



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: ENGLISH

Trial Chamber I

Before Judges:

Judge Lennart Aspegren, President
Judge Laïty Kama
Judge Navanethem Pillay

Registry: Mr. Agwu U. Okali

Judgement of: 27 January 2000

THE PROSECUTOR

v.

ALFRED MUSEMA

Case No. ICTR-96-13-A

JUDGEMENT AND SENTENCE

Office of the Prosecutor:

Ms Carla Del Ponte
Ms Jane Anywar Adong
Mr Charles Adeogun-Philips
Ms Holo Makwaia

Counsel for the Defence:

Mr Steven Kay, QC
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1. INTRODUCTION

1.1 The International Criminal Tribunal

1. This Judgement is rendered by Trial Chamber I of the International Criminal Tribunal for Rwanda (the “Tribunal”), composed of Judge Lennart Aspegren, presiding, Judge Laïty Kama, and Judge Navanethem Pillay, in the case of *The Prosecutor v. Alfred Musema*.

2. The Tribunal was established by United Nations Security Council Resolution 955 of 8 November 1994¹ after it had studied official United Nations reports² which revealed that genocide and other widespread, systematic, and flagrant violations of international humanitarian law had been committed in Rwanda. The Security Council determined that this situation constituted a threat to international peace and security, and was convinced that the prosecution of persons responsible for serious violations of international humanitarian law would contribute to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda. Accordingly, the Security Council established the Tribunal, pursuant to Chapter VII of the United Nations Charter.

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

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

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

³ The Rules were successively amended on 12 January 1996, 15 May 1996, 4 July 1996, 5 June 1997, 8 June 1998, and 4 June 1999.



1.2 Jurisdiction of the Tribunal

4. Pursuant to the provisions of the Statute, the Tribunal has the authority to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda. The Statute has also empowered the Tribunal with the authority to prosecute Rwandan citizens, who are natural persons, responsible for such violations committed in the territory of neighbouring States. Under Article 7 of the Statute, the Tribunal's jurisdiction *rationae temporae* limits prosecution to acts committed between 1 January 1994 and 31 December 1994. Individual criminal responsibility, pursuant to Article 6, shall be established for acts falling within the Tribunal's jurisdiction *rationae materiae*, as provided in Articles 2, 3, and 4 as follows:

“Article 2: Genocide

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



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3. The following acts shall be punishable:
- a) Genocide;
 - b) Conspiracy to commit genocide;
 - c) Direct and public incitement to commit genocide;
 - d) Attempt to commit genocide;
 - e) Complicity in genocide.

Article 3: Crimes Against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes, when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation;
- e) Imprisonment;
- f) Torture;



-
- g) Rape;
 - h) Persecutions on political, racial, and religious grounds;
 - i) Other inhumane acts.

Article 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- b) Collective punishments;
- c) Taking of hostages;
- d) Acts of Terrorism;
- e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- f) Pillage;
- g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial



guarantees which are recognised as indispensable by civilised peoples;

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

5. In addition, Article 6 states the principle of individual criminal responsibility:

“Article 6: Individual Criminal Responsibility

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

6. Although the Tribunal and national courts shall have concurrent jurisdiction to prosecute persons suspected of serious violations of international humanitarian law and whose identity and acts fall within the said limits of personal and temporal jurisdiction, the Tribunal shall have



primacy over national courts pursuant to Article 8 of the Statute and may formally request that national courts defer to its competence.



1.3 The Indictment

7. The initial Indictment against Alfred Musema was submitted by the Prosecutor on 11 July 1996, and was confirmed by Judge Yakov A. Ostrovsky on 15 July 1996.

8. On 14 December 1998, the Chamber confirmed an amended Indictment, submitted on 20 November 1998 by the Prosecutor. In this Indictment, the count of Complicity in Genocide was added *alternatively* to the existing count of Genocide. The Prosecutor submitted a second significantly amended Indictment on 29 April 1999, which the Chamber confirmed on 6 May 1999. This Indictment contains the final version of the Prosecutor's charges, and is the basis of the present judgement.

9. The amended Indictment, as confirmed on 6 May 1999, is printed in full in *Annex A*.



1.4 The Accused

10. Alfred Musema-Uwimana, here called Musema, was born on 22 August 1949 in the Byumba *Préfecture*. He is from Butare *Commune*. He began his studies in 1968 at the “*Université d’État, Faculté des Sciences Agronomiques*” in Gembloux, Belgium, and graduated in 1974.

11. Musema and his wife Claire Kayuku were married in 1975. They have three children. Like Musema, his wife is from Butare *Commune*.

12. Musema began his career in the Rwandan Ministry of Agriculture & Livestock Breeding, working in association with ORSTOM, a French company. In 1984, by presidential decree, Musema, then 35 years of age, was appointed as the director of the public enterprise, the Gisovu Tea Factory (under the parastatal organization *OCIR-thé*).

13. The Gisovu Tea Factory, constructed during the years 1977 to 1983, was in production for only a short time before Musema assumed responsibility in 1984. Although the tea plantations were young, the factory soon rose to the same standing as other, more established tea factories. By 1993, the Gisovu tea factory was one of the most successful tea factories in Rwanda. Indeed, its excellence was reflected in its volume of trade on the London Tea Market. (See Exhibit D11, a table of figures from Wilson Smith & Co., on the London Tea Exchange.)

14. Though the Head office of the Gisovu tea factory was located in Kibuye, Musema’s area of responsibility encompassed the *preféctures* of Kibuye and Gikongoro.

15. Between 1984 and 1994, Musema participated in two missions abroad. The first mission was to Kenya, where Musema visited the Kenya Tea Development Authority, and the second mission was to Morocco, where he examined alternative types of teas. Musema was chosen to participate in the mission to Morocco on the recommendation of Japanese businessmen, who identified the Gisovu tea factory as the most suitable Rwandan factory to produce several



varieties of tea.

16. Musema was a member of the “*conseil préfectorial*” in Byumba *Préfecture* and a member of the Technical Committee in the Butare *Commune*. Both positions of responsibility involved socio-economic and developmental matters and did not focus on *préfectorial* politics.



2. PROCEEDINGS

2.1 Procedural background

17. On 11 February 1995, Alfred Musema was arrested in Switzerland by the national authorities, on the basis of a warrant of arrest issued by the examining magistrate. Musema was detained by the Swiss authorities, confirmation of the detention being extended on a monthly basis in conformity with Articles 56 and ff. of the Code of the Martial Criminal Procedure. On 4 March 1996, the then Prosecutor, Richard J. Goldstone, applied to the Tribunal for a formal request for deferral by Switzerland concerning Alfred Musema⁴. By decision of 12 March 1996⁵, Trial Chamber I, constituted of Judge Laïty Kama, Presiding, Judge Lennart Aspegren and Judge Navanethem Pillay, formally requested the Swiss federal Government to defer to the Tribunal all investigations and criminal proceedings currently being conducted in its national courts against Alfred Musema. The Chamber further requested the Government of Switzerland to continue to detain Alfred Musema until an indictment was established and confirmed and a warrant of arrest was issued against him by the Tribunal.

⁴ See “Application by the Prosecutor for a formal request for deferral by Switzerland concerning Musema Alfred”, Case No. ICTR-96-5-D, (4 March 1996).

⁵ See “Decision on the formal request for deferral presented by the Prosecutor”, Case No. ICTR-96-5-D, (12 March 1996).



18. In conformity with Articles 17 and 18 of the Statute, and Rules 28 and 47 of the Rules, the Prosecutor presented an indictment dated 11 July 1996 against Alfred Musema to Judge Yakov Ostrovsky, who confirmed all the counts therein by decision of 15 July 1996⁶. A warrant of arrest and order for surrender addressed to the Swiss authorities was issued by Judge Ostrovsky on the same day⁷. Musema was transferred to the Tribunal's Detention Facility in Arusha on 20 May 1997.

19. Musema's initial appearance had to be rescheduled on two occasions, 16 June 1997 and 3 September 1997 respectively. Defence Counsel, Ms Marie- Paule Honegger of the Geneva Bar, failed to attend on both occasions and declined to accept the appointment of alternate counsel. Musema insisted on his right to have his appointed counsel present before entering a plea. After further delays were caused by the Defence Counsel to the scheduling of the initial appearance, the Chamber found that the Defence Counsel's conduct and lack of co-operation was obstructing the proceedings and was contrary to the interests of justice. The Chamber thus issued a warning to Ms Honegger, pursuant to Rule 46(A) of the Rules, that she may be sanctioned by the refusal of further audience before the Chamber if she defaulted in complying with the Chamber's request to represent in person her client during his initial appearance scheduled anew for 18 November 1997, in which case the Chamber would instruct the Registrar to replace her as counsel for Musema under Rule 46(C)⁸.

20. On 18 November 1997, the Defence Counsel, despite the said warning and notice, failed to be present at the initial appearance of Musema. Finding no reasonable or compelling grounds in the response of the assigned counsel for refusing to be present at the Tribunal for the hearing, the Chamber gave effect to the said warning by refusing her further audience before the Tribunal. The Chamber instructed the Registrar to immediately assign a new counsel to Musema⁹.

⁶ See "Decision on the review of the Indictment", Case No. ICTR-96-13-I, (15 July 1996).

⁷ See "Warrant of Arrest, Order for Surrender", Case No. ICTR-96-13-I.

⁸ See "Warning and notice to Counsel in terms of Rule 46(A) of the Rules of Procedure and Evidence", Case No. ICTR-96-13-I, (31 October 1997).

⁹ See "Decision to withdraw counsel and to allow the Prosecutor to redact identifying information of her witnesses", Case No. ICTR-96-13-I, (18 November 1997).



21. Prior to formally charging Musema by having the Indictment read out to him during the initial appearance, the Chamber informed Musema that his pleading guilty or not guilty to the charges without the presence of his lawyer did not deprive him of his right to counsel, and further explained to him that should he fail to enter a plea to the charges, a plea of not guilty would be entered on his behalf. After having satisfied itself that Musema had understood and accepted this, the Chamber proceeded with the initial appearance. The Chamber recalled that, in any event, Musema would be entitled to conduct his own defence if he so chose, pursuant to Rule 45(F) of the Rules. Thereafter, Musema pleaded not guilty to all the counts preferred against him.

22. Furthermore, pursuant to Rule 69 of the Rules, the Chamber granted permission to the Prosecutor to temporarily redact the names and other identifying information of her witnesses in the supporting material until such time as the Chamber had ordered protective measures for the Prosecutor's witnesses¹⁰.

¹⁰ See *infra*.



23. On 30 October 1998, the Prosecutor requested leave to file an amended Indictment against Alfred Musema. The proposed 39 page amended Indictment was filed on 3 November 1998¹¹. On 18 November 1998, after having heard the parties during the audience held to that end, Trial Chamber I rendered its decision thereon¹². The Chamber granted leave to the Prosecutor to add the count of Complicity in Genocide as an alternative Count to the Count of Genocide in the Indictment and on the same facts adduced in respect of the latter Count. Furthermore, leave was granted to the Prosecutor to amend paragraph 5 of the Indictment to include the allegation of Individual Criminal Responsibility under Article 6(3) of Statute in respect to every count. The Chamber directed the Prosecutor to withdraw the draft amended Indictment, and to immediately amend the original Indictment in conformity with the Decision. The new Indictment was filed by the Prosecutor on 20 November 1998. On the same day, Musema pleaded not guilty to the new charges therein before Trial Chamber I, constituted for this hearing of Judge Lennart Aspegren, Presiding, Judge Tafazzal H. Khan and Judge Navanethem Pillay.

24. By decision of 20 November 1998, the Chamber granted the motion of the Prosecutor for protective measures for her witnesses¹³.

25. On Monday 25 January 1999, before Trial Chamber I, constituted of Judge Lennart Aspegren, Presiding, Judge Laïty Kama and Judge Navanethem Pillay, the case on the merits of Musema commenced with the opening arguments of the Prosecutor, and the hearing of the first prosecution witness. Defence Counsel, Mr. Steven Kay QC, reserved his right to make an opening statement at the commencement of the case for the defence.

26. On 17 March 1999, the Chamber denied the application of 23 November 1998 and the 22 February 1999 corrigendum thereto filed by African Concern, a charitable non-governmental

¹¹ See "Prosecutor's request for leave to file an amended indictment"(Case No. ICTR-96-13-I), dated 30 October 1998; "Brief in support of Prosecutor's request for leave to file an amended indictment", Case No. ICTR-96-13-I, (30 October 1998); "Amended Indictment", Case No. ICTR-96-13-I, (filed 3 November 1998).

¹² See "Decision on the Prosecutor's request for leave to amend the Indictment"(Case No. ICTR-96-13-I), dated 18 November 1998.

¹³ See "Decision on the Prosecutor's Motion for Witness Protection", Case No. ICTR-96-13-T, (20 November 1998).



organization, to file a written brief as *Amicus Curiae* in the case¹⁴ on the subject of restitution of property to victims.

¹⁴ See “Decision on an Application by African Concern for Leave to Appear as an *Amicus Curiae*”, Case No. ICTR-96-13-T, (17 March 1999).



27. By Decision of the Chamber rendered on 6 May 1999, the Prosecutor was granted leave to amend the Indictment against Musema, *inter alia*, by adding of one new count against Musema and by expanding on the facts adduced in the then existing Indictment in support of the new count. The Chamber acknowledged that although the filing of the motion for leave to amend the Indictment came at a late stage in the presentation of the Prosecutor's case, this did not cause prejudice to Musema. Furthermore, the Chamber held that no undue delay would be caused to the proceedings by allowing the amendments as all the pertinent witness statements had already been disclosed to the Defence and as all witnesses the Prosecutor intended to rely upon in support of the new count had already testified in the case¹⁵.

28. With regard to witnesses, the Chamber granted leave to both the Prosecutor and the Defence to call additional witnesses¹⁶. The Chamber also ordered, pursuant to a request of the Prosecutor and on the basis of Rule 90*bis* of the Rules, on 19 April 1999, that three of the Prosecutor's protected witnesses be transferred temporarily to the Tribunal's Detention Facilities in Arusha in order to testify in the trial of Musema. The co-operation of the Government of Rwanda was sought in the matter¹⁷.

29. In total, twenty-two protected witnesses, one investigator and one expert witness appeared for the Prosecutor and she closed her case on 7 May 1999. The Defence opened its case on 10 May 1999 with the testimony of Musema. Five other witnesses, including two protected witnesses and one investigator appeared for the Defence. The Defence closed its case on 23 June 1999.

30. Closing arguments were heard on 25 and 28 June 1999 and the case put into deliberation. In all, the Trial covered 39 days between 25 January and 28 June 1999.

¹⁵ See "Decision on the Prosecutor's Request for Leave to Amend the Indictment", Case No. ICTR-96-13-T, (6 May 1999).

¹⁶ See "Decision on the Prosecutor's Request for Leave to Call Six New Witnesses", Case No. ICTR-96-13-T, (20 April 1999), and "Decision on the Motion of the Defence for Two Additional Witnesses and for Witness Protection", Case No. ICTR-96-13-T, (6 May 1999).

¹⁷ See "Order for Temporary Transfer of Three Detained Witnesses (Q, L, AB) Pursuant to Rule 90*bis* of the Rules of Procedure and Evidence", Case No. ICTR-96-13-T, (19 April 1999).





2.2 Evidentiary matters

31. The Chamber will here address general evidentiary matters of concern which arose during this trial, including general principles of the evidence evaluation, assessment of documentary evidence, false testimony, impact of trauma on the testimony of witnesses, interpretation and cultural factors affecting the testimony of witnesses.

2.2.1 General Principles of the Assessment of Evidence

32. The Chamber has considered the charges against Musema on the basis of testimony and exhibits offered by the Parties to prove or disprove allegations made in the Indictment.

33. The Chamber also relies on facts not in dispute and on other elements relevant to its decision, such as constitutive documents pertaining to the establishment and the jurisdiction of the Tribunal. The Chamber notes that, under Rule 89(A) of the Rules, it is not bound by any national rules of evidence. The Chamber has thus applied, in accordance with Rule 89, the rules of evidence which in its view best favour a fair determination of the matter before it and are consonant with the spirit and general principles of the law.

Admissibility

34. The admission of all evidence, regardless of its form, is governed by Rule 89(c) of the Rules, which states:

“A Chamber may admit any relevant evidence which it deems to have probative value.”



Reliability

35. The application of these criteria of admissibility (relevance and probative value) has been clarified by a majority of Trial Chamber II of the ICTY in the Tadić case¹⁸. This decision established that evidence which is both relevant and probative must also enjoy some component of reliability.

36. The role that reliability plays in determining the admissibility and the probative value of evidence is further clarified by the decision of the ICTY in the Delalić case¹⁹. The Trial Chamber there stated that:

“for evidence to be relevant, and to have a nexus between it and the subject matter, such evidence must be reliable. The same is true for evidence which is said to have probative value.”²⁰

37. The Chamber went on to state that reliability is the invisible golden thread which runs through all the components of admissibility.

38. The Chamber concurs with this understanding of the relationship between relevance, probative value, and reliability. The reliability of evidence does not constitute a separate condition of admissibility; rather, it provides the basis for the findings of relevance and probative value required under Rule 89(c) for evidence to be admitted.

Probative value

¹⁸*The Prosecutor v. Dusko Tadić*. See “Decision on Defense Motion on Hearsay”, Case No. IT-94-1-T (5 August 1996).

¹⁹*The Prosecutor v. Zejnil Delalić, Zdravko Mucić a/k/a “Pavo”, Hazim Delić and Esad Landžo a/k/a “Zenga”*. See “Decision on the Prosecution’s Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample”, Case No. IT-96-21-T (21 January 1998) (RP D5395-D5419).

²⁰*Id.* para. 32.



39. As a general principle, the Chamber attaches probative value to evidence according to its credibility and relevance to the allegations at issue.

40. As the Chamber has noted above, the probative value of evidence is based upon an assessment of its reliability.

41. The Chamber has assessed the relative weight and probative value to be accorded to each piece of evidence in the context of all other evidence presented to it in the course of the trial.

Corroboration

42. The Chamber notes that during trial, the corroboration of evidence was an important factor in assessing the probative value of much of the evidence presented by the Parties, in particular where only one testimony was presented in support of certain facts alleged in the Indictment, and also in relation to documentary evidence. (Documentary evidence is dealt with below.) The Chamber now turns to the question of the corroboration of testimonies.

43. The Chamber recalls that it is bound only to the application of the provisions of its Statute and Rules, in particular Rule 89 of the Rules. Rule 89 sets out the general principle of the admissibility of any relevant evidence which has probative value, provided that such evidence meets the requirements for the conduct of a fair trial. The Chamber may rule on the basis of a single testimony if, in its opinion, that testimony is relevant and credible.

44. The manner of application of the only Rule which deals specifically with the issue of corroboration of testimony, Rule 96(i) - which states that no corroboration shall be required for the testimonies of victims of sexual assault - was also raised during the trial.

45. The Chamber recalls that, as is stated in the *Akayesu* Judgement²¹ and the *Rutaganda*

²¹ *Akayesu* Judgement, para. 134.



Judgement²², sub-Rule 96(i) accords to the testimony of a victim of sexual assault the same basis of evaluation of reliability as the testimony of victims of other crimes. In the opinion of the Chamber, it cannot be concluded on the basis of this sub-Rule that in cases of crimes other than sexual assault, corroboration is required; nor does it follow from the sub-Rule, as Counsel for the Defence argued in this case, that corroboration is required where a witness is testifying to the occurrence of a sexual assault. On the contrary, it is proper to infer that the ability of the Chamber to rule on the basis of testimonies and other evidence is not bound by any rule of corroboration, but rather on the Chamber's own assessment of the probative value of the evidence before it.

46. The Chamber may freely assess the relevance and credibility of all evidence presented to it. The Chamber notes that this freedom to assess evidence extends even to those testimonies which *are* corroborated: the corroboration of testimonies, even by many witnesses, does not establish absolutely the credibility of those testimonies.

Corroboration in relation to Count 3 (Conspiracy to Commit Genocide)

47. The Chamber notes that this freedom extends to evidence pertaining to a Count of Conspiracy to Commit Genocide, as is present in the Indictment in the instant case. The Chamber notes that the probative value of the testimony of alleged co-conspirators will be assessed in relation to its credibility and relevance, on the same basis as other evidence.

48. However, the presence of a Count of Conspiracy to Commit Genocide may allow the admission of evidence which does not pertain specifically to the facts alleged in the Indictment, since such evidence may serve to establish the existence of and/or the participation of the Accused in the conspiracy alleged in the Indictment. In particular, evidence relating to the acts and declarations of fellow members of the alleged conspiracy performed or made in pursuance of the objects of the conspiracy *may* have probative value, and may, as a result, be deemed admissible, though such evidence does not pertain to facts alleged in the Indictment.

²²Rutaganda Judgement, para. 17.



49. The admissibility of such evidence shall, as shall all other evidence, be determined through reference to the criteria of relevance and probative value, under Rule 89(C) of the Rules. Relevance is to be assessed through reference to the nexus between the evidence and the existence and/or commission of the conspiracy. As Judge Pal said in the *Tokyo Judgement*, speaking only of declarations and not acts:

“In order to be competent as evidence the declaration must have been made in furtherance of the prosecution of the common object, or must constitute a part of the *res gestae* of some act done for the accomplishment of the object of the conspirators, otherwise such a statement should not be competent evidence against the others.”²³

50. The extent to which such evidence will prove merely the existence of a conspiracy, rather than the participation of the Accused in that conspiracy, will be a matter of assessment by the Chamber.

Hearsay evidence

51. The Chamber notes that hearsay evidence is not inadmissible *per se*, even when it cannot be examined at its source or when it is not corroborated by direct evidence. Rather, the Chamber has considered such hearsay evidence, with caution, in accordance with Rule 89. The Chamber further notes that, where it has relied upon such evidence, that evidence has, as with all other evidence, been subject to the tests of relevance, probative value and reliability discussed above.

Evidence not presented

²³The International Military Tribunal for the Far East (29 April 1946 - 12 November 1948). See Röling, B.V.A and Rüter, C.F. (eds), *The Tokyo Judgement*, vol. II (Amsterdam, APA-University Press Amsterdam BV, 1977), p. 630.



52. The value of the evidence presented to the Chamber is in no way altered by the non-provision of *other* evidence²⁴. The Chamber is free to evaluate all evidence before it on the basis of its relevance and probative value. The absence of forensic or real evidence shall in no way diminish the probative value of the evidence which is provided to the Chamber; in particular, the absence of forensic evidence corroborating eyewitness testimonies shall in no way affect the assessment of those testimonies, the relevance, reliability and probative value of which shall be assessed as discussed above. Similarly, the failure of one Party to present evidence to the Chamber shall not in any way affect the Chamber's assessment of the probative value of such evidence if it is presented by the other Party²⁵.

2.2.2 The Assessment of Documentary Evidence

53. Documentary evidence consists of documents produced as evidence for evaluation by the Tribunal. For the purposes of this case, the term "document" is interpreted broadly, being understood to mean anything in which information of any description is recorded. This interpretation is wide enough to cover not only documents in writing, but also maps, sketches, plans, calendars, graphs, drawings, computerized records, mechanical records, electro-magnetic records, digital records, databases, sound tracks, audio-tapes, video-tapes, photographs, slides and negatives. Many, though not all, of these types of documents were produced in this case by both Parties in support of their respective cases.

54. Considered as a distinct form of evidence, documentary evidence raises a number of particular issues, both in the assessment of its admissibility and the assessment of its probative value.

The burden of proof in relation to admissibility

²⁴ Although the provision of copies of documentary evidence where originals appear to be available may constitute an exception to this general rule. See further below.

²⁵ Notwithstanding this observation, the Chamber recalls the duties on both parties to disclose evidence of which they have knowledge, subject to Rules 66, 67 and 68.



55. The Chamber notes that in order for a document to be admissible as evidence, the Party that seeks to rely on the document must first prove that it meets with the standards of relevance and probative value (discussed above) laid out by sub-Rule 89(C). In other words, the burden of proof of the reliability (which, as discussed above, “runs through” the criteria of admissibility, namely relevance and probative value) of the document lies on the Party that seeks to rely on the document. When documents are admitted with the consent of both Parties, as has occurred in the instant case, the issue of proof of reliability does not arise. A similar situation arises when a document is admitted by way of judicial notice, as a “fact of common knowledge” under Rule 94, since no proof of the fact is required. When, however, the reliability of documentary evidence is questioned, the issue arises as to the required standard of proof of reliability for the admission of evidence.

56. With certain exceptions, discussed below, the Chamber is of the opinion that the standard of proof required to establish the reliability of documentary evidence is proof on the balance of probabilities. The admission of evidence requires, under sub-Rule 89(C), the establishment in the evidence of *some* relevance and *some* probative value. Accordingly, the standard of proof required for admissibility should be lower than the standard of proof required in the final determination of the matter at hand through the weighing up of the probative value of all the evidence before the Chamber. The admission of evidence does not require the ascertainment of the exact probative value of the evidence by the Chamber; that comes later. Admission requires simply the proof that the evidence has *some* probative value. Different standards of proof are appropriate for the process of admission and the process of determining the exact probative value of the same evidence.

57. Furthermore, the determination of admissibility does not go to the issue of *credibility*, but merely *reliability*. Accordingly, documentary evidence may be assessed, on the balance of probabilities, to be reliable, and as a result admitted. Later, that same evidence may be found, after examination by the Chamber, not to be credible.²⁶

²⁶ As it was stated by the ICTY in Decision on the Motion of the Prosecution for the Admissibility of Evidence (21 January 1998) (RP D5423-D5440, RP D5431):

“the mere admission of a document into evidence does not in and of itself signify that the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts.”



58. The circumstances which give rise to exceptions to this general rule include (but are not limited to) those circumstances in which the rights of the Accused are threatened by the admission of the evidence in question, or wherever the allegations about the unreliability of the evidence demand for admissibility the most exacting standard, consistent with the allegations. In such cases, a standard of proof of “beyond reasonable doubt” may, in the opinion of the Chamber, be justified.²⁷

Probative Value

59. The Chamber notes that the general principles governing the assessment of the probative value of documentary evidence do not differ in any way from the general principles governing the assessment of the probative value of evidence presented in other forms. Documentary evidence is assessed in accordance with the Rules, in particular Rule 89.

60. Notwithstanding this commonality of general principles, the Chamber notes that the *means* by which credibility (and to a lesser extent relevance) will be assessed *do* differ according to the form and nature of the evidence before the Chamber. The Chamber has considered a number of factors specific to documentary evidence in assessing the credibility of this evidence. These are discussed in detail below.

²⁷ See “Decision on Zdravko Muci_’s Motion for the Exclusion of Evidence”, IT-96-21-T (2 September 1997) (RP D5082-D5105)), where the ICTY found that the Prosecution bore a burden to prove beyond reasonable doubt that the evidence they sought to admit was obtained voluntarily and not in any way that contradicted the right of the Accused to a fair trial.



61. Distinct from the question of the authenticity of a document is the issue of the relationship between the document and its *source*, or *authorship*. Many national, and indeed some previous international, jurisdictions, have disallowed evidence which is deemed “self-serving”: that is, those documents written or produced by one Party (usually by the Accused) in order to support, in a propagandistic way, his or her own claims²⁸.

62. The Chamber has deemed it inappropriate to exclude such evidence unless, as sub-Rule 89© suggests, it is deemed either irrelevant or devoid of probative value.

63. The Chamber notes, nevertheless, that the source of a document may, taken in context, impact upon the assessment of the reliability or credibility (or both) of the document. For example, evidence produced in support of a defence of alibi from a source other than the Accused may be of greater probative value than evidence provided or produced by the Accused. While noting this, the Chamber emphasizes that such an understanding of the relationship between the source of documentary evidence and its probative value must in no way be interpreted as a presumption of the guilt of the Accused. The Chamber has not, in any way, allowed its assessment of the probative value of documentary evidence to interfere with the right of the accused to a fair trial.

64. Central to the establishment of the credibility and reliability of documentary evidence is the establishment (by the Party that seeks to rely on the document) of the *authenticity of the document, and of its contents*. The central importance of authenticity in the Tribunal’s assessment process is manifest in sub-Rule 89(D) of the Rules, which states that a Chamber may request verification of the authenticity of evidence obtained out of court.

65. In assessing the authenticity of these documents and their contents, the Chamber has, as with all forms of evidence, relied on its power under sub-Rule 89(C) to admit any relevant evidence which it deems to have probative value. In particular, it has acted under sub-Rule 89(B), applying rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

²⁸ See e.g. the discussion of Judge Pal in the Decision of The International Military Tribunal for the Far East, fn. 23, *supra*, pp. 638, 641-5, note 7.



66. In assessing the authenticity of documentary evidence, the Chamber has taken into account, amongst other factors, the form, contents and purported use of the document, and the position of the Parties thereon.

67. Form includes such matters as:

- whether the document provided to the Chamber is an original or a copy. Originals will, as a general rule, have a higher probative value than copies;
- whether, a document being a copy, is in any way registered or enrolled with some institutional authority;
- whether the document is signed, sealed, certified, stamped or in any other way officially authorized by some authority or organization;
- whether or not the document has been duly executed. In general terms this involves showing that it was written, produced or authorized by the person or party by whom it purports to be written, produced or authorized.

68. Resolution of such matters may be effected by the Chamber through a variety of means, pursuant to sub-Rule 89(D), which states that a Chamber may request verification of the authenticity of evidence obtained out of court. The means available to the Chamber are limited by sub-Rule 89(B), which states that a Chamber shall apply rules of evidence which will best favour the fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. Accordingly, while the Chamber may order the production of a sample of a witness' handwriting for purposes of comparison against documentary evidence, it cannot order such a sample to be produced from the Accused against his or her will, since such an order would compel the Accused to testify against himself or herself²⁹.

²⁹ See "Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Muci_, to Provide a Handwriting Sample", IT-96-21-T (21 January 1998) (RP)



69. The Chamber notes that among the means available to the Chamber to resolve such matters of form is resort to expert testimony.

Other factors affecting probative value:

70. The content of a document may be direct evidence of the existence of a fact or a state of affairs, and of the authenticity of the document itself. The probative value of the content of a document will be assessed by the Chamber in light of all the circumstances of the case, including its relation to oral testimony given before the Chamber pertaining to the content of the document.

71. Similarly, the purported use of the document, whether provided by the content of the document, its form, or oral testimony, may, in certain circumstances, be relevant in the assessment of the authenticity and the probative value of the document.

72. While all of these factors are relevant in assessing the authenticity and probative value of documentary evidence, other factors may also be considered. Further, in assessing authenticity, the Chamber observes that as a general rule, it is insufficient to rely on any one factor alone as proof or disproof of the authenticity of the document. Authenticity must be established through reference to all relevant factors.

The relationship between oral testimony and documentary evidence:

73. In many instances in this case, doubt as to the probative value of a document has arisen not through the form or content of the document, but through inconsistencies between the document and oral testimony rendered before the Chamber. The Chamber wishes, therefore, to address this matter in detail.

D5395-D5419). It is to be expected that a Chamber would be unable to make any other order which involved a similar self-condemnation by the accused, such as ordering the accused to speak certain words in the presence of a witness for the purposes of aural identification.



74. Concerning the question of oral testimony as “corroboration” of documentary evidence, the Chamber notes the following matters.

75. In assessing the probative value of the documents submitted, the Chamber has distinguished between those documents of which the form, contents and purported use are found to be supported by secondary evidence, primarily oral testimony, and those documents which are found to lack secondary support. Any evidence which is supported by other evidence logically possesses a greater probative value than evidence which stands alone, unless both pieces of evidence are not credible. Accordingly, oral testimony may serve to support, or “corroborate”, documentary evidence. The Chamber notes that this approach is wholly in accord with its stated views on the free assessment of evidence and the use of corroborating evidence, and with Rule 89 of the Rules.

76. The Chamber notes that such an approach to the assessment of the probative value of documentary evidence is supported by earlier practice in international criminal proceedings. In the *Tokyo Judgement* of 1946,³⁰ Judge Pal stated that “where a written instrument is not a fact in issue but only a piece of evidence in proof of some act, other independent evidence is admissible”³¹. In relying on this statement as authority for its approach to the assessment of documentary evidence, the Chamber notes that many of the documents submitted as evidence in this case unambiguously fall into the second category to which Judge Pal made reference - that of “evidence in proof of some other act”. The Chamber notes further that the principles outlined by Judge Pal in relation to admissibility are applicable to the assessment of probative value, since what is at stake in both situations is the reliability of the evidence in question.

77. Judge Pal went on to discuss the use of extrinsic evidence in the interpretation of written instruments:

“The words of a written instrument may, to all appearance, appear to be free from ambiguity in themselves. Yet external circumstances may create some doubt or difficulty as to the proper application of the words. In such cases the question of construction may admit of

³⁰The International Military Tribunal for the Far East, fn. 23, *supra*.

³¹*Id.*, p. 640.



extrinsic evidence.

Whether it be ‘the intention of the writer’ or ‘the meaning of the words’, the aim really is to ascertain the true nature of the transaction. Neither ‘intention’ nor meaning of the words can be the sole object. The primary object is to determine what it was that was really intended and the primary source of determining such intention is the language used”³².

78. This statement further supports the rule that oral testimony, or other independent evidence, may be used to “corroborate” documentary evidence. Since documentary evidence is not limited to written material, the use of independent or secondary evidence to “corroborate” documentary evidence should not be limited to those situations where the ambiguity or uncertainty arises from the *words*.

79. The Chamber finds that independent evidence may be used to “corroborate”, support, prove or disprove the authenticity and probative value of documentary evidence, once that independent evidence has been admitted. This principle is not limited to the use of oral testimony in supporting documentary evidence: it permits the use of multiple documents in mutual support (for example the combined use of maps, photographs and videos), and it also permits the use of documentary evidence in support of oral testimony.

80. The Chamber notes that the use of documents in support of oral testimony will extend to the use of documents as *aides mémoires* to refresh the memory of witnesses. However, where documents appear to be used not simply to refresh the memory of the witness, but as a crutch without which the testimony of the witness would fall, the Chamber notes that the credibility of the witness and the probative value of his or her testimony may be undermined.

81. Concerning the question of the assessment of prior statements, the Chamber notes the following.

82. Firstly, it notes that a significant problem arises where the oral testimony of a witness

³²*Id.*, p. 653.



contradicts, or is inconsistent with, prior statements made by the witness which have been admitted as documentary evidence into the proceedings.

83. Secondly, the Chamber also notes that the probative value of the respective pieces of evidence will, in part, depend on the conditions under which the prior statement was provided, as well as on other factors relevant to, or indicia of, the prior statement's reliability or credibility, or both. Accordingly, the Chamber will address separately three classes of prior testimony submitted as documentary evidence in this case:

- (1) witness statements and other non-judicial testimonies;
- (2) testimonies before this Tribunal; and
- (3) statements before other judicial bodies.

84. Firstly, regarding witness statements and other non-judicial testimonies, the Chamber notes that a large number of witnesses who appeared before the Chamber in this case had previously made statements, which included witness declarations and, in one case, a radio interview³³.

85. The Chamber has evaluated the probative value of such testimonies in light of the circumstances in which they were made, and in view of other factors pertaining to the reliability of the testimonies. The circumstances it has taken into consideration include such matters as: the language in which the testimony was made or in which the interview was conducted; the access of the Chamber to transcripts of the testimonies or the interviews, and its corresponding ability to scrutinise the nature of the questions put to a witness; the accuracy of interpretation and transcription; the time lapse between the prior testimonies and the testimony at trial; the difficulties of recollection; the use or non-use of solemn declarations; and the fact of whether or not a witness had read or reviewed the statement at the time at which it was made³⁴.

³³Defence Closing Argument (28 June 1999).

³⁴See further *Akayesu* Judgement, para. 134; *Rutaganda* Judgement, para. 19.



86. In light of these factors, it is the Chamber's opinion that the probative value of such prior witness statements is, generally, lower than the probative value of positive oral testimony before a Court of law, where such testimony has been subjected to the test of cross-examination.

87. Secondly, regarding testimonies before this Tribunal, in accordance with this principle of assessing prior statements in the light of the circumstances in which those statements were provided, the Chamber must confront the situation, which arose in this case, where the testimony of a witness appears to conflict with a prior statement made by the same witness before this Tribunal in separate proceedings.

88. The Chamber notes that in such cases, witnesses may have provided conflicting evidence under solemn declaration. The Chamber will, in accordance with the general principles of the assessment of evidence discussed above, assess such evidence on a case-by-case basis. It will address the admissibility of such evidence, and, in evaluating the probative value of the evidence, will address the explanations given by the witness for the discrepancies between his or her testimonies, and the materiality of such apparent discrepancies.

89. The Chamber further notes that inconsistency between two testimonies of the same witness, both given under solemn declaration, affects the credibility and reliability of the later testimony.

90. Where a conflict between testimonies exists, it is not the task of the Chamber to assess the credibility and reliability of the testimony in the earlier proceedings (for example the *Kayishema* and *Ruzindana* case), since these issues have been determined previously (and possibly, as in this case, by another Trial Chamber) in light of all the information available to it.

91. Thirdly, the Chamber notes that the issue of the assessment of the probative value of prior statements made before other judicial bodies arose in this case in relation to the "Swiss Files". The "Swiss Files" is the name given in this trial to the transcripts of interviews given by the Accused to a Swiss *juge d'instruction* following his arrest in Switzerland on 11 February 1995. The "Swiss Files" include eight voluntary statements and a number of accompanying documents, all submitted as



evidence by the Prosecution, with the consent of the Defence³⁵. The truth and probative value of the “Swiss Files” were not in question, to the extent that the files establish an accurate account of the interviews conducted by the Swiss authorities. However, both the Prosecutor and the Defence did, at different points in the Trial, contest the truth of Musema’s prior statements and the probative value of some of the documents, contained in those Files.

92. In assessing the probative value of the “Swiss Files”, the Chamber has relied on the general principle discussed above, taking into account the circumstances and conditions in which the documents were produced.

93. The Chamber makes two further observations relevant to the assessment of the probative value of such evidence.

94. Firstly, the Chamber notes that judicial testimonies (and other testimonies made under oath or solemn declaration) tend, as a general rule, to demonstrate greater reliability than non-judicial testimonies³⁶.

95. Secondly, the Chamber notes that the probative value of such evidence must be assessed in the light of the minimum standards expected by the Tribunal for the production of such evidence. These minimum standards provide a general yardstick against which the Chamber is able to measure the reliability of such evidence. However, the standards which comprise this yardstