on the 16 April, the date that the Trial Chamber has found the major attack at this site occurred. It would not, however, account for his whereabouts in the days that preceded this attack. Kayishema also denies ever being present at any of the massacre sites in the Bisesero area during the period set out in the Indictment, but provides no specific alibi.

241. Kayishema testified before this Trial Chamber that in the early hours of Saturday 16 April, upon the departure of the commanding officer Major Jabo, the Tutsi gendarmes were mutinying and were looking for him with harmful intention. Upon receipt of this information he, with his wife and children, went into hiding. Kayishema stated in his testimony that between 9 and 10 a.m. he and his family left the *prefectorial* house and went into hiding. They sought refuge in the houses of white people in Kibuye because they had already been looted and no one was likely to return to them. The first house was that of Mr. Soufflet which lay along from the *Prefectorial* residence on Lake Kivu, approximately three kilometres from Home St. Jean and the Catholic Church. Kayishema stated that they remained there for the nights of 16 and 17 April. He and his family then moved next door, to the last house in that direction, for the remaining two nights. This was owned by a Swiss technical assistant who was working in the forestry department. Kayishema contended that he was absent from his family only when he would investigate

[145] Rule 85(A)(iii) of the Rules.

a noise outside or when his informant visited their hiding place. This absence was never in excess of 30 minutes.

242. In an earlier account, Kayishema had volunteered details of this Prosecution period to the investigators, as shown in exhibit 350C, a transcript of the interview with investigators. On 6 November 1996, during the interview with investigators, Kayishema stated that he was in his own home during the period of the massacres at Home St. Jean, the Catholic Church, and the Stadium. Although at this time he could not remember the dates, or the days of the week that he was confined to his house, Kayishema identified individuals with whom he had hidden, namely Emmanuel Dusabimana, Alphonse Kayiranga, the wife of Lieutenant Charles Twagirayezu and the Tutsi wife of a Hutu named Francois. He did not, however, call any of these people to testify on his behalf. In this statement he also asserted that he would spend his nights, in the bush, hiding. During his cross-examination Kayishema explained the difference between his oral testimony and his statement to the investigators. He stated that his position in both was that he had been in hiding during the period of the massacres at the aforementioned sites and, therefore, could not have perpetrated the atrocities alleged.

243. In his testimony, Kayishema went on to describe his activities after he came out of hiding. He talked of travelling around the *Prefecture*, burying bodies and taking wounded or malnourished children to the hospital, around 22 April. He met with the interim Prime Minister, Jean Kambanda, on 3 May and attended a public meeting with him. Kayishema also talked of going to Gitarama on 9 May in order to meet with the interim government that was based there at that time. His diary,[146] the personal diary of the *Prefect*, details meetings on 10, 11, and 13 May with his *sous prefects*. Kayishema referred to these meetings, as well as those on the 14 May with his prefectorial council and on 16 May with the interim president, in his testimony to the Trial Chamber. He also confirmed that he had gone into the Bisesero area throughout May, but only to conduct his prefectorial duties and to investigate the disparities between the information he had received and the actual situation in the area. Kayishema submitted, therefore, that

Defence witness DU, who testified that the defendant had not left his prefectorial office in this period, had been mistaken. Kayishema maintained, however, that he never visited any of the massacre sites in the Bisesero area during the months of April, May and June 1994 as charged in the Indictment. Moreover, when questioned in cross-examination about eye-witnesses who had identified him in the Bisesero area at specific sites such as Muyira Hill, and the Cave, Kayishema maintained that he did not know where such sites were even located. He asserted that those witnesses who identified him at various massacre sites either between 16 to 20 April, or in the Bisesero area during the massacres in April, May and June had erred.

Defence Witnesses in Support of Kayishema

244. In support of his alibi defence, the defendant called a number of witnesses, including his wife. In her first statement to investigators Mrs. Kayishema had stated that she, her husband and their children had gone into hiding in mid April. She also stated that on 13 May, the date of one of the major attacks in the Bisesero area, her husband had driven her to work in the morning and after dropping her at her work place, he went directly to his office. She arrived at work that Friday morning at 8 a.m., and returned home with her husband at 11 a.m.

245. In her testimony before the Chamber, however, Mrs. Kayishema, who holds a degree in education science and has served as a school inspector, clarified and elaborated upon her first statement. She contended that they had gone into hiding between 16 and 20 April 1994, following the departure of the commanding officer of the *gendarmerie nationale* in Kibuye Prefecture on 15 April. The corporal who remained was an RPF sympathiser and, she asserted, they had been informed that he had made various threats against the *prefect*. Although in her testimony Mrs. Kayishema referred to just female and sick gendarmes who had remained behind after the meeting on 15 April, she maintained that she and her husband had gone into hiding on 16 April for fear of their lives. They hid in the houses of those people who had been building the roads, staying in several houses and changing frequently. No more details about the houses were given.

[146] Def. exh. 58.

However, when questioned about her initial statement to investigators where she claimed to have gone into hiding in the bush for three days, she was able to clarify to this Chamber that she and her children had been hiding in the houses, and that her husband had spent the nights in the bush.

246. In her testimony, Kayishema's wife further elaborated upon the events of Friday 13 May 1994. In addition to the activities in the morning, she recalled that she had attended a public meeting chaired by her husband. The meeting, which began at 2 p.m., was to present the new *sous prefets*. Mrs. Kayishema did not offer any further testimony regarding her husband's whereabouts over the ensuing weeks, but simply stated that he continued with his duties as *Prefect* until their departure to Zaire on 16 July 1994.

247. Most witnesses for Kayishema had either not seen him at all during the period in question, such as witness DAC, or had seen him for very short periods of time on isolated occasions. Witness DN, for example, had seen him at a meeting in late April, witness DK saw him at a meeting to inaugurate a school in mid May, and witness DM had seen him briefly sometime in May at the roundabout at the centre of Kibuye Town. Consequently, although all Defence witnesses testified to never having heard of the participation of their *Prefect* in these massacres, very little specific evidence was proffered as to the accused's whereabouts during their execution. Only two other witnesses were able to provide further detailed insight into Kayishema's activities from 6 April 1994. With regard to the massacre at Mubuga Church, the only witness presented by the Defence was DV. The witness knew the accused by sight because he had seen him in Gitesi where he undertook his studies. He had not actually been present at the massacre and was unsure of the date it occurred. However, he lived only six to seven hundred meters from Mubuga Church and stated that he had not seen the defendant in the vicinity during the period of the massacres. In fact, witness DV testified that he did not see the defendant at all throughout April, May, June or July.

248. Witness DU testified as to Kayishema's whereabouts from 4 May to 16 July 1994. His testimony covered almost the entire period. He knew the defendant well and stayed

in Kayishema's house upon returning to Kibuye on 4 May. DU also worked in a canteen, just fifteen meters from the entrance of the *Prefecture* offices. Although he could not see Kayishema's office, he had a clear view of the entrance of these offices. He testified that he saw Kayishema every day over those two months. He ate breakfast, lunch and evening meals with Kayishema and his family, and often travelled to and from work with him. In the opinion of DU, Kayishema could not have visited the Bisesero area at any time from 4 May to 16 July because the defendant was never absent for periods in excess of 30 minutes. The witness felt able to state this with some certainty because of the proximity of the canteen to the defendant's offices and the fact that the noise of Kayishema's vehicle as he arrived at or departed from the offices made his whereabouts very obvious. The one exception that the witness could recall to these minimal absences was when Kayishema led a meeting and was gone for six hours. Mrs. Kayishema informed witness DU that Kayishema was at a meeting. Like the many other witnesses called for the Defence, DU had never heard any reference to the participation in any massacres by his *Prefect*, Kayishema.

Examination of Kayishema's Alibi Defence

249. Having set out the defence propounded by Kayishema, the Trial Chamber has also given consideration to the various arguments raised by the Prosecution with regard to the issue of Kayishema's alibi. Particularly, the Chamber has taken note of the many contradictions in the defence raised by Kayishema. These are contradictions not only within his own testimony, but also contradictions between his testimony and the testimony of his wife and the other witnesses called on his behalf.

250. The Trial Chamber observes Kayishema's various statements to the investigators and to the Chamber do not correlate. For instance, in his first voluntary statement to investigators in July 1996 Kayishema made no reference to being in hiding or to the events which supposedly led to his being in hiding, namely the 'mutiny' of the *gendarmerie nationale*. A number of observations may be made in this regard. In the first instance, the Trial Chamber does not make a negative finding due solely to Kayishema's non-disclosure of his alibi during the initial interviews with investigators.

However, in addition to this non-disclosure within his interviews, in Kayishema's diary there was no mention of him either being in hiding or of the gendarme mutiny. The diary, Kayishema confirmed, was the personal diary of the *Prefect*. Whilst this Chamber appreciates that it is not possible to note every event which occurred, it is surprising that no mention was made of such major events, in particular those that precluded him from undertaking his official functions as *Prefect*.

251. The second statement given by Kayishema to investigators, on 6 November 1996, also differs in many respects from his testimony before this Chamber. In that interview, Kayishema did not remain silent, but gave specific details of his whereabouts during the massacres at the Home St. Jean complex, the Catholic Church and Gatwaro Stadium. He stated that he was in his home, the residence of the *Prefect*. When questioned specifically if he was in his home, for the whole time, Kayishema affirmed, "Home, in *my* house." Kayishema further provided the names of those individuals with whom he was hiding, as set out above. He also went on to describe how he would have to spend entire nights in the bush. Kayishema's statement that he was in his own home contradicts his testimony in court where he testified that he was in hiding in houses belonging to others. In his testimony, responding to a judicial question inquiring whether he was in *his* home or in hiding, Kayishema confirmed that he was hiding in the bush *at night*. This answer does not clear up the discrepancy. In his oral testimony Kayishema gave specific details of being in two houses for two nights each, moving from one to the other. Further, when questioned specifically as to why he had told investigators that he had been in *his* home, Kayishema referred to the need to protect the identity of those in whose houses he had occupied. Responding to another judicial question inquiring why, therefore, he had not told investigators that he had been in hiding could not reveal the identity of Kayishema simply asserted that he had not lied. Kayishema suggested that his response to investigators that he had been in his house had served its purpose, namely to protect the identity of those in the houses of whom he sought refuge.

252. One final point was raised with regard to Kayishema's presence at the sites of Home St. Jean, and the Stadium. In his statement to the investigators he was asked

specifically if he had ever visited any of these sites between 7 April and the end of May. He answered emphatically, no. Yet in cross-examination before this Chamber, he stated that he had been at the Catholic Church and Home St. Jean sometime between 13 April and the massacres. When questioned on this discrepancy, he answered that he understood that the investigator was asking whether he had been to these sites on a daily basis. This explanation is not entirely convincing.

Contradictions Between Kayishema's Evidence and the Evidence of his Wife and Others

253. The contradictions within this defence extend beyond the statements and testimonies of Kayishema alone. Discrepancies exist, for example, between his account and that of his wife's. In her statement to the investigators on 28 April 1998 Mrs. Kayishema maintained that she and her family were in hiding for three days in the bush, but she could not remember the days or dates. Almost two months later, before this Trial Chamber, she testified that they went into hiding on 15 April, and finally concluded under cross-examination that they had actually gone into hiding on 16 April. She made no mention of others being in their house prior to their departure. Whilst Mrs. Kayishema confirms that they were in hiding until 20 April, she talks of moving from house to house "frequently".[147] Her husband said that they were in just two houses. She testified that he spent the nights in the bush. He testified that for these four nights and days he did not leave her in excess of 30 minutes.

254. With respect to those dates outside of 16 to 20 April, Mrs. Kayishema's testimony offers little further insight. She does not provide any information of her husband's whereabouts on 15 April, during the massacres at Mubuga Church. Similarly, she provides little information on his movements after they came out of hiding. She does confirm that he continued his activities as *Prefect* and she also testified as to his activities on Friday 13 May 1994. It was on this date that one of the major attacks in the Bisesero area occurred. It was her testimony, however, that during that day Kayishema had driven her to work at around 8 a.m. They then returned home at approximately 11 a.m. that same morning where they stayed until she and her husband attended a public meeting

[147] Trans., 24 June 1998, p. 121.

where the defendant presented the new *sous préfets* at 2 p.m. that afternoon. When asked why Mrs. Kayishema had not mentioned this meeting in the afternoon when speaking to investigators two months prior to her testimony she claimed that she had simply not remembered it. This meeting was entered in Kayishema's diary. However, whereas two previous meetings with regard to the new *sous prefects* had been written in French, this meeting was noted in another ink and written in Kinyarwanda. Furthermore, this note states that it was a meeting with all staff members to present the new *sous prefects.*[148] There is no mention of the meeting being a public one as Mrs. Kayishema had claimed. The Trial Chamber has some doubt whether the entry regarding this meeting was in fact entered at the time of events.

255. Beyond these specific days, and a few other notable days of interest such as when the Cardinal visited the region, the Mrs. Kayishema does not offer any further testimony as to her husband's actions during the remaining period when massacres were occurring in the Bisesero area. However, Witness DU, a friend of Kayishema who claims to have been resident in his house from 4 May, offers this alibi. He testified that apart from one day when the defendant was attending a meeting all morning, Kayishema never left his offices for more than half an hour. It is a testimony that is discredited initially by its improbability, especially in light of Kayishema's position as *Prefect* that demanded his presence over the whole *Prefecture*. It is also a testimony that is discredited by its contradictions with Mrs. Kayishema's and the defendant's own testimony before this Chamber. Kayishema gave detailed evidence of his continuing activities as *Prefect* throughout April, May and June. He specifically confirmed, contrary to the opinion of DU, that he had been to the Bisesero area. The testimony of witness DU, therefore, adds little weight to Kayishema's alibi defence for the massacres that occurred in the Bisesero region.

Kayishema's Elaboration

256. A further phenomenon highlighted by the Prosecution was the Kayishema's ability to recall exact dates, days and even times that he was in hiding during his testimony. It is

[148] Def. exh. 58.

a matter of concern to this Trial Chamber because it is in sharp contrast to his interview, almost two years prior. In that interview in November 1996 Kayishema could not provide any dates or even days that he was in hiding. Kayishema was asked in cross-examination before this Trial Chamber why he had given the response to the investigators that he did not remember what days he was in hiding. His considered response was that, in the first place, he did not know what were going to be the key issues for his defence. Secondly, he asserted that he had the right to remain silent. However, this Chamber notes that he did not remain silent. Rather, he specifically said that he did not remember.[149] The Chamber also notes that Kayishema could not have an answer what had aided his memory, in light of the absence of any entry in his diary, since that last interview. Although not conclusive in itself, the Trial Chamber has taken such elaboration into consideration.[150]

Finding

257. In light of these contradictions, this Chamber does not find any merit in the defence advanced by Kayishema. Whilst the burden of proof rests upon the Prosecution to prove the case against Kayishema, the defence of alibi that has been raised on his behalf has not been sufficient to levy any doubt against that Prosecution case which is set out and considered below.

5.1.3 Ruzindana's Alibi Defence

258. In total, 21 witnesses appeared on behalf of Ruzindana alone and gave testimony pertinent to his defence of alibi. Most of these witnesses did not give a comprehensive account of Ruzindana's whereabouts during the period when massacres were known to have occurred in the Bisesero region. Nevertheless, a picture was built by the Defence of a man continuing his business in the town of Mugonero.

[149] Pros. exh. 350CA.

[150] Similar elaboration by the accused, central to the defence of alibi, were observed by the Trial Chamber in the *Tadic* Judgement, para. 502.

259. After the death of President Habyarimana, on 6 April 1994, Ruzindana and his family left Remera, a neighbourhood of Kigali, where they had been living. They returned to Mugonero where Ruzindana's father continued to run a shop. Ruzindana was a businessman and a well-known figure in the area. A number of witnesses testified to having seen Ruzindana for varying periods of time between April and July 1994. Witnesses testified to having seen Ruzindana serving customers in his father's shop, others observed Ruzindana at the local market which was held every Wednesday, or noticed him on the roads between Kibuye, Cyangugu and Gisenyi.

260. Specifically, witnesses such as DD testified to frequenting the store of Ruzindana's father "almost everyday" where, on most occasions, Ruzindana had served him.[151] Witness DD, a friend of Ruzindana's was not more specific but witness DAA apparently corroborated his account. Like DD, witness DAA worked in a store opposite the Ruzindana family shop and confirmed that Ruzindana was never away from Mugonero for more than a week. However, like all other witness who testified for the accused, he never accompanied Ruzindana on these business trips. Moreover, the only exact dates to which he could confirm that Ruzindana was present at Mugonero were the 12 to 14 April.

261. Ruzindana was also seen regularly in the Mugonero market, which was held every Wednesday. Witnesses DB, DE, DF, DN, DQ, DS and DY identified Ruzindana in the market on numerous occasions throughout April, May and June. However, no exact dates were ever given by these witnesses. Witness DB, for example, saw the accused one Wednesday in early May; witness DF recollected seeing him four times in these three months; witness DQ saw him once in April and twice in May. Thus, it is possible to see that these sightings, which would last only a few minutes, are utilised by the Defence to reflect the activities of an individual continuing his normal course of business. They are not, and cannot, be offered as a comprehensive alibi for his whereabouts during the massacres in the Bisesero area.

[151] Trans., 20 May 1998, p.105.

262. Similarly, the Defence offered a number of examples where witnesses had seen Ruzindana on the roads in the conduct of his business. Other witnesses referred to Ruzindana driving one of his four trucks in the course of his trading, transporting beer or coffee to and from Mugonero. Witness DQ, for example, testified that Ruzindana passed by on the road to Kibuye on at least nine occasions in this period; witness DS saw him with empty beer bottles on the way to Kibuye; witness DD, who worked opposite the Ruzindana shop, talked of the accused leaving with empty beer bottles and returning, a few hours later, with full ones; and witness DR, who owned a kiosk near the roadside, testified that Ruzindana would often drive past with his driver in his green Toyota pick-up truck – leaving at approximately 8 a.m. with empty beer bottles and returning around 4 p.m. with full ones. Although none of these witnesses were able to give the Trial Chamber any specific dates as to when they saw Ruzindana undertaking these trips, they were able to further elaborate upon the impression of an individual continuing his daily business activities. To this end, witnesses DB and DA also testified that Ruzindana was in the areas of Cyangugu and Gisenyi for business purposes. Once again, their information is very imprecise and relate his whereabouts for only very limited periods of time. For example, witness DB described how he met Ruzindana in Mugonero approximately one week after the President's death, in Cyangugu *Prefecture* on a Tuesday one month after that, and then in Mugonero on Wednesday of the next week.

263. The Chamber is cognisant of the difficulties often encountered by witnesses in recalling such details and we have, accordingly, set out our approach elsewhere.[152] However, the Trial Chamber observes that virtually none of the witnesses presented on behalf of the accused were able to give any substantial idea of his whereabouts in their testimony before this Tribunal. Beyond those already stipulated, only witness DH was able to verify a certain date that Ruzindana was in Mugonero. He described how the accused was present when he arrived in Mugonero on the morning of Saturday 16 April. Witness DH, a relative of the accused, remained there until 3 p.m. and described how Ruzindana had also stayed in the town for the duration of his visit. Beyond that, like those witnesses set out above, witness DH simply describes how he had met Ruzindana

one day in mid May on the road to Kibuye, about twenty kilometres from Mugonero, and that Ruzindana had just bought supplies of beer.

264. Ruzindana's wife was one of the few who is able to give a more comprehensive picture of his movements during this period. She testified that whilst he went to work, she would remain in the house during the day. However, because they shared a midday meal every day she could be certain that Ruzindana was within the vicinity of Mugonero on most days. Mrs. Ruzindana testified that the Ruzindana had only left for prolonged periods of time on four or five occasions. These periods could be either one or two days if Ruzindana had gone to Cyangugu or Gisenyi on business. Employees working in Ruzindana's house supported this testimony. The houseboy, DC, testified that Ruzindana would leave very early some mornings and would not return for up to two days. Although he had no personal knowledge of why Ruzindana was away, DC testified that on such occasions Ruzindana had instructed him to inform his family that he had gone for supplies. No clear indication of the days or dates that the accused would spend away from the home were offered. This is in common with those other witnesses set out above who corroborated the fact that Ruzindana would go away for either day trips or prolonged periods of time, but could also offer no certainty as to when those occasions were. Accordingly, as with sightings at the market and on the road, the Trial Chamber is unable to assess whether the sightings and trips away that have been alluded to were congruent or separate.

265. Each witness further testified that at no time did they see Ruzindana in the company of the militia or the armed forces or in the possession of any form of weapon during the period set out in the Indictment.

Examination of Ruzindana's Alibi Defence

266. The Prosecution questioned the reliability, credibility and relevance of various Defence witnesses. They raised the issue of reliability *vis-à-vis* the testimony of various witnesses who had close relationships with Ruzindana. Not only was there Ruzindana's

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[152] Chapter 3.3

wife who testified, but also two other relations, a number of close friends, and two employees of Ruzindana. The Prosecution also raised the issue of credibility of a number of these witnesses. For example, witness DB states that he saw Ruzindana in Cyangugu on 26 June as Ruzindana headed for Zaire. The Prosecution noted, however, that DC also testified before the Chamber that Ruzindana was at home the entire day on 26 June.

267. The final point raised by the Prosecution is the pertinence of the testimony of many Defence witnesses. The majority of the witnesses were close relatives or former employees, who are likely to benefit from shielding Ruzindana from any criminal responsibility. Many individuals testified to having seen him on market day for various lengths of time between five minutes and one hour. Several more testified to having seen him on the road to Kibuye, even those who did not know Ruzindana nevertheless remembered his frequent journeys. However, even those who spent a great deal of time with Ruzindana: his wife, his sister, and his brother-in-law, as well as his servants, all testify that they did not travel with him on the frequent business trips that he supposedly made. They, like all of the other witnesses for the Defence, were not in a position to corroborate Ruzindana's location when he left on his 'business trips.'

268. These witnesses cannot account for the activities of Ruzindana even on a day-to-day basis, let alone 24-hours-a-day. His wife, after all, confirmed that Ruzindana was gone for two-day periods on a number of occasions. Furthermore, in cross-examination his wife conceded that the Defendant made many more daylong journeys to Kibuye although he did not spend the night.[153] The many witnesses who had seen him on the road to Kibuye confirmed these apparent trips. However, in cross-examination these witnesses also stated that this same road from Mugonero to Kibuye divided, branching off into the direction of Gishyita and the area of Bisesero.

269. Bisesero lies approximately twenty kilometres from Mugonero. Given the proximity, therefore, these day trips would have more than sufficed to enable Ruzindana

[153] This is a point corroborated by Defence witness DAA, who owned a shop opposite the Ruzindana family shop. See Trans., 18 and 19 Aug. 1998.

to reach the massacre sites and then return home. Accordingly, it is not sufficient for the purposes of his alibi defence, for witnesses to state that Ruzindana was the road from Mugonero or for Ruzindana's sister to state that whenever he was not on a business trip, that the accused would enjoy the family meal with them.

270. Furthermore, the Prosecution does not deny that Ruzindana continued trading throughout April, May and June, or that he made several other trips to locations such as Cyangugu. Rather, this supports the contention of Prosecution witnesses, X, FF and II who had not only heard reference to their attackers coming from Gisenyi, Gikongoro and Cyangugu, but had also noticed the accents peculiar to these regions.

Finding

271. The Chamber is cognisant of the difficulties raised in advancing this defence due to the time period covered in the Indictment. The legal issues that this gives rise to have already been considered.[154] At this juncture it is sufficient to note that, on a factual basis, many witnesses for the Defence were unable to provide specific dates as to when they had seen Ruzindana in Mugonero.

272. The burden of proof is, of course, on the Prosecution to prove their case beyond a reasonable doubt. In the opinion of the Trial Chamber, however, the alibi defence provided by Ruzindana does not diminish the Prosecution case. Even if the evidence proffered by the Defence in support of alibi is accepted in its entirety, it remains insufficient to raise doubt in relation to Ruzindana's presence in Bisesero at the times of the massacres. Accordingly, the Trial Chamber rejects the defence of alibi advanced by Ruzindana and has set out its factual findings below.

[154] See, chapter 3.4

5.2 DID GENOCIDE OCCUR IN RWANDA AND KIBUYE IN 1994?

273. A question of general importance to this case is whether genocide took place in Rwanda in 1994, as the Prosecution has alleged. Considering the plethora of official reports, including United Nations documents,[155] which confirm that genocide occurred in Rwanda and the absence of any Defence argument to the contrary, one could consider this point, settled. Nevertheless, the question is so fundamental to the case against the accused that the Trial Chamber feels obliged to make a finding of fact on this issue. The Trial Chamber underscores that a finding that genocide took place in Rwanda is not dispositive of the question of the accused's innocence or guilt. It is the task of this Chamber to make findings of fact based on the Indictment against the accused and assess the evidence to make a finding of the possible responsibility of each person under the law only.

274. According to Article 2 of the Tribunal's Statute, genocide means various enumerated acts committed with intent to destroy in whole or in part, a national, ethnic, racial or religious group as such. The enumerated acts include, *inter alia*, killing members of a group and causing serious bodily or mental harm to members of the group. The purpose of this Chapter is not to decide whether specific acts by particular individuals amounted to genocidal acts, that is, acts committed with the special intent to destroy the Tutsi group in whole or in part. Rather, this Chapter assesses whether the events in Rwanda as a whole, reveal the existence of the elements of the crime of genocide. Such a finding allows for a better understanding of the context within which perpetrators may have committed the crimes alleged in the Indictment. Additionally, because the Indictment concerns events that took place in Kibuye, this Chapter of the Judgment includes a general examination of the events in that *prefecture*.

275. The Trial Chamber heard testimony from the United Nations Special Rapporteur of the Commission on Human Rights, Dr. René Degni-Segui, whose credentials qualified

[155] *See* Pros. exh. 328 - 331.

him as an expert and whose testimony was convincing. The Trial Chamber is seized of his reports to the Security Council on the situation of human rights in Rwanda in 1994, which he submitted after conducting investigations throughout Cyangugu, Butare and Kibuye *prefectures*. *Inter alia*, Degni-Segui proffered evidence[156] before the Trial Chamber that perpetrators planned the genocide of the Tutsi population prior to 7 April 1994, and produced reports concerning the massacres, which occurred during hostilities. He testified that although to date no one has found any official written document outlining the genocidal plan, there exist sufficient indicators that a plan was in place prior to the crash of the President's plane on 7 April 1994. These indicators include (1) execution lists, which targeted the Tutsi elite, government ministers, leading businessmen, professors and high profile Hutus, who may have favoured the implementation of the Arusha Accords; (2) the spreading of extremist ideology through the Rwandan media which facilitated the campaign of incitement to exterminate the Tutsi population; (3) the use of the civil defence programme and the distribution of weapons to the civilian population; and, (4) the "screening" carried out at many roadblocks which were erected with great speed after the downing of the President's plane.[157] The outcome of the implementation of these indicators was the massacres carried out throughout the country.

276. It is the opinion of the Trial Chamber that the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide. To make a finding on whether this plan existed, the Trial Chamber examines evidence presented regarding the more important indicators of the plan.

Background to the Events of 1994

277. The time was ripe in early 1994 for certain so-called Hutu extremists in power in Rwanda who opposed the Arusha Accords, to avoid having to share decision-making positions with opposition groups. After attending a meeting on the implementation of the Arusha Peace Accords, in Tanzania, President Juvénal Habyarimana was en route to

[156] The witness produced seven reports for the Security Council. He relied most heavily on one Report, Pros. exh. 331, during his testimony before this Chamber (U.N. Doc. E/CN4/1995/71 1995).

Rwanda when his plane was shot down over Kigali airport and crashed on 6 April 1994. Witness O testified that he on 8 April heard a broadcast on Radio France International (RFI) that the Rwandan People's Army (RPA or FAR) had announced the end of the cease-fire. The state of fear that ensued, caused by the rumours about the intentions of the RPF to exterminate the Hutus and the terror and insecurity that prevailed in Rwanda, served as a pretext for the execution of the genocidal plan and consequently the retention of power by the extremist Hutus. Based on eyewitness and expert testimony and reports, immediately after the plane crash, on 7 April 1994, massacres began throughout Rwanda.

278. A radio announcement on the morning of 7 April, concerning the death of the President, ordered people to remain at home. This announcement was made in order to facilitate the movement of the soldiers and gendarmes from house to house to arrest and execute real and perceived enemies of the Hutu extremists, specifically those named on execution lists. Witnesses, including Degni-Segui and Prosecution witness RR, confirmed this fact.

The Effects of Extremist Ideology Disseminated Through the Mass Media

279. Military and civilian official perpetuated ethnic tensions prior to 1994. *Kangura n*ewspaper, established after the 1990 RPF invasion, Radio Television Mille Colline (RTLM) and other print and electronic media took an active part in the incitement of the Hutu population against the Tutsis. *Kangura* had published the "Ten Commandments" for the Hutus in 1991, which stated that the Tutsis were the enemy. In addition, according to witnesses, in 1991 ten military commanders produced a full report that answered the question how to defeat the enemy in the military, media and political domains. These witnesses also testified that in September 1992 the military issued a memorandum, based on the 1991 report, which also defined the "enemy" as the Tutsi population, thereby transferring the hostile intentions of the RPF to all Tutsis. According to one report, prior to 6 April, the public authorities did not openly engage in inciting the Hutus to perpetrate massacres. On 19 April however, the President of the Interim

[157] See Pros. exh. 330B and 331B, p. 5.

Government, told the people of Butare to "get to work" in the Rwandan sense of the term by using their machetes and axes.

280. Several witnesses stated that during the atrocities "the Rwandese carried a radio set in one hand and a machete in the other."[158] This demonstrates that the radio was a powerful tool for the dissemination of ethnic hatred. Radio National and RTLM freely and regularly broadcasted ethnic hatred against the Tutsis. For example, a UNICEF report refers to an RTLM broadcast stating that "for babies who were still suckling . . . they [the assailants] had to cut the legs so that they would not be able to walk."[159] In 1992 Leon Mugesera, a professor turned propagandist for the MRND, declared in a public meeting "*nous ne commettrons pas l' erreur de '59 ou nous avons fait échoppé des plus jeunes"* (we will not make the 1959 mistake where we let the younger ones [Tutsis] escape.)[160] Mugusera also incited the Hutus by explaining that " . . . we must remove the entrails but there is shorter way, let us throw them into the river so they can go out of the country that way."[161] These speeches and reports became widely diffused through repetition in public meetings and through the mass media.

281. The dissemination and acceptance of such ideas was confirmed by a Hutu policeman to Prosecution witness Patrick de Saint-Exupery, a journalist reporting for the French newspaper *Le Figaro*. De Saint-Exupery remarked that the policeman had told him how they killed Tutsis "because they were the accomplices of the RPF" and that *no Tutsis should be left alive.*[162] (emphasis added.) This witness, who went to the Bisesero region late June 1994, described how "the hill was scattered, literally scattered with bodies, in small holes, in small ditches, on the foliage, along the ditches, there were bodies and there were many bodies."[163]

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[158] Trans., 9 Mar. 1998, p. 47.
[159] Trans., 5 Mar. 1998, at 112; Prosecution exh. 331B.
[160] Trans., 5 Mar. 1998, p. 98.
[161] *Ibid*. p. 85.
[162] Trans., 18 Nov. 1997, p. 136.
[163] Trans., 18 Nov. 1997, p. 153.

282. As a result of the diffusion of the anti-Tutsi propaganda, the killings "started off like a little spark and then spread."[164] Degni-Segui stated that many communities were involved. Butare was an exception as there was resistance to carrying out the killings because the *prefect* was a Tutsi. The killings did not start in Butare until 19 April, after the Interim Government sacked the *prefect* and after a visit and an inciting speech by the Interim President. The speech urged the inhabitants of Butare to engage in a murderous manhunt by appealing to the populace that "the enemies are among you, get rid of them."[165]

The Civil Defence Program and the Militias

283. In 1994, Rwandan officials controlled the militias and civil defence forces. The militias trained in military camps. During times of unrest or emergency states call such groups into duty to supplement its armed forces. The evidence before the Trial Chamber moreover reveals that both the militias and the civil defence forces programme became an integral part of the machinery carrying out the genocidal plan in 1994.

284. One of the means by which an ordinary Rwandan became involved in the genocide was through the civil defence programme. Initially both Hutus and Tutsis were involved in the civil defence programme. Authorities established the civil defence programme in 1990 for the security of the civilian population, whereby they could arm persons at all administrative levels, from the top of the *prefecture*, down to the cellule. Degni Segui confirmed this scheme during a conversation with Bisimungu, the Chief of Staff of the Armed Forces, the chief of the police and the Commander of the Gendarmerie, during one of his visits to Rwanda. Unfortunately, the civil defence programme was used in 1994 to distribute weapons quickly and ultimately transformed into a mechanism to exterminate Tutsis. Numerous eyewitnesses such as Witnesses C and F confirmed this fact. They testified that they witnessed the distribution of machetes to civilians by the Prefectoral and Communal authorities in early April 1994. Other evidence before this Chamber shows that 50,000 machetes were ordered and distributed through this

[164] Trans., 5 Mar. 1998, p. 110.
[165] Pros. exh. 330B, p. 6.

programme shortly before the commencement of the 1994 massacres, to the militias of the MRND (members of the *Interahamwe*) and CDR (members of the *Impuzamugambi*), and the Hutu civilian population. Degni-Segui concluded that in the end this "system served to kill innocent people, namely Tutsis."[166]

285. Prosecution evidence, including letters from Rwandan authorities confirmed that "the population must remain watchful in order to unmask the enemy and his accomplices and hand them over to the authorities."[167] Witness R who was familiar with the administrative structure of Rwanda in 1994, affirmed that the people were told to "protect themselves within the Cellules and the Sectors," by organising patrols and erecting roadblocks.[168]

286. Other eyewitnesses recounted their versions of the occurrences at the massacre sites and almost all affirmed the presence of members of the *Interahamwe* and other armed civilians. In fact, several witnesses averred that the majority of the attackers were members of the militias and other civilians who were singing songs of extermination as they approached their victims. Several witnesses further stated that most of these attackers carried machetes and other traditional agricultural tools, as opposed to the gendarmes or police who were armed with guns and grenades.

Roadblocks and Identification Cards

287. The perpetrators of the genocide often employed roadblocks to identify their victims. Both Prosecution and Defence witnesses testified to this fact. Degni-Segui testified that within hours of the President's death, the military personnel, soldiers, the members of the *Interahamwe* and armed civilians erected and manned roadblocks. In fact, some roadblocks were erected within thirty to forty-five minutes after the crash of President's plane and remained throughout Rwanda for at least the following three months. According to this witness "what they had to do was to use identity cards to

[166] Trans., 9 Mar. 1998, p. 101-102.
[167] Pros. exh. 52, p. 4.
[168] Trans., 2 Oct. 1997, p. 51.

separate the Tutsis from the Hutus. The Tutsis were arrested and thereafter executed, at times, on the spot."[169]

288. De Saint-Exupery confirmed the existence of roadblocks in Rwanda during the time in question. He testified that from Goma to Kibuye on 25 June 1994, "at the approach . . . to each locality, there was a roadblock."[170] Witness Sister Julianne Farrington stated that in May 1994 as she travelled from Butare to Kibuye, she went through 45 roadblocks. She further stated that at some roadblocks military personnel monitored movements, while others were manned by young Hutus in civilian dress. Other witnesses, including witnesses G, T, and Defence witness DA and DM, who travelled through various parts of Rwanda during the genocide, confirmed these facts before this Trial Chamber. The Trial Chamber notes that those who produced identity cards bearing the indication Hutu and those with travel documents were able to pass through these roadblocks without serious difficulties. Conversely, those identified as Tutsis were either arrested or killed. The Trial Chamber recognises that the erection of roadblocks is a natural phenomenon during times of war. However, the roadblocks in Rwanda were unrelated to the military operations. Sadly, they were used to identify the Tutsi victims of the genocide.

Conclusion

289. In summary, the Trial Chamber finds that the massacres of the Tutsi population indeed were "meticulously planned and systematically co-ordinated" by top level Hutu extremists in the former Rwandan government at the time in question.[171] The widespread nature of the attacks and the sheer number of those who perished within just three months is compelling evidence of this fact. This plan could not have been implemented without the participation of the militias and the Hutu population who had been convinced by these extremists that the Tutsi population, in fact, was the enemy and responsible for the downing of President Habyarimana's airplane.

[169] Trans., 5 Mar. 1998, p. 105.
[170] Trans., 18 Nov. 1997, p. 118.

290. The cruelty with which the attackers killed, wounded and disfigured their victims indicates that the propaganda unleashed on Rwanda had the desired effect, namely the destruction of the Tutsi population. The involvement of the peasant population in the massacres was facilitated also by their misplaced belief and confidence in their leadership,[172] and an understanding that the encouragement of the authorities to guaranteed them impunity to kill the Tutsis and loot their property.

291. Final reports produced estimated the number of the victims of the genocide at approximately 800,000 to one million, nearly one-seventh of Rwanda's total population.[173] These facts combined prove the special intent requirement element of genocide. Moreover, there is ample evidence to find that the overwhelming majority of the victims of this tragedy were Tutsi civilians which leaves this Chamber satisfied that the targets of the massacres were "members of a group," in this case an ethnic group. In light of this evidence, the Trial Chamber finds a plan of genocide existed and perpetrators executed this plan in Rwanda between April and June 1994.

5.2.1 Genocide in Kibuye

292. Having determined that perpetrators carried out a genocidal plan in Rwanda in 1994, this Chamber now turns to assess the situation in Kibuye *Prefecture*. After the death of the President on 6 April 1994, the relatively calm co-existence of the Hutus and Tutsis came to a halt in Kibuye. According to the Prosecutor, Kibuye was among the first of the *prefectures* "to enter into this dance of death."[174] In Kibuye, the first incidents took place on 8 and 9 April 1994 in various *communes*. The Chamber heard testimony and received documentary evidence that the perpetrators of the genocide in Kibuye acted with requisite intent to destroy the Tutsi population in whole or in part and that they in fact succeeded in achieving this goal. In this Chapter , this Chamber examines briefly the occurrences in Kibuye *Prefecture* from April to June 1994.

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[171] Trans., 5 Mar. 1998, 84.
[172] See Part II, *supra* discussing the Historical Context of 1994 Events in Rwanda.
[173] Pros. exh. 331B, p. 5.

Background

293. The Chamber finds that events in Kibuye unfolded as follows. After the crash of the President's plane, the atmosphere quickly began to change. The Hutu population began openly to use accusatory or pejorative terms, such as *Inkotanyi* (Kinyarwanda for RPF accomplice/enemy)[175] and *Inyenzi* (Kinyarwanda for cockroach) when referring to the Tutsis. The members of the *Interahamwe* and other armed militant Hutus began a campaign of persecution against the Tutsis based on the victims' education and social prominence. Simultaneously, the Tutsi population, as a whole, suffered indiscriminate attacks in their homes. Perpetrators set on fire their houses and looted and killed their herds of cattle. Witness A testified that on the morning of 7 April 1994 his Hutu neighbours began to engage in looting, attacking Tutsi-owned houses and slaughter Tutsi-owned livestock. Witnesses C, F, OO and E, corroborated these occurrences.

294. On their way to the gathering places many witnesses saw roadblocks where the perpetrators separated Tutsis from the Hutus. Once the Tutsis reached these places they were injured, mutilated and some of the women were raped. In the end the Tutsis were massacred by Hutu assailants who sang songs whose lyrics exhorted extermination during the attacks. These attackers were armed and led by local government officials and other public figures. The fact that these massacres occurred is not in dispute. In fact, Kayishema testified that he and others engaged in a clean-up operation after the massacres.

295. To illustrate implementation of the genocidal plan, the Trial Chamber now turns to examine the occurrences in the commune in Kibuye, immediately following the death of President Habyarimana, and other related issues which serve as further proof, such as meetings and documentary evidence, of the genocidal events in Kibuye.

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[174] Trans., 11 Apr. 1997, at 34.

[175] *See* the testimonies of Witnesses G, U and Z explaining that *Inkotanyi* meant "all the Tutsis" or the "enemy".

Initial Attacks at the Residences of the Tutsis

296. There is sufficient evidence to find that in communes such as Gishyita Gitesi, Mabanza and Rutsiro the initial persecution of the Tutsis and individual attacks on their houses began almost immediately after the death of the President. The fact that killings took place throughout Kibuye is corroborated by a diary entry[176] which was tendered by Witness O. Witness O testified that initially after the President's death, in Gitesi Commune, there was relative calm. He also stated, however, that on 7 April "he saw wounded people everywhere, by the roadside, bushes and very close to the administrative headquarters of the *Prefecture*."[177] Witness O, under cross-examination, told the Trial Chamber that the first people to be killed were in Kigali and they were *alleged* to be RPF collaborators. Witness O testified there was a cause-and-effect relationship correlation between the 8 April radio announcement of the purported resumption of the war and the first deaths in Rwanda and, in particular, in Kibuye *Prefecture*.

297. Witness F's testimony is illustrative of many other witnesses and of the situation as a whole. A resident of Gitesi commune, Witness F testified that he heard the news of the crash at 10 a.m. on 7 April and that as a result, the mood of the people changed to one of panic in his neighbourhood. On 7 or 8 April, a meeting took place at Mutekano Bar, situated some 400-500 meters from the Kibuye prison, along the road heading to the Kibuye *Prefecture* Office. Witness F testified during that period, he interacted with one Mathew, who was participating in the said meeting. Witness F observed the meeting, the topic of which was security – addressing the "Tutsi problem" -- from the roadside for about twenty minutes. Many local officials participated in the meeting.

298. Witness F testified that after the meeting of 8 April, he witnessed machetes being distributed by Ndida, the Commune Secretary. The machetes had been transported into the commune by Prefectoral trucks and the Secretary of Gitesi Commune supervised the unloading. They were taken towards the Petrol Rwanda fuel Station. About twenty

[176] Prosecution Exhibit 76E, as shown in the Trans., of 13 October 1997.
[177] Trans., of 13 October 1997, p.149

persons received a machete each including, Eriel Ndida, Rusigera, Siriaki, Emmanuel, the Headmaster and many others. On 9 April, the local officials departed to other commune after the distribution of machetes. That evening around his neighbourhood in Gitesi, Witness F noticed that the situation had changed and that militant Hutus openly were attacking the Tutsi. The proximity of the distribution of weapons to the massacres of Tutsi civilians is evidence of the genocidal plan. He noticed that militant Hutu had begun throwing rocks at Tutsis and throwing some persons into Lake Kivu. He also observed similar acts of violence in Gishyita commune. He stated that some persons from Gishyita crossed Lake Kivu to take refuge in the commune of Gitesi.[178]

299. On 12 April, the first person in Witness F's neighbourhood was killed. Munazi, who was with other militant Hutu and members of the Interahamwe killed Nyirakagando, an elderly Tutsi. Witness F and others saw her dead body in the morning of 13 April, as they were fleeing their homes. Witness F stated that "the Hutus killed her because she was Tutsi."[179] Militant Hutus started by chasing Tutsi men. Witness F stated that "when the Tutsi realised that they were being pursued by the Hutus, they started to flee through the bushes."[180] Witness F's wife was gang-raped by the Hutus before her children's eyes on 13 April. Witness F's mother "was killed with the use of a spear to her neck" during the same attack.[181] Witness F left his wife who was no longer able to walk and first hid in the bush, within sight of his house and on 13 April fled to a Pentecostal church at Bukataye.

300. Witness F spent the night at the church parish at Bukataye. During the night, there was an attack on the church parish, led by the Headmaster of the Pentecostal school. People carrying clubs and spears accompanied the Headmaster of the school. He said, "the Tutsi who were in the Church should come out so that they could be killed."[182] Those who were unable to flee the Church were separated. Tutsi women separated from

[178] Trans., 22 April 1997, p.36.
[179] Trans., 22 Apr. 1997, p. 46.
[180] Trans., 22 Apr. 1997, p. 47.
[181] Trans., 22 Apr. 1997, p. 49.
[182] Trans., 22 Apr. 1997, p. 51.

the Hutu women. The latter remained and watched as the attackers killed the former. Witness F stated that the men, including him, then fled to the bushes.

Mass Movement of the Tutsi Population

301. Witness B testified that, when the attacks began in her commune, she and others decided to flee, stating "we did not want to be killed in our homes, and the people were saying that if you go to the Church no one could be killed there."[183] Witness B along with her mother, young sister and brother as well as four other Tutsis, left their village in Kabongo, Bishura sector, Gitesi commune, for the Catholic Church in Kibuye. As they fled, there were armed Hutus around their home.

302. Because the Tutsis were targets in their homes, they began to flee and seek refuge in traditional safety. Witness T, who worked at the Catholic Church and Home Saint Jean, (the Complex) testified that in the days following the President's death, a curfew was announced and people were told to stay at home. Tutsis, however, began to arrive on the peninsula, where the Complex is located, shortly thereafter. These Tutsis were from the hill of Bururga. Others came from Gitesi, Bishunda, Karongi and Kavi. They had converged at the communal office but they were not allowed to stay. Witness T stated that she helped lodge the thousands refugees, comprised of the elderly, women and children, in the dormitories at the Complex. Those seeking refuge were worried because their homes had been burnt. The first incidents of burning homes started between 7 and 10 April in Burunga, the hill to the left of the Home St. Jean, and other hills nearby. Witness T stated that she saw the home of a friend aflame.

303. Explaining a diary entry from 14 April 1994 to the Trial Chamber, Witness O stated that those seeking refuge from Gitesi Commune, who were on their way to the Stadium, told him that they were fleeing massacres which had begun in their area. Witness O observed many massacres during that time and aided Tutsi survivors to reach Kibuye Hospital.

304. Witness C testified that two days after the President's death people in Burunga, Mabanza commune started fleeing. She testified that attackers were attacking the Tutsi for being Tutsi and burning their houses. She explained that there was no apparent reason for these attacks besides these persons' ethnicity. Regarding the militant Hutu, she stated that "they themselves really could not find a reason for this because they would share everything on a day-to-day basis."[184] She saw people fleeing from Mabanza, including a member of her extended family, and the family of Nyaribirangwe. Her relative had been dealt a machete blow to his head.

305. Witness B testified that they fled to the Catholic Church "because people like my father who had lived through other periods of unrest as in 1959, when there was an attack against the Tutsi, at that time people took refuge at the Church."[185] Witness T had a similar reason for going to a place of refuge. She testified that since the 1959 revolutions, whenever people felt insecure, they would go to churches, parishes and would be protected and be "respected in these places."[186] Additionally, witness F testified, that they arrived at the Catholic Church on 15 April at about 4 a.m. and found scores of other Tutsis who had come from other commune such as Mabanza, Rutsiro, Kaivere and Gishyita as well as Gisenyi *Prefecture*.

306. Witness A testified that on 7 April, militant Hutu began to attack Tutsi-owned houses, slaughtered Tutsi-owned livestock. The Abakiga (Hutus from the northern region of Rwanda) joined their fellow Hutu: On 12 April 1994, militant Abakiga Hutu identified the Tutsi by identification cards and massacres started in Gatunda shopping area. Witness A went to the Catholic Church, arrived 13 April between 6 and 7 a.m., and found numerous refugees gathered there.

307. Almost all Prosecution and Defence witness, including Mrs. Kayishema, who travelled throughout Kibuye *Prefecture*, testified that they encountered roadblocks. At

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[183] Trans., 17 Apr. 1997, p. 8.
[184] Trans., 17 Apr. 1997, p. 116.
[185] Trans., 17 April 1997, p.11
[186] Trans., 6 May 1997, p.24

these roadblocks the attackers used identification cards to distinguish between and to separate Hutus from Tutsis.

Other Evidence of Intent to Commit Genocide

308. The record in the present case is replete with evidence that reveals the existence of a plan to destroy the Rwandan Tutsi population in 1994. The Trial Chamber explores briefly some of the more pertinent evidence relative to the acts demonstrating the intent to commit genocide that took place in Kibuye *Prefecture*.

309. Evidence presented to the Chamber shows that in Kibuye *Prefecture* the massacres were pre-arranged. For months before the commencement of the massacres, *bourgmestres* were communicating lists of suspected RPF members and supporters from their commune to the *Prefect*.[187] In addition, the Prosecutor produced a series of written communications between the Central Authorities,[188] Kayishema and the Communal Authorities that contain language regarding whether "work has begun" and whether more "workers" were needed in certain commune.[189] Another letter sent by Kayishema to the Minister of Defence requested military hardware and reinforcement to undertake clean-up efforts in Bisesero.[190]

310. Some of the most brutal massacres occurred after meetings organized by the *Prefectoral* authorities and attended by the heads of the Rwandan interim government and/or ordinary citizens of the *prefecture* to discuss matters of "security."[191] During one of these meetings Kayishema was heard requesting reinforcement from the central authorities to deal with the security problem in Bisesero. Witness O testified that on 3 May 1994, Interim Governmental Prime Minister Jean Kambanda visited Kibuye *prefecture* with a number of other officials, including Ministers of Interior, Information, and Finance, the *Prefect* of Kibuye, and the General Secretary of MDR party. Witness O

[187] Pros. exh. 55-58.
[188] Pros. exh. 52, 54 and 296.
[189] Pros. exh. 53. (Letter from Kayishema to all *Bourgmestre*s in Kibuye.)
[190] Pros. exh. 296.
[191] Meetings attended by Prime Minister Kambanda and/or his Ministers included that on 3 May 1994.

attended a meeting with these and other officials in his capacity as an official of Kibuye hospital and voiced his concern regarding seventy-two Tutsi children who survived the massacre at the Complex and were in poor physical condition at Kibuye hospital. Members of the *Interahamwe* had threatened these children, aged between 8 and 15 years. The Prime Minister did not personally respond to Witness O's concern, but asked the Minister of Information to do so. That minister rebuked Witness O, remarking that he should not protect people who don't want to be protected. He also declared that Witness O obviously did not approve of the politics of the Interim Government, and could not recognize the enemy. The Minister of Information gave the impression that the Interim Government recognized these infirm children as enemies. Later, these children were forcibly taken from the hospital and killed.

311. Sister Farrington testified to having witnessed the discriminatory attitude of various Kibuye authorities towards all Tutsis. During the occurrences Sister Farrington went to Kibuye Prefectoral offices to inquire about obtaining a *laissez-passer* that would allow some of the nuns from her convent to leave Rwanda. Over a period of three days she spoke with the Sous-*prefect*, Gashangore as well as Kayishema. Gashangore used hostile language when referring to Tutsis and accused specific people in the *Prefecture* of being "central to the activities of the *Inkontany*." During another attempt to obtain help, Sister Farrington spoke with Kayishema in his office where he spoke to her in an agitated and aggressive tone. Kayishema told her that there was a war prepared by the *Inkotanyi*, and the Tutsi people were collaborators of the enemy. As proof he showed her a list of names of people, maps and other documents allegedly preparing Tutsis to become revolutionaries.

Conclusion

312. Considering this evidence, the Trial Chamber finds that, in Kibuye *Prefecture*, the plan of genocide was implemented by the public officials. Persons in positions of authority used hate speech and mobilised their subordinates, such as the gendarmes the communal police, and the militias, who in turn assisted in the mobilisation of the Hutu population to the massacre sites where the killings took place. Tutsis were killed, based

on their ethnicity, first in their homes and when they attempted to flee to perceived safe havens they were stopped at roadblocks and some were killed on the spot. Those who arrived at churches and stadiums were attacked and as a result tens of thousands perished.

313. Having examined the reasons why Tutsis gathered at the four massacre sites, the Trial Chamber now examines the evidence specific to these sites and the role, if any, of the accused Kayishema, and his subordinates, as well as that of Ruzindana in the alleged crimes.

5.3 AN INTRODUCTION: THE MASSACRES AT THE CATHOLIC CHURCH AND HOME SAINT-JEAN COMPLEX, STADIUM IN KIBUYE TOWN AND THE CHURCH IN MUBUGA

314. This Chapter addresses the occurences common to the first three massacre sites in the Indictment namely, the Catholic Church and Home Saint-Jean Complex (Complex), located in Kibuye, the Stadium in Kibuye (Stadium), and the Church in Mubuga (Mubuga Church), in Gishyita commune. This introduction does not include the fourth massacre site, Bisesero area, because the masscres in that area followed a slightly different pattern and took place over a much longer period of time than the first three sites. Additionally, under this Indictment, the Bisesro charges include both accused persons where as the first three sites concern Kayishema only. A summary of the witness testimonies for the first three sites paints the following picture.

315. In mid-April 1994, Tutsi seeking refuge from various communes converged on the three sites in order to escape atrocities perpetrated by the Hutus against the Tutsis. Throughout Kibuye *Prefecture*, Tutsis were being attacked, their houses set ablaze and cattle looted or slaughtered. Historically, community centres such as the Churches and the Stadium were regarded as safe havens where people gathered for protection in times of unrest; this was the case in April 1994. Many witnesses testified that they went to these sites with the belief that the prefectorial authorities would protect them. By the time some Tutsi reached the churches they were overflowing and these people continued on to the Stadium, often under the instruction of the gendarmes and local officials. By all accounts, very large numbers of Tutsis amassed in each of the three sites. Estimates varied from 4,000 to over 5,500 at Mubuga, about 8,000 at the Complex and, 5,000 to 27,000 at the Stadium.

316. At all three sites, gendarmes guarded the entrances or completely surrounded the structure. The gendarmes controlled the congregation, maintaining order or preventing people from leaving. Witnesses testified that Tutsi who attempted to exit were killed by armed Hutu assailants. Conditions inside the massacre sites became desperate, particularly for the weak and wounded. The authorities did not provide food, water or

medical aid and, when supplies were offered, the Gendarmes prevented them from reaching the Tutsis.

317. With thousands of internally displaced persons (hereinafter refugees)[192] effectively imprisoned at the three sites in Kibuye, five days of almost continuous massacres commenced. First, at Mubuga Church the major killing started on 15 April and continued on 16 April. On 15 and 16 April the Complex suffered preliminary attacks followed by a major slaughter on 17 April. On 18 April, the massacre at the Stadium began with the attackers returning on 19 April to complete the job. Evidence before the Trial Chamber suggests that thousands of Tutsi seeking refuge were killed during these few days.

318. Testimony reveals striking similarities in the assailants' methods both during the initial gathering of Tutsis and later during the execution of the massacres. Some of those seeking refuge assembled at the three sites had done so owing to encouragement by Hutu officials. Initially, the gendarmes appeared merely to be maintaining order and allowed people to leave the Churches or Stadium to find food or water. Soon thereafter, however, authorities cut off supplies and prevented those seeking refuge from leaving. Those who attempted to leave were either chased back inside the structure or were killed by the armed attackers while the gendarmes watched. At this stage gendarmes and/or the members of the *Interahamwe* surrounded the Churches and at the Stadium gendarmes guarded the entrances. These conditions of siege soon turned into massive attacks by Gendarmes, communal police, prison wardens, the members of the *Interahamwe* and other armed civilians. Having surrounded the site, they usually waited for the order from an authority figure to begin the assault. The massacres started with the assailants throwing grenades, tear gas, flaming tires into the structure, or simply shooting into the crowds. Those who tried to escape were killed with traditional weapons. Following these hours of slaughter, the attackers would enter the building or Stadium carrying crude traditional weapons and kill those remaining alive.

319. The above background facts for the most part, are not refuted and the Trial Chamber finds ample evidence to support this general picture of events. The real issue for the Trial Chamber is the role, if any, played by Kayishema and/or those under his command or control, at the three crime sites. The Prosecution alleges that Kayishema was present, participated and led others at all three massacre sites. Kayishema admitted that he visited the sites when Tutsi were congregated but prior to the massacres to assess the situation. Kayishema, however, denies his presence during the days of attack. Indeed, Kayishema's alibi states that he was in hiding during the times of the massacres[193] because his life was under threat. He claims to have been hiding from the morning of 16 April through 20 April, coming out on the morning of 20 April.

320. Evidence shows that others saw Kayishema at the three sites during the period of 14 to 18 April. On 14 April Kayishema stated that he visited Mubuga Church, but only to monitor the situation. Testimony, however, places Kayishema at Mubuga in the morning, of 15 April and at the Complex at 3 p.m. in the afternoon. The evidence suggests that the two churches are approximately 40 kilometres apart by road. Again, on 16 April, Kayishema was seen in the morning at Mubuga during the start of the attack and then at the Complex during the preliminary acts of violence. The following day, 17 April, witnesses testified that Kayishema was present at the Complex and played a pivotal role in the massive slaughter of that day. Lastly, Kayishema is said to have initiated the massacre at the Stadium on 18 April. The Trial Chamber now turns to separately assess the evidence for each of the four massacre sites enumerated in the Indictment.

5.3.1 THE MASSACRE AT THE CATHOLIC CHURCH AND HOME ST. JEAN

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[192] Because the parties referred to the internally displaced persons as "those seeking refuge"throughout the trial, the Trial Chamber will remain consistent with this usage, noting however, that this use of the term in this context is inaccurate.

[193] It should be noted that the massacre at Mubuga Church began on 15 April and that Kayishema's claim of alibi did not begin to until the morning of 16 April.

Background

321. According to the Indictment, the massacre site at the Home St. Jean Catholic Church Complex (Complex) is located in Kibuye, Gitesi commune, on the peninsula surrounded by Lake Kivu. A road runs perpendicular to the entrance to the Complex. One can see the Catholic Church but not Home Saint Jean from the road. The Complex, according to Expert witness Sjouke Eekma, is accessible by either the road from the roundabout or from the *Prefecture*. There were several doors to the Catholic Church.

322. During the unrest occurring in the commune soon after the crash of the President's plane, thousands of people sought refuge in places of worship such as the Complex. For instance, witness F testified, that he arrived at the Catholic Church on 15 April and found many other Tutsis who had arrived from other communes such as Mabanza, Rutsiro, Kaivere and Gishiyita as well as Gisenyi *Prefecture*. Witness B testified that she fled to the Catholic Church "because people like my father who had lived through other unrest as in 1959, when there was an attack against the Tutsi, at that time people took refuge at the (Catholic) Church."[194] Witness T corroborates other witnesses' reason for seeking refuge at the Church. She testified that since the 1959 revolutions, whenever people felt insecure, they would go to churches, parishes and would be protected; that is, they would be "respected in these places."[195]

323. The conditions inside these places of shelter worsened. In the Catholic Church people were crowded. Witness A testified that when a census was made for purposes of food distribution, the number of those seeking refuge was found to be 8,000 people of Tutsi ethnicity.[196] The census is corroborated by Witnesses T and F. The Tutsis seeking refuge received no assistance whatsoever from the *Prefectural* Authorities.

324. The major attack on the Complex took place on 17 April but prior to that attack, members of the *Interahamwe* and local officials launched several smaller attacks. Tutsi

[194] Trans., 17 April 1997, p. 11.
[195] Trans., 6 May 1997, p. 24.

seeking refuge threw stones and repulsed the smaller attacks. From about 15 April, the *gendarmerie nationale* surrounded and prevented the Tutsi from leaving

325. Expert witnesses Dr. Haglund, a Forensic Anthropologist, and Dr. Peerwani a Pathologist, testified regarding the victims of the massacre. Both experts examined cadavers of thousands of people and described how they had been killed. Dr. Haglund testified that he had examined the large mass grave near the Catholic Church along with four additional areas that also contained human remains. Dr. Peerwani examined 122 cadavers during January and February 1996. Now part of the evidence, identification cards found on the victims indicated that they were all Tutsi.

326. Dr. Haglund's written report confirms that many people, men, women and children were killed at the Complex. Of the 493 dead examined by Dr. Haglund, only found one gunshot injury. He estimated that 36% of people in the grave had died from force trauma whereas 33% of the people died from an undetermined cause. Dr. Haglund selected an individual as an example who he identified as a fifty year old man. The man's fibula had been completely severed by some sharp object,[197] which "would have severed the achilles" tendon rendering this individual partially crippled.[198] On the neck region "all the soft tissue from the right side of the neck towards the back would have been cut through"[199] and "a sharp cut mark in the tibia body, and in the inferior border of the scapular shoulder blade, another trauma caused by a blow of a sharp object."[200] Dr. Haglund concluded that the fifty-year old man was trying to protect himself by presenting different body aspects to the armed assailant. Dr. Peerwani found stab wounds indicating the use of sharp force instruments and confirmed that many of the victims were young children and the old.

The Attacks

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[196] Trans., 15 Apr. 1997, p. 31.
[197] Trans., 26 Nov. 1997, p. 29
[198] Trans., 26 Nov. 1997, p. 30
[199] Trans., 26 Nov. 1997, p. 32
[200] Trans., 26 Nov. 1997, p. 33

15, 16 April 1994

327. Several witnesses testified about the minor attacks that occurred on 15 and 16 April. Witnesses T and A testified that an attack on the Complex occurred on 15 April at 3:00 p.m. During that attack, Witnesses A and D saw Kayishema snatching a child from its mother. Witness F testified that local officials participated in an attack on the Complex on 16 April. The gendarmes simply watched, but those seeking refuge repulsed the attack. After this event, witness F saw Kayishema and Mugambira, a prosperous Kibuye businessman, transporting weapons in their vehicles. A military pick-up also assisted in transporting weapons to the nearby Petrol Rwanda fuel station. Witness F saw the accused, Kayishema, hold a meeting with other assailants near the Petrol Rwanda fuel station.

17 April 1994 on Catholic Church

328. On 17 April, between 9 and 10 a.m., a major attack occurred at the Catholic Church, where thousands of Tutsi men, women and children had taken refuge. The attackers arrived from three directions, namely from the roundabout, the *Prefecture* and Lake Kivu. Witness F, who was standing in front of the Catholic Church, vividly described the various attackers. Witness F and others testified that the attackers were Hutu civilians; Twa civilians; communal police officers; prison guards and local officials such as the Communal Accountant; Rusizera, the Assistant *Bourgmestre*, Gahima, the Headmaster of the Pentecostal school, Emmanuel Kayihura and Siriaka Bigisimana. Other witnesses identified and corroborated the presence of the local officials. Witness E recognised the *conseiller*s of Gishura Sector and witness C named particular officials such as *Conseiller* Ndambizimana; Calixte, the Prison Warden; and the *Bourgmestre* of Gitesi Commune. The attackers carried assorted weapons including machetes, swords, spears, small axes, clubs with nails, the "*impuzamugenzi*" and other agricultural tools. They were singing "let us exterminate them". Kayishema arrived with the attackers from the *Prefecture* Office in a white Toyota vehicle. Witnesses F, C, D, E and A clearly observed Kayishema's arrival. For example, witness F was sufficiently close to the accused to see that he was wearing a pair of white shorts. Witness A, D and F stated that Kayishema was carrying a sword.

329. Witness F saw Kayishema arrive, get out of his vehicle along with the *gendarmes*, and receive applause as he walked towards the group of attackers. Witnesses F, D and E testified respectively that Kayishema ordered the assailants to "begin working, get down to work"[201] "go to work," or "start working."

330. They were all positioned so that they could hear Kayishema utter these words. According to witnesses E and F, the phrase "go to work" in the Rwandan context means "to kill Tutsis." At that point, Witnesses E and F testified that after ordering attackers "to go to work," Kayishema climbed up the hill along the path near the Church, addressed the assembled attackers through a megaphone, informed them that he had received orders from Kigali to kill the Tutsis and commanded the *gendarmes* to shoot. Witness E said that Kayishema then fired three shots.

331. Three witnesses saw Kayishema speak and give orders for the attackers to go to work. Only Witness E, however, claims to have seen Kayishema fire three signal shots. Witness A testified that it was the gendarmes opposite the Church who fired the shots. At that point some attackers began to throw stones at those seeking refuge and the *gendarmes* opened fire. The gendarmes shot the Tutsis who were in front of the Church. Soon thereafter the *gendarmes* and other Hutu assailants started to attack Tutsis inside the Church. They fired grenades and tear gas canisters inside the Church through the doors, and proceeded to fire their guns. Witness F who escaped by climbing a tree nearby, stated that "I could see quite clearly the square or the area in front of the Church. I could see him [Kayishema] with my own eyes."[202] Witness F saw Kayishema walk to the threshold of the Church and send an attacker to bring a jerrican of petrol. The petrol was poured on tires and the doors of the Church, and then set ablaze. According to witness A, the main door of the Church was burnt down. Witness C saw the attackers throw a tire which was doused with petrol, inside the Church. Many witnesses, including Witness F, testified that people were burnt.

[201] Trans., 22 Apr. 1997.
[202] *Ibid*., p. 98.

332. At some point, Kayishema led the attackers who entered the Church and began to kill the survivors. Witness A, who had hidden under dead bodies and had smeared himself with blood, observed that Kayishema entered the Church with a young man and took steps to ensure that there were no survivors. Witness A stated that he could see Kayishema clearly since at that point the only attackers inside the Church were Kayishema and the young man. Witness A saw Kayishema use his sword to cut a person called Rutabana and a baby who was lying on top of witness A. With regard to this scene, witness A stated that he knew that it was a baby on top of him as he could feel the child's legs kicking him about the chest level.[203] Kayishema with his sword cut witness A, injuring him near his right clavicle, the right hand and the left elbow. The Trial Chamber was shown the scars of these injuries.

333. Several witnesses, such as A, B, C, D and E managed to escape. Others, such as B, C, D fled to the Home St. Jean, whilst witness F fled to the Stadium.

17 April 1994 on Home St. Jean

334. The attacks progressed from Catholic Church to the Home St. Jean when assailants descended upon the scene around 1 or 2 p.m., singing the lyrics "let's exterminate them." The assailants threw grenades inside the building and as a result, people suffocated. When the gendarmes broke the lock of the door, the fleeing Tutsis were faced with members of the *Interahamwe* wielding machetes and spears. Witnesses B and C survived by denouncing their Tutsi ethnicity to the attackers. Attackers allowed them to join a group of 15 to 20 Hutu who were being escorted to safety by the gendarmes and walked away from the Church. On their way, the two and others met Kayishema who asked the accompanying gendarmes "where are you taking these Tutsi?"[204] Notwithstanding that members of the group replied that they were all Hutu, Kayishema struck witness B with his machete.

[203] Trans., 15 April 1997, p. 145.
[204] Trans., 17 Apr. 1997, p.29.

The Victims

335. The attackers left thousands dead and many injured. Witness D estimated the number of those seeking refuge at the Complex prior to the major attack to be around 8,000. Witness A heard the same figure from Leonard Surasi, a man who had estimated the number in order to supply them with food. Witnesses A, B, C, D and F saw substantial numbers of dead bodies after the attack. Witness O, a local Hutu who had recorded this massacre as an entry in his personal diary, testified that he had participated in burying the dead bodies. Witness E testified that one week after the massacre at the Church, he saw prisoners come to collect bodies for burial. They spent five days burying the dead. Witness G, a Hutu, who had assisted in burying the dead, testified that at the Catholic Church, there were bodies along the road from the *Prefecture*, in front of the main door to the Church, inside the Church, in front of the Father's residence and also inside the Priests' house. He also stated that people assisting in the burial of the Tutsis were being threatened by Ruberanziza and Bisenyamana among other people.[205]

336. At the Home St. Jean, in particular, Witness T, a person employed at Home St. Jean, testified that she lost nine staff members and their children. Witness G saw around 200 to 300 Tutsi corpses scattered in front, behind, in the cellar, on upper floors and around the Home St. Jean buildings. Further, many of the survivors were injured. Witness F observed about forty injured people, whose ankles had been cut.

Case for the Defence

337. The defence for Kayishema offered a defence of alibi on the dates of the massacre, which appears above in Chapter 5.1 on Alibi. In cross-examination, the Defence challenged witness A's ability to having seen Kayishema when he entered the Church. They further questioned witness A's ability to have found space and time to smear himself with blood. This Chamber finds that although witness A's testimony may have lacked certain details, his testimony regarding Kayishema's presence and participation, on the whole, is credible. Moreover, witness A's description of Kayishema's attire and the weapon he carried conforms to the testimony of other witnesses, such as B, C and D.

Further, witness A's identification of Kayishema is strengthened because he knew Kayishema prior to the events. Witness A first saw Kayishema in 1993 at the Kibuye Hospital (a friend pointed out Kayishema saying, "there is the *Prefect*.") This Chamber finds reliable witness A's deposition of Kayishema's presence and participation in the attacks of 17 April.

338. Witness B testified regarding the encounter with Kayishema when she and others were being escorted as 'Hutus' by *gendarmes*. Witness B affirmed that Kayishema wore white shorts and uttered "where are you taking these Tutsi?"[206] The *gendarmes* responded "these are not Tutsi but they are Hutus."[207] The Defence in their closing remarks did not deny the scene but claimed that Witness B was involuntarily wounded. The Defence suggested to the witness that the push was intended to put her back in line. The Trial Chamber finds witness B to be a credible witness who identified Kayishema during the attacks and heard him speak. Witness B met Kayishema in 1989 at the Kibuye hospital and thereafter had seen him from time to time. Witness C corroborated witness B's testimony regarding the attack. The Trial Chamber finds no material contradictions in witness B's story.

339. Regarding witness C, the Trial Chamber notes that she knew Kayishema prior to the events. Witness C stated that she and the accused were from Bwishyura Sector and that she knew him and his father. She testified that she saw Kayishema cut the fingers of witness B with a machete. A list tendered into evidence by witness C shows the names of victims and attackers. The names of Kayishema and other local officials appear amongst the alleged attackers.

340. The defence cross-examined witness D on his ability to hear Kayishema utter the words "go to work." Witness D stated that he heard Kayishema ordering the attackers to "go to work" from a distance of approximately ten to fifteen meters away, while standing

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[205] Trans., 24 Apr. 1997, p.4.
[206] Trans., 17 Apr. 1997, p. 93.
[207] Trans., 17 Apr. 1997, p .97.

between the road which leads to the roundabout and to the *Prefecture*. The Defence also challenged witness D's account of his hiding in the ceiling of Home St. Jean. Witness D explained that he left the Church at 1 p.m. and stayed in the ceiling in Home St. Jean with five others, until 4 a.m. Witness T corroborates his account although she did not specifically single out witness A as being one of those in the ceiling.

341. Witness D, identified Kayishema as one of the attackers. He knew Kayishema prior to the events because Kayishema attended meetings at the Home St. Jean in his capacity as the *Prefect* of Kibuye. Witness D saw Kayishema on 15 April in a white vehicle near the Home St. Jean. His account of Kayishema's arrival and description of the attack is corroborated by many witnesses including A, B, C and F. The Trial Chamber finds that witness D identified Kayishema and finds his account of Kayishema's participation credible.

342. Witness F testified that he was in front of the Church when Kayishema arrived and that there was little distance between him and the attackers. Witness F confirmed seeing Kayishema and stated that he wore "white shorts" and carried a sword. Witness F's account of how Kayishema spoke through a megaphone was corroborated by witness E. Witness F knew Kayishema prior to the events and gave a detailed account of Kayishema's participation during the events of the attack. The Trial Chamber has considered witness F's testimony and finds his account of the events of 17 April is reliable and conforms to that of other witnesses.

343. Witness E testified also that he heard Kayishema use a large megaphone to order attackers "to go to work."[208] According to this witness, Kayishema spoke using the megaphone to deliver a message from Kigali to exterminate the Tutsis, and fired gunshots. The Trial Chamber notes that witness E described Kayishema's arrival at the massacre site, identified Kayishema and described his participation. The Trial Chamber finds witness E's testimony regarding the events credible. Additionally, he knew Kayishema as the chief of Kibuye hospital prior to these events. His account of the

occurrences was corroborated by other witnesses. However, witness E was the sole eyewitness to testify that Kayishema fired the shot signaling the start of the massacre. Hence there exists some doubt as to whether Kayishema actually fired the shots, that sparked off the attack. This uncertainty is not surprising in light of the circumstances. Given the confusion of multiple shooters and the prevailing terror, this Chamber cannot find that Kayishema fired the shots. Nevertheless, the Trial Chamber finds that the shooting began following Kayishema's order. The Trial Chamber finds, beyond a reasonable doubt, that Kayishema ordered and instigated the attack upon the Catholic Church.

Conclusion

344. The Trial Chamber finds that the witnesses' testimonies proved, beyond a reasonable doubt, that Kayishema was present at and participated in the 17 April 1994 massacres at the Complex. Witnesses, such as witness T and witness G, constituted "independent" witnesses, in the sense that they were not survivors as such, because they were not the target of the massacres. Their testimonies corroborated the events as recounted by those who survived the massacre. All the witnesses claimed that they previously knew Kayishema and they identified him at the trial. Moreover, the events occurred in broad daylight. The Hutu attackers killed with impunity as the local officials present not only refrained from preventing the massacre, but encouraged them.

345. The defence failed to controvert the credibility of these witnesses or the reliability of the evidence on fundamental issues, in particular the identification of Kayishema during the attack. Minor discrepancies in testimony between witnesses did not raise a reasonable doubt as to the issue of Kayishema's participation.

Factual Findings

346. With regard to Kayishema's participation in the Complex massacre, the Trial Chamber accepts the evidence of witnesses A, B, C, D, E, F, G and T.

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[208] Trans., 16 Apr., p. 156.

347. Paragraph 25 of the Indictment alleges that by 17 April thousands of unarmed and predominantly Tutsi had gathered at the Complex. The Trial Chamber is satisfied from the evidence presented that there were indeed thousands of men, women and children who had sought refuge at the Complex. Further, the Trial Chamber finds that they were unarmed and predominantly Tutsi.

348. Paragraph 26 of the Indictment alleges that some Tutsis went to the Complex because Kayishema ordered them to do so at a time when Kayishema knew that an attack was going to occur. The Prosecution did not prove that the Tutsis were ordered to go to the Complex or that Kayishema ordered them to go there. Most of the witnesses went there on their own volition. Others such as witness B went there because in the past their parents had gone to such places for safety. It was only witness D, who testified that Kayishema ordered him to go to the Church.[209] This testimony while credible, does not satisfy this Chamber of the facts alleged in paragraph 26. Consequently, the Trial Chamber finds, beyond a reasonable doubt, that the Tutsi men, women and children went to the Complex on their own volition or because their parents had in the past found refuge in such places.

349. Paragraph 27 of the Indictment alleges that people under Kayishema's control, surrounded the Complex and prevented people from leaving at a time when Kayishema knew the attack was going to occur. This Chamber finds that the evidence of witnesses A, B, C, E and F shows that after those seeking refuge had gathered in the Complex it was surrounded by people under Kayishema's orders or control, including *gendarmes* and members of the *Interahamwe*. Witness D described how attackers in boats surrounded the peninsula on which the Complex is located. Witness B, described how the Complex was surrounded by members of the *Interahamwe* carrying machetes and spears. Witness C, testified that gendarmes prevented persons from leaving the Complex on 17 April 1994.

[209] Trans., 14 Apr. 1997, p. 12.

350. The Trial Chamber finds, beyond a reasonable doubt that Kayishema knew or must have known that an attack was about to occur. This is because Kayishema stated that he had received orders from Kigali to kill Tutsis, he initiated the attack on 17 April, and he gave orders for the attack to begin. It follows, therefore, that Kayishema had the requisite knowledge. Kayishema was seen at the Complex twice before the attacks of 17 April and knew or must have known from the massive number of armed attackers that, in the circumstances of Kibuye *Prefecture* at the time, there was potential for a massacre to occur. Indeed, because smaller scale attacks had occurred there on the 15 and 16 April, Kayishema must have been aware of the potential for further attacks. Furthermore, as shown above in paragraph 28 of the Indictment, the Complex massacres followed the massacre at Mubuga Church where Kayishema had played a major role by initiating a systematic pattern of extermination within Kibuye. For these reasons, the Prosecution proved the allegations in paragraph 27.

351. Paragraph 28 of the Indictment alleges that on 17 April Kayishema went to the Complex, ordered the attackers to commence an attack and participated personally. Witnesses A, B, C, D, E and F testified that, notwithstanding the massive number of people seeking refuge at the Complex, they clearly saw Kayishema. The Trial Chamber finds the identification of Kayishema convincing. In making this finding the Trial Chamber is mindful that all the above-mentioned witnesses had known Kayishema prior to the events and successfully identified Kayishema at trial. In addition, the events occurred in broad daylight. The Trial Chamber finds, beyond a reasonable doubt, that on 15, 16 and 17 April, Kayishema went to the Complex, and that during the attacks it was not possible to leave the premises as those who attempted to flee were killed.

352. The Trial Chamber also finds, beyond a reasonable doubt that Kayishema participated in and played a leading role during the massacres at the Complex. Kayishema led the attackers from the *Prefecture* office to the massacre site at the Complex, he instigated and encouraged all the attackers by the message from Kigali to kill the Tutsis, which he delivered through the megaphone. Kayishema also orchestrated

the burning of the Church. Further, he cut one Rutabana inside the Church after the major offensive subsided.

353. Paragraph 29 of the Indictment alleges that the Complex attacks left thousands dead or injured. The Trial Chamber finds, beyond a reasonable doubt, that the single day of the major scale attack, as well as the smaller-scale sporadic attacks upon the Complex, resulted in the death of thousands of Tutsis whilst numerous others suffered injuries. This Chamber bases this finding primarily on the testimony of Dr. Haglund and Dr. Nizam Peerwani, Prosecution expert witnesses. Thus, the Prosecution has proved the facts alleged in paragraph 29.

354. In relation to paragraph 30 of the Indictment: The accusations in this paragraph are addressed in Chapter 6.1 *infra.*

5.3.2 The Massacre at the Stadium in Kibuye

Background

355. The witnesses presented a horrific account of the Kibuye Stadium massacre that occurred in mid-April 1994. Hutu military, police and the members of the *Interahamwe* conducted a massive, systematic, two-day slaughter of thousands of Tutsi civilians. Four witnesses were survivors of this massacre. Dr. Haglund, who visited the Stadium in September 1995, presented photographic slides. These slides depict a stadium with a field of grass about the size of a football pitch and additional side space for viewing; brick walls about eight foot high surround the Stadium on three sides and Gatwaro Hill flanks the fourth side. Spectator grandstands are located at one end. The road runs parallel to the side of the Stadium, facing Gatwaro Hill.

356. On Monday, 18 April 1994, at approximately 1 or 2 p.m., groups of gendarmes, communal police, prison wardens and members of the *Interahamwe* came from the direction of the roundabout in Kibuye town, surrounded the Stadium and started to massacre the Tutsi with tear gas, guns and grenades. The first attack of the massacre

finished at approximately 6 p.m. The next day, after celebrating in the local bar, attackers returned to kill survivors. The fact that the massacre at the Stadium occurred does not appear to be in dispute; Kayishema himself testified that a major attack at the Stadium took place on 18 April 1994[210] and witness DO estimated that about 4,000 of those seeking refuge were killed at the Stadium. Witness G, a local Hutu, who helped to bury bodies found in and near the Stadium, stated that dead bodies covered the entire ground of the Stadium and that bodies were buried using machinery over five days. Therefore, the issues for the Trial Chamber to consider here are whether Kayishema was present at the Stadium on 18 April 1994 and, if so, what was his role if any, and the role of anyone acting under Kayishema's orders or control.

The Role of Kayishema and His Subordinates

357. The Trial Chamber now assesses the evidence in relation to Kayishema's role at the Stadium massacre. In short, witnesses testified that Kayishema arrived in a white vehicle at the head of a column of attackers, ordered them to begin the killing and gave the signal by shooting a gun into a crowd of persons. The identification of Kayishema at the Stadium is strengthened by the witnesses' knowledge of the accused prior to the events in 1994. Witness I had known Kayishema since the accused was a child and had been the neighbour of Kayishema's parents. Indeed, Kayishema himself testified that witness I was a friend of his family. Witness K had known Kayishema before he was a *Prefect* and had seen him many times when he went for medical treatment. Witness M claimed to have known Kayishema all his life, but admitted that the accused did not know him well. Witness L had not known Kayishema before and testified that he only knew it was Kayishema at the Stadium because others had informed him so. With some variation in detail, witnesses I, K, L and M gave a similar account, both of the events and of Kayishema's role in particular. The testimony of witness I, the most lucid and complete is discussed thoroughly below, followed by the testimony of witnesses K, L, M, F, and NN.

Witnesses

[210] Trans., 10 Sept 1998, p. 24.

Witness I

358. Witness I is an elderly carpenter. In mid-April, sometime between 15 and 20 April 1994, witness I and seventeen other family members left their home in search of refuge and protection from massacres occurring throughout the *Prefecture* of Kibuye. Witness I testified that his *Conseiller* had told him to go to the Stadium where Tutsi would be safe. He explained that they arrived at the Stadium and stayed there for three or four days. When he arrived at the stadium no one was guarding the entrances but soon thereafter gendarmes started to control who could exit and, confiscated weapons from those who entered. Witness I testified that those attempting to leave were killed by members of the *Interahamwe* and, that he saw this happen. In the Stadium there was no firewood, the water had been cut off, and the Tutsi seeking refuge ate raw meat from cows. Sick and wounded were amongst them and those who attempted to seek help from the local hospital just yards from the Stadium were beaten back or killed. Those seeking refuge barely had room to sit down and there was no protection from sun or rain. The authorities provided no assistance. Soon after arrival the Tutsi heard from others about the massacres at Mubuga Church and Home St. John.

359. Witness I testified, describing his feelings, "For me I thought that no one would be able to kill off 15,000 people, and I thought that any authority who would represent so many people would not dare to kill them off, because these people worked for those persons in authority. They paid taxes and they provide assistance and they repair roads . . . . So I told myself that no one was going to be able to use firearms or machetes to kill us off. I said that no person in authority would be able to do such a thing."[211]

360. Witness I testified that at about 2 p.m. on 18 April armed civilians, soldiers, former soldiers and prison wardens armed with guns, clubs and machetes came from the direction of the roundabout in Kibuye. They divided into groups and surrounded the Stadium, taking position on the hills. From his viewpoint in the spectator grandstands witness I testified that he clearly observed Kayishema standing by the main entrance, near a house owned by the MRND. From this location, Kayishema could see into the

Stadium. Witness I saw Kayishema ask for a gun, shoot it toward the masses inside the Stadium as if to signal the attack to commence, and then give the gun back to the gendarme. Kayishema's two shots struck two people. At that point the massacre began. The attackers threw tear gas and grenades and fired guns into the Stadium. Witness I described the scene, "some were dead already, others were wounded in a way that they could no longer lift themselves from the ground. There were children who were crying because of the blows they had received. Others were bleeding or looking for water." The massacre stopped at approximately 6:00 or 6.30 p.m. After the attack ceased, witness I heard the attackers gathered in the bar next to the Stadium, drinking and dancing. On that first day witness I did not see attackers enter the Stadium. Those who tried to flee were killed with sharpened bamboo sticks. Witness I discovered that his two wives and fifteen children who accompanied him to the stadium had been killed on that day. During the night of 18 April he managed to escape and fled towards Karongi.

361. The Defence asserted that witness I did not mention to investigators in an interview prior to his testimony that he had seen two people killed by Kayishema's opening shots. Witness I admitted that, although he had seen two people hit by Kayishema's shots, he did not know whether the victims had died. The Trial Chamber accepts the evidence that Kayishema's shots struck two persons seeking refuge in the Stadium, an assertion that is corroborated by witness M.

Witnesses K, L, and M

362. Witnesses K, L and M are also Tutsis who had sought refuge inside the Stadium and survived the massacre of 18 April. Their testimony regarding the appalling conditions within the Stadium and the gendarmes preventing egress conforms to the evidence of witness I. In addition, the witnesses testified to an incident that occurred on the morning of 18 April; a white man started to count the people in the Stadium in order to bring aid but left when Kayishema, who arrived at the Stadium with gendarmes, threatened the same white man if he helped them. All three witnesses testified that they

[211] Trans., 28 April 1997, p. 49.

did not understand the conversation between the white man and Kayishema in French, but that others translated the gist of it from French to Kinyarwanda.

363. Like witness I, witnesses K, L and M testified that on 18 April at around 1 or 2 p.m., Kayishema came from the direction of the Kibuye roundabout accompanied by the members of the *Interahamwe*, gendarmes, communal police and prison wardens. The witnesses saw Kayishema walk to a position just outside the main gate, in front of the MRND building, and order the massacre to commence. Witnesses K and L added further that Kayishema was armed with a sword and that the attackers were singing a song in Kinyarwanda with the lyrics, "exterminate them, exterminate them." These witnesses also testified that the attackers surrounded the Stadium, used tear gas, grenades and guns to kill those inside the Stadium, but did not enter.

364. Witness M gave nearly the same account as witness I with regard to Kayishema firing gunshots into the Stadium. M testified that Kayishema had taken a gun from a gendarme, fired it into the Stadium twice, hitting two people, and then fired once into the air, at which point the massacre started. Witnesses K and L, however, testified that they did not see Kayishema fire into the Stadium but heard him order the gendarmes to "fire on these Tutsi dogs." This difference in testimony is understandable considering that witnesses I and M were observing events from half way up the grandstands whereas witnesses K and L were positioned just inside the Stadium close to the main entrance. When considered together, the witness testimony shows that Kayishema first ordered the gendarmes to fire on the Tutsis and then grabbed a gun and personally fired twice into the Stadium, apparently to lead and set an example to start the massacre. It is reasonable that witnesses K and L did not see Kayishema shoot because, having heard Kayishema's orders to fire, they already were fleeing. Indeed, witness K testified that when he heard Kayishema give the order to shoot he immediately ran further back into the Stadium; witness L testified that when he heard Kayishema's order he ran to find his family and did not see Kayishema again. Witnesses K, L and M testified that the massacre continued until 6 or 6.30 p.m. Witness O, a Hutu doctor, testified that he heard the massacre start with firing and grenades at around 3 p.m. and continue until dark.

365. There is less evidence relating to the massacres on the morning of 19 April. Witness K testified that at 6 a.m. he and others left the Stadium and fled up Gatwaro Hill when he saw the attackers returning to where they appeared to return in order to finish off any survivors with traditional weapons. As he fled, witness K saw the attackers going into the Stadium and heard shouts and screams. Their testimony did not place Kayishema at the Stadium on 19 April.

Witnesses F and NN

366. Witnesses F and NN observed events from hiding places outside the Stadium. The testimony of these witnesses conforms generally to that offered by witnesses I, K, L and M but also differs in some respects. Witness F testified that he survived the massacre at Catholic Church Home St. John and during the night of 17 April fled to Gatwaro Hill, from where he had a good view of the Stadium. He observed the events at the Stadium 18 April and Kayishema's participation, including the opening gunshots. Witness F, however, testified that Kayishema arrived with the attackers between 9.30 and 10 a.m. and estimated that they were there for approximately two hours before the massacre started. Contradicting the other witnesses, witness F testified that killers entered the Stadium on 18 April and began cutting up the Tutsis. The apparent confusion in witness F's account may be explained by the circumstances and the mental state in which he observed the events; responding to a question of what he did when the massacre started, witness F stated "I was astonished. I completely lost my head. I cannot even tell you what I witnessed as regards the massacres and this was because a lot of my family were inside the Stadium and they were being massacred."[212]

367. Witness NN testified that on 18 April he was hiding between two buildings about 40 metres from where Kayishema stopped by the Stadium's main entrance. Witness NN testified that, before shooting into the Stadium, Kayishema murdered a Tutsi child and its mother. He stated that Kayishema then took the child from its mother, held it upside down by one leg, extended the other leg to a soldier and sliced it vertically with a sword.

According to NN, Kayishema shot the child's mother as she ran to the Stadium entrance. The Trial Chamber notes that NN observed the events from a different position, which could explain his divergent account. Furthermore, evidence suggests that Kayishema was surrounded by gendarme and members of the *Interahamwe* when he arrived at the main entrance and, therefore, the view of the other witnesses could have been obstructed at the time when Kayishema allegedly killed the child. However, the Stadium witnesses all testified that they had a clear view of Kayishema when he arrived and, that being so, it seems unlikely that they would omit an incident of such horror from their testimony. Furthermore, if Kayishema had first shot the child's mother before he moved to the main entrance from where he shot twice into the Stadium, the other witnesses likely would have observed this. According to their evidence, they did not. For all the above reasons, the Trial Chamber does not rely on the evidence proffered by witnesses F and NN pertaining to the Stadium massacre on 18 April 1994.

The Defence Case

368. In his defence, Kayishema testified that he was in hiding and did not go to the Stadium at the time of the massacres. However, Kayishema testified that he did visit the people seeking refuge at the Stadium sometime after 13 April but before they were killed; "Yes I went to the place but my CV is clear. I'm quite used to this sort of plague. When there are so many people I know how to gather them together, how to seek solution to the problems, how to subdivide them according to their needs . . . ." In other words, Kayishema testified that he went to the Stadium in order to assess the situation. This, however, squarely contradicts his statement to Prosecution investigators. When asked by investigators if he ever went to the Stadium, Home St. John or Mubuga Church from 7 April 1994 until the end of the war, Kayishema gave a categorical "no". When questioned about this apparent contradiction during cross-examination Kayishema testified that he thought the investigator was asking him whether he had visited the sites *everyday* and therefore he answered in the negative.[213] With regard to gendarmes

[212] Trans., 22 April 1997 p. 133.
[213] See Prosecution exhibit 350c(b).

guarding the gates of the Stadium and controlling the movement of people in and out, Kayishema testified that this was "true and normal."

369. The Defence raised further issues of detail. The Defence questioned why the huge number of Tutsis did not escape before the 18 April by overpowering the four or so gendarmes who were guarding the entrances. The witnesses were consistent in their responses, stating that the gendarmes were armed but those seeking refuge were powerless, therefore, those who tried to leave would have been killed. This fear seems reasonable particularly in light of the evidence that Tutsis had initially sought refuge in the Stadium as a means of escaping atrocities occurring throughout Kibuye *Prefecture* and that Tutsis had been killed when they attempted to leave.

370. The Defence further asserts that there is no direct evidence that Kayishema ordered the water supply in the Stadium to be turned off as suggested by some Prosecution witnesses. The Trial Chamber agrees with the Defence; although it is clear that the taps in the Stadium did not supply water, there is no direct evidence that Kayishema was responsible.

Factual Findings

371. With regard to Kayishema's participation in the Stadium massacre, the Trial Chamber accepts the evidence of witnesses I, K, L and M. In cross-examination all four witnesses remained fundamentally faithful to the evidence proffered in chief.

372. Paragraph 32 of the Indictment alleges that by April 18 thousands of unarmed and predominantly Tutsis had gathered in the Stadium. The Defence pointed out that Prosecution witnesses did not give a consistent figure with regard to the number of Tutsi whom had gathered in the Stadium. Witness estimates varied from 5,000 to 27,000. The Trial Chamber does not consider this variation fatal to the reliability of the witness evidence. Mindful that the Indictment merely states "thousands of men, women and children had sought refuge in the Stadium located in Kibuye town," the Trial Chamber is satisfied from the evidence that there were indeed thousands of men, women and children

who had sought refuge at the Stadium. Further, the Trial Chamber finds that those seeking refuge were predominately Tutsi and, with the exception of a small number of machetes with which they slaughtered cows for food, they were unarmed.

373. Paragraph 33 of the Indictment alleges some refugees went to the Stadium because Kayishema ordered them to do at a time when Kayishema knew that an attack was going to occur. The Prosecution failed to prove this allegation. In fact, almost all witnesses testified to the contrary.

374. Paragraph 34 of the Indictment alleges that people under Kayishema's control, surrounded the Stadium and prevented people from leaving at a time when Kayishema knew the attack was going to occur. The evidence of Prosecution witnesses I, K, L and M, discussed above, is sufficient to show that after those seeking refuge had gathered in the Stadium, it was surrounded by people under Kayishema's control, including gendarmes. Witnesses I, K, L, M and O, testified that gendarmes prevented persons from leaving the Stadium from about 16 April 1994. Kayishema himself accepted that gendarmes were controlling the movement of people in and out of the Stadium. Furthermore, the Stadium massacre followed the massacres at Mubuga Church and Catholic Church, Home St. John. Indeed, a systematic pattern of extermination existed which is a clear demonstration of the specific intent to destroy Tutsis within Kibuye *Prefecture* in whole or in part. The evidence shows that Kayishema played a major role within this system. For these reasons, the Trial Chamber finds that at the time when the Tutsi were prevented from leaving, Kayishema knew or had reason to know that an attack on the Stadium was going to occur.

375. Paragraph 35 of the Indictment alleges that on April 18 Kayishema went to the Stadium, initiated, ordered, and participated in the attack. It further alleges that during the night of April 18, attackers killed Tutsis if they tried to leave. Witnesses I, K, L and M notwithstanding the mass people, testified that they clearly saw and (in relation to K and L) heard Kayishema. The Trial Chamber finds the evidence of Kayishema's identification and participation convincing. In a scenario, such as the Stadium, it is not

surprising that those inside would strain to see and hear what was happening outside when a group of attackers arrived *en masse* at the main gate. The photographic exhibits indicate that witnesses I and M, positioned on the spectator stands, would be able to see over the Stadium wall to the main entrance. Witnesses K and L, positioned just inside the Stadium close to the main entrance, explained how, despite many people being between them and Kayishema, they wanted to see who had arrived and succeeded in doing so. All of the identification occurred in broad daylight. In making this finding the Trial Chamber is mindful that witnesses I, K and M had known Kayishema prior to the events and successfully identified Kayishema at the trial. Witness L, however, had not known Kayishema prior to the Stadium massacre, but others informed him that it was *Prefect* Kayishema at the time of the events. Therefore, the Trial Chamber must treat the identification of Kayishema by witness L with extra vigilance. The account of witness L is so similar to the other Prosecution witnesses, particularly K, such that the Trial Chamber accepts that his testimony related to the same man. Accordingly, the Trial Chamber considers that the testimony of L further corroborates the evidence of witnesses I, K, and M with regard to Kayishema's participation in the Stadium massacre.

376. The Trial Chamber finds beyond a reasonable doubt that on 18 April 1994 Kayishema went to the Stadium and ordered members of the *Gendarmerie Nationale*, communal police and members of the *Interahamwe* to attack the Stadium. Further, Kayishema initiated the attack by firing a gun into the Tutsi who had assembled in the Stadium and his shots struck two of them. The evidence indicates that the attackers tear gas, guns and grenades were used on 18 April and that the massacre continued on 19 April. However, the evidence relating to the 19 April is not sufficient to show which assailants were attacking the Stadium, or to prove Kayishema's presence. The Trial Chamber is also satisfied that during the attacks some of the Tutsis who attempted to flee were killed.

377. There is conflicting evidence pertaining to whether the Tutsis were prevented from leaving the Stadium during the night of April 18 and the morning of April 19. The Trial Chamber finds that the Prosecution has not proved their case on this issue.

378. Paragraph 36 of the Indictment alleges that the Stadium attacks left thousands dead or injured. The Trial Chamber is convinced by the evidence that the two days of attacks on the Stadium resulted in thousands of deaths and numerous injuries to Tutsi men, women and children. Predominantly Hutu assailants perpetrated these acts.

379. In relation to paragraph 37 of the Indictment: The accusations in this paragraph are dealt with below in Part VI.

5.3.3 THE MASSACRES AT THE CHURCH IN MUBUGA

Background

380. The Church in Mubuga, like other places of worship in Rwanda, was regarded historically as a safe haven in times of unrest. This was also the case in 1994. The Prosecution alleges that by about 14 April 1994 thousands of unarmed men, women and children, most of whom were Tutsi, had gathered at the Church in Mubuga to escape on-going and widespread violent attacks throughout Kibuye *Prefecture*. The Prosecution alleges that on 14 April the authorities of the *Prefecture*, including Kayishema and *Bourgmestre* Sikubwabo, came with gendarmes to the Church located in Gishyita Commune. According to one eyewitness,[214] Sikubwabo stated that he was going to exterminate the Tutsis. Over the next few days, attackers killed thousands of people. Only a handful of those who had sought refuge in the Church would survive this massacre, just one of many in Kibuye *Prefecture*.

381. The allegation that this appalling event occurred at Mubuga Church is not in dispute. In fact, an assortment of witnesses, including various eyewitnesses, Sister Julie Ann Farrington, Defence witness DP, and Kayishema, confirmed that after the massacre, corpses and/or human remains were found inside and/or in the immediate vicinity of Mubuga Church. Witnesses who visited this site shortly after the massacre remarked that the decomposing bodies caused a strong stench in the area. In addition, Dr. Haglund,

testified that he went to the Church grounds on 20 September 1995 to investigate two alleged graves sites there. He deposed that one grave had been exhumed previously and the bodies had been reburied nearby. In the second area he found a depression in the ground and there were indications that this area had been disturbed. Upon an attempt to probe the second mass grave he found that the ground was too hard and therefore he did not conduct further investigations there. Due to uncontested evidence showing a massacre near the Church in Mubuga, the questions that remain relate to the presence and the participation of Kayishema and those under his control in this massacre.[215] The Trial Chamber examines the role Kayishema and his subordinates played at this massacre site, in detail, below.

Prosecution Case

382. Five Prosecution eyewitnesses, V, W, OO, PP and UU appeared before the Trial Chamber to recount the events of prior to and during the massacre in mid-April 1994 at Mubuga Church.[216] With slight variations, these five eyewitnesses recounted the events in the following manner. While thousands of Tutsis congregated at this site, between 9 and 14 April 1994, witnesses heard that the *Prefect* had met with the Hutu priest and that the distribution of food to those seeking refuge was forbidden. The same Hutu priest, who had replaced the Tutsi priest at Mubuga Church, refused water to those seeking refuge, and told them to "die, because your time has come."[217]

383. Paragraph 40 of the Indictment alleges that "[a]fter the men, women and children began to congregate in the Church, Clement Kayishema visited the Church on several occasions" and that on or about 10 April he brought gendarmes to this location who prevented those seeking refuge in the Church from leaving. All prosecution witnesses deposed that gendarmes had gathered on the Church grounds and patrolled the Church

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[214] Trans., 3 Mar. 1998, p. 28.

[215] The Prosecutor presented witnesses who testified that Ruzindana was present and participated in the massacre at Mubuga Church. The Trial Chamber will not consider this evidence because the Indictment in question charges Clement Kayishema alone with crimes at this site.

[216] Witness OO deposed that the massacres continued on 17 April 1994. There will be an examination of this potential discrepancy in the Analysis and Findings Chapter on the massacres at Mubuga Church below.

[217] Trans., 20 Nov. 1997, p. 16.

complex to ensure that those who had sought shelter there would not leave. Witness V stated that gendarmes accompanied Kayishema before and during the attacks and witness PP stated that he saw gendarmes near the Church on 13 April. Witness UU stated that on the 15 April Kayishema arrived with "soldiers." The other three eyewitnesses stated that gendarmes were present throughout the congregation of those seeking refuge and during the massacres. For example, witness V stated that the gendarmes arrived on either the 9 or 10 April.

384. Witnesses V, OO and PP all confirmed the allegation that, prior to the attacks, the Tutsis could not leave the Church due to a fear of the gendarmes and other armed individuals patrolling the Church complex. According to one witness, this fear was founded upon the murder of individuals who had attempted to leave the Church building, to find food.

385. Paragraph 41 of the Indictment asserts that individuals under Kayishema's control "directed members of the *Gendarme* [sic] *Nationale*, communal police of Gishyita *commune*, members of the *Interahamwe* and armed civilians to attack the Church," and that these individuals directly participated in the events. What follows is how the events unfolded as recounted by Prosecution eyewitnesses before the Trial Chamber.

15 April 1994

386. A number of Prosecution eyewitnesses stated that after the Tutsis began to gather, the Church doors were kept locked from the inside in order to prevent the assailants, who previously had attempted to attack, from entering the Church. Therefore, on the morning of 15 April, the assailants began the attack by throwing tear gas grenades into the Church and shooting through the windows. Witnesses V, W and UU placed Kayishema and the local authorities at the Church on this day. According to witnesses OO and W, *Bourgmestre* Sikubwabo and *Conseillers* Mika Muhimana and Vincent Rutaganera led the attack. Witness V stated that he saw Kayishema arrive at the Church in the company of gendarmes on 15 April, while UU stated that he saw Kayishema in the company of

"soldiers" on this day. Witness V was the only witness that claimed that Kayishema had a gun and opened fire.

387. According to UU, on this day, Kayishema came to the Church and went to the home of the Hutu priest behind the Church. Witness OO confirmed the cooperation of the priest with Kayishema when he deposed that the priest instructed him to conduct a head count of the Tutsis in the Church for the *Prefect*. In addition, the Prosecution eyewitnesses confirmed the presence and/or participation of the communal police and civilians, such as local businessman Rundikayo, on this date. Witnesses indicated that although some people died from the effects of the tear gas, the number of Tutsis killed was relatively low on this day. By all accounts, the attackers left the Church in the afternoon of 15 April.

16 April 1994

388. On the morning of 16 April 1994 the Church doors were finally forced opened and the assailants entered the Church. Witness PP recalled that "we were hoping to be killed by bullets and not by machetes."[218] The attackers again used tear gas grenades, along with other traditional weapons and, during the ensuing panic some Tutsis were trampled to death.

389. Witness OO testified that, on the morning of 16 April, Kayishema came with soldiers of the National Army. Witness W was the other eyewitness who placed Kayishema at the Church on this date. It was claimed that in addition to Kayishema, local authorities such as *Bourgmestre* Sikubwabo and various *conseiller*s were present at the Church on this date. Soldiers threw grenades and other armed attackers shot at and hacked with machetes the Tutsis inside the Church. After most people in the Church had been killed, witness OO, who hid under the corpses of fallen Tutsis, stated that he heard

[218] Trans., 3 Mar. 1998. p. 30.

the *Prefect* telling the local authorities "to come and collect the Caterpillar [bulldozer] to bury the dead."[219]

The Defence Case

390. The Defence conceded that Kayishema came to Mubuga Church on 14 April, but that he did so only to monitor the situation. In fact, during closing arguments, the Defence reminded the Trial Chamber that his visit to the Church is recorded in Kayishema's diary.[220] This was an obvious mistake as nothing is recorded in the said diary under this date.

391. The Defence also attempted to impeach Prosecution witnesses by stressing that some contradicted themselves, or each other, with regard to the exact hour of the commencement of the attacks or the varying dates of the end of the attacks. For example, the Chamber was asked to recall that witness OO deposed that the attacks did not end until 17 April while others claimed that the massacre, at this site, ended on 16 April. According to Kayishema's Defence Counsel the idea that "a witness can only identify Clement Kayishema if he knew him before" is incorrect.[221] In cross-examination issues of visibility were raised which will be analysed below.

Factual Findings

392. The allegations in paragraph 39 of the Indictment, that by about 14 April 1994 thousands of Tutsis congregated in Mubuga Church and that they were taking refuge from attacks which had occurred throughout Kibuye, are not in dispute. In addition all five Prosecution witnesses and at least one Defence witness confirmed that many Tutsis had come to the Church for protection. The witnesses gave slightly differing numbers about the persons that were gathered at the Church. Witness V estimated that about 4,000 people, mostly women and children had assembled there by 12 April, while witness W remarked that the number of persons taking shelter at this location was between 4,000

[219] Trans., p. 39, 20 Nov. 1997. The Trial Chamber notes that the witness claimed this conversation took place after the massacres, on 17 April, a date that was not corroborated by other witnesses.
[220] Def. exh. 58.
[221] Trans., 4 Nov. 1998, p. 148.

to 5,000 by the time of the attacks. Witness OO stated that 5,565 were present at the Church according to a head count he conducted on the instructions of the Hutu priest, who had told OO that this information was needed by the *Prefect* for humanitarian purposes. The Trial Chamber accepts that between 4,000 to 5,000 persons had taken refuge at Mubuga Church.

393. Paragraph 40 of the Indictment charges Kayishema with having visited the Church on several occasions before the attacks and having brought gendarmes to this location on or about 10 April. The gendarmes allegedly prevented the Tutsis within the Church from leaving. As discussed above, all Prosecution eyewitnesses affirmed having seen gendarmes at the Church while they were assembling there and during the attacks. With regard to Kayishema having brought the gendarmes two witnesses testified that prior to the attack they saw him at the Church either arriving with or in the company of gendarmes. Therefore, we find that whether these gendarmes came to this location with Kayishema or arrived without him is irrelevant as Kayishema knew or should have known of their activities, especially given the state of security in his *Prefecture*. The issue is the presence of the gendarmes and not whether they were physically transported to the crime site by Kayishema.

394. Whether the gendarmes prevented the Tutsis from leaving the Church is the second question raised in paragraph 40 of the Indictment. The Defence contended that the gendarmes were present for the protection of the Tutsis. The Prosecution witnesses painted another picture. They stated that while the gendarmes were present before the attacks, armed assailants, including the members of the *Interahamwe*, surrounded the Church and attacked Tutsis attempting to exit, with impunity. Witnesses W and OO both affirmed that Tutsis who initially attempted to leave the Church for food or water were either chased back into the building or beaten to death by the armed assailants outside the Church. Witness OO stated that those seeking refuge could not even leave the Church to use the toilet. One Prosecution eyewitness testified that approximately, twelve to fifteen gendarmes were present at the Church. If this number was accurate, coupled with the fact that gendarmes are usually armed, then it would be conceivable that the gendarmes

could engage in the prevention of the departure of the Tutsi seeking refuge from this site. Moreover, during the attacks, the gendarmes were seen throwing grenades and shooting into the crowds of the unarmed civilians inside the Church. All these facts leave no doubt that the gendarmes were involved in the virtual imprisonment and later the massacre of the Tutsis in Mubuga Church until the attacks began inside the Church on the morning of 15 April.

395. Paragraph 41 of the Indictment, surprisingly, does not charge Kayishema with having been present during the attacks. It states "on or about 14 April 1994 individuals, including individuals under Clement Kayishema's control, directed members of the *Gendarme* [sic] *Nationale*, communal police of Gishyita *commune*, members of the *Interahamwe* and armed civilians to attack the Church." The Indictment goes on to allege that the attacks continued for several days as not all the persons within the Church could be killed at one time. As aforementioned, all five Prosecution eyewitnesses to the events at Mubuga Church were there on the 14 and 15 April. Two witnesses deposed that they had been there on the 16 April and only one on 17 April 1994. These witnesses stated that they closed the doors to the Church to avoid being attacked by assailants. The Trial Chamber finds that, with regard to the date, there were no material contradictions in the oral testimonies of these five witnesses, as claimed by the Defence. The Trial Chamber further finds that the attackers, who surrounded the Church, began their attempts to kill the Tutsis before 15 April, but that the dates on which the massacres were carried out inside the Church were in fact 15 and 16 April in the presence, and at the direction of, local authorities.

396. Because a number of eyewitnesses placed Kayishema at Mubuga Church during the attacks, at this juncture, it is appropriate to consider the identification of the accused at this location before and during the attacks. Preliminarily, we are cognizant of the fact that the events took place during the daytime, which renders visibility less problematic. Secondly, we note that because those seeking refuge were awaiting attacks, they must have been constantly seeking to know about the goings-on around the Church and were

therefore, as mentioned by some witnesses, such as W, looking outside through the windows and doors.

397. Having observed the demeanor of the witnesses and listened closely to their oral testimony the Trial Chamber is satisfied that the eyewitnesses were credible and did not attempt to invent facts. This credibility was helpful in determining the reliability of the identification of the accused at the massacre site. Mubuga Church has three doors and several windows[222] and according to the eyewitnesses' accounts, the assailants, including Kayishema and his subordinates came close to the Church building at some point during the time in question. During cross-examination, some concerns of obstructed visibility were raised also in the case of OO, because he had placed Kayishema at the site by stating that while he (witness OO) was lying under the corpses of slaughtered Tutsis, he heard Kayishema speaking with other local authorities. The question then becomes one of voice recognition and not of visibility, as the Defence contend. The Trial Chamber is satisfied that the witnesses' prior familiarity with the accused - he had seen the *Prefect* at the installation of Sikubwabo as *Bourgmestre* and at local rallies - and having heard his voice at other meetings prior to the massacres would enable OO to recognise Kayishema's voice and render the identification of the accused a trustworthy one.

398. The Defence contested the identification of the accused by witness W by pointing to the unfavorable visibility conditions caused by the tear gas released into the Church. Since there is both oral and pictorial[223] evidence of grenades having been used the Trial Chamber notes that this factor could have made for poor visibility. However, Mubuga Church covers a sizeable amount of space, capable of holding 4,000 to 5,000 persons. Witness W stated that he was not near the part of the Church where the grenade landed and was therefore able to view the persons outside. At any rate, it remains unclear whether the witness saw Kayishema prior to the launching of the tear gas grenade or after. Therefore, the Trial Chamber accepts the testimony of witness W.[224]

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[222] Pros. ex's. 37, 39 and 40.
[223] Pros. exh. 47.
[224] It should be noted that witness W deposed that he had known Kayishema well before the attacks.

399. Questions were also raised by the Defence regarding the reliability of witness UU's identification of the accused. UU testified that he was near the main entrance of Mubuga Church when Kayishema arrived in his vehicle. During cross-examination, however, he stated that he did not recognise Kayishema until he heard other people remark that the *Prefect* had arrived. The Trial Chamber observes that witness UU had met Kayishema on one occasion prior to April 1994, at Kayishema's grandfather's home, but may not have recognised him immediately upon his arrival at Mubuga Church on 15 April. However, the witness stated that after the declaration by others he did recall knowing Kayishema. The Trial Chamber finds this, in fact, to be the case.

400. Each one of these eyewitnesses, with the exception of PP, placed Kayishema at the site on at least one day either shortly before or during the attacks of 15 and 16 April. Witness PP's hearsay evidence also corroborated the accounts of other eyewitnesses. Additionally all eyewitnesses presented by the Prosecution for this site affirmed having seen at least one or more of the following outside the Church during the time in question: local authorities such as *Bourgmestre* Sikubwabo, *Conseillers* Muhimana and Rutagenera, Minister of Information Niyitegeka as well as gendarmes, members of the *Interahamwe*, communal police and other armed civilians. It is interesting to note that the Defence only contested the presence of local authorities during the cross-examination of Kayishema and not before.[225]

401. Paragraph 42 of the Indictment maintains that as a result of the attacks thousands of deaths and numerous injuries to men, women and children perished and numerous others sustained injuries.

402. The Trial Chamber has made a finding with regard to the number of the Tutsis present at the Church. Therefore, in light of the testimony that most of the persons assembled at the Church were slaughtered, the Trial Chamber deems it unnecessary to

focus on exact numbers. Suffices to say we find that thousands of persons were massacred at this site and therefore the Prosecution has met its burden beyond a reasonable doubt with regard to this allegation.

403. Paragraph 43 of the Indictment asserts the Kayishema did not attempt to prevent this massacre and failed to punish those responsible. This allegation is addressed in Chapter 6.1.

Conclusion

404. It is clear from the evidence presented to the Trial Chamber that of the thousands of Tutsis gathered at Mubuga Church, only a few survived this weekend massacre. The Trial Chamber is satisfied, beyond a reasonable doubt, that Kayishema and his subordinates, including local authorities, the gendarmes, the communal police and the members of the *Interahamwe* were present and participated at the attacks at Mubuga Church between 14 and 16 April. As aforementioned, Kayishema, is not charged with having been present during the attacks under paragraph 41 of the Indictment. In light of the testimony of the five witnesses the Chamber nevertheless finds that Kayishema was present during the actual attacks. We further find that his presence and the presence and the participation of other local authorities, encouraged the killings of the Tutsis who had assembled to seek refuge there.

[225] When asked by Ms. Thornton about whom lead the massacres in Kibuye Prefecture, Kayishema stated that none of the local authorities had taken part and that trials were conducted after he fled the country, in July 1994, to find the culprits.

5.4 THE MASSACRES IN THE AREA OF BISESERO

5.4.1 Introduction

405. The evidence before the Trial Chamber presents a picture of a massive, horrific assault on the Tutsis gathered in the Bisesero area by extremist Hutu military, communal police, members of the *Interahamwe* and armed civilians. These attacks continued throughout April, May and June 1994. The Bisesero area was home and area of refuge to many Tutsis during the genocide. Many Tutsis from other regions, hid in caves, scattered through woods and bushes, or gathered on the high hills in the area. Some Tutsis congregated in Bisesero because they had heard that they would be protected. This was not the case. Relentlessly, they were pursued by Hutus bent on genocide, who shot or hacked all the Tutsis they found.

406. The most severe attacks occurred in the Bisesero area on 13 and 14 May 1994, after an apparent two-week lull in the attacks. Some evidence asserted that this two-week pause in the attacks resulted from a resistance by the Tutsis assembled in Bisesero and attackers used this pause to regroup. Witness G attended a meeting, held on 3 May by Prime Minister Jean Kambanda at Kayishema's offices, in which Kayishema reported there was serious insecurity caused by those gathered in Bisesero and requested reinforcement to resolve the problem.[226] Soon after in mid May, the assailants again pursued those seeking refuge from place to place. At times, Hutu operations were conducted on a huge, organised scale with hundreds of assailants transported in buses to areas where Tutsi civilians had gathered. At other times, minor military or *Interahamwe* patrols throughout the region attacked Tutsis whenever they were found. The ultimate aim of these assaults appeared to be the complete annihilation of the entire Tutsi population. In pursuit of this objective, attackers killed thousands of Tutsi civilians.

[226] Witness G also testified that in the ensuing days he saw the members of the *Interahamwe* from Gisenyi *Prefecture*, armed with guns, going toward Bisesero.

General Allegations

407. Paragraph 45 of the Indictment alleges, that the Bisesero area spans two communes, Gishyita and Gisovu, in Kibuye *Prefecture*. The Prosecution alleges that from about 9 April until 30 June 1994, thousands of men, women and children sought refuge in the area of Bisesero. Most were Tutsis seeking refuge from attacks that had occurred throughout the *Prefecture* of Kibuye.

408. Bisesero's geography is not in dispute. The Trial Chamber is seized of Prosecution exhibits, including maps and photographic slides, which depict the area of Bisesero.

409. Furthermore, the Defence did not contest the allegation that from about 9 April until 30 June 1994, Tutsis sought refuge in Bisesero from Hutu attacks that had occurred in other parts of Rwanda and, in particularly, other areas of Kibuye *Prefecture*. Many eyewitnesses confirmed having been amongst thousands of Tutsis fleeing other attacks within Kibuye *Prefecture*[227] and other witnesses confirmed having seen many Tutsis fleeing various areas in Kibuye to Bisesero. Kayishema testified: "I can tell you that the, [*sic*] aggressors were Hutu and the attacked were the Tutsis, some who came from Bisesero and others who had gathered in the hills of Bisesero. On both sides – on either side there were cases of mortality."[228] Numerous witnesses confirmed the mass murder of Tutsis in the Bisesero area. For instance, Chris McGreal, a journalist for the London-based *Guardian* newspaper, testified that he spoke to Tutsis seeking refuge on a hill in Bisesero in June 1994. While there, he saw evidence of mass killings in the area including human corpses. The Tutsis whom he interviewed told him that these bodies remained unburied because they (the Tutsis) feared attacks by the armed Hutus near the water. Patrick de Saint Exupery, a journalist for the Paris-based *Le Figaro*, visited Bisesero in June 1994. He confirmed that a "Bisesero Hill was scattered, literally scattered with bodies, in small holes, in small ditches, on the foliage, along the ditches, there were bodies and there were many bodies."[229]

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[227] For example, witnesses OO, PP, W survived the massacres at Mubuga Church and took refuge in the Bisesero area.
[228] Trans., 4 Sept. 1998, p.59.
[229] Trans., 18 Nov. 1997, p.137.

410. Paragraph 46 of the Indictment, alleges that "the area of Bisesero was regularly attacked on almost a daily basis, throughout the period of about 9 April 1994 through 30 June 1994. The attackers used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis in Bisesero. At various times the men, women and children seeking refuge in Bisesero attempted to defend themselves from these attacks with stones, sticks and other crude weapons."

411. The above allegations were not contested. Most Prosecution witnesses, including survivors of attacks, confirmed that attacks took place on a regular basis, during the time in question. Witness OO testified that "the attacks were every day in Bisesero, but most frequent in Muyira and Gitwa. The attacks began at about 6 a.m. and would continue until about 4 to 5 p.m." Kayishema himself testified that "major attack"[230] and "massacres"[231] took place in Bisesero. There is sufficient evidence to show that attacks occurred at approximately twelve sites in the Bisesero area.[232] Dr. Haglund observed the aftermath of the massacres in September 1995 at various sites at Bisesero. Testifying about his visit to a hill on the border of Gishyita and Gisovu Commune, Dr. Haglund stated "[a]nd if one looks through field glasses or a magnifying instrument across . . . this hillside there were many white spots – it looks almost like strange mushrooms growing here and they represented skeletons, the heads of human bodies that were littered on this landscape . . ."[233] and "in a brief walk around I observed a minimum of 40 to 50 individual skeletons lying about on the hill. These were skeletons on the surface. They represented men, women, children and adults."[234]

412. All types of weapons were used by the attackers, witness JJ confirmed that attackers were carrying "clubs, machetes and grenades." Witness HH also reported that

[230] Trans., 9 Sep. 1998, p. 37.
[231] Trans., 8 Sep. 1998, p. 117.
[232] The Trial Chamber notes that some witnesses used specific names of neighbourhoods when testifying about specific attacks. For the purpose of clarity however, we have grouped neighbouring localities together and described the attacks by date.
[233] Trans., 25 Nov. 1997, p. 65.
[234] Trans., 24 Nov. 1997, p. 82.

the assailants were armed with guns, machetes, swords and spears. The forensic evidence presented by Dr. Haglund confirmed that the victims were killed with such weapons during the massacres. Tutsis, who had gathered at Bisesero, also attempted to defend themselves with crude weapons. Witness X, along with other witnesses, confirmed this fact. Witness EE stated that the Tutsis threw rocks at the assailants to thwart attacks and escape.

5.4.2 Massacres Where Kayishema and Ruzindana Acted in Concert

413. The Prosecution alleges that at various massacre sites in Bisesero, Kayishema and Ruzindana often in concert, brought and directed groups of armed attackers. Moreover, the Prosecution accuses both of personally attacking and killing persons seeking refuge in Bisesero area. Evidence shows that assailants attacked the Tutsis seeking refuge over a vast area. For clarity, the Chamber discusses the evidence chronologically and site by site, with emphasis on the most severe attacks.

Bisesero Hill

414. Witness FF saw Kayishema, Ruzindana and Mika Muhimana, the *Conseiller* of the Gishyita sector, arriving at Bisesero in a white vehicle on 11 May. Kayishema was wearing a green shirt and carrying a megaphone. Ruzindana wore a white shirt and carried a weapon. Mika said through a megaphone that they were working for the Red Cross and that peace had returned. He urged people to bring the wounded and the handicapped to the Church in Mubuga where they would get blankets and beans. As those seeking refuge emerged from their hiding places Ruzindana stepped out of his vehicle and shot at a woman and two girls. Witness FF observed these events from a distance of approximately ten meters. This Chamber finds this uncontroverted testimony.

Attacks at Muyira Hill in May

415. Muyira Hill is located in the Bisesero area on the border between Gishyita and Gisovu commune on the Gishyita side of the road that separates the two communes at this location. As Saint Exupery deposed, it was a manhunt for Tutsis. Many witnesses

identified Kayishema and/or Ruzindana at this massacre site including witnesses PP, OO, II, JJ, NN, HH, UU, FF, KK. Witnesses PP and OO were survivors of the Church in Mubuga massacres who then escaped to Bisesero. Witness PP testified that on 13 May Kayishema and Ruzindana were at the foot of Muyira Hill participating in the attacks. Witness PP clearly observed the attackers throwing grenades, chasing those seeking refuge and, before nightfall, Kayishema and Ruzindana shooting at the fleeing Tutsis. On 14 May, also at Muyira, PP heard Kayishema addressing a group of attackers who had come from other *prefectures*.

416. Witness OO testified that the Muyira attacks were led by the *Bourgmestre*, the *Prefect*, *conseillers* and Ruzindana. The attackers separated into groups and encircled the Tutsis seeking refuge. According to OO, he stated that before the attacks, Ruzindana had distributed traditional weapons to the attackers. Witness OO stated that on 13 May Kayishema and Ruzindana came to Muyira Hill leading a convoy of vehicles, including buses, which were transporting soldiers. He testified that Kayishema signalled the start of the attack by firing a shot. Witness OO stated that he saw Kayishema clearly and described that Kayishema wore a green suit on that day. Witness OO saw Ruzindana who was armed, leading one of the group of attackers. Ruzindana shot witness OO, striking him in the foot that day. The Defence noted that the witness had told the Prosecution investigator he had been shot in the leg rather than foot. The witness explained that the Kinyarwanda word he had used on both occasions was "*ikirenge,*" which means foot. The Trial Chamber is satisfied that, any discrepancy is not a material contradiction.

417. With regard to the events of 14 May, OO saw Ruzindana and Kayishema arrive with members of the *Interahamwe*. From his hiding place that morning he heard Kayishema address the attackers who came from the other *prefecture*s and remembered Kayishema saying "the dirt should be cleaned that day and that they should finish the job . . ." and that Kayishema and others would take care of what remained to be done.[235]

418. Witness II, testified that on 13 May he observed the government owned ONATRACOM buses arrive along with many other vehicles from which soldier exited. As the assailants began the attack, the Tutsis fled, after an initial attempt to defend themselves using stones. Witness II testified that he saw Ruzindana arrive with the soldiers and appear to lead them. Although during examination-in-chief II testified that he witnessed Ruzindana firing a gun at the Tutsis, in cross-examination, this statement proved to be based on an assumption rather than his direct observation. In addition, on the evening of 13 May, while he was hiding at Uwingabo Cellule, II observed the attackers regrouping. There he saw and heard Kayishema thanking those attackers from the surrounding commune and *prefecture*s, including Ruzindana, for having shown such devotion to their work.

419. On 14 May II observed the attackers as they again arrived in buses and cars. From a literal stone's throw away, II saw Kayishema and Ruzindana leading the group and observed both shoot at the Tutsis. Witness II fled in the direction of Karongi Hill and escaped. Witness II further claimed that he saw Ruzindana, on several occasions, giving money to several of the attackers.

420. Witness JJ testified to the events at Muyira Hill on 13 May. He affirmed that Kayishema, dressed in a green civilian suit, arrived in a white vehicle with military escort and Ruzindana was seen to be transporting assailants. Kayishema held a short barrelled, black gun and a hand megaphone. He divided the attackers into groups, gave instructions and fired the first shot. Witness JJ recalled that at the end of the attack, Kayishema presided over the regrouped assailants. During the examination-in-chief, JJ initially stated that he was 300 meters away from Kayishema, but later approximated the distance to have been 120 meters.

421. On 14 May, witness JJ again saw Kayishema between Gishyita Hill and Gisovu where the assailants parked their vehicles. At the end of the large-scale attack,

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[235] Trans., 20 Nov. 97, p. 86.

Kayishema brought together and congratulated the assailants from other areas. Attackers shot witness JJ in the hand during the Muyira attacks.

422. Witness NN testified that on 13 May 1994, he recognised Kayishema, Ruzindana and *Bourgmestre* Ndimbati, among the attackers. Kayishema was waiting for those seeking refuge on the road and shot in the direction of three Tutsis named Mbunduye, Munyandamutsa and Hakizimana. The record is unclear whether the witness observed the death of any of these persons. Witness NN, who stated that Ruzindana transported members of the *Interahamwe* to the massacre site on 13 May. There he fired gunshots at two Tutsis named Ragasana and Birara and shot at OO, but missed. Witness NN, who lost an eye from a grenade explosion at this site recalled how the Hill was covered with dead at the end of the attack.

423. Witness HH testified that assailants during the attack of 13 May included Kayishema, Ruzindana, Musema, Ndimbati and Sikubwabo. As OO was hiding in the forest Kayishema and Ruzindana were quite close when OO saw them shoot at a group of Tutsis seeking refuge who were at the top of the hill. Witness HH remembered the attackers singing: "The Tutsis should be exterminated and thrown into the forest . . . don't spare the newly born baby, don't spare the elderly man, don't spare the elderly woman. Kagame left the country when he was a young baby."[236] In cross-examination, HH explained that he had not mentioned Ruzindana in his written statement because the Prosecution investigator had inquired only about the presence of responsible officials. Having reviewed the written statement, the Trial Chamber finds credible the witness's explanation.

424. Witness UU observed Kayishema at Mpura Hill, a 30-minute walk from Muyira Hill, on 14 May. There, he saw Kayishema near the top of Mpura, drinking beer with other assailants before the start of the attacks. He then saw Kayishema directing other leaders to the location of Tutsis nearby. Thereafter, the attackers began to pursue the Tutsis on Mpura Hill. Witness UU testified that he saw Ruzindana giving money to the

attackers on 15 May on Gitwa Hill in Mubuga and that he had heard a conversation between him and the attackers regarding additional payments. The witness's testimony clarified that he was able to observe the exchange of money. However, UU stated that he heard only the conversation between the attackers, and not that between Ruzindana and these assailants, who confirmed that they expected Ruzindana to pay them more in the following days. If the latter version of UU's testimony regarding additional payment is how the events unfolded, the evidence proffered amounts to hearsay. However, because other witnesses, such as II corroborate Ruzindana's disbursement of payments to the attackers at various sites, the Trial Chamber finds this discrepancy to be a minor one.

425. The witnesses above provide a thorough account of the role of Kayishema and Ruzindana in the Muyira attacks of 13 and 14 May 1994. The Trial Chamber need not detail the further evidence that supports the Prosecution's case. It suffices to say that the evidence of witnesses Z and AA affirms Ruzindana was participating in the Muyira Hill attacks.

Witnesses FF and KK

426. Witnesses FF and KK provided evidence that conforms generally to the accounts of the above witnesses. However, doubt exists as to the quality or reliability of their testimony. Witness FF stated that he observed the events from the peak of Gitwa Hill. The Defence proffered evidence that Gitwa Hill is about three kilometres from Muyira Hill and suggested that FF was testifying to events that were at least half that distance away. The Prosecution failed to prove otherwise. Accordingly, the Trial Chamber is not satisfied that FF had a clear view of events and deems his evidence unreliable.

427. Witness KK was a public official in Rwanda in 1994. He testified that on 13 May, he heard the attackers singing: "let's exterminate them, let's exterminate them, we must finish off these people who are hiding in bushes. Let's look for men, everywhere so that no one remains."[237] He further testified that on 14 May, Kayishema led the attackers, shot

[236] Prosecution exh., 297.
[237] Trans., 26 Feb. 1998, pp. 33-34.

at those seeking refuge as they descended Muyira Hill, and addressed a crowd of assailants using a megaphone. In his written statements, however, KK had made no mention of Kayishema except in reference to a radio broadcast where the former Prime Minister had thanked Kayishema for being valiant. Witness KK explained this omission by stating that the Prosecution investigators had only asked him about those who came from his commune. A close review of his witness statement, however, reveals that this was not the case. The two statements made by witness KK to the investigating team, show that the investigators inquired about leaders of the attacks in general. They did not ask specific questions about the attackers' origins. For the above reasons, the Trial Chamber gives little weight to the evidence proffered by witness KK.

Attacks at Muyira Hill and Vicinity in June

428. The attacks in the Bisesero area continued into June 1994. A letter dated 12 June 1994 shows Kayishema's continued involvement in the massacres. In this letter, Kayishema requested from the Ministry of Defence a plethora of ammunition, such as "gun-propelled and hand grenades, bullets for R4 rifles and magazines for machine guns" to undertake a "clean-up operation" ("*ratissage*" in French) in Bisesero.[238]

429. Witness PP, who had seen Kayishema and Ruzindana at the attacks on Muyira Hill on 13 and 14 May, saw them again in June at Kucyapa. As PP was running through Kucyapa he saw Kayishema and Ruzindana who fired a gun at him and at the group with which he was fleeing. Later in June, PP saw Kayishema and Ruzindana for the last time near Kabanda's house. Here PP was with a group of unarmed Tutsis and saw both the accused and others fire guns and kill people. Witness PP also testified that Kabanda, a prominent businessman, was a particularly sought after target by both Kayishema and Ruzindana. Witness PP deposed that Kabanda was eventually shot by *Bourgmestre* Sikubwabo, decapitated and his head was delivered to Kayishema for reward. PP was hiding in a nearby bush when he saw Sikubwabo shoot Kabanda, but only heard about the beheading from others. The account of the beheading, given by PP, is not sufficient to prove particular direct acts of participation of the accused. However, with regard to the

acts of those under his control, in this instance *Bourgmestre* Sikubwabo, the Trial Chamber finds the evidence of this witness convincing.

430. In light of the above evidence, the Trial Chamber finds that Kayishema and Ruzindana were present at the massacres in Muyira Hill and its vicinity beginning on about 13 May 1994. Further, the Trial Chamber finds that Kayishema and Ruzindana helped transport other assailants to Muyira Hill and vicinity, instigated them to attack the Tutsis gathered there, orchestrated the method of attack, led the attacks, and personally participated in them. Additionally, with regard to Kayishema, this Chamber finds that the Prosecution has proved the participation in the massacres of his subordinates, including the gendarmes, communal police, members of the *Interahamwe*, and local officials, such as *Bourgmestre* Sikubwabo.

The Cave

431. One of the most horrific mass killings in Bisesero took place at a site simply called the "cave," located in Gishyita commune, Bisesero Sector, Kigarama cellule. Hutu assailants launched an attack on the cave where Tutsis sought refuge. The assailants came in the morning and fired guns and threw grenades into the crowd of Tutsis who sought refuge at this location. The attackers then fetched and piled wood at the entrance of the cave and set fire to it. The smoke killed hundreds of people inside. By all accounts, there was apparently only one survivor. The Prosecution asserts that Kayishema and Ruzindana were amongst those leading the attack.

432. Dr. Haglund visited the cave in September 1995 and described it by stating: "I went back perhaps 40 or 50 feet – about 10 metres. It got gradually smaller and smaller and narrower and it would make sharp turns and drops . . . ." Dr. Haglund took photographs from inside and outside the cave which the Prosecution entered into evidence.[239] Dr. Haglund further stated "as I went [further back into the cave] . . . I did observe [the remains] of many individuals, men, women and children protruding from the mud that

[238] Pros. exh., 296.
[239] Pros. exh., 152-55.

had covered them up in the intervening rainy season, and at minimum, I observed at least 40 people in this area." Witness QQ, who's sister died at the cave, testified that he saw the smoke coming from the cave on the day of the attack, as he was fleeing from the hill. Later, when he went back to the cave, he discovered that the attackers had set the fire at the entrance.

433. Witness CC is the sole survivor of the massacre at the cave. On the day of the attack, in June 1994, witness CC was inside the cave. According to witness CC, the attack was launched at 9 a.m. when the attackers threw grenades into the cave that did not explode. Members of the *Interahamwe* then went to look for wood and dry grass and piled it and firewood and earth at the entrance of the cave and ignited. On several occasions, during the attack witness CC heard the members of the *Interahamwe* talking of Kayishema and Ruzindana in a manner that would suggest they orchestrated the attack. Being inside the cave, however, CC never actually saw Kayishema or Ruzindana. CC claimed that he was able to stay alive by rubbing mud on his body and sipping dripping water. He did lose consciousness later but came to when cool air flowed into the cave after other Tutsis unblocked the entrance from outside.

434. Two witnesses, witness W and HH were hiding outside the cave and confirmed that Kayishema and Ruzindana were present and participated in the cave massacre. Witness W, who was hiding in a thorny bush less than five minutes walk from the cave entrance, testified that in May or June 1994, more than one hundred people, mostly the elderly, women and children took refuge in the cave. As the attackers arrived he heard them singing: "[w]e are going to exterminate them and put them in a hole." Kayishema, Ruzindana, *Bourgmestre* Sikubwabo and other local authorities were among the attackers. Witness W confirmed that the attack started in the morning when the attackers fired into the cave. Later they piled wood at the entrance of the cave and set the wood ablaze. Witness W further testified that Kayishema appeared to be leading a group of attackers and that Ruzindana was leading those attackers from Ruhengeri. After attackers departed at 5 or 6 p.m., Witness W and others re-opened the entrance to rescue any survivors.

435. Witness HH testified that he fled to the cave after his wife and children were killed in another part of Kigarama. He remained outside watching the assailants in the nearby forest. He recognised Kayishema, Ruzindana, Sikubwabo, Ndimbati, and other civil authorities amongst the attackers. He recounted that the assailants fired into the cave, then closed the mouth of the cave, piled wood at the entrance and set the wood ablaze on the orders of Kayishema and Ruzindana. Witness HH confirmed W's account that Kayishema and Ruzindana were leading the groups of assailants and he saw the two men giving them instructions, "just like an overseer who is demonstrating to workers how the work should be done." After the attack, HH and others removed the earth from partially blocking the cave's entrance. Although his testimony is not completely clear on this point, it appears that when HH went into the cave he found no survivors, but later one person came out alive. Among the victims were HH's mother, sister, sister-in-law and her three children.

436. The Defence claims that there is a discrepancy between the testimony of witnesses CC, W and HH with regard to when CC was rescued from the cave. The Defence asserts that CC claimed to have stayed in the cave for three days and nights after the attack, while HH and W testified that after the departure of the assailants on the same evening, the cave entrance was opened and CC was rescued. The Trial Chamber does not find such a discrepancy. It is true that CC deposed that he remained in the cave for three days and nights after the attack. However, careful review of the transcript shows that HH stated that, although the rescuers opened the cave the same evening, they did not find any survivors on that day. HH testified that later one person came out alive. This conforms with CC's account. Witness W supported HH's account that the rescuers opened the cave on the same day and that they were able to save one survivor but did not mention the day that the survivor emerged from the cave. Witness HH and W both named the survivor as CC. It is also possible that CC lost track of time as he was unconscious for an unknown period of time. Whatever the exact day of CC's exit from the cave, the testimony of the three witnesses in relation to the presence and role of Kayishema, his subordinates and Ruzindana at the cave are a consistent and credible.

437. The Chamber notes that no exact date of this event was established. Witness CC stated it was in June. Witness W indicated it happened in late May or June, but added that he was disoriented during this period due to starvation and other factors. According to witness HH, the massacre at the cave took place after French soldiers arrived, which he thought to be 30 June. The problem that witnesses have recollecting precise dates, and the consequential lack of specificity on when the events occurred, has been discussed above. In any event, the essential elements of the crimes depicting the location and nature of the atrocities correlate, thus clearly showing that the witnesses were testifying to the same massacre.

438. The Trial Chamber finds that an attack occurred at the cave and assailants killed scores of Tutsis. Further, both Kayishema and Ruzindana were present at the attack and played a leading role in directing the perpetrators of this massacre; Ruzindana of a particular group of attackers and Kayishema in general. This Chamber finds that gendarmes, members of the *Interahamwe* and various local officials were present and participated.

5.4.3 Massacres Where Kayishema and Ruzindana Acted Separately

439. There are a number of sites within the area of Bisesero area where the witnesses testified to having seen one of the two accused. The Trial Chamber first turns to evidence in relation to Kayishema, followed by that in relation to Ruzindana. Again, the evidence is presented and analysed chronologically and per site.

Attacks for Which Kayishema is Accused Separately

Karongi Hill

440. Testimony reveals that after the massacre at the Stadium, many Tutsi civilians fled to Karongi. Witness U testified that one morning in mid April Kayishema arrived with the *Conseiller* of Gitesi Commune, soldiers, gendarmes and Hutu civilians. Witness U was close to the arriving vehicles and observed Kayishema wearing a black, short sleeve

shirt and a pair of black trousers. They proceeded to attack Tutsis on Karongi Hill. During the siege, gendarmes and soldiers shot at the Tutsi crowd on the Hill while the Hutu civilians surrounded the Hill preventing escape. Witness U heard Kayishema, who was speaking through a megaphone, demand help for the attack. According to witnesses, the attack started around 10 a.m. and ended about 3 p.m.

441. After this attack at Karongi, witness U fled to Kigarama Hill (in the record transcribed as Muchigarama). Here, in late April, he witnessed another attack led by Kayishema. He stated that although Kayishema was not armed, "[i]t was as though he was a general of the army,"[240] and that thousands of Tutsis lost their lives during these attacks.

442. Witness DD testified that a large-scale attack took place at Karongi Hill towards the end of April. He saw, from a hiding place 30 to 35 meters away, that Kayishema arrived in a white car with other civic authorities, soldiers, gendarmes, communal police, members of the *Interahamwe* and civilians at about 9 a.m. Witness DD testified that Kayishema was wearing a white shirt, a black jacket and a pair of dark trousers and was carrying a long gun. After having given instructions to the attackers, Kayishema proceeded to the top of the Hill with other attackers. Kayishema shot at Rutazihana, a fleeing Tutsi refugee, and killed him instantaneously. The attack continued until the evening. Witness DD described how the slaughtered bodies on the Hill were like "small insects which had been killed off by insecticide."[241] On that day, DD lost many members of his family, including his mother, wife, nine children, four sisters and their children, five of his brother's children, two brothers and their wives.

443. During the cross-examination, the Defence Counsel stressed the difference between the written statement signed by DD and his oral testimony. In his statement to investigators the witness had described how his friend Rutazimana was killed by the bullet of a soldier, whereas in his testimony, he asserted that Kayishema had shot

[240] Trans., 6 May 1997, p. 141.
[241] Trans., 25 Feb. 1998, p. 28.

Rutazimana. The doubt raised by this inconsistency, of which the accused is entitled to the benefit, was not dispelled by the explanation of the witness. With regard to prior inconsistent statements, the Trial Chamber is of the opinion that greater emphasis should be placed on direct testimony than on unchallenged prior statements. Although the witness's oral testimony was truthful overall and the accused bears responsibility for the acts of his subordinates at this site as one of the leaders of the attack, we find that with regard to the shooting incident a reasonable doubt has been raised.

Gitwa Cellule and Gitwa Hill

444. Yet another site where Kayishema allegedly led and participated in the attacks is Gitwa Cellule and Gitwa Hill. Witness MM, who lost his wife, four children, two brothers and one sister during the attacks, testified that he (the witness) saw Kayishema when he was hiding at Mukazirandimbwe. Kayishema came in a white double-cabin vehicle with soldiers and members of the *Interahamwe* who were carrying guns, clubs, machetes and spears. Kayishema ordered and urged the assailants to exterminate the Tutsis seeking refuge there. Witness MM saw Kayishema three times at Gitwa in similar circumstances during May. He testified that although he did not see Kayishema carry a weapon or observe any killing, he stated that, "wherever one went one saw nothing but bodies."[242]

Attacks for Which Ruzindana is Accused Separately

Mine at Nyiramuregro Hill

445. Nyiramurego Hill, where a mine is located, is in Bisesero sector. Witness RR testified that he saw Ruzindana arrive in a vehicle with members of the *Interahamwe*, park his car at the foot of the hill and distribute machetes and guns about 15 April. According to this witness Ruzindana told the attackers to "hurry up, I'm going to bring other people to help you. But each time bring me an identity card or a head and I will pay you." Although after cross-examination the exact distance at which RR observed Ruzindana remained unclear, RR maintained that he was close enough to hear and see Ruzindana on that occasion.

446. Two witnesses gave specific accounts regarding another incident involving Ruzindana at Nyiramurego Hill. Witnesses II and EE stated that a group of Tutsis, who had taken refuge in the Mine, in this Hill, were killed by Ruzindana, members of the *Interahamwe* and soldiers. Both witnesses testified that a young Hutu boy who knew of these Tutsis hiding place brought the attackers to this site. Specifically, II testified that one morning after the Muyira attack on 14 May (either in May or June), while he was hiding near the road by this Hill, he saw Ruzindana arrive in a vehicle accompanied by the members of the *Interahamwe*. Ruzindana stayed by the roadside while the assailants began to uncover the mine entrances and kill those hiding within. Two young Tutsi women were discovered in the Mine by the members of the *Interahamwe* and Ruzindana ordered that they be brought to him. One of these young women, named Beatrice, a former schoolmate of II's, was approximately sixteen years old. Ruzindana tore open her blouse and then slowly cut off one of her breasts with a machete passed to him by an members of the *Interahamwe*. After he finished, Ruzindana cut off her other breast while mockingly telling her to look at the first breast as it lay on the ground. He then tore open her stomach. Beatrice died as a result of the assault. A member of the *Interahamwe*, following Ruzindana's lead, immediately proceeded to kill the second young woman while Ruzindana watched. With some slight variation, witness EE confirmed this account. Both witnesses observed this event from hiding places alongside the road, adjacent to where Ruzindana and the assailants stopped to carryout the attack. Witness EE added that his family members were killed before his eyes as members of the *Interahamwe* and soldiers uncovered the holes in which the Tutsis were hiding and proceed to kill them and other Tutsis using firearms and machetes.

447. The Trial Chamber is satisfied that both witnesses were able to observe the incident with sufficient visibility because the event occurred during the daytime and both were hiding within viewing distance. Furthermore, they both had known Ruzindana previously. Accordingly, the Trial Chamber is satisfied that the witnesses made proper identification of Ruzindana.

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[242] Trans., 24 Feb. 1998, p. 27.

Bisesero Hill

448. During the second half of April 1994, witness Z observed regular attacks during which Ruzindana was present with members of the Presidential Guard and members of the *Interahamwe*. During these attacks Ruzindana would generally wait by his vehicle and give instructions to the attackers. At one of these attacks, on 14 April 1994, witness Z was hiding close to Ruzindana, on Bisesero Hill. Witness Z heard Ruzindana give orders to the assailants to surround the hill and begin the attack. This witness also claimed that Ruzindana was armed and shot at the Tutsis. However, the witness stated that "not many people died during this time period," but that there was pillaging of property that was distributed later amongst the attackers. The Trial Chamber is satisfied that Ruzindana was present and played a pivotal role in the massacres at this site by ordering the assailants to surround the Hill and kill the Tutsis hiding there.

Gitwa Cellule

449. Another massacre site where Ruzindana was present was Gitwa Cellule. On 15 April 1994, witness KK saw Ruzindana transport assailants to this site in a vehicle, which he knew belonged to Ruzindana. Furthermore, witness KK was approximately 50 meters away when he saw Ruzindana shoot a Tutsi man named Ruzibiza in the leg. Ruzibiza fell to the ground.

450. Later, in early May, witness MM observed Ruzindana leading members of the *Interahamwe* during a massacre at this location. The assailants began to chase MM and other Tutsis. MM's wife, who was carrying their child on her back, was running behind MM when she was shot. As he was fleeing the scene, MM turned around to see the attackers, and claims to have seen Ruzindana aiming and firing at his wife. After the attack he returned to the place where his wife had fallen and saw that she had a bullet wound and had been mutilated by traditional weapons. Both his wife and baby were dead. When questioned by the Defence about the circumstances under which MM saw Ruzindana firing the gun, he admitted that he only saw Ruzindana for a short time and that he didn't know how a gun worked.

451. The Trial Chamber is satisfied that Ruzindana was amongst a group of attackers at the site who pursued the Tutsis hiding there in an attempt to kill them and that witness MM's wife and baby died as a result of this attack. The Trial Chamber is also satisfied that Ruzindana attempted to kill MM's wife because MM deposed that he saw Ruzindana aim in her direction. However, the Trial Chamber is not satisfied, beyond a reasonable doubt, that Ruzindana's gunshot actually struck MM's wife or that she in fact died from the bullet wound she received. The Prosecution did not establish that Ruzindana was the only assailant amongst the group who was firing into the fleeing Tutsis and the actual cause of her death remains unclear. The Defence challenged the credibility of MM on the ground that, in cross-examination, MM said that he had not met other Rwandans during his stay in Arusha. The Defence pointed out that it is well known that Prosecution witnesses are lodged together in the same house during their stay in Arusha. On re-examination, when asked why he refused to admit such a fact, MM claimed that he thought the question had referred to people with whom he was sharing his bed. Despite the confusion of this response the Trial Chamber is satisfied that MM's testimony represented a strong and accurate account of the events in Bisesero.

The Vicinity of Muyira Hill

452. Attacks in the vicinity of Muyira Hill continued into June 1994. Witness II testified to one event at a hole formed by water running under the road in an area called Gahora in Gitwa Cellule. According to II, in early June many Tutsis children, as well as adults, were hiding in this hole; amongst them II's younger brother and sister. While hiding in the bush, just five meters away, witness II saw members of the *Interahamwe* coming down the valley to drink water from a tap near the hole. On discovering the Tutsis hiding there, the members of the *Interahamwe* informed Ruzindana that they had found "inyenzi." Ruzindana sent soldiers to monitor the hole and II heard him say that he was going to Gishyita to look for tools. Ruzindana returned with spades and a hose at about 1 p.m., at which time the soldiers and members of the *Interahamwe* began to unearth the Tutsis. The massacre started when Ruzindana and other soldiers opened fire. Many Tutsis died in the hole while others were shot or hacked to death near the roadside

as they tried to escape. After the attack, II found his brother and sister murdered in the nearby bushes. During cross-examination, II remained true to this account. The Trial Chamber finds beyond reasonable doubt that Ruzindana was present, participated and led the attack on the hole where an unknown number of Tutsi civilians were killed, including II's brother and sister.

5.4.4 Bisesero Analysis and Findings

453. Paragraphs 45 and 46 of the Indictment have been discussed above and the allegations therein, were not contested by the Defence.

454. Paragraph 47 of the Indictment directly implicates both the accused persons in the attacks at Bisesero. The most consequential evidence is the identification of the accused at the massacre sites by Prosecution witnesses. Also of grave importance in the case of Kayishema, is evidence of the participation of those under his control. The Trial Chamber is mindful of its obligation to vigorously analyse the evidence. Very pertinent is the witnesses' who knew the accused prior to the massacres; identification is far more reliable when it is based upon recognition of a person already known to the witness. Equally important are the conditions under which the witnesses identified the accused.[243] These issues are discussed below.

455. The Prosecution presented numerous eyewitnesses who testified that they saw Kayishema at various massacre sites in Bisesero. Most Prosecution witnesses claimed that they knew Kayishema before the events. Most commonly the witnesses recognised or knew Kayishema because he was the highest government official in Kibuye. For instance, OO and HH claimed to 'know' Kayishema because he was the *Prefect* of Kibuye *Prefecture* and OO had met Kayishema at the installation of the *Bourgmestre* Sikubwabo. Witness OO added that all the inhabitants of Gishyita commune knew Kayishema because he was seen at civic rallies and meetings. In this regard, witness II stated that he saw Kayishema at the swearing ceremony of Sikubwabo. Witness DD had

[243] See Part 3 on Evidentiary Matters, *supra*.

seen Kayishema at meetings and recalled one such meeting at the Stadium. Witness HH testified that he used to see Kayishema at meetings and NN claimed to have participated in meetings organised by Kayishema. Witness KK had worked with Kayishema each time there was a meeting to organise. Witness PP knew Kayishema when the accused was a medical doctor at Kibuye hospital. A number of witnesses also knew Kayishema's family. For example, witness OO, knew Kayishema's grandfather and mother; witness JJ knew Kayishema's father; and witness UU greeted Kayishema in 1992 or 1993 when Kayishema came to visit his (Kayishema's) grandfather. Witness PP met Kayishema at Kibuye church when Kayishema had gone to see a priest there. All Prosecution survivor witnesses successfully identified of Kayishema in court. This prior familiarity with Kayishema enhanced the reliability of the witness's identification of Kayishema heard by the Trial Chamber.[244]

456. Similarly, most of the witnesses testified that they knew Ruzindana in some capacity prior to the massacres. Evidence suggests that Ruzindana was one of the most prominent traders in Kibuye and that his family was well known generally because his father had been the *Bourgmestre* of Gisovu. Some knew him personally, that is they had had contact with him previously or knew his family. For example, witness FF studied with Ruzindana. Ruzindana attended social functions at which witness OO was also present and had business dealings with him. Witness NN claimed to have been Ruzindana's friend and that he knew some members of his family. Witness RR had known Ruzindana since he was old enough to recognise people, and had been a fellow guest at the marriage of a local man named Antoine. Witness Z had known Ruzindana since at least 1986 and HH had known him long before 1994, having met him at the market and being a customer at his family's shop. Ruzindana was also a neighbour of witness BB's parents and they had played football together.

457. Other witnesses, knew Ruzindana by sight due to his reputation as a prominent businessman in their community and/or because of his father's standing in the

[244] For a detailed explanation of the identification requirement see Chapter 3.2, *supra*.

community.[245] Examples of such witnesses are II, KK, MM and PP. All Prosecution survivor witnesses successfully identified Ruzindana in court. This prior familiarity with the identity of Ruzindana enhanced the reliability of the identification evidence heard by the Trial Chamber.[246]

458. It is apparent that when the witnesses stated that they 'knew' the accused they were not always referring to a personal acquaintance or friendship. Rather, the witnesses were sometimes referring to 'knowing of' or 'knowing who the accused was,' due to his prominence in the community. The Trial Chamber is satisfied that the use of such phraseology was not an attempt by the witnesses to mislead the Trial Chamber. Indeed, it is consistent with common usage in much the same way as one would say that they 'knew' President Nelson Mandela, even though they have never met him through his image in the media. In any event, for the purposes of identification, it is the physical recognition of the accused rather than personal acquaintance which is most pertinent. The above evidence suggests that most of the witnesses who identified Kayishema and/or Ruzindana, were aware of the physical appearance of the accused prior to seeing them at the massacre sites.

459. The conditions under which the witnesses saw the accused was closely scrutinised by the Defence teams. The Trial Chamber notes that all of the identifications at the massacre sites occurred in daylight. The witnesses were generally questioned about the distance from which they observed the accused. The evidence indicates that almost all of the witnesses were close enough to clearly observe the accused during the attacks and the level of detail provided by the witnesses supports this assertion. For example, at the Muyira Hill attack, where the witnesses were looking down at the accused from higher positions during daylight, the witnesses provided precise details regarding the accused participation. Witness PP saw both accused shooting at Tutsi; OO was close enough to see Kayishema wearing a green outfit and the following day recalled hearing specific words as Kayishema addressed the attackers; JJ also remembered Kayishema's green suit

[245] Ruzindana's father, Murakaza was also a businessman and a former *Bourgmestre*.
[246] *Ibid*.

on May 13 and added that Ruzindana was carrying a gun; II observed Kayishema thanking assailants on 13 May and saw both accused shoot at Tutsis on 14 May; NN testified that Ruzindana chased and shot at him; and HH, from his hiding place in the forest, observed both accused as they shot at those seeking refuge on top of the Hill.

460. A further example is the massacre at the cave; witnesses W and HH insisted that they had a clear view of the accused from their hiding places. Witness W stated that he was in bushes 'less than five minutes walk away,' whereas HH was concealed in the nearby forest. The ability of HH to see these events is supported by photographic exhibit 310, which represents HH's view of the cave from his hiding place. Lastly, witnesses EE and II identified Ruzindana as Beatrice's killer, at the Mine, from their respective hiding places alongside the road; both witnesses testified that they were close enough to hear Ruzindana. Prosecution photographic exhibits regarding these hiding places indicates that these witnesses could have clearly seen Ruzindana whist remaining concealed.

461. After reviewing the witness testimonies and Prosecution exhibits, the Trial Chamber is satisfied, beyond a reasonable doubt, that Kayishema was properly identified by prosecution witnesses FF, PP, OO, II, JJ, NN, HH, UU, W, U, DD and MM, as having participated in one or more of the assaults on the Tutsi population. And, that Ruzindana was properly identified by Prosecution witnesses FF, PP, OO, II, JJ, NN, HH, UU, W, EE, Z, KK, RR and MM, as having participated in one or more assaults.

462. Paragraph 47 of the Indictment alleges specifically that at various locations throughout April, May and June 1994, and often in concert, Clement Kayishema and Obed Ruzindana brought to the area of Bisesero members of the *gendarmerie nationale*, communal police, *Interahamwe* and armed civilians and directed them to attack people seeking refuge there. The Trial Chamber opines that bringing attackers to Bisesero could mean either personally transporting them in the same vehicle, or leading a convoy of vehicles. Furthermore, evidence to prove that the accused transported or lead the attackers from one area within Bisesero to another area within

Bisesero is enough to satisfy the wording of paragraph 47 of the Indictment. It is not incumbent on the Prosecution to prove from where the attackers came.

463. In relation to the 13 and 14 May assault at Muyira Hill, witnesses OO, II, JJ and NN testified that they had seen Kayishema and Ruzindana arrive at the head of the convoy of vehicles which transported the assailants to the massacre site. Testimony reveals that Ruzindana personally transported attackers. The witnesses confirmed that soldiers, members of the *Interahamwe*, communal police and armed civilians, were amongst the attackers. Evidence provided by OO, JJ and UU proves how Kayishema directed the assaults, by splitting the assailants into groups, leading a group as it advanced up the Hill and indicating places where the Tutsis could be found. Indeed, PP, OO, II and JJ heard Kayishema address a group of attackers, encouraging them to 'work' harder or thanking them for "work" done. Evidence shows that Kayishema used a megaphone to address the congregated attackers. Witness OO and JJ further testified that Kayishema signalled the start of the attacks by firing a shot into the air. Ruzindana also played a leadership role, heading a group of attackers up the Hill and shooting at those seeking refuge, as evidenced by II and OO. Witness OO also saw Ruzindana distributing traditional weapons prior to the attacks.

464. Evidence proffered in relation to other sites confirms the leadership role of both the accused. At the cave, W testified that Kayishema was directing the siege generally and Ruzindana was commanding the attackers from Ruhengeri; HH added that both the accused appeared to be giving instructions, as if demonstrating how the cave should be blocked, wood collected and fire built. At Karongi Hill, U saw Kayishema arrive with soldiers, gendarmes and Hutu civilians and use a megaphone to address the attackers; DD also observed Kayishema at this site giving instructions to soldiers, gendarmes, communal police and members of the *Interahamwe*. Ruzindana was also seen transporting members of the *Interahamwe* to the Mine at Nyiramurego Hill and then directing the attackers. At Bisesero Hill witness Z heard Ruzindana give orders to the assailants to surround the Hill and begin the assault.

Witness KK testified that Ruzindana transported attackers to Bisesero Hill and, in the following month, MM observed Ruzindana there leading members of the *Interahamwe*. Witness II testified that the massacre at the hole near Muyira Hill was orchestrated by Ruzindana and that it commenced on his instruction.

465. The strength and reliability of this evidence was not effectively challenged in Court. Accordingly, the Trial Chamber is satisfied that both Kayishema and Ruzindana brought members of the *gendarmerie nationale*, communal police, members of the *Interahamwe* and armed civilians to the area of Bisesero and directed them to attack those Tutsis seeking refuge.

466. Paragraph 47 of the Indictment further alleges that Kayishema and Ruzindana personally attacked and killed people seeking refuge in Bisesero. There is an abundance of evidence that reveals how Kayishema and Ruzindana participated in the attacks. Along with the evidence discussed in paragraphs above, many witnessed testified that they observed Kayishema and/or Ruzindana personally shoot at Tutsi those seeking refuge. At Bisesero Hill in April, Z recognised Ruzindana as he shot at those seeking refuge. Later, at a similar spot in May, FF was just metres from Ruzindana when he observed him shooting at women and two girls. At Muyira Hill in May PP, II, NN and HH witnessed both the accused shooting at Tutsis as they fled. In June, PP was shot at by Kayishema and Ruzindana at Kucyapa. Two eyewitnesses testified that Ruzindana killed a young girl named Beatrice. At Gitwa Cellule in April, KK was approximately 50 metres from Ruzindana as he shot Ruzibiza, hitting him in the leg. And, MM testified that Ruzindana shot his wife in May.

467. The major contention of the reliability of witnesses, which was raised by the Defence, has been discussed within the analysis of evidence relating to the particular site. Defence challenges did not negate the quality and strength of the above evidence. The Trial Chamber is satisfied beyond reasonable doubt that Ruzindana and Kayishema personally attacked Tutsis seeking refuge during the assaults described in Bisesero.

468. There is also strong evidence to show that both accused persons personally aided in the killings. The Trial Chamber is left with no doubt that Kayishema and Ruzindana aided and abetted, the killings through orchestration and direction.[247] Kayishema further abetted through his inciting speeches to assailants, and Ruzindana by his provision of transportation and weapons. The evidence proves that Kayishema and Ruzindana personally assisted in attacks that resulted in the killing of Tutsi civilians.

469. Cases of personal killing by Kayishema or Ruzindana relating to specific individuals is less certain. There is ample evidence to show that both the accused personally attempted to kill or injure those seeking refuge, generally by shooting at them. However, as discussed within the above text, in most instances where a witness testified to one or both of the accused shooting at a refugee, the Prosecution failed to establish a resulting death.[248] This is not surprising considering the circumstances under which the witnesses observed the events. One would not expect a fleeing refugee to risk his or her life in order to verify the death of a victim. Nonetheless, it is not for the Trial Chamber to speculate if Tutsis died as a direct consequence of shooting, or other acts, by an accused.

470. One instance where sufficient evidence has been proffered is the killing of Beatrice by Ruzindana. Witnesses II and EE both provided a horrific account of Ruzindana cutting off the breasts of Beatrice before killing her by slashing her stomach with a machete. The witnesses clearly observed Ruzindana mutilate and murder her, both heard him mock his victim in the process. Both witnesses recognised the victim, one of them as a former schoolmate and the other as a prominent person from the area. Both witnesses named the victim as Beatrice. Both witnesses deposed that Beatrice died as a result of Ruzindana's actions. For these reasons, the Trial Chamber is satisfied, beyond a reasonable doubt, that Ruzindana mutilated and personally killed Beatrice.

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[247] See for example, the evidence relating to the massacres at Muyira Hill, the cave and the Mine at Nyiramuregra Hill.

[248] See the analysis of the evidence within the specific site Chapter s above.

471. In paragraph 48 of the Indictment the Prosecution alleges that the attacks resulted in the deaths of thousands men, women and children. All survivor witnesses attested to the fact that thousands were killed in the Bisesero area during April through June 1994. Witnesses, including Dr. Haglund and several journalists, confirmed this fact. Kayishema himself testified that massive burial efforts had taken place in this area.

472. Finally, in paragraph 49 of the Indictment it is alleged that Kayishema did not take measures to prevent the attacks or to punish the perpetrators is discussed in Chapter 6.1 of the Judgement, *infra*.

VI. LEGAL FINDINGS

6.1 KAYISHEMA'S COMMAND RESPONSIBILITY

473. The Trial Chamber has made its findings as to fact. It is clear that Kayishema and Ruzindana either planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of many of the criminal acts prohibited by Articles 2 to 4 of this Statute, in relation to each crime site. Their individual criminal responsibility under Article 6(1) has been proven beyond a reasonable doubt and is set out by the Trial Chamber in its legal findings for the relevant counts. The factual findings which go to prove this individual criminal responsibility are also relevant to Kayishema's responsibility as a superior, in particular his knowledge and prevention of the attacks.

474. The extent of the liability to be incurred by Kayishema alone under the doctrine of command responsibility pursuant to Article 6(3) warrants further elaboration. In relation to the crime sites of the Complex, the Stadium, and Mubuga Church the Indictment asserts: 'Before the attack on the [site] Clement Kayishema did not take measures to prevent the attack, and after the attack Clement Kayishema did not punish the perpetrators.' See paragraphs 30, 37, and 43. In relation to the Bisesero Area the Indictment asserts: 'Throughout this time, Clement Kayishema did not take measures to prevent the attack, and after the attack Clement Kayishema did not punish the perpetrators.' See paragraph 49.

475. In relation to the extent of the liability to be incurred by Kayishema under the doctrine of command responsibility, the General Allegations of the Indictment assert, at paragraph 22, that Kayishema is responsible, as a superior, for the criminal acts of his subordinates in the administration, *gendarmerie nationale* and communal police. In relation to the specific sites it is alleged that Kayishema ordered these assailants and others such as the members of the *Interahamwe* and armed Hutu civilians to attack the Tutsi. As such, and in light of the proven facts, it is incumbent upon the Trial Chamber

to consider the degree of control exercised by Kayishema over the assailants, and his corresponding culpability for their criminal acts. The Chamber, where appropriate, will then proceed to examine[249] whether Kayishema took measures to prevent the attacks or punish the perpetrators, under each crime site.

The Assailants

476. *Bourgmestre*s and other members of the administration, gendarmes, soldiers, communal police, prison wardens, members of the *Interahamwe* and armed civilians were identified at the massacre sites and the Trial Chamber has found that they participated in the atrocities at these sites. The question which the Trial Chamber must address, therefore, is whether Kayishema exercised *de jure* or *de facto* control over these assailants.

477. Both the Prosecution and Defence laid heavy emphasis upon whether Kayishema enjoyed *de jure* control over the appropriate administrative bodies and law enforcement agencies. Notably, both Parties also emphasised the turmoil that prevailed between April and July 1994. The Defence, for example, described, "a society that no longer recognised the rule of law"[250] and, in summarising the evidence of Professor Guibal, submitted that, "in common language, after the crash of the President's plane, the situation that occurred was such that a government had to be invented."[251]

478. The Chamber is mindful of the need, therefore, to view the *de jure* powers of Kayishema with an appreciation that, at the time, a chaotic situation that prevailed. Accordingly, any consideration as to the *de jure* powers exercised by Kayishema must be subject to an elucidation of the *de facto* power, or lack thereof, that he held over the assailants.

[249] The law relating to this area has been discussed *supra* in Chapter 4.4.
[250] Closing arguments, Mr. Ferran, Trans., p. 112, 3 Nov. 1998.
[251] *Ibid*., p. 90, 4 Nov 1998.

De Jure Control

479. The Indictment states that the *Prefect* as trustee of the State Authority in the *Prefecture* had control over the *Prefectoral* administration and its agencies. The Chamber has found that, *inter alia*, *Bourgmestre* Sikubwabo, a number of communal police, and members of the *gendarmerie nationale* were responsible for numerous deaths and injuries inflicted upon innocent Tutsis.

480. The Trial Chamber finds that it is beyond question that the *Prefect* exercised *de jure* authority over these assailants. The Rwandan law is very clear in this respect.

481. The *Prefects'* position *vis-à-vis* the *bourgmestre* is evidently one of hierarchical authority and supervisory jurisdiction. Two Rwandan statutes support this finding. The first, *Loi sur l'organisation de la commune*, 1963, clearly implies in Article 59 that the *bourgmestre* is under the hierarchical authority of the *Prefect*.[252] The same law provides at Article 85 that where a communal authority fails to execute measures prescribed by law or decree, then the *Prefect* may, ultimately, supplant this communal authority in order to remedy their inaction.[253] Moreover, at Articles 46 and 48, the *Loi sur l'organisation de la commune*, 1963, establishes the power of the *Prefect* to take disciplinary sanctions against a *bourgmestre* and even to propose his dismissal to the Minister of the Interior. Coupled with this is the law as promulgated in the second statute submitted to this Trial Chamber, the *Décret-Loi organisation et fonctionnement de la préfecture*, 11 March 1975. Article 15 of this statute makes clear that, in addition to the hierarchical authority that the *Prefect* exercises over the *bourgmestre*s and their services, he also has a general power of supervision over the acts of the communal authorities. Therefore, these provisions, coupled with the *Prefect's* overarching duty to maintain

[252] Article 59: En tant que représentant du pouvoir exécutif, le *Bourgmestre* est soumis à l'autorité hiérarchique du préfet.

[253] Article 85: Lorsque les autorités communales font preuve de carence et n'exécutent pas des mesures prescrites par les lois ou règlements, le préfet peut après deux avertissements écrits restés sans effet se substituer à elles. Il peut prendre toutes les mesures appropriées pour parer à leur défaillance.

public order and security, reflect the ultimate hierarchical authority enjoyed by the *Prefect* over the *bourgmestre*.[254]

482. The communal police are under the direct control over the *bourgmestre*. This matter was not disputed, and reflects the findings of the Trial Chamber in the *Akayesu* Judgement. Even if it is not axiomatic that the *Prefect* would hold the corresponding hierarchical *de jure* authority over the communal police, the law provides that in the situation which faced Rwanda and Kibuye *Prefecture* in 1994, it is the *Prefect* who retains ultimate control. To this end, the *Loi sur l'organisation de la commune*, 1963, allows the *Prefect* to requisition the communal police and place them under his direct authority in cases of grave public disorder or in times when unrest has occurred or is about to occur.[255]

483. Similarly, the *Prefect* exercises this ultimate authority of requisition over the *gendarmerie nationale*. The position set out in the *Décret-Loi sur la création de la Gendarmerie Nationale*, 1974, states that any competent administrative authority may requisition the *gendarmerie nationale*, that the advisability of the requisition cannot be questioned as long as it does not contravene any law or regulation, and that the requisition persists until the requisitioning authority informs the *gendarmerie* otherwise.[256] Moreover, the *gendarmerie nationale* may *only* execute certain functions, notably, ensuring the maintenance and restoration of public order, when it is legally requisitioned to do so.[257] The Trial Chamber recalls that Kayishema requisitioned the

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[254] *Article 15: Le préfet, en plus du pouvoir hiérarchique qu'il a sur les Bourgmestres et leurs services administratifs, dispose sur les actes des autorités communales, du pouvoir général de tutelle, determiné par les dispositions de la loi communale.*

[255] *Article 104 (para. 2): Toutefois, en cas de calamité publique ou lorsque des troubles menacent d'éclater ou ont éclaté, le préfet peut réquisitionner les agents de la Police communale et les placer sous son autorité directe.*

[256] *Article 29: L'action des autorités administratives compétentes s'exerce à l'égard de la Gendarmerie Nationale par voie de réquisition; Article 33: L'autorité requise de la Gendarmerie Nationale ne peut discuter l'opportunité de la réquisition pour autant qu'elle n'aille pas à l'encontre d'une loi ou d'un règlement; Article 36: Les effets de la réquisition cessent lorsque l'autorité requérante signifie, par écrit ou verbalement, la levée de la réquisition à l'autorité de Gendarmerie qui était chargée de son exécution.*

[257] *Décret-Loi sur la création de la Gendarmerie Nationale, reading Articles 4 and 24 in conjunction: Article 4 (para. 3): Les fonctions extraordinaires sont celles que la Gendarmerie Nationale ne peut remplir que sur réquisition de l'autorité compétente; Article 24 (Under section 23, Extraordinary functions): La*

gendarmerie both by telephone, and in writing, in the face of the public disorder that prevailed in Rwanda in the pivotal months of April to July 1994.

484. This *de jure* power of the *Prefect* was confirmed by the expert Defence witness, Professor Guibal. In his testimony to the Trial Chamber he opined that, even after the 1991 Constitution, in the advent of multiple party politics,

> the *Prefect* had considerable powers with regard to the *prefectorial* conference. The *Prefect*, according to the text of 1975, . . . could even requisition the intervention of the armed forces. The *Prefect* can define regulations for law and order and he can punish directly. . .[258]

485. Further, when Counsel for Kayishema asked whether, in light of the multi-party politics, it was, "a co-ordination role that the *Prefect* plays rather than the exercise of hierarchical power", Professor Guibal replied, "normally the relationships fall under the hierarchy rather than under co-ordination".[259]

486. Professor Guibal then proceeded to describe how the situation would have been very different in the tumultuous realities of Rwanda in 1994. The situation in the country and the peculiar nature of the party-orientated constitution would have led to what he described as "crisis multi-partyism". Although he did not examine the specific context of the Rwandan crisis, he explained that such a *status quo* would have arisen because each respective party would have felt that the situation should be resolved through them, not the constitution. A dichotomy between political and administrative hierarchy would have emerged. This led Professor Guibal to the conclusion that although the power of the *Prefect* over the forces of law and order existed formally in 1994, these powers were emptied of any real meaning when the ministers, the ultimate hierarchical superiors to the police, gendarmes and army, were of a different political persuasion.

Gendarmerie Nationale assure le maintien et le rétablissement de l'ordre public lorsqu'elle en est légalement requise.

[258] Trans., 27 May 1998, p.125.

[259] *Ibid.*

487. The Trial Chamber is of the opinion that such assertions clearly highlight the need to consider the *de facto* powers of the *Prefect* between April and July 1994. Such an examination will be conducted below. However, the delineation of power on party political grounds, whilst perhaps theoretically sound, should only be considered in light of the Trial Chambers findings that the administrative bodies, law enforcement agencies, and even armed civilians were engaged together in a common genocidal plan. The focus in these months was upon a unified, common intention to destroy the ethnic Tutsi population. Therefore, the question of political rivalries must have been, if it was at all salient, a secondary consideration.

488. The actions of Kayishema himself also appear to evidence a continued subordination of the *bourgmestre*s to his *de jure* authority during the events of 1994 or, at least, an expectation of such subordination. Prosecution exhibit 51, for example, is a letter from Kayishema to the *bourgmestre*s requesting that they recruit people to be "trained" for the civil defence programme. Prosecution exhibit 53 is another letter from Kayishema to the *bourgmestre*s, dated 5 May 1994, which requests an urgent report on the security situation in their communes and to inform him of where "the works" had started. In addition, Kayishema testified to this Trial Chamber that in late May 1994, he went to the *Bourgmestre*s in his *prefecture* and instructed them to disregard a letter that they had received directly from the Minister of Interior relating to the civil defence programme. His clear objective in doing so was to prevent the *Bourgmestre*s from implementing the explicit instructions of the Minister.[260]

489. Even in the climate that prevailed, therefore, Kayishema clearly considered that this hierarchical relationship persisted and expected his 'requests' to be executed. Accordingly, the Trial Chamber finds that it is beyond any doubt that Kayishema exercised *de jure* power over the *Bourgmestre*s, communal police, gendarmes and other law enforcing agencies identified at the massacre sites.

[260] Trans., 3 Sept. 1998, p. 113. The Trial Chamber was never seized of the details of these instructions. However, the contents of these instructions are only of secondary importance.

De Facto Control

490. However, the jurisprudence on this issue clearly reflects the need to look beyond simply the *de jure* authority enjoyed in a given situation and to consider the *de facto* power exercised. The Trial Chamber in the *Celebici* case stated that in the fact situation of the Former Yugoslavia, where the command structure was often ambiguous and ill-defined,

> . . .persons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so. Thus the Trial Chamber accepts the . . . proposition that individuals in positions of authority, whether civilian or military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as their *de jure* positions as superiors. *The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude impositions of such responsibility*.[261] [emphasis added]

491. Thus, even where a clear hierarchy based upon *de jure* authority is not present, this does not prevent the finding of command responsibility. Equally, as we shall examine below, the mere existence of *de jure* power does not always necessitate the imposition of command responsibility. The culpability that this doctrine gives rise to must ultimately be predicated upon the power that the superior exercises over his subordinates in a given situation.

492. The Trial Chamber has found that acts or omissions of a *de facto* superior can give rise to individual criminal responsibility pursuant to Article 6(3) of the Statute. Thus, no legal or formal position of authority need exist between the accused and the perpetrators of the crimes. Rather, the influence that an individual exercises over the perpetrators of the crime may provide sufficient grounds for the imposition of command responsibility if it can be shown that such influence was used to order the commission of the crime or that, despite such *de facto* influence, the accused failed to prevent the crime. The *Celebici* case provides an exposition of the jurisprudence on this point.[262] One

[261] Celebici Judgement, para. 354.
[262] *Ibid*., paras. 375-376.

particularly pertinent example is the *Roechling* case which the Trial Chamber in the *Celebici* Judgement summarised as,

> . . . an example of the imposition of superior responsibility on the basis of *de facto* power of control possessed by civilian leaders. While the accused in this case were found guilty, *inter alia*, of failing to take action against the abuse of forced labourers committed by members of the Gestapo, it is nowhere suggested that the accused had any formal authority to issue orders to personnel under Gestapo command.[263]

493. This passage is instructive not only when considering Kayishema's control over the less explicitly documented command structures which existed in Rwanda in 1994, such as the members of the *Interahamwe* and those armed civilians involved in the 'civil defence programme'; but also when examining the realities of Kayishema's relationship with *bourgmestre*s, communal police and the *gendarmerie nationale*.

494. Defence witnesses such as DN and DK testified to the lack of material means available for the *Prefect* to control the public disorder that ensued after the death of the President. Trial Chamber notes, however, that these witnesses did not actually contest the control that the *Prefect* exercised over the law enforcing and administrative bodies.

495. It was the Defence's position that the *Prefect* had insufficient means to prevent those assailants, including a few defecting members of the army and *gendarmerie nationale*, from committing the massacres of 1994. Kayishema himself testified that he had sent what gendarmes he had at his disposal to the area of Bisesero, but that there was little that could be done.

496. Professor Guibal, for the Defence, described how the *status quo* that emerged in 1994 after the death of the President would have been one where the traditional influence and power of the *Prefect* would have been greatly reduced. He was of the opinion that the authority the *Prefect*, as a member of a political party and in the climate of the "crisis multi-partyism", would have been diminished, both *de jure* and *de facto*.

[263] *Ibid*., para. 376.

497. In this respect, Professor Guibal referred to a 'paralysis of power' suffered by the *Prefect*. Accordingly, it was submitted by the Defence, the political and administrative uncertainty that reigned between April and July 1994 was such as to curtail the *Prefect's* power of requisition and his influence over administrative bodies. This uncertainty, the Defence submitted, also manifested itself amongst the population as a whole. Professor Guibal opined that the citizens in such a climate of uncertainty would receive instructions and orders with difficulty.

498. In short, the Defence submitted that in the pivotal months of 1994, Kayishema was in not in a *de facto* position to control the actions of the assailants and that he was neither in a position to prevent nor to punish the commission of the massacres in his *Prefecture*.

499. Once again, however, the theoretical underpinning proffered by Professor Guibal does not reflect the reality that the Trial Chamber has found existed in Rwanda. The *Prefect* was a well-known, respected, and esteemed figure within his community.[264] The testimony of Kayishema provides an illustrative example of the influence that the *Prefect* enjoyed. He related to the Trial Chamber an instance in August 1992 when, soon after taking office, he was telephoned by the *Bourgmestre* of Gishyita Commune. The *Bourgmestre* reported that houses were being burnt down in his commune, people were fleeing and the situation was chaotic. Kayishema told the Trial Chamber that he was requested to go directly to the scene and intervene, that the *Bourgmestre* had said "I just want your presence here on the spot."[265]

500. The Trial Chamber draws three basic conclusions from this. Firstly, it is indicative of the effect that Kayishema's presence at a scene could have, thus is appurtenant to the responsibility he must bear in aiding and abetting the crimes pursuant to Article 6(1). Secondly, in times of crisis it was ultimately the *Prefect* that was called upon, with all the powers of influence that such a bearer of that title wielded. Finally, it also reflects the *de*

[264] See Part II, Historical Context.
[265] Trans., 3 Sept. 1998, p. 113.

facto influence he had and the commensurate *de facto* authority he exercised as *Prefect* in such times. A clear parallel can be drawn with the climate that prevailed in Rwanda in 1994.

501. The facts of the case also reflect the *de facto* control that Kayishema exercised over *all* of the assailants participating in the massacres. Kayishema was often identified transporting or leading many of the assailants to the massacre sites. He was regularly identified, for example, in the company of members of the *Interahamwe* – transporting them, instructing them, rewarding them, as well as directing and leading their attacks. The Trial Chamber, therefore, is satisfied that Kayishema had strong affiliations with these assailants, and his command over them at each massacre site, as with the other assailants, was clearly established by witness testimony.

502. In the Bisesero area, for example, witness W testified that Kayishema was directing the massacre of those Tutsi who had sought refuge at the Cave. Witness U, at Karongi Hill, described to the Trial Chamber how Kayishema arrived at this location leading a number of soldiers, gendarmes, and armed civilians, addressed them by megaphone and then instructed them to attack. Upon these orders, the massacres began. These facts have been proven beyond a reasonable doubt.

503. The massacre that occurred at the Stadium provides a further striking example of the control exercised by Kayishema. The Trial Chamber has found that Kayishema transported gendarmes to the Stadium where, for two days, they simply stood guard and controlled the movement of persons in and out of the Stadium. Kayishema returned on 18 April leading more gendarmes, members of the *Interahamwe*, other armed civilians and prison wardens. Only then, when Kayishema ordered them to commence the attacks, firing into the crowd twice, did the guarding gendarmes begin their massacre. The onslaught by those who had been guarding the Stadium and those assailants who joined them were impromptu and unforeseen, but formed part of an attack that was clearly orchestrated and commanded by, *inter alia*, Kayishema.

504. All of the factual findings need not be recounted here. These examples are indicative of the pivotal role that Kayishema played in leading the execution of the massacres. It is clear that for all crime sites denoted in the Indictment, Kayishema had *de jure* authority over most of the assailants, and *de facto* control of them all. It has also been proved beyond reasonable doubt that the attacks that occurred were commenced upon his orders (Mubuga Church excepted). They were attacks clearly orchestrated by him, and only executed upon his direction.

505. Further, where the perpetrators of the massacres were found to be under the *de jure* or *de facto* control of Kayishema, and where the perpetrators committed the crimes pursuant to Kayishema's orders, the Trial Chamber is of the opinion that it is self-evident that the accused knew or had reason to know that the attacks were imminent and that he failed to take reasonable measures to prevent them. In such a case, the Trial Chamber need not examine further whether the accused failed to punish the perpetrators. Such an extended analysis would be superfluous.

506. The Trial Chamber finds, therefore, that Kayishema is individually criminally responsible, pursuant to Article 6(3) of the Statute, for the crimes committed by his *de jure* and *de facto* subordinates at the Home St. Jean and Catholic Church Complex, the Stadium and the Bisesero area.

507. It only remains for the Trial Chamber to consider whether Kayishema knew, or had reason to know, of those attacks at which he was not present. If he was so aware, or ought reasonably to have known of such impending attacks, then the Chamber must consider whether the accused attempted to prevent or punish the commission of those crimes.

Kayishema's Knowledge and Prevention of the Attack and Punishment of the Perpetrators

508. The Trial Chamber has not found that Kayishema, though present at Mubuga Church before and during the attacks there, specifically ordered the massacres. As such,

it is necessary to consider the remaining elements necessary to establish command responsibility under Article 6(3) of the Statute.

509. After examination of the facts presented, the Trial Chamber concludes that Kayishema knew or had reason to know that a large-scale massacre was imminent. The Trial Chamber is convinced of this fact for a number of reasons. First, the Tutsis were the subject of attacks throughout Rwanda by the date of the attack at Mubuga Church, and Kayishema was privy to this information. Second, following Kayishema's conversation with the Hutu priest, witnessed by a number of Tutsis at the Church, the priest refused the Tutsis access to water and informed them that they were about to die. Finally, the attackers included soldiers, gendarmes, and the members of the *Interahamwe*, all of whom he exercised either *de jure* or *de facto* control over.

510. In light of his duty to maintain public order, and seized of the fact that massacres were occurring elsewhere in Rwanda, the Trial Chamber is of the opinion that Kayishema was under a duty to ensure that these subordinates were not attacking those Tutsi seeking refuge in Mubuga Church. Moreover, his identification at the site both before and during the attacks leave the Trial Chamber in no doubt that Kayishema knew of the crimes that were being committed by his subordinates.

511. In order to establish responsibility of a superior under Article 6(3), it must also be shown that the accused was in a position to prevent or, alternatively, punish the subordinate perpetrators of those crimes. Clearly, the Trial Chamber cannot demand the impossible. Thus, any imposition of responsibility must be based upon a material ability of the accused to prevent or punish the crimes in question.

512. The accused, for instance, testified to the Trial Chamber that because the gendarmes had mutinied, he did not exercise the requisite control over their actions. However, not only did a number of the incursions upon Mubuga Church occur prior to the supposed mutiny (on the evening of 15 April), but the Trial Chamber has found this line of defence untenable in light of the overwhelming evidence presented by the

Prosecution that Kayishema was present at, instrumental in, and a participant of the massacres delineated in the Indictment. Kayishema was in *de jure* and *de facto* control of the assailants and others, such as *Bourgmestre* Sikubwabo, identified as directing the attacks at Mubuga Church.

513. In light of this uncontestable control that Kayishema enjoyed, and his overarching duty as *Prefect* to maintain public order, the Trial Chamber is of the opinion that a positive duty upon Kayishema existed to prevent the commission of the massacres. This point was enunciated succinctly by the United States Military Tribunal at Nuremberg in the *Hostage case* where it declared,

> [u]nder basic principles of command responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. *By doing nothing he cannot wash his hands of international responsibility*"[266] [emphasis added]

No evidence was adduced that he attempted to prevent the atrocities that he knew were about to occur and which were within his power to prevent.

514. On the issue of Kayishema's failure to punish the perpetrators, the Defence submitted that the only power held by the *Prefect* in this respect was the ability to incarcerate for a period not exceeding 30 days. The Trial Chamber concurs with the Defence's submission that this would not be sufficient punishment for the perpetrators of the alleged crimes (though possibly sufficient as a short-term measure to help prevent further atrocities). However, the Trial Chamber is mindful that there is no evidence to suggest that in the 3 months between the start of these attacks and Kayishema's departure from Rwanda, no action was commenced which might ultimately have brought those responsible for these barbarous crimes to justice.

515. It is unnecessary to elaborate upon Kayishema's punishment of these perpetrators, or lack thereof, in any further detail. The task would be a superficial one in light of the

Trial Chamber's findings that Kayishema exercised clear, definitive control, both *de jure* and *de facto*, over the assailants at every massacre site set out in the Indictment. It has also been proved beyond a reasonable doubt that Kayishema ordered the attacks or, knowing of their imminence, failed to prevent them.

Conclusion

516. The inherent purpose of Article 6(3) is to ensure that a morally culpable individual is held responsible for those heinous acts committed under his command. Kayishema not only knew, and failed to prevent, those under his control from slaughtering thousands of innocent civilians; but he orchestrated and invariably led these bloody massacres. This Trial Chamber finds that in order to adequately reflect his culpability for these deaths, Kayishema he must be held responsible for the actions and atrocities committed.

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[266] Cited, *Celebici* Judgement, para 338.

6.2 GENOCIDE

517. Kayishema and Ruzindana both are charged with the crime of Genocide, under Article 2(3)(a) of the Statute. Kayishema is charged with Genocide under Counts 1, 7 and 13 for his responsibility for the crimes committed on 17 April 1994 at the Catholic Church and Home St. Jean (Complex), 18 April 1994 at Gatwaro Stadium and 14 and 15 April 1994 at the Mubuga Church, respectively. Kayishema is also charged with Genocide under Count 19 for the crime of Genocide committed in the Bisesero area throughout April, May and June 1994. Kayishema is charged for his criminal responsibility under Articles 6(1) and 6(3) of the Statute.

518. Ruzindana is charged with Genocide under Count 19 for his role in the massacres that occurred in the Bisesero area. For his acts or omission Ruzindana is alleged to be criminally responsible under Article 6(1) of the Statute.

519. Genocide, in accordance with Article 2(2) of the Statute, means the commission of any of the acts enumerated in Article 2(2)(a) through to (e) of the Statute "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The components of the crime of genocide are discussed in the Chapter that examines the law relating to genocide.

520. In this Chapter, the Chamber first examines the accused persons' *mens rea* in order to determine whether they carried out acts with the specific intent to destroy the Tutsi group in whole or in part. In light of those findings, the Chamber examines the culpable genocidal acts for which the accused are responsible and determine their criminal responsibility under Articles 6(1) and 6(3) of the Statute.

6.2.1 The Components of Specific Intent

521. In order to prove the commission of the crime of genocide the Prosecution must prove beyond a reasonable doubt, that the criminal acts were committed with the intent to destroy in whole or in part a national, ethnical, racial or religious group, as such.

The Targeted Group

522. The Prosecution submitted that the targeted group was the Tutsi population in Kibuye that was attacked on the grounds of ethnicity. The Chamber discusses the identity of the victims in detail within the Part on Factual Findings, addressing genocide in Kibuye generally and the massacres at the four crime sites in particular. The evidence proves, beyond a reasonable doubt, that the victims of the acts for which Kayishema and Ruzindana are charged were Tutsis.

523. The Chamber further accepts that the Tutsis were an ethnic group. In support of this contention the Prosecution provided evidence that since 1931, Rwandans were required to carry identification cards which indicated the ethnicity of the bearer as Hutu, Tutsi or Twa.[267] The government-issued identification cards specified the individual bearer's ethnicity. It should be noted that, in accordance with Rwandan custom, the ethnicity of a Rwandan child is derived from that of her or his father.

524. The Prosecution's expert witnesses, Professor Guichaoua and Mr. Nsanzuwera, also offered information on this issue. Through Mr. Nsanzuwera a copy of an identity card was tendered into evidence. He confirmed that all Rwandans were required to identify themselves by ethnicity on official documents. He added that identification based on ethnicity was a highly divisive issue in Rwanda. Therefore, the matter was addressed in the Arusha Peace Accords, which categorically resolved that there would be no mention of ethnicity on the identification cards of Rwandans from that period forth. Identification cards identifying the victims as Tutsis were found on those exhumed from mass graves in Kibuye.

[267] Prosecutor's Closing Brief, 9 October 1998, p. 28. See *supra* Part II, Historical Context.

525. Additionally, the scores of survivors who testified before this Chamber stated that they were Tutsis and that those whom they saw massacred during the time in question were also Tutsis.

526. In *Akayesu*, Trial Chamber I found that the Tutsis are an ethnic group, as such. Based on the evidence presented in the present case, this Trial Chamber concurs. The Trial Chamber finds beyond a reasonable doubt that the Tutsi victims of the massacres were an ethnical group as stipulated in Article 2(2) of the Statute, and were targeted as such.

Context of the Massacres

527. In the Law Part, the Trial Chamber acknowledges the difficulty in finding explicit manifestations of a perpetrator's intent. The Trial Chamber states that the specific intent can be inferred from words and deeds and may be demonstrated by a pattern of purposeful action. The evidence, in the present case, is considered in light of this reality.

Genocide in Rwanda and Kibuye Generally

528. The Chamber examines the tragic events in Rwanda and in Kibuye in 1994 in Part V. The examination is useful here as it gives context to the crimes at the four crimes sites. The analysis shows that there indeed was a genocidal plan in place prior to the downing of the President's airplane in April 1994. This national plan to commit genocide was implemented at *prefecture* levels. For instance, Kayishema as the *Prefect*, disseminated information to the local officials above and below him using the established hierarchical lines of communications.[268]

529. The Prosecution submitted that the killings were planned and organised with a clear strategy, which was implemented by Kayishema and Ruzindana in Kibuye. The plan was executed efficiently and successfully in this *Prefecture*. Those who escaped the April massacres in and around Kibuye Town fled to Bisesero where they were relentlessly pursued and attacked. One witness described Bisesero Hill as strewn with

dead bodies "like small insects which had been killed off by insecticide."[269] There is documentary evidence that Kayishema requested reinforcement from the national authorities to attack the unarmed Tutsi population under the guise that there was a "security problem" in Bisesero.[270]

530. A letter dated 26 June 1994 written by the then *Bourgmestre* of Mabanza, Bagilishema to the *Prefect* of Kibuye, Kayishema, stated that there was no need for sending additional attackers to Mabanza because there were no Tutsis left in his commune.[271] The letter clearly indicates the knowledge and participation of the civilian authorities in the process of extermination.

Kayishema's Intent to Destroy in Whole or in Part the Tutsi Group, As Such

The Number of Victims

531. The number of Tutsis killed in the massacres, for which Kayishema is responsible, either individually or as a superior, provides evidence of Kayishema's intent. The Trial Chamber finds that enormous number of Tutsis were killed in each of the four crime sites. In the Complex, the number of Tutsis killed was estimated to be about 8,000; there were between 8,000 and 27,000 Tutsis massacred at the Stadium; and, at Mubuga Church between 4,000 and 5,500 Tutsi were massacred. The number killed in Bisesero is more difficult to estimate, however, evidence suggests that the number of those who perished was well into the tens of thousands.

532. Not only were Tutsis killed in tremendous numbers, but they were also killed regardless of gender or age. Men and women, old and young, were killed without mercy. Children were massacred before their parents' eyes, women raped in front of their families. No Tutsi was spared, neither the weak nor the pregnant.

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[268] See, for example, Pros exh's. 51 and 53.
[269] See Chapter 5.4 , *supra* (Bisesero Factual Findings.)
[270] Pros. exh. 296.
[271] Pros. exh. 59.

533. The number of the Tutsi victims is clear evidence of intent to destroy this ethnic group in whole or in part. The killers had the common intent to exterminate the ethnic group and Kayishema was instrumental in the realisation of that intent.

Methodology – Persistent Pattern of Conduct

534. The Trial Chamber finds compelling evidence that the attacks were carried out in a methodical manner. The Prosecution submitted that evidence of specific intent (*dolus specialis*) arises from the repetitive character of the planned and programmed massacres and the constant focus on the Tutsi members of the population. The perpetrators did not commit just one massacre but continually killed the Tutsi from April to June 1994.[272]

535. This consistent and methodical pattern of killing is further evidence of the specific intent. Kayishema was instrumental in executing this pattern of killing. Tutsi refugees gathered in places which had served historically as safe havens including the Complex, the Stadium and Mubuga Church. These places were surrounded by Hutu assailants, those inside the structure were not allowed to leave, and were denied food, medicine or sanitary facilities.[273] Eventually, the refugees were massacred. If there were too many Tutsis to kill in one day the killers would return to finish off their 'work' the next morning. This Chamber finds that Kayishema instigated the attacks at the Complex and the Stadium.

536. In the area of Bisesero the attacks continued for several months; April, May and June of 1994. At Bisesero, evidence proves that Kayishema was leading and directing the attacks. The attackers were transported by government buses and other vehicles. This Chamber finds that Ruzindana brought the Hutu attackers in his personal vehicles and that Kayishema did the same in the trucks belonging to the *Prefecture*. The assailants included the local officials such as the *bourgmestres*, *counseillers*, communal police, the *gendarmerie nationale*, members of the *Interahamwe*, other soldiers as well as the accused themselves.

[272] Trans., 21 Oct. 1998, pp. 125 and 141.
[273] See *supra* Chapter 5.3 (discussing safe places).

537. The weapons used and the methods by which the Tutsis were killed are also consistent throughout the four crime sites. Generally, the witnesses testified that Kayishema and the gendarmes were armed with guns and grenades while other attackers used traditional farming instruments such as machetes and crude weapons such as bamboo spears. Grenades and guns were used at the crime sites where the Tutsis were taking refuge in enclosed spaces to start the attack, and thereafter victims were hacked to death by machetes. Kayishema and Ruzindana both were seen carrying firearms at the crime sites.

Kayishema's Utterances

538. Kayishema's utterances, as well as utterances by other individuals under his direction before, during and after the massacres, also demonstrate the existence of his specific intent. Tutsis were called *Inkotanyi* meaning an RPF fighter or an enemy of Rwanda, *Inyenzi* meaning cockroach. They also were referred to as filth or dirt. Witness WW testified how she heard the Tutsi were being referred to as "dirt" when Kayishema told *Bourgmestre* Bagilishema that "all the dirt has to be removed,"[274] referring to the Tutsis who had sought shelter in the communal office. During the attacks at the Stadium, Kayishema called the Tutsi: "Tutsi dogs" and "Tutsi sons of bitches," when instigating the attackers to kill the Tutsis gathered there.

539. The Chamber also finds that Kayishema used a megaphone to relay a message from Kigali encouraging the extermination of the Tutsis during the attack at the Complex. Several witnesses who survived the massacres at the Complex heard Kayishema say "go to work" or "get down to work"[275] which, as many witnesses affirmed, meant to begin killing the Tutsis. Other witnesses testified to having heard the attackers, including members of the *Interahamwe*, who were *de facto* under Kayishema's control, sing songs about exterminating the Tutsi.[276] The Trial Chamber

[274] Trans., 19 Feb. 1998, p.34 and Chapter on Genocide in Kibuye
[275] See *supra* (discussing Factual Findings).
[276] See testimony of witnesses F, W, B, PP,NN.

accepts Prosecution exhibit 297, tendered through Witness HH, which was a transcription of the lyrics of one of these extermination songs. Essentially, the song urges attackers not to spare the elderly and even the babies because Kagame (the then RPF leader) left Rwanda as a child.[277] Again, the Chamber notes the common intention of the attackers with that of Kayishema.

540. In sum for all the reasons stated above the Chamber finds beyond a reasonable doubt that Kayishema had the intent to destroy the Tutsi group in whole or in part and, in pursuit of that intent, carried out the acts detailed below.

Ruzindana's Intent to Destroy in Whole or in Part the Tutsi Population, As Such

541. Ruzindana displayed his intent to rid the area of Tutsis by his words and deeds and through his persistent pattern of conduct throughout the Bisesero area.

Ruzindana's Utterances

542. Witnesses heard Ruzindana giving orders to the Hutu attackers in the Bisesero area. Specifically, some testified about Ruzindana's statements about not sparing babies whose mothers had been killed because those attacking the country initially left as children.[278] The Trial Chamber also heard evidence of Ruzindana's anti-Tutsi utterances to the assailants, saying that the Tutsi refugees were "the enemy."

Methodology - Persistent Pattern of Conduct

543. Ruzindana played a leadership role in the systematic pattern of extermination of the Tutsis who had sought refuge in the area of Bisesero. Evidence proves that many of the Tutsis who had survived the massacres in and around Kibuye Town during April fled to Bisesero. Ruzindana was instrumental in the pursuit of these Tutsi persons, by transporting, encouraging, and leading the attacks.

[277] See Chapter 5.4 , *supra* (Bisesero Factual Findings.).
[278] Trans., 14 Oct. 1997, p. 17.

544. The Trial Chamber finds that at many of the crime sites within Bisesero, Ruzindana did bring Hutu assailants to the sites in his vehicles. Once at the site, Ruzindana directed attackers to kill and offered payment in exchange for the severed heads of well known Tutsis or identification cards of murdered Tutsis. Ruzindana was seen carrying firearms at many of the massacre sites. The Chamber accepted evidence from witnesses who testified about overhearing conversations between the Hutu assailants who referred to Ruzindana as their patron. Yet other witnesses affirmed that *gendarmes*, speaking among themselves, stated that they were not concerned about using too many bullets, because Ruzindana would purchase more for them. As a result of Ruzindana's consistent pattern of conduct, thousands of Tutsis were killed or seriously injured; men, women and children alike.

545. The Trial Chamber is satisfied, from all the evidence accepted, that the perpetrators of the culpable acts that occurred within Kibuye *Prefecture*, during the period in questions, were acting with a common intent and purpose. That intent was to destroy the Tutsi ethnic group within Kibuye. Both Kayishema and Ruzindana played pivotal roles in carrying out this common plan.

6.2.2 The Genocidal Acts of Kayishema and Ruzindana

546. The Prosecution alleges that the accused persons committed acts pursuant to Article 2(2). Although Article 2(2) includes a variety of acts, the Prosecution, during closing arguments, only addressed the Trial Chamber on killings (Article 2(2)(a)), causing serious bodily or mental harm (Article 2(2)(b)) to Tutsis, and deliberately inflicting on Tutsis conditions of life calculated to bring about their physical destruction (Article 2(2)(c)) in whole or in part.

547. As a preliminary matter, the Chamber finds that in implementing the policy of genocide, the intent of Kayishema, those under his control and Ruzindana, was to kill members of the Tutsi group at the four crime sites. Inherent in the act of mass killing is the infliction of serious bodily and mental harm. For example, the Trial Chamber was

presented with the opportunity to view numerous healing bullet and machete wounds. Furthermore, the Chamber heard the testimony of many witnesses who recounted having watched their loved ones mutilated, raped or killed in a heinous manner. The evidence established that the genocidal act of the accused persons was killing. The Trial Chamber holds Kayishema and Ruzindana responsible for the *results* of the killings and serious bodily and mental harm to the Tutsi population in Kibuye.

548. No evidence was proffered to show that the accused persons, or Kayishema's *de facto* and *de jure* subordinates, deliberately inflicted, on the Tutsi group in Kibuye, conditions of life to bring about their physical destruction in whole or in part. The Chamber acknowledges the Prosecution argument that Tutsis seeking refuge at the four crime sites were deprived of food, water and adequate sanitary and medical facilities. These deprivations, however, were a result of the persecution of the Tutsis, with the intent to exterminate them within a short period of time thereafter. These deprivations were *not* the deliberate creation of conditions of life - as defined in Chapter 4.1 of this Judgement - intended to bring about their destruction. Additionally, the Chamber finds that the time periods during which these deprivation occurred were not of sufficient length or scale to bring about the destruction of the group. Therefore, the Trial Chamber only examines killings.

549. As stated above, the Chamber has found that Kayishema's and Ruzindana's culpable conduct was committed with the intent to destroy the Tutsi group in whole or in part. In relation to Kayishema this intent applies to all four massacre sites. For Ruzindana this intent relates to Bisesero only.

550. Below, the Chamber addresses the evidence in relation to Kayishema's and Ruzindana's genocidal acts.

COUNT 1:

Charges Kayishema with Genocide in Violation of Article 2(3)(a) of the Statute for the Massacres at the Complex

551. With respect to the Complex, the Trial Chamber finds, *inter alia*, that by about 17 April 1994 thousands of Tutsis had gathered. Persons under Kayishema's control including gendarmes and members of the *Interahamwe* surrounded the Complex. There were also boats surrounding the peninsula on which the Complex was located. The attackers who had surrounded the Complex carried machetes, spears and other traditional weapons and prevented people from leaving. The Trial Chamber is satisfied that those attempting to flee were killed.

552. Kayishema led the attackers from the *Prefecture* office to the Complex. He then ordered them to begin the attack on the Tutsi by relaying a message from Kigali, through a megaphone, to kill the Tutsis. Thus, Kayishema orchestrated and participated in the attack that lasted hours. As a result of the attack, thousands of Tutsis were killed.

553. The Trial Chamber finds that prior to the attack, Kayishema knew that it was imminent. Indeed, along with initiating the attack, he was seen at the Complex twice before the attacks of 17 April.

Kayishema's Criminal Responsibility

554. For the reasons stated above, pursuant to Article 6(1) of the Statute, Kayishema is individually responsible for instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation and execution of genocide by the killing and causing of serious bodily harm to the Tutsis at the Complex on 17 April 1994.

555. Additionally, under Article 6(3) of the Statute, Kayishema is responsible, for genocide, as superior, for the mass killing and injuring of the Tutsi at the Complex on 17 April 1994, undertaken by his subordinates. The assailants at the Complex including gendarmes, members of the *Interahamwe*, local officials, including prison wardens,

conseillers and *bourgmestres*. The Trial Chamber finds that Kayishema had *de jure* control over most of the assailants and *de facto* control over all the attackers. The evidence proves that Kayishema was leading and directing the massacre. As stated in the Legal Findings on Criminal Responsibility, because Kayishema himself participated in the massacres, it is self-evident that he knew that his subordinates were about to attack and failed to take reasonable and necessary measures to prevent them, when he had the material ability to do so.

COUNT 7:

Charges Kayishema with Genocide in Violation of Article 2(3)(a) of the Statute for the Massacres at the Stadium in Kibuye Town

556. The Trial Chamber finds that by 18 April 1994, thousands of men, women and children, unarmed Tutsis, sought refuge in the Stadium located in Kibuye Town. Once the refugees had gathered, persons under Kayishema's control, including *gendarmes*, prevented refugees from leaving the Stadium and surrounded the Stadium. The Trial Chamber is satisfied that during the attacks, some of the Tutsi who attempted to flee were killed. Kayishema instigated the attacks by ordering the attackers to "shoot those Tutsi dogs" and by firing the first shot into the Stadium. As a result of the attack, thousands of people were killed and numerous sustained serious physical injuries.

557. The Chamber finds beyond a reasonable doubt, that at the time when the Tutsi were prevented from leaving the Stadium, Kayishema knew or had reason to know that an attack was about to occur.

Kayishema's Criminal Responsibility

558. For the reasons stated above, Kayishema is individually criminally responsible under Article 6(1) of the Statute for instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation and execution of genocide by killing and injuring Tutsis in the Stadium

559. Under Article 6(3) of the Statute, Kayishema is responsible for genocide as a superior for the acts committed by his subordinates during the massacres at the Stadium on 18 April 1994. The assailants at the Stadium included gendarmes, soldiers, members of the *Interahamwe*, prison wardens and armed civilians. The Trial Chamber finds that Kayishema had *de jure* control over most of the assailants and *de facto* control over them all. The evidence proves that Kayishema ordered, led and directed the massacre. Accordingly, it is self-evident that he knew that his subordinates were about to commit the massacres and failed to take reasonable and necessary measures to prevent them, when he had the material ability to do so.

COUNT 13:

Charges Kayishema with Genocide in Violation of Article 2(3)(a) of the Statute for the Massacres at the Church at Mubuga

560. The Trial Chamber finds that, *inter alia*, thousands of Tutsis had gathered at Mubuga Church seeking refuge from attacks which were occurring throughout Kibuye *Prefecture*. Only a few of those seeking refuge survived the massacres that occurred on 15 and 16 April. Kayishema and his subordinates, including local officials, gendarmes, communal police and members of the *Interahamwe* were present and participated in the attacks. The Trial Chamber finds that those who initially attempted to leave the Church in search of food or water were forced to retreat or beaten to death by armed assailants outside the Church. Kayishema's presence prior and during the major attack and the participation of those under his control encouraged the killings of the Tutsi refugees assembled there. As a result of the attack, thousands of people were killed and numerous sustained serious physical injuries.

561. The Chamber finds, beyond a reasonable doubt, that at the time when the Tutsis were prevented from leaving the Mubuga Church, Kayishema knew or had reason to know that an attack was about to occur.

Kayishema's Criminal Responsibility

562. Under Article 6(1) of the Statute, Kayishema is individually responsible for genocide for the killing and serious injuring of Tutsis at the Mubuga Church on 15 and 16 April 1994. Kayishema visited the Church before the attacks and transported gendarmes. The Hutu Priest of this parish, who had been co-operating with Kayishema, specifically told the refugees that they were about to die, and asked that a headcount be done for the *Prefect*. The gendarmes eventually attacked the refugees. Kayishema also was present during the attacks. These findings prove beyond a reasonable doubt that Kayishema aided and abetted the preparation and execution of the massacre.

563. Additionally, under Article 6(3) of the Statute, Kayishema is responsible for genocide as a superior for the acts of his subordinates that took place at the Mubuga Church on 15 and 16 April 1994. The assailants at Mubuga included the *Bourgmestre* and the *conseillers* of the Commune, gendarmes, soldiers, members of the *Interahamwe*, communal police, other local officials and armed civilians. The Trial Chamber has found that Kayishema had *de jure* control over most of the assailants and *de facto* control over them all. It is clear that Kayishema knew that an attack was imminent by virtue of his presence before and during the massacre. Accordingly, the Trial Chamber finds, beyond a reasonable doubt, that Kayishema knew that his subordinates were about to attack the refugees in the Church and failed to take reasonable and necessary measures to prevent them, when he had the material ability to do so.

COUNT 19:

Charges Kayishema and Ruzindana with Genocide in Violation of Article 2(3)(a) of the Statute for the Massacres at the Area of Bisesero

564. The Trial Chamber finds that both Kayishema and Ruzindana brought the *gendarmerie nationale*, communal police, members of the *Interahamwe* and armed civilians to the area of Bisesero and directed them to attack the Tutsis. Both accused persons also personally participated in the attacks. Furthermore, the Trial Chamber found that Ruzindana mutilated and personally killed a sixteen-year-old girl named Beatrice at the Mine at Nyiramurego Hill. Accordingly, Kayishema and Ruzindana

were responsible for the killings at a number of massacre sites during April, May and June 1994. Hutu assailants during these attacks killed and injured thousands of Tutsis.

565. In relation to the 13 and 14 May assault at Muyira Hill, Kayishema and Ruzindana arrived at the head of the convoy of vehicles which transported soldiers, members of the *Interahamwe*, communal police and armed civilians. Some of the vehicles, in which the assailants arrived, belonged to the Rwandan Government. Kayishema signalled the start

566. of the attacks by firing a shot into the air, directed the assaults by dividing the assailants into groups, and headed one group of them as it advanced up the Hill and verbally encouraged the attackers through a megaphone. Ruzindana also played a leadership role, distributing traditional weapons, leading a group of attackers up the Hill and shooting at the refugees.

566. The Trial Chamber finds that both accused persons also participated in other massacres. At the cave, Kayishema was directing the siege generally and Ruzindana was commanding the attackers from Ruhengeri; both were giving instructions to the attackers and orchestrating the attack. At Karonge Hill, Kayishema arrived with soldiers, gendarmes and Hutu civilians and used a megaphone to address the attackers, giving them instructions. Ruzindana was seen transporting members of the *Interahamwe* to the Mine at Nyiramurego Hill and then directing the attackers. At Bisesero Hill, Ruzindana was seen transporting attackers and giving orders to the assailants to surround the Hill and begin the assault. Ruzindana orchestrated the massacre at the Hole near Muyira Hill, and the assault commenced upon his instruction.

Kayishema's Criminal Responsibility

567. In light of the factual findings outlined above, the Trial Chamber finds that the killings that took place in Bisesero during April, May and June 1994 were carried out with the intent to destroy the Tutsi group in whole or in part. Further, the Trial Chamber finds, beyond a reasonable doubt, that Kayishema caused the death of and serious bodily harm to Tutsis at numerous places in the Bisesero area including, Karonge Hill at the end

of April, Bisesero Hill on 11 May, Muyira Hill on 13 and 14 May, the Cave in Gishyita Commune, Gitwa Cellule in May and Kucyapa in June.

568. Under Article 6(1) of the Statute, Kayishema is individually responsible for genocide for killing and injuring the Tutsi at the attacks in the Bisesero area during April, May and June 1994 with the intent to destroy the Tutsi ethnic group. Kayishema's involvement varied from crime site to crime site within Bisesero. At the crime sites where he was found to have participated, Kayishema committed one or more of the following acts: headed the convoy of assailants; transported attackers in his vehicle; directed the initial positioning of the attackers; verbally encouraged them; initiated the attacks by orders or gunshots; lead the groups of attackers; shot at fleeing Tutsis; and, finally, thanked the Hutu attackers for their "work." These facts prove, beyond a reasonable doubt, that Kayishema, instigated, ordered, committed and otherwise aided and abetted in the preparation and execution of the massacre that resulted in thousands of deaths and serious bodily injuries with intent to destroy the Tutsi ethnic group.

569. Additionally, under Article 6(3) of the Statute, Kayishema is responsible for genocide, as superior, due to the killing and injuring that took place in Bisesero area in during April, May and June 1994 by his subordinates. The assailants in Bisesero were identified as gendarmes, soldiers, members of the *Interahamwe*, and armed civilians. The Trial Chamber finds that Kayishema had *de jure* control over most of the assailants and *de facto* control over them all. The evidence proves that Kayishema was leading and directing the massacres at numerous sites throughout the period.

Ruzindana's Criminal Responsibility

570. In light of the factual findings outlined above, the Trial Chamber finds that the killings that took which took place in Bisesero, during April, May and June 1994, were carried out with intent to destroy the Tutsi group in whole or in part. Further, the Trial Chamber finds beyond reasonable doubt that Ruzindana caused the death of Tutsis at numerous places in the Bisesero area including, the Mine at Nyiramurego Hill on 15 April, Gitwa Cellule in early May, Bisesero Hill on 11 May, Muyira Hill on 13 and 14

May, the Cave, Kucyapa in June, the Hole near Muyira in early June. Ruzindana caused these deaths by premeditated acts or omissions, intending to do so.

571. In particular under Article 6(1) of the Statute, Ruzindana is individually responsible for the killings that took place within the attacks that the Trial Chamber has found he participated, in the Bisesero area during April, May and June 1994. Ruzindana's involvement varied from site to site and day to day. At the sites where he was found to have participated, Ruzindana committed one or more of the following acts: Headed the convoy of assailants; transported attackers in his vehicle; distributed weapons; orchestrated the assaults; lead the groups of attackers; shot at the Tutsi refugees; and, offered to reward the attackers with cash or beer. The Trial Chamber further found that Ruzindana personally mutilated and murdered individuals during the attack at the Mine at Nyiramuregra Hill. These findings prove beyond reasonable doubt that Ruzindana, instigated, ordered, committed and otherwise aided and abetted in the preparation and execution of the massacre that resulted in thousands of murders with the intent to destroy the Tutsi ethnic group.

6.3 CRIMES AGAINST HUMANITY

572. Counts 2, 8, 14, of the Indictment charge Kayishema with crimes against humanity for murder and Counts 3, 9, 15, charge him with crimes against humanity for extermination. Kayishema is charged also in Counts 4, 10, 16 with crimes against humanity other inhumane acts.

573. Count 20 charges both Kayishema and Ruzindana with crimes against humanity for murder, Count 21 charges them with crimes against humanity for extermination and Count 22 charges both accused with crimes against humanity for other inhumane acts.

574. Pursuant to Article 3 of the Statute, the Trial Chamber shall have the power to prosecute persons for a certain number of crimes committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The offences which constitute crimes against humanity when committed in such a context include, *inter alia*, murder, extermination, deportation, torture, rape, and other inhumane acts.

575. Under this Article the Prosecution charged the accused only for three crimes: murder, extermination and other inhumane acts committed as part of a widespread or systematic attack against the civilian population on discriminatory grounds.

Murder and Extermination

576. As far as murder and extermination are concerned indeed they took place in Kibuye *Prefecture* within the context of a widespread and systematic attack. The evidence produced proves that the attacks were aimed at the Tutsi civilian population as an ethnic group. Evidence also shows that the Tutsi victims were generally peasant farmers, refugees or persons of similar status, including the elderly, women and children. In light of the overwhelming testimony the Chamber finds, beyond a reasonable doubt, that the massacres were based on the grounds of ethnicity.

577. Thus, all necessary elements exist for the conclusion that the accused could be convicted for crimes against humanity (murder) and crimes against humanity (extermination). However, in this particular case the crimes against humanity in question are completely absorbed by the crime of genocide. All counts for these crimes are based on the same facts and the same criminal conduct. These crimes were committed at the same massacre sites, against the same people, belonging to the Tutsi ethnic group with the same intent to destroy this group in whole or in part.

578. Considering the above and based on the facts the Trial Chamber finds that it will be improper to convict the accused persons for genocide as well as for crimes against humanity based on murder and extermination because the later two offences are subsumed fully by the counts of genocide as discussed in the Part of the Judgement entitled Cumulative Charges.

579. The responsibility of the accused persons for their criminal conduct is thus fully covered under those counts of genocide.

Other Inhumane Acts

580. As far as counts for other inhumane acts are concerned the accused could be found guilty of crimes against humanity based on other inhumane acts.

581. The crimes must be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The accused must be aware that their crimes were committed in the context of such an attack. Furthermore, the policy element demands a showing that the crimes were instigated by a government or by an organisation or group. A detailed consideration of the elements of crimes against humanity can be found in the Part of the Judgement that addresses the Law.[279]

[279] *See* Crimes Against Humanity, Chapter 4.2.

582. As stated above, the Trial Chamber finds, beyond a reasonable doubt, the necessary elements of the attack exist to satisfy the crimes against humanity. The acts for which both accused are charged took place within the context of a widespread and systematic attack. Although only one of the alternative conditions must be proved by the Prosecution, the Trial Chamber finds that both conditions are satisfied. Evidence before this Trial Chamber proves that the attacks in Rwanda generally, and in Kibuye *Prefecture* in particular, were carried out in a systematic manner, that is, pursuant to a pre-arranged policy or plan.[280] The evidence of a policy or plan discussed in relation to the counts of genocide is applicable here. The evidence proves that the attacks in Rwanda generally, and in Kibuye *Prefecture* in particular, were aimed at the civilian population. Indeed, evidence shows that the victims in Kibuye were generally peasant farmers, those seeking refuge or persons of similar status, including the elderly, women and children. An abundance of evidence from witnesses, experts and Kayishema himself proves that the attacks in Kibuye *Prefecture* were carried out against Tutsis based on their ethnicity; again this issue is discussed in more detail in relation to the counts of genocide. Lastly, the Trial Chamber finds that the attack must have been part of a broader policy or plan that had been instigated or directed by any organisation or group and that the accused persons had knowledge that their conduct formed part of that attack.

583. For the accused to be found guilty of crimes against humanity for other inhumane acts they must, *inter alia*, commit an act of similar gravity and seriousness to the other enumerated crimes, with the intention to cause the other inhumane act. This important category of crimes is reserved for deliberate forms of infliction with (comparably serious) inhumane results that were intended or foreseeable and done with reckless disregard. Thus, the category of other inhumane acts demands a crime distinct from the other crimes against humanity, with its own culpable conduct and *mens rea*. The crime of other inhumane acts is not a lesser-included offence of the other enumerated crimes. In the opinion of the Trial Chamber, this category should not simply be utilised by the Prosecution as an all-encompassing, 'catch all' category.

[280] *Ibid.*

584. In relation to all four sites the Indictment did not particularise the nature of the acts that the Prosecution relied upon for the charge of 'other inhumane acts.' Nor did the Indictment specify the nature and extent of the accused's responsibility for the other inhumane acts. This is true for both Kayishema and Ruzindana. In relation to the culpable acts, for each site the Indictment states little more than: The attackers used (specified) weapons to kill people at the site, the accused participated, and the attack resulted in thousands of deaths and numerous injuries. Not one act, allegedly perpetrated either by Ruzindana, Kayishema, or the other assailants, was specified as an 'other inhumane act'. Therefore, it was incumbent upon the Prosecution to rectify the vagueness of the counts during its presentation of evidence. Indeed, "the question of knowing whether the allegations appearing in the Indictment are vague will, in the final analysis, be settled at Trial."[281]

585. At trial, the Prosecution proffered evidence that the Hutu assailants, under Kayishema's and/or Ruzindana's control and direction, deliberately attempted to kill the Tutsi civilians at the sites for which they are respectively charged. As a result of the intent to massacre, most of the Tutsi were killed whilst others sustained injuries. The Prosecution presented its case on this basis. As such it was not difficult to identify the conduct and evidence that supported the charges of crimes against humanity for extermination and murder. However, the conduct to support the crimes of other inhumane acts was not so easily identified.

586. The Chamber heard horrific testimony of mutilation and other conduct by the Hutu assailants that could potentially amount to other inhumane acts. However, throughout trial the Prosecution failed to adequately particularise which pieces of evidence supported the other inhumane act charges. The most specific identification came in response to Defence objections. On a couple of occasions the Defence objected to the evidence of certain injuries proffered by the Prosecution, submitting that it was outside the nature and parameters of the charges. In response, the Prosecution identified the injuries as evidence of other inhumane acts. This method of using the crime as a 'catch-all' – specifying

[281] *The Prosecutor v. Tihomir Blaskic*, IT-95-14-PT, Decision on the Defence Motion Based Upon Defects

which acts support the count almost as a postscript - does not enable the counts of other inhumane acts to transcend from vagueness to reasonable precision. Further, the fact that some of the survivors displayed their injuries to the Trial Chamber did not mitigate the Prosecution's obligation to distinguish the specific acts, along with the resultant injuries, as those that support the other inhumane act charges. Only in its Closing Brief did the Prosecution submit that the injuries sustained by the survivors amounted to other inhumane acts and, that the environment of fear and desperation where victims were forced to witness the killing and severe injuring of friends, family and other Tutsi inherently caused serious mental harm.[282] Accordingly, the Defence teams were not properly seized of the acts that allegedly constituted the other inhumane acts charges until the end of the trial.

587. In interests of justice and a fair trial the Defence should be seized as promptly as possible, and at any event during the trial, of the conduct which allegedly offends each individual count of crimes against humanity for other inhumane acts. The Indictment did not identify the offending conduct or the nature and extent of the accused's responsibility. During trial, the Prosecution failed to rectify this imprecision. Accordingly, the fundamental rights of both the accused, namely to be informed of the charges against him and to be in a position to prepare his defence in due time with complete knowledge of the matter, has been disregarded in relation to all the counts of crimes against humanity for other inhumane acts. A right that is particularly important considering the gravity of the charges.

588. For all the above reasons, the Trial Chamber finds that the Prosecution has not proved its case against Kayishema pursuant to Counts 4, 10, 16, and 22 crimes against humanity for other inhumane acts.

589. For all the above reasons, the Trial Chamber finds that the Prosecution has not proved its case against Ruzindana pursuant to Count 22 crimes against humanity for other inhumane acts.

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in the Form Thereof, 4.4.97, at p. 12.

6.4 COMMON ARTICLE 3 AND ADDITIONAL PROTOCOL II

Counts 5, 11, 17, 23 - Violations of Common Article 3 (a violation of Article 4(a) of the ICTR Statute) and Counts 6, 12, 18, 24 - Violations of Protocol II (a violation of Article 4(a) of the ICTR Statute).

590. Counts 5, 11 and 17 of the Indictment charge Kayishema with violations of Common Article 3 and Counts 6, 12 and 18 charge Kayishema with violations of Protocol II.

591. Count 23 charges both Kayishema and Ruzindana with violations of Common Article 3 and count 24 charges them with violations of Protocol II. All these counts are covered by Article 4 of the ICTR Statute.

592. During the trial, evidence was produced that between about 10 April and 30 June 1994 thousands of men, women and children were killed and numerous persons injured as a result of massacres at the Catholic Church and Home St. Jean Complex, at the Stadium in Kibuye Town, at the Church in Mubuga and in the area of Bisesero in the *Prefecture* of Kibuye, Republic of Rwanda.

593. These men, women and children were unarmed and were predominantly Tutsis seeking protection from attacks that had occurred throughout various regions in Rwanda and Kibuye *Prefecture*. The Prosecution considers the massacred people as victims of the armed conflict and charges Kayishema and Ruzindana with serious violations of Common Article 3 and Protocol II.

594. From the point of view of the Prosecutor, under international law, in order to hold an individual liable for violations of Common Article 3 and/or Protocol II, the following five requirements must be met:

> First, the alleged crime(s) must have been committed in the context of a non-international armed conflict.

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[282] See, for example, Prosecutor's Closing Brief at p. 80.

> Second, temporal requirements for the applicability of the respective regime must be met.
>
> Third, territorial requirements for the applicability of the respective regime must be met.
>
> Fourth, the individual(s) charged must be connected to a Party that was bound by the respective regime; and
>
> Fifth, the victims(s) of the alleged crimes(s) must have been individual(s) that was (were) protected under the respective regime.[283]

595. The first requirement should be considered as a corner stone to clarify the situation in order to establish whether the alleged crimes referred to in the Indictment could be qualified as violations of Common Article 3 and Protocol II.

596. In order to hold Kayishema and Ruzindana criminally responsible for the above mentioned counts, from the point of view of the Prosecution, it must be proved that Common Article 3, as well as Protocol II applied to the situation in Rwanda in 1994.[284]

597. The Trial Chamber finds that this is not a question that need be addressed. It has been established, beyond a reasonable doubt, that there was an armed conflict, not of an international character, in Rwanda. This armed conflict took place between the governmental armed forces, the FAR, and the dissident armed forces, the RPF, in the time of the events alleged in the Indictment, that is from April to July 1994. It has also been shown, beyond a reasonable doubt, that Rwanda was bound by Common Article 3 and Protocol II, which were applicable to "the situation in Rwanda in 1994." The Parties in this non-international conflict confirmed their readiness to comply with the rules of these international humanitarian instruments. As far as the second, temporal requirements, and the third, territorial requirements, are concerned, it should be added that these international instruments, as it was shown above, were applicable in the entire territory of Rwanda with the understanding that the alleged crimes should be considered

[283] Closing Brief of the Prosecutor, p. 45, para. 149-154 (Closing Brief).

[284] *Ibid*, p. 81, para. 306; p. 82, para. 312-33; p 93, para.370; p.94, para. 377; p. 106, para. 436; p. 107, para.442; p.135, para. 559 and 565; p. 150, para. 75 and 82.

in the context of the armed conflict and interpreted in a broad territorial and temporal framework.

598. Therefore, the question which should be addressed is not whether Common Article 3 and Protocol II were applicable to "the situation in Rwanda in 1994," but whether these instruments were applicable to the alleged crimes at the four sites referred to in the Indictment. It is incumbent on the Prosecutor to prove the applicability of these international instruments to the above-mentioned crimes.

599. However, the Prosecution limited itself to state, "in order to hold Clement Kayishema and Obed Ruzindana criminally responsible for the above mentioned counts, the Prosecutor must prove that the alleged crimes must have been committed *in the context* of a non-international armed conflict."[285] [emphasis added]

600. The Prosecutor did not specify the meaning of the words "in the context." If she meant "during" an internal armed conflict, there is nothing to prove as it was recognised, and this matter was not in dispute, that in this period of time Rwanda was in a state of armed conflict not of international character. Therefore, in this case the words "in the context" are too general in character and do not clarify the situation in a proper way. When the country is in a state of armed conflict, crimes committed in this period of time could be considered as having been committed in the context of this conflict. However, it does not mean that all such crimes have a direct link with the armed conflict and all the victims of these crimes are victims of the armed conflict.

601. There is recognition, nevertheless, in the Prosecutor's Closing Brief that "the Prosecutor must also establish a nexus between the armed conflict and the alleged offence."[286] The following paragraph of this document was intended to prove such a nexus,

[285] *Ibid*, p. 81, para. 306; p. 93 para. 370; p. 106, para. 436; p. 135, para. 559; p. 150 para. 75.
[286] *Ibid*, p. 48, para.163.

> In the present case, the Prosecutor submits that the evidence shows, beyond a reasonable doubt, that for each of the alleged violations there was a nexus between the crimes and the armed conflict that was underway in Rwanda. The Tutsis who were massacred in Kibuye went to the four sites seeking refuge from attacks that were occurring on the Tutsis throughout Kibuye and Rwanda. These attacks were occurring because hostilities had broken out between the RPF and the FAR and the Tutsis were being sought out on the pretext that they were accomplices of the RPF, were "the enemy" and/or were responsible for the death of the President.[287]

602. It is true that "the Tutsis went to the four sites seeking refuge from attacks that were occurring on the Tutsis throughout Kibuye and Rwanda." However, the Tutsi were attacked by neither the RPF nor the FAR in the places where they sought refuge in Kibuye. It was proved through witness testimony that these attacks were undertaken by the civilian authorities as a result of a campaign to exterminate the Tutsi population in the country. Therefore, there is no ground to assert that there was a nexus between the committed crimes and the armed conflict, because "the Tutsis went to the four sites seeking refuge from attacks. . ." The Prosecutor's next allegation is that "these attacks were occurring because hostilities had broken out between the RPF and the FAR and the Tutsis were being sought out on the pretext that they were accomplices of the RPF, were "the enemy" and/or were responsible for the death of the President."

603. It is true that "hostilities had broken out between the RPF and the FAR" in this period of time. However, evidence was not produced that the military operations occurred in Kibuye *Prefecture* when the alleged crimes were committed. Furthermore, it was not shown that there was a direct link between crimes committed against these victims and the hostilities mentioned by the Prosecutor. It was also not proved that the victims were accomplices of the RPF and/or were responsible for the death of the President. The Prosecutor herself recognised that the Tutsis were being sought out *on the pretext* that they were accomplices etc. These allegations show only that the armed conflict had been used as pretext to unleash an official policy of genocide. Therefore, such allegations cannot be considered as evidence of a direct link between the alleged crimes and the armed conflict.

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[287] *Ibid*, p. 48, para. 165.

604. 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 established factually. The Prosecutor must show that material provisions of Common Article 3 and Protocol II were violated and she has to produce the necessary evidence of these violations.

In this respect, the Prosecutor stated the following:

> A final requirement for the applicability of Common Article 3 and Additional Protocol II is that the victim be an individual that was protected by Common Article 3 and/or Additional Protocol II.
>
> Common Article 3 applies to persons taking no active part in the hostilities including members of the armed forces who have laid down their arms and those who are *hors de combat.*
>
> Additional Protocol II applies to all persons which do not take a direct part or who have ceased to take part in the hostilities (Article 4), persons whose liberty has been restricted (Article 5), the wounded, sick, and shipwrecked (Article 7), medical and religious personnel (Article 9) and the civilian population (Article 13).[288]

605. The Prosecutor did not specify whether she finds that all or only some of the enumerated Articles of Protocol II have been violated. In any case, Article 5 of Protocol II is not applicable to the alleged crimes because there is no evidence that the victims of these crimes were interned or detained persons, deprived of their liberty for reasons related to the armed conflict. It is sufficient to read all four paragraphs of this Article to realise its non-applicability to the crimes in question.

606. Again, no evidence was produced that Article 7 of Protocol II, which aims to protect the wounded, sick and shipwrecked persons, is applicable to the alleged crimes. It was not shown that the victims of the alleged crimes fall into this category.

[288] Closing Brief, p. 55, Paras. 188-190.

607. The Prosecutor raised also the question of applicability of Article 9 of Protocol II which deals with the protection of religious and medical personnel. In the instant case, pursuant to the evidence, the victims were not religious and medical personnel. Therefore, Article 9 cannot be applicable to the alleged crimes.

608. Article 13 of Protocol II is more pertinent to the case before the Trial Chamber, since it is devoted to the protection of the civilian population during armed conflicts. This Article, entitled "Protection of the Civilian Population" stipulates,

> 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
>
> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

609. From these two paragraphs of Article 13 it could be understood that military operations in all circumstances should be conducted in such a way not to create dangers for the civilian population, as well as individual civilians, and in any case this category of persons shall not be the object of attacks during military operations.

610. The Prosecutor emphasised that the attacks against the Tutsis at the four sites, referred to in the Indictment, "were occurring because hostilities had broken out between the RPF and the FAR."[289] It is true that such hostilities had broken out in different parts of the country. In accordance with Article 13, as well as Articles 14 to 18 of Protocol II, each Party in the conflict was obliged to conduct the hostilities without affecting the civilian population and individual civilians or creating dangers for them. The Prosecutor claimed,[290] and the witnesses confirmed, that there were no military operations in Kibuye Town nor in the area of Bisesero in this period of time. There is also no evidence that the civilian population, at the four sites in question, was affected by military operations which were under way in other regions of Rwanda.

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[289] Closing Brief, p. 48, para. 165.

611. On the basis of the foregoing, it could not be asserted *pleno jure* that Articles 5, 7, 9 or 13 to 18 of Protocol II were violated in the case of the alleged crimes.

612. In charging Kayishema and Ruzindana with serious violations of Common Article 3 and Protocol II the Prosecutor specifically refers to Article 4(a) of the ICTR Statute. A separate analysis of Article 4(a) of the Statute is not merited, since this Article, Common Article 3 and Article 4 of Protocol II, are interconnected. Article 4(a) of the Statute coincides with Article 4(2)(a) of Protocol II which reproduces, without substantial changes, Common Article 3. These three Articles contain an enumeration of certain prohibited acts. Article 4(2) of Protocol II indicates that these acts are prohibited against persons referred to in the first paragraph.[291] This category of persons is defined in this paragraph in the following way, "All persons who do not take a direct (active) part or who have ceased to take part in the hostilities."

613. In paragraph 192 of its Closing Brief the Prosecution pointed out that "in this case, the victims of the crimes *took no part* in the hostilities . . . they were unarmed and not affiliated with an armed force of any kind." [emphasis added]. In paragraph 193 and 194 the Prosecutor expressed her satisfaction that "the Defence did not challenge the civilian status of the victims by making any submissions or leading evidence connecting any victims to the RPF or hostilities that prevailed in 1994." However, in the next paragraph the Prosecution took another position by asserting that "the victims in this Indictment were civilians and *were taking no active part* in the hostilities" [emphasis added].[292]

614. Thus, the position of the Prosecutor is not expressed *claris verbis*. If the victims "took no part in the hostilities" this is one situation, but if these persons "were *taking no active part* in the hostilities" this is another situation and in this case there is a need to prove that these men, women and children participated indirectly in the hostilities or at

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[290] See *Ibid*, p. 56, para. 195.
[291] The same indications are provided under Common Article 3.
[292] *Ibid*, p. 56, para. 196.

least committed harmful acts against the Party in the conflict. If there is no such evidence of a nexus this statement sounds like *petitio principii*, and there is no legal ground for the conclusion that it met the fifth requirement established by the Prosecutor as necessary in order to hold individuals liable for violations of this treaty regime.[293]

615. Since the Prosecutor did not produce evidence of a nexus between the alleged crimes and the armed conflict, the Trial Chamber is of the opinion that there is no ground to consider the applicability to the instant case of Article 4(a) of the Statute which covers Common Article 3 and Article 4(2)(a) of Protocol II.

616. It has already been illustrated that the FAR and the RPF were Parties in the internal armed conflict in Rwanda during the period of time in question. Pursuant to the above mentioned fourth requirement of the Prosecution, Kayishema and Ruzindana must be connected to one of these Parties and bound by the respective regime. In other words, to hold both accused criminally responsible for serious violations of Common Articles 3 and Protocol II it should be proved that there was some sort of a link between the armed forces and the accused.

617. It was shown that both accused were not members of the armed forces. However, it was recognised earlier in this Judgement that civilians could be connected with the armed forces if they are directly engaged in the conduct of hostilities or the alleged civilians were legitimately mandated and expected, as persons holding public authority or *de facto* representing the Government, to support or fulfil the war effort.

618. However, the Prosecution did not produce any evidence to show how and in what capacity Kayishema and in particular Ruzindana, who was not a public official, were supporting the Government efforts against the RPF.

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[293] During this analysis, the Prosecutor noted that it may appear that an expert witness, Professor Degni-Segui, took the position that the victims were not protected persons under the regimes. But the Trial Chamber, from point of the view of the Prosecutor, is free to reject or accept the testimony of experts. See Closing Brief, p. 56.

619. Presenting her case, the Prosecutor pointed out that Kayishema and Ruzindana carried rifles and participated in the massacres alleged in the Indictment. However, the Prosecutor herself recognised that the FAR or the RPF were not involved in these massacres, which were organised and directed by the civilian authorities of the country. She further recognised that the overwhelming majority of the attackers were civilians, armed with traditional weapons. This was proved through witness testimony, and also recognised by the Prosecutor in her Closing Brief, when she stated "the Hutu civilian population was mobilised to attack and kill the Tutsi population under the guise of the Civilian Defence Program."[294] Therefore, these men, women and children were killed not as a result of the military operations between the FAR and the RPF but because of the policy of extermination of the Tutsi, pursued by the official authorities of Rwanda. Therefore, it does not follow from the participation of the accused in these massacres that they were connected with the armed forces of the FAR or the RPF.

620. The struggle for power between the FAR and the RPF, which was underway in 1994, meant that each Party in this armed conflict, in all circumstances, had to treat humanely all persons belonging to the adverse Party. In this period of time, Rwanda had been invaded by the armed forces of the RPF and, in accordance with international law, the Government of this country was undoubtedly entitled to take all necessary measures to resist these attacks. But it does not follow that crimes could be committed against members of the RPF who were under the protection of Common Article 3 and Protocol II.

621. However, the crimes committed at the four sites, referred to in the Indictment, were not crimes against the RPF and its members. They were committed by the civilian authorities of this country against their own civilian population of a certain ethnicity and this fact was proven beyond a reasonable doubt during the trial. It is true that these atrocities were committed during the armed conflict. However, they were committed as part of a distinct policy of genocide; they were committed parallel to, and not as a result of, the armed conflict. Such crimes are undoubtedly the most serious of crimes which

[294] *Ibid*, p. 49, para. 165.

could be committed during or in the absence of an armed conflict. In any event, however, these crimes are beyond the scope of Common Article 3 and Protocol II which aim to protect victims of armed conflict.

622. In this respect, it is important to recall a recent statement of the ICRC that, "It should be stressed that in war time international humanitarian law coexists with human rights law, certain provisions of which cannot be derogated from. Protecting the individual *vis-à-vis* the enemy, (as opposed to protecting the individual *vis-à-vis* his own authorities) is one of the characteristics of the law of armed conflicts. A state at war cannot use the conflict as a pretext for ignoring the provisions of that law . . . ."[295] This is just what happened in Rwanda with only one clarification. The armed conflict there was used not only as a pretext for ignoring the provisions of human rights laws but, moreover, as a pretext for committing extremely serious crimes.

623. Considering the above, and based on all the evidence presented in this case, the Trial Chamber finds that it has not been proved, beyond a reasonable doubt, that the crimes alleged in the Indictment were committed in direct conjunction with the armed conflict. The Trial Chamber further finds that the actions of Kayishema and Ruzindana, in the alleged period of time, had no direct connection with the military operations or with the victims of the armed conflict. It has not been shown that there was a direct link between the accused and the armed forces. Moreover, it cannot be concluded *pleno jure*, that the material provisions of Common Article 3 and Protocol II have been violated in this particular case. Thus both accused persons, *ipso facto et ipso jure*, cannot be individually responsible for violations of these international instruments.

624. The Trial Chamber finds, therefore, that Kayishema did not incur individual criminal responsibility for breaches of Article 4 of the Statute under counts 5, 6, 11 ,12, 17 and 18, and neither Kayishema nor Ruzindana incurred liability under counts 23 and 24.

VII. CUMULATIVE CHARGES

Introduction

625. The Indictment charges both accused persons cumulatively, *inter alia*, for Genocide, Crimes Against Humanity/Extermination (extermination) and Crimes Against Humanity/Murder (murder). Within each crime site, the three types of crimes in question[296] are based on the same conduct, and the Defence submits that these crimes amounts to the same offense. Therefore the Chamber must consider the facts of the present case as they apply to the charges. The focus of the analysis that follows therefore is whether the charges, as framed in the Indictment, are proper and sustainable. The issue is not one of concurrent sentencing.

Arguments of the Parties

626. The Defence Teams submitted that the Trial Chamber should not convict for both genocide and Crimes Against Humanity because there is a *concur d'infraction* or concurrence of violations. The Defence for Ruzindana submitted that "Crimes Against Humanity have been largely absorbed by the Genocide Convention."[297] Furthermore, they argue that there is a partial overlap in the protected social interest of the two Articles of the Statute.[298] The Defence for Kayishema submitted that "The criterion which makes it possible to give separate recognition to the two concepts in law (genocide and extermination) is that the special interests served by genocide are different from those served by extermination. In the instant case, the interests were the same, no convincing argument having been advanced to the contrary."[299] The Prosecution does not argue the

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[295] ICRC, Report of the Meeting of Experts, October 1998.

[296] The Trial Chamber does not address the other three crimes charged in the present Indictment because, for various reasons outlined in the Legal Findings Part, the accused have not been found criminally responsible for each of these crimes.

[297] Defence Closing Brief (Ruzindana), 29 Oct. 1998, at 6.

[298] *Ibid.*

[299] Defence Brief of Clement Kayishema at 7.

substantive issues involved in the possibility of a *concur d'infractions* or the overlapping elements of the crimes.

The Test of Concurrence of Crimes

627. It is only acceptable to convict an accused of two or more offences in relation to the same set of facts in the following circumstances: (1) where offences have differing elements, or (2) where the laws in question protect differing social interests. To address the issue of concurrence, that is whether two or more crimes charged in the Indictment could be considered the same offense, the Trial Chamber examines two factors: Firstly, whether the crimes as charged contain the same elements, and secondly, whether the laws in question protect the same social interests.[300] The Chamber first analyses the issue of concurrence as it applies to the laws of genocide and Crimes Against Humanity generally; that is, examine whether the violation of these laws *could* overlap? The Chamber will follow this analysis with an application to the case at bench; that is, ask whether the crimes *do* overlap given the factual circumstances of the present case?

General Analysis of Concurrence in Relation to Genocide and Crimes Against Humanity; Could the Violation of these Laws Overlap?

628. The Trial Chamber first examines concurrence as it relates to the umbrella laws of genocide and Crimes Against Humanity, addressing the elements that could be invoked when the laws are applied to different factual scenarios. This allows the Trial Chamber to determine whether concurrence *could* occur where genocide and one or more of the enumerated crimes within Crimes Against Humanity are charged in relation to the same set of facts.

629. In relation to the elements of the crimes in question, not all the elements of genocide or Crimes Against Humanity will be invoked in every case. Between the two crimes there are three elements that, if applied in a particular case, could be relied upon to prove one crime but not the others. In such a case there would be no overlap of elements.

[300] Many national jurisdictions have adopted such concepts in conducting criminal proceedings. *See* Blockburger v. United States, 284 U.S. 299 (1932).

In other circumstances however, the elements relied upon to prove each of the crimes could be the same.

630. Firstly, and most fundamentally, some of the enumerated crimes under Crimes Against Humanity would not be carried out with the objective to *destroy* a group in whole or in part; the primary requirement for genocide. For example, Crimes Against Humanity of deportation or imprisonment would not generally lead to the destruction of a protected group. Within Crimes Against Humanity, however, the enumerated crimes of murder (when carried out on a large scale) or extermination would, by their very nature, be committed with the objective to eliminate a part of the population based on discriminatory grounds. Indeed, the terms extermination and destroy are interchangeable in the context of these two crimes. Thus, the element could be the same, given the right factual circumstances.

631. Secondly, under Crimes Against Humanity all of the enumerated crimes must be committed specifically against a "civilian population"[301] where as to commit the crime of genocide one must commit acts to destroy "members of a group." The victims' civilian or military status has no bearing on proving an allegation of genocide. However, in some factual scenarios where the victims are members of the civilian population only, the element would be the same.

632. Third, the discriminatory grounds under Crimes Against Humanity include a type of discrimination not included under genocide, that is political conviction. Where the Prosecution case is based on the same discriminatory grounds, the element would be the same.

633. Fourthly, extermination requires a showing that at least one murder was a part of a mass killing event. Mass killing is not required for the crime of murder. Further, under the Statute, premeditation is required for murder but not for a killing that is a part of a

[301] For a detailed discussion on the definition of the civilian population, under Crimes Against Humanity, *see* Chapter 4.2, *supra*.

policy of extermination. However, as in the case before this Chamber, where all murders are premeditated and form a part of a mass killing event, the elements of the offences are the same.

634. In sum, the Chamber finds that one may have the specific intent required to commit genocide and also to act pursuant to a policy that may fulfil the intent requirement for some Crimes Against Humanity, while carrying out acts that satisfy the material elements of both Crimes.

635. Similarly, in relation to protecting differing "social interests," the elements of the two crimes may overlap when applied in some factual scenarios, but not in others. Under the crimes of genocide and Crimes Against Humanity the social interest protected is the prohibition of the killing of the protected class of persons. The class of persons is limited to the civilian population under Crimes Against Humanity whereas under genocide it is not limited to attacks against the civilian population. Where the status of the victims and the elements of the crimes are the same however, the laws may be said to protect the same social interests.

636. Having examined the elements, both mental and physical, and the protected social interests, the Trial Chamber finds that genocide and Crimes Against Humanity may overlap in some factual scenarios, but not in others. This is not surprising. Both international crimes are offenses of mass victimization that may be invoked by a wide array of culpable conduct in connection with many, potentially different, factual situations. Accordingly, whether such overlap exists will depend on the specific facts of the case and the particular evidence relied upon by the Prosecution to prove the crimes.

Do the Crimes Overlap in the Present Case ?

637. For his conduct at the Complex, Kayishema is charged cumulatively with Genocide (Count 1), Murder (Count 2) and Extermination (Count 3); for his conduct at the Stadium cumulatively with Genocide (Count 7), Murder (Count 8) and Extermination (Count 9); for his conduct at Mubuga Church cumulatively with Genocide (Count 13), Murder

(Count 14) and Extermination (Count 15); and, for his conduct in Bisesero cumulatively with Genocide (Count 19), Murder (Count 20) and Extermination (Count 21). Ruzindana is charged cumulatively for his conduct in Bisesero with Genocide (Count 19), Murder (Count 20) and Extermination (Count 21).

638. In the instant case, both accused persons participated in the three-month long killing event that subsumed Rwanda, committing crimes in Kibuye *Prefecture*. In short, the Prosecution alleges and the Trial Chamber finds, that Kayishema and Ruzindana intended to kill vast numbers of Tutsis in Kibuye *Prefecture* and committed numerous acts, including aiding and abetting others, in pursuit of this objective. Evidence proves that the killings for which the accused were responsible were perpetrated against a civilian population. The Trial Chamber finds that the massacres were carried out solely on the basis of ethnicity. Moreover, in the present case the evidence produced indicates that the murders committed were part of the mass killing event. Each one of these issues is examined in detail below.

The Conduct Relied Upon to Prove All Three Crimes Was the Same – the Physical and Mental Elements

639. The Prosecution case was based on the accused's objective to kill Tutsis in Kibuye *Prefecture*, or their aiding and abetting other Hutus to do so, over a three-month period. The policy of genocide in Kibuye, also served to prove the policy element for Crimes Against Humanity. With regard to the *actus reus* of both accused persons, the Trial Chamber finds that the attacks in which the accused participated and/or led resulted in thousands of deaths and numerous injuries. The same acts or omissions serve as the basis for the Prosecution case in all three types of crimes in question. For example, the widespread or systematic element of the attack required for Crimes Against Humanity also served to prove that the acts perpetrated by the accused were genocidal acts namely, killings with intent to destroy the Tutsi ethnic group in whole or in part.

640. With regard to the *mens rea*, the Trial Chamber finds this case to be one of intentional extermination or destruction of the Tutsi population; all the killings and

serious injuries occurred as a result of this objective. It is the same intent that has served as the basis for all three types of crimes in question.

641. Therefore, the elements and the evidence used to prove these elements were the same for genocide and the crimes of extermination and murder, in the instant case.

The Protected Social Interest - The Victims Were the Same

642. The Trial Chamber finds that the victims of the massacres were Tutsi civilians.[302] The discriminatory ground upon which the attacks were based was solely one of ethnicity. Accordingly, the discriminatory element, which is a requirement for both genocide and Crimes Against Humanity, was the same. Furthermore, the Tutsi victims of the attacks were civilians; members of the civilian population in Kibuye *Prefecture*. The victims held the same status whether they were victims of the genocidal acts or the crimes of extermination or murder. Thus, in this case, the same evidence established that the acts of the accused were intended to destroy the Tutsi group, under genocide, and were equally part of a widespread or systematic attack against civilians on the grounds that they were Tutsis, under extermination and murder.

643. Therefore, in the instant case, the social interest protected, that is, the lives of Tutsi civilians, was the same for genocide and the crimes of extermination and murder under Crimes Against Humanity.

All Murders Were a Part of the Mass Killing Event

644. The Trial Chamber finds that the murders at each one of the crime sites took place as part of the policy of genocide and extermination within Kibuye *Prefecture*. All the killings were premeditated and were part of the overall plan to exterminate or destroy the Tutsi population. The killings go to prove the charges of Crimes Against Humanity for murder as well as extermination and genocide. None of the killings were presented to the Trial Chamber as a separate or detached incident from the massacres that occurred in the four crime sites in question. Therefore, the Trial Chamber finds that the elements of the

crimes are the same for all three types of crimes and that evidence used to prove one crime is used also prove the other two.

Findings

The Same Offence?

645. The Prosecution uses the same elements to show genocide, extermination and murder, and relies upon the same evidence to prove these elements. The evidence produced to prove one charge necessarily involved proof of the other. The culpable conduct that is, premeditated killing, relied upon to prove genocide, also satisfied the *actus reus* for extermination and murder. Additionally, all the murders were part of the extermination (the mass killing event) and were proved by relying on the same evidence. Indeed, extermination could only be established by proving killing on a massive scale.[303]

646. The widespread or systematic nature of the attacks in Kibuye satisfied the required elements of Crimes Against Humanity, and also served as evidence of the requisite acts and Genocidal intent. The *mens rea* element in relation to all three crimes was also the same that is, to destroy or exterminate the Tutsi population. Therefore, the special intent required for genocide also satisfied the *mens rea* for extermination and murder. Finally, the protected social interest in the present case surely is the same. The class of protected persons, i.e., the victims of the attacks, for which Kayishema and Ruzindana were found responsible were Tutsi civilians. They were victims of a genocidal plan and a policy of extermination that involved mass murder. Finally, the Prosecutor failed to show that any of the murders alleged was outside the mass killing event, within each crime site. These collective murders all formed a part of the greater events occurring in Kibuye *Prefecture* during the time in question.

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[302] See Legal Findings on Crimes Against Humanity.

[303] It is important to note that an accused may be guilty of extermination, under Crimes Against Humanity, when sufficient evidence is produced that he or she killed a single person as long as this killing was a part of a mass killing event.

647. Therefore, the Trial Chamber finds that, in the peculiar factual scenario in the present case, the crimes of genocide, extermination and murder overlap. Accordingly, there exists a *concur d' infractions par excellence* with regard to the three crimes within each of the four crime sites, that is to say these offenses were the same in the present case.

The Consequences of Concurrence

648. During the trial, the Prosecution used the same elements to prove all three types of crimes as they applied to the four crime sites. In the context of the present case the three laws in question protected the same social interests. Therefore, the counts of extermination and murder are subsumed fully by the counts of genocide. That is to say they are the same offence in this instance.

649. The Trial Chamber is therefore of the view that the circumstances in this case, as discussed above, do not give rise to the commission of more than one offence. The scenario only allows for a finding of either genocide or extermination and/or murder. Therefore because the crime of genocide is established against the accused persons, then they cannot simultaneously be convicted for murder and/or extermination, in this case. This would be improper as it would amount to convicting the accused persons twice for the same offence. This, the Trial Chamber deems to be highly prejudicial and untenable in law in the circumstances of this case. If the Prosecution intended to rely on the same elements and evidence to prove all three types of crimes, it should have charged in the alternative. As such, *these* cumulative charges are improper and untenable.

650. Further, even if the Trial Chamber was to find that the Counts of extermination and murder were tenable, the accused persons could not have been convicted for the collective murders, in this case, under Article 3(a) and extermination under Article 3(b) of the Statute, as charged. This is because, as stated above, the Prosecutor failed to prove that any of the murders alleged was outside the mass killing event, within each crime site. In this situation as well, the Prosecutor should have charged the accused in the alternative.

VIII. THE VERDICT

FOR THE FORGOING REASONS, having considered all of the evidence and the arguments of the parties, THE TRIAL CHAMBER finds as follows:

(1)By a majority, Judge Khan dissenting,

Decides that the charges brought under Articles 3(a) and (b) of the Statute (Crimes Against Humanity (murder) and Crimes Against Humanity (extermination) respectively) were in the present case, fully subsumed by the counts brought under Article 2 of the Statute (Genocide), therefore finding the accused, Clement Kayishema, NOT GUILTY on counts 2, 3, 8, 9, 14, 15, and both accused persons, Clement Kayishema and Obed Ruzindana, NOT GUILTY on counts 20 and 21.

(2)Unanimously **finds** on the remaining charges as follows:

In the case against **Clement Kayishema**:

Count 1: Guilty of Genocide
Count 4: Not Guilty of Crimes Against Humanity/Other Inhumane Acts
Count 5: Not Guilty of a violation of Article 3 Common to the Geneva Conventions
Count 6: Not Guilty of a violation of Additional Protocol II
Count 7: Guilty of Genocide
Count 10: Not Guilty of Crimes Against Humanity/Other Inhumane Acts
Count 11: Not Guilty of a violation of Article 3 Common to the Geneva Conventions
Count 12: Not Guilty of a violation of Additional Protocol II
Count 13: Guilty of Genocide
Count 16: Not Guilty of Crimes Against Humanity/Other Inhumane Acts
Count 17: Not Guilty of a violation of Article 3 Common to the Geneva Conventions
Count 18: Not Guilty of a violation of Additional Protocol II

Count 19: Guilty of Genocide

Count 22: Not Guilty of Crimes Against Humanity/Other Inhumane Acts

Count 23: Not Guilty of a violation of Article 3 Common to the Geneva Conventions

Count 24: Not Guilty of a violation of Additional Protocol II

In the case against **Obed Ruzindana**:

Count 19: Guilty of Genocide

Count 22: Not Guilty of Crimes Against Humanity/Other Inhumane Acts

Count 23: Not Guilty of a violation of Article 3 Common to the Geneva Conventions

Count 24: Not Guilty of a violation of Additional Protocol II

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

_____

William H. Sekule
Presiding

_____ _____

Yakov A. Ostrovsky Tafazzal Hossain Khan

Judge Khan appends a Separate and Dissenting Opinion to this Judgement.

Dated this twenty-first day of May 1999
Arusha
Tanzania

1. I fully agree with and share in the Judgment with the exception of the Majority's view that the charges of crimes against humanity/murder (hereinafter murder) and of crimes against humanity/extermination (hereinafter extermination) are improper and untenable. The Majority finds that there is no reason to enter a conviction under these counts. I respectfully **disagree**.

2. The Majority's determination stems from the finding that *concur d'infractions par excellence* (hereinafter also referred to as concurrence) exists with regard to the three crimes of genocide, murder and extermination, within each of the four crime sites. The Majority thus determines that the three crimes amount to the same offence and pronounce verdicts of Not Guilty for all the counts of murder and of extermination, in relation to both accused persons. That is, Not Guilty under Counts 2, 3, 8, 9, 14, 15, 20 and 21 for Clement Kayishema and Counts 20 and 21 for Obed Ruzindana.

3. I find that, notwithstanding the concurrence of crimes, the charges were proper and deserve full consideration. Having fully examined the criminal responsibility of the accused under the said charges, I find Kayishema and Ruzindana Guilty for all the counts of murder and of extermination preferred against them.

Background

4. In effect, the issue on which I dissent is the legal consequence of finding that concurrence exists between charges within the same indictment. That is, the effect of concurrence on the assessment of the guilt or innocence, the verdict pronounced (conviction) and the penalty imposed (sentence) in relation to those charges. In this case, concurrence is found on the basis that the same culpable conduct of the accused supports all three crimes, and that the three crimes, as proved, contain the same elements and protect the same social interest. I do not disagree with the finding that the charges, *as proved*, rely on the same evidence and the same culpable conduct.

5. However, I do not agree with the approach taken by the Majority with regard to the consequence of this concurrence. The Majority determines that the murder and extermination charges are 'improper and untenable' and, consequently, do not fully

address the criminal responsibility of the accused persons under those charges. The Majority opines,

> Therefore, the counts of extermination and murder are subsumed fully by the counts of genocide. That is to say they are the same offence in this instance.
>
> The Trial Chamber is therefore of the view that the circumstances in this case, as discussed above, do not give rise to the commission of more than one offence. The scenario only allows for a finding of either genocide or extermination and/or murder. Therefore because the crime of genocide is established against the accused persons, then they cannot simultaneously be convicted for murder and/or extermination, in this case. This would be improper as it would amount to convicting the accused persons twice for the same offence. This, the Trial Chamber deems to be highly prejudicial and untenable in law in the circumstances of this case. If the Prosecution intended to rely on the same elements and evidence to prove all three types of crimes, it should have charged in the alternative. As such, *these* cumulative charges are improper and untenable.[1]

6. Ultimately, the Majority pronounces both the accused **Guilty** for the counts of genocide only but **Not Guilty** for the counts of murder and extermination under each crime site. I respectfully **disagree** with this approach. In my opinion, the consequence of concurrence should be dealt with at the penalty stage – by sentencing the accused concurrently for the cumulative charges – rather than at the *verdict*.

7. In Part 1 of this Dissent I shall examine the submissions of the Parties, the relevant jurisprudence and its applicability to the case at Bench. In Part II, I shall address the criminal responsibility of the accused persons under the counts of murder and of extermination.

PART 1

The Submissions of the Parties

8. The Defence submitted that the Trial Chamber should not *convict* for both genocide and crimes against humanity because there is a *concur d'infractions*. The Defence for Ruzindana submitted that "Crimes Against Humanity have been largely

[1] Kayishema and Ruzindana Judgment at Part VII

absorbed by the Genocide Convention"[2] and that there was a *partial* overlap in the protected social interest of the two Articles of the Statute.[3]

9. The Prosecution, on the other hand, contended that it is permissible to convict the accused for all the established counts for which the accused persons were responsible and to impose multiple sentences. By issuing multiple sentences, the Prosecution submitted, the Chamber would adequately address the gravity of each crime, the role of the accused, and the totality of their culpable conduct. The Prosecution further submitted that "multiple sentencing will not prejudice the convicted person. The Chamber may remedy any prejudicial effect by imposing concurrent sentences for offences which arise from the same factual circumstances."[4]

10. I find that the substance of the Prosecution's submission is in line with the applicable jurisprudence from the International Criminal Tribunals.

The Jurisprudence

11. The jurisprudence from national courts and the views of legal commentators on the issue of concurrence is mixed. Some argue that it is wrong to *convict* for two or more crimes that suffer from concurrence while others argue that an accused can be convicted for all the established crimes but, in order to avoid prejudice, *punished* for the established crimes concurrently (generally by imposing the sentence for the gravest crime).

12. Notwithstanding this general lack of uniformity, the international criminal jurisprudence most relevant to this Tribunal has been consistent in its approach from the very first case at the ICTY - *Prosecutor v. Dusko Tadic*. The ICTY and ICTR have consistently opined that the issue of cumulative charges should be addressed at the stage of penalty - by sentencing the accused concurrently for the established crimes that are supported by the same culpable conduct.

[2] Defence Closing Brief (Ruzindana), p. 6, 29 Oct. 1998.
[3] *Ibid.*
[4] Prosecutor's Sentencing Brief at para 102.

13. In dealing with the issue of concurrence, it appears that the ICTY Chambers have limited their analysis to the overlap of the accused's *culpable conduct*. They have placed less emphasis on the overlapping *elements* of the cumulative crimes. I agree with this approach. What must be punished is culpable conduct; this principle applies to situations where the conduct offends two or more crimes, whether or not the factual situation also satisfies the distinct elements of the two or more crimes, as proven.

In *Prosecutor v. Dusko Tadic*, the Defence submitted that,

> In the system of the amended indictment each event is composed of a general description of a vague behaviour of the accused and of a number of Counts, being multiple qualifications of the crimes arising from that behaviour.
>
> Whereas the vague description of behaviour does not individualize specific behaviour per qualification, and where the multiple qualifications of each prosecuted behaviour in the sequential Counts are not individualized per victim nor indicted as alternatives or subsidiars to each other if resulting from the same behaviour, each charged event may result in a cumulation of Counts, being different qualified crimes, but resulting from the same alleged behaviour.
>
> The present indictment is contrary to a fair administration of justice since it exposes the accused to the effect of a double jeopardy.[5]

14. In its response to the above submission the Trial Chamber, in its Decision of 14 November 1995, ruled,

> In any event, since this is a matter that will only be at all relevant in so far as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty can not be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. *What is to be punished by penalty is proven criminal conduct* and that will not depend upon technicalities of pleading.[6] [Emphasis added]

[5] Prosecutor v. Dusko Tadic, Defence Motion on the Form of the Indictment, (4 September 1995), IT-94-I-T.
[6] Prosecutor v. Dusko Tadic, Decision on the Defence Motion on the Form of the Indictment (14 November 1995) IT-94-I-T at p 6.

The said Chamber fully addressed all the cumulative counts and, in July 1997, sentenced Tadic on findings of guilt for numerous counts which relied upon the same culpable conduct, stating that "[e]ach of the sentences is to be served concurrently."[7]

15. Meanwhile, on 6 December 1996, the ICTY Appeals Chamber addressed the said issue in *Prosecutor v. Zejnil Delalic, et al.* (hereinafter *Celebici*), where it held,

> The accused also complains of being charged on multiple occasions throughout the Indictment with two differing crimes arising from one act or omission . . . . On this matter, the Trial Chamber endorsed its reasoning on an identical issue in the *Tadic* case: [Quoting the text of the *Tadic* Decision as stated in paragraph 14 above]
>
> The Bench does not consider that the reasoning reveals an error, much less a grave one, justifying the granting of leave to appeal.[8]

16. Following the above Appeals Chamber Decision, in the *Celebici* Judgment of 16 November 1998, the Trial Chamber held,

> The Trial Chamber . . . thus declined to evaluate this argument on the basis that the matter is only relevant to penalty considerations if the accused *is ultimately found guilty* of the charges in question. . . . It is in this context that the Trial Chamber here orders that each of the sentences is to be served concurrently. The sentence imposed shall not be consecutive.[9] [Emphasis added]

17. Hence, the Appeals Chamber has clearly endorsed the view initially stated by the *Tadic* Trial Chamber and followed in several Tribunal cases; to wit, it is at the stage of penalty (sentencing) where the issue of concurrence - and the contingent prejudice to the accused - should be addressed, rather than at the verdict.

18. Notably, the Trial Chambers of the ICTR have dismissed defence preliminary motions where the defence argued that cumulative charging based upon the same culpable conduct is impermissible. For example, in *Prosecutor v. Nahimana*, dismissing the defence contentions, Trial Chamber I of the ICTR held,

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[7] Prosecutor v. Dusko Tadic Sentencing Judgment at para 76.
[8] Prosecutor v. Zejnil Delalic, *et al*., Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment), IT-96-21-AR, Appeal Decision, at para IV.
[9] Celebici Judgment, IT-96-21-T, at para 1286.

> In any case and as far as the cumulation of charges is concerned, it is the highest penalty that should be imposed. However, it is evident that we are not at this stage yet.
>
> Finally, it should be pointed out in this regard that in the *Delalic* case, Trial Chamber I of the ICTY dismissed the objection raised by the Defence regarding the cumulation of charges on the grounds that the question was only relevant to the penalty if the accused is ultimately found guilty.[10]

19. The said issue was also raised in *Prosecutor v. Ntagerura*. On 28 November 1997, only four days later, Trial Chamber II of the ICTR fully endorsed the aforesaid view of Trial Chamber I, thus dismissing the defence contention.[11]

20. In *Prosecutor v. Akayesu,* Chamber I of the ICTR again endorsed the principle pronounced in *Tadic* case and held,

> In that case, when the matter reached the sentencing stage, the Trial Chamber dealt with the matter of cumulative criminal charges by imposing concurrent sentences for each cumulative charge. Thus, for example, in relation to one particular beating, the accused received 7 years' imprisonment for the beating as a crime against humanity, and a 6 year concurrent sentence for the same beating as a violation of the laws or customs of war.
>
> The Chamber takes due note of the practice of the ICTY. This practice was also followed in the *Barbie* case, where the French *Cour de Cassation* held that a single event could be qualified both as a crime against humanity and as a war crime.[12]

21. More recently, on 24 February 1999, in the *Prosecutor v. Milorad Krnojelac,* Trial Chamber II of the ICTY held,

> This pleading issue has already been determined by the International Tribunal in favour of the prosecution: previous complaints that there has been an impermissible accumulation where the prosecution has charged such different offences based upon the same facts – as it is here – have been consistently dismissed by the Trial Chambers, upon the basis that the significance of that fact is relevant only to the question of penalty. More importantly, the **Appeals Chamber** has similarly dismissed such a complaint.

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[10] Prosecutor v. Nahimana Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, 24 November 1997, at para 37.
[11] Prosecutor v. Ntagerura Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment of 28 November 1997, at para 26.
[12] Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T (2 September 1998) at paras 464, 465.

22. In the same Decision, the Chamber further held,

> The Prosecution must be allowed to frame charges within the one indictment on the basis that the Tribunal of fact may not accept a particular element of one charge which does not have to be established for the other charges, and in any event in order to reflect the totality of the accused criminal conduct, so that the *punishment* imposed will do the same. Of course, great care must be taken in *sentencing* so that an offender *convicted* of different charges arising out of the same or substantially the same facts is not *punished* more than once for his commission of the individual act (or omissions) which are common to two or more of those charges. But there is no breach of the double jeopardy principle by the inclusion in the one indictment of the different charges arising out of the same or substantially the same facts.[13] (Emphasis added)

23. Thus, the line of international jurisprudence has evolved to hold that where the prosecution has charged such different crimes based upon the same facts, the matter falls for consideration *once* an accused is ultimately found guilty. And, the consequence of cumulative charges can be suitably dealt with at the stage of sentencing, rather than at verdict. In my view, this approach applies equally well to matters where the elements of the crimes, as proved, also overlap.

24. The jurisprudence in this area of international law is no doubt still fresh - the case at Bench is only the second trial wherein the accused have been prosecuted for the international crimes of genocide simultaneously with crimes against humanity. Although different approaches are conceivable, in my view, it is important that the various Chambers ensure that the jurisprudence ripens into a judicious, as well as a consistent, body of law.

25. For the above reasons, and those that follow, I find no justification to depart from the approach employed by the Chambers in the aforementioned cases.

Were the Charges of Murder and of Extermination Improper and Untenable?

26. The answer to this question, in my opinion, is an emphatic no.

[13] Prosecutor v. Milorad Krnojelac, Decision on the Defence Preliminary Motion on the Form of the Indictment, at para 10.

27. The Majority holds that if the Prosecution intended to rely on the same elements and evidence to prove all three types of crimes, it should have charged in the alternative and, that the cumulative charges are "improper and untenable."[14] Accordingly, the Majority does not fully address the accused's criminal responsibility under the charges of murder and extermination. I **disagree** with this approach.

28. At the start of trial it was too early to assess concurrence. Whether the crimes *as proved* suffer from concurrence is a question that is best determined after a trial chamber has accepted or rejected the evidence adduced - only then will a chamber be fully seized of the culpable conduct and the elements applicable to the charges in question.[15] This much is accepted by the Majority in its determination,

> Having examined the elements, both mental and physical, and the protected social interests, the Trial Chamber finds that genocide and crimes against humanity may overlap in some factual scenarios, but not in others. This is not surprising. Both international crimes are offences of mass victimisation that may be invoked by a wide array of culpable conduct in connection with many, potentially different, factual situations. Accordingly, whether such overlap exists will depend on the specific facts of the case and the particular evidence relied upon by the Prosecution to prove the crimes.[16]

29. Not surprisingly, in *Prosecutor v. Milorad Krnojelac*, Trial Chamber II of the ICTY held that the Prosecution must be allowed to frame charges within the one indictment on the basis that the Tribunal may not accept a particular element of one charge and, in order to reflect the totality of the accused's conduct.[17]

30. In the case at Bench, although Ruzindana filed a preliminary motion, pursuant to rule 72 (B)(ii) of the Rules, on defects in the form of the Indictment,[18] the cumulative nature of the charges was not challenged therein. Similarly, Kayishema filed preliminary motions, none of which addressed the cumulative charges. Therefore, it is reasonable to infer that the Defence teams did not raise the issue being

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[14] Kayishema and Ruzindana Judgment at Part VII
[15] For example, in the present case, if the evidence to prove that the attacks were based on political grounds (one of the alleged discriminatory grounds for the crimes against humanity charges) had been accepted by the Chamber, then the crimes of extermination and murder would contain a different element from genocide. In this example, the elements of the charges would not completely overlap.
[16] Kayishema and Ruzindana Judgment at Part VII
[17] Prosecutor v. Milorad Krnojelac, *ibid.*
[18] Preliminary Motions, filed by Ruzindana, (8 February 1997).

mindful that the Tribunals had consistently dismissed such challenges. Nor did the Defence raise it during the presentation of evidence. Consequently, the Trial Chamber had no occasion to direct the Prosecution to amend the cumulative charges and the Prosecution had no reason to believe that they were improper and untenable.

31. It is not fair on the Prosecution, nor does it serve the interests of justice, to find at this stage that the charges should have been in the alternative. Having regard to the jurisprudence referred to above, I hold that the charges are proper and tenable.

The Verdict Should Flow From the Chamber's Factual Findings Based Upon the Consideration of Proven Facts

32. Once the Prosecution has been permitted to proceed throughout trial with charges which, depending upon the Chamber's ultimate findings, may or may not overlap, the Trial Chamber is under the obligation to address the criminal responsibility on each charge. In my opinion, the verdict should be based upon the consideration of proven facts rather than the 'technicalities of pleading.' Here, this is particularly important since the offences of genocide and crimes against humanity are intended to punish different evils and to protect different social interests. Indeed, finding as the Majority did that murder and extermination are subsumed by genocide and that they are the same offence, defeats the very scheme and object of the law.

33. Further, the full assessment of charges and the pronouncement of guilty verdicts are important in order to reflect the totality of the accused's culpable conduct. For crimes against humanity to be established, the Chamber must be satisfied that there was a widespread or systematic attack against a civilian population. These elements are not required for genocide. Genocide requires the specific intent to destroy a certain protected group, in whole or in part, and this destruction need not be part of a widespread or systematic attack, or targeted against a civilian population. Therefore, as in this case, where the culpable conduct was part of a widespread and systematic attack specifically against civilians, to record a conviction for genocide alone does not reflect the totality of the accused's culpable conduct. Similarly, if the Majority had chosen to convict for extermination alone instead of genocide, the verdict would still fail to adequately capture the totality of the accused's conduct.

The Approach Herein Does Not Prejudice the Accused

34. The concept of c*oncur d'infractions* is to protect an accused from prejudice where the same facts and conduct support a conviction for two or more crimes which rely upon the same elements. I fully endorse this principle. Indeed, it is unfair that an accused is punished more than once for one culpable conduct where the facts and victims are the same. However, any real prejudice in the instant case would arise from the *sentence* imposed rather than the *pronouncement of conviction*.

35. It is said that multiple convictions may unnecessarily tarnish the criminal record and image of the accused. I do not find this position convincing in the instant case. Here the realities that have emerged are so vast and complicated that they attract both the laws of genocide and crimes against humanity. Once the accused has been found guilty of the abominable crime of genocide, it is difficult to appreciate how the pronouncement of additional guilty verdicts under the two crimes of murder and extermination would tarnish his image further or lead to other prejudice, when the sentences are ordered to run concurrently.

36. Further, as the Majority acknowledges, the Prosecution used the same elements to show the existence of the three crimes and, "relied upon the same evidence to prove these elements . . . [t]he evidence produced to prove one charge necessarily involved proof of the other." Accordingly, during trial the accused persons were not prejudiced by having to refute any extra evidence due to the cumulative charges. On the other hand, had this been a case of double jeopardy (that is, where a person is prosecuted in *successive* trials for an offence for which he has already been acquitted or convicted), then the potential for prejudice would be obvious. Here, we are not concerned with successive trials.

37. Both Kayishema and Ruzindana will be sentenced according to their culpable conduct which, in this case, is the leadership role they played in massacring thousands of Tutsi men, women and children, due purely to their ethnicity. Whether this conduct offends one or three crimes, the sentence imposed must be the same. In my opinion, a verdict that the accused persons are guilty for the counts of murder and of extermination, as well as genocide, will in no way prejudice the accused. Thus,

concurrent sentencing based upon the proven criminal conduct is a satisfactory way of ensuring that the accused do not suffer prejudice.

PART II

The Criminal Responsibility Under the Counts of Murder and Extermination

38. The Majority correctly determines that,

> The Prosecution uses the same elements to show genocide, extermination and murder, and relies upon the same evidence to prove these elements. The evidence produced to prove one charge necessarily involved proof of the other. The culpable conduct that is, premeditated killing, relied upon to prove genocide, also satisfied the *actus reus* for extermination and murder. Additionally, all the murders were part of the extermination (the mass killing event) and were proved by relying on the same evidence. Indeed, extermination could only be established by proving killing on a massive scale.
>
> The widespread or systematic nature of the attacks in Kibuye satisfied the required elements of crimes against humanity, and also served as evidence of the requisite acts and genocidal intent. The *mens rea* element in relation to all three crimes was also the same that is, to destroy or exterminate the Tutsi population. Therefore, the special intent required for genocide also satisfied the *mens rea* for extermination and murder. Finally, the protected social interest in the present case surely is the same. The class of protected persons, i.e., the victims of the attacks, for which Kayishema and Ruzindana were found responsible were Tutsi civilians. They were victims of a genocidal plan and a policy of extermination that involved mass murder. Finally, the Prosecutor failed to show that any of the murders alleged was outside the mass killing event, within each crime site. These collective murders all formed a part of the greater events occurring in Kibyue *Prefecture* during the time in question.[19]

39. Thus, as is evident from the above, the Majority accepts the criminal responsibility of Kayishema and Ruzindana under the charges of murder and of extermination. The Trial Chamber's findings in relation to the evidence and the accused person's criminal responsibility pursuant to the charges of genocide will apply equally to murder and extermination under each crime site, respectively. However, for the sake of completeness, I am obliged to briefly address certain aspects of these counts.

[19] Kayishema and Ruzindana Judgment at Part VII

The Attack

40. The Trial Chamber has analysed the essential elements of the attack under crimes against humanity.[20] The analysis reveals that Kayishema's criminal conduct at the massacres at Mubuga Church, the Stadium, the Complex and Bisesero area was part of a widespread or systematic attack against a civilian population on ethnic grounds, and that Kayishema was aware that his acts formed part thereof. And, that Ruzindana's criminal conduct at Bisesero area was part of a widespread or systematic attack against a civilian population on ethnic grounds, and that Ruzindana was aware that his acts formed part thereof. The conduct of both accused was instigated or directed by a government or another organization or group. I concur with this analysis and shall not repeat it here.

The Crimes

41. The Majority did not specifically determine whether the evidence satisfies the distinct elements of the individual crimes of murder and extermination, at the four crime sites; an analysis that the Majority deems unnecessary due to the concurrence with genocide. Of course, a finding of guilt may only be entered if the Prosecution has proved the requisite elements beyond all reasonable doubt. Therefore, below I shall apply the evidence to the distinct elements of murder and extermination bearing in mind that much of the evidence has already been discussed in detail pertaining to the genocide counts. The criminal responsibility of the accused persons under each said count will be the same as that stated under the count of genocide, within the same crime site.

The massacres at the Catholic Church and Home St. John Complex

Count 2

42. Count 2 charges Kayishema with crimes against humanity in violation of Article 3(a) (murder) of the Tribunal Statute. All the killings on 17 April 1994 at the Complex were murders, that is, premeditated and intentional killings. Further, Kayishema caused the death of Tutsis at the Complex massacre by premeditated acts or omissions, intending to do so. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at the Complex has been established by the

[20] Kayishema and Ruzindana Judgment Parts VI Chapter 3 and Part VII

evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 1 (genocide) is equally attracted and applicable to this Count 2 (murder).

Count 3

43. Count 3 charges Kayishema with crimes against humanity in violation of Article 3(b) (extermination) of the Tribunal Statute. On 17 April 1994 at the Complex there was extermination, that is a mass killing event. Kayishema participated in the extermination, having intended the killings. The mass killing resulted in the death of thousands of Tutsis. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at the Complex has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 1 (genocide) is equally attracted and applicable to this Count 3 (extermination).

The massacres at the Stadium in Kibuye Town

Count 8

44. Count 8 charges Kayishema with crimes against humanity in violation of Article 3(a) (murder) of the Tribunal Statute. All the killings on 18 April 1994 at the Stadium were murders, that is, premeditated and intentional killings. Kayishema caused the death of Tutsis in the Stadium massacre by premeditated acts or omissions, intending to do so. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at the Stadium has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 7 (genocide) is equally attracted and applicable to this Count 8 (murder).

Count 9

45. Count 9 charges Kayishema with crimes against humanity in violation of Article 3(b) (extermination) of the Tribunal Statute. On 18 April 1994 at the Stadium there was extermination, that is a mass killing event. Kayishema participated in the extermination, having intended the killings. The mass killing resulted in the death of thousands of Tutsis. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at the Stadium has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal

responsibility under Count 7 (genocide) is equally attracted and applicable to this Count 9 (extermination).

The massacres at the Church in Mubuga

Count 14

46. Count 14 charges Kayishema with crimes against humanity in violation of Article 3(a) (murder) of the Tribunal Statute. All the killings on 15 and 16 April 1994 at the Mubuga Church were murders, that is, premeditated and intentional killings. Further, Kayishema caused the death of Tutsis at the Mubuga Church massacre by premeditated acts or omissions, intending to do so. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at Mubuga Church has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 13 (genocide) is equally attracted and applicable to this Count 14 (murder).

Count 15

47. Count 15 charges Kayishema with crimes against humanity in violation of Article 3(b) (extermination) of the Tribunal Statute. On 15 and 16 April 1994 at Mubuga Church there was extermination, that is a mass killing event. Further Kayishema participated in the extermination, having intended the killings to take place. The mass killing resulted in the death of thousands of Tutsis. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at Mubuga Church has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 13 (genocide) is equally attracted and applicable to this Count 15 (extermination).

The massacres in the Area of Bisesero - Kayishema

Count 20

48. Count 20 charges Kayishema with crimes against humanity in violation of Article 3(a) (murder) of the Tribunal Statute. The killings that took place in Bisesero area during April, May and June 1994 that involved Kayishema were murders, that is, premeditated and intentional killings. Kayishema caused the death of Tutsis at numerous places in the Bisesero area including, Karonge Hill at the end of April, Bisesero Hill on 11 May, Muyira Hill on 13 and 14 May, the Cave, Gitwa Cellule in

May and Kucyapa in June. Kayishema caused these deaths by premeditated acts or omissions, intending to do so. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at Bisesero area has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 19 (genocide) is equally attracted and applicable to this Count 20 (murder).

Count 21

49. Count 21 charges Kayishema with crimes against humanity in violation of Article 3(b) (extermination) of the Tribunal Statute. The killings in the Bisesero area during April, May and June 1994 amounted to an extermination, that is a mass killing event. Further, Kayishema participated in the extermination, having intended the killings. The mass killing resulted in the death of thousands of Tutsis. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at Bisesero area has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 19 (genocide) is equally attracted and applicable to this Count 21 (extermination).

The massacres in the area of Bisesero - Ruzindana

Count 20

50. Count 20 charges Ruzindana with crimes against humanity in violation of Article 3(a) (murder) of the Tribunal Statute. The killings that took place in Bisesero area during April, May and June 1994 that involved Ruzindana were murders, that is, premeditated and intentional killings. Further, Ruzindana caused the death of Tutsis at numerous places in the Bisesero area including, the Mine on 15 April, Gitwa Cellule in early May, Bisesero Hill on 11 May, Muyira Hill on 13 and 14 May, the Cave, Kucyapa in June, the Hole near Muyira in early June. Ruzindana caused these deaths by premeditated acts or omissions, intending to do so. The criminal responsibility of Ruzindana under Articles 6(1) and 6(3) for the massacres at Bisesero area has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Ruzindana's criminal responsibility under Count 19 (genocide) is equally attracted and applicable to this Count 20 (murder).

Count 21

51. Count 21 charges Ruzindana with crimes against humanity in violation of Article 3(b) (extermination) of the Tribunal Statute. The killings in the Bisesero area during April, May and June 1994 amounted to an extermination, that is a mass killing event. Further, Ruzindana participated in the extermination, having intended the killings. The mass killing resulted in the death of thousands of Tutsis. The criminal responsibility of Ruzindana under Articles 6(1) and 6(3) for the massacres at Bisesero area has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Ruzindana's criminal responsibility under Count 19 (genocide) is equally attracted and applicable to this Count 21 (extermination).

Conclusion

52. The relevant jurisprudence of the International Tribunals is well founded and applicable to this case. The approach employed therein properly avoids entering into the legal quagmire of overlapping acts, elements and social interests at the stage of *conviction*. Rather, it concentrates upon the criminal conduct at the stage of *sentencing*. In doing so, it ensures that the accused's culpable conduct is reflected in its totality and avoids prejudice through *concurrent sentencing*.

53. In the case at Bench, the Trial Chamber finds that the same culpable conduct of the accused persons offends the crimes of genocide, murder and of extermination, within each crime site, on the facts and evidence of the case. In my opinion therefore, both accused persons should be found Guilty under each count of genocide, murder, and of extermination preferred against them, notwithstanding the finding that the crimes, *as proved*, suffer from c*oncur d'infractions.*

Dissenting Verdict

Genocide

54. Accordingly, I completely **agree** with and share in the verdict that Clement Kayishema is **Guilty** under Counts 1, 7, 13 and 19 for genocide. And, that Obed Ruzindana is **Guilty** under Count 19 for genocide.

Crimes against humanity/other inhumane acts

55. Further, I completely **agree** with and share in the verdict that Clement Kayishema is **Not Guilty** under Counts 4, 10, 16 and 22 for crimes against humanity/other inhumane acts. And, that Obed Ruzindana is **Not Guilty** under Count 22 for crimes against humanity/other inhumane acts.

Violations of article 3 common to the Geneva Conventions and Additional Protocol II

56. Further, I completely **agree** with and share in the verdict that Clement Kayishema is **Not Guilty** under Counts 5, 6, 11, 12, 17, 18, 23, and 24 for violations of article 3 common to the Geneva Conventions and Additional Protocol II. And, that Obed Ruzindana is **Not Guilty** under Counts 23 and 24 violations of article 3 common to the Geneva Conventions and Additional Protocol II.

*Crimes against humanity/murder and crimes against humanity/extermination - **Kayishema***

57. In light of the foregoing, **in addition** to the unanimous Guilty verdicts rendered by this Chamber for genocide, I would pronounce Clement Kayishema **Guilty** under Counts 2, 8, 14, and 20 for crimes against humanity/murder and **Guilty** under Counts 3, 9, 15 and 21 for crimes against humanity/extermination. In order to ensure that Kayishema would not suffer prejudice due to the concurrence of his culpable conduct, I would order that the sentences imposed in relation to the said counts of murder and extermination be equal to, and served concurrently with, the sentences imposed for the counts of genocide, under each of the four crime sites, respectively. I would not impose consecutive penalties.

*Crimes against humanity/murder and crimes against humanity/extermination - **Ruzindana***

58. In light of the foregoing, **in addition** to the unanimous Guilty verdict rendered by this Chamber for genocide, I would pronounce Obed Ruzindana **Guilty** under Count 20 for crimes against humanity/murder and **Guilty** under Count 21 for crimes against humanity/extermination. In order to ensure that Ruzindana would not suffer prejudice due to the concurrence of his culpable conduct, I would order that the sentences imposed in relation to the said counts of murder and extermination be equal to, and served concurrently with, the sentence imposed for the count of genocide, for his conduct within the Bisesero area. I would not impose consecutive penalties.

59. For all the above reasons, I respectfully submit this Separate and Dissenting Opinion.

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

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Judge Tafazzal Hossain Khan

Dated this twenty first day of May 1999
Arusha, Tanzania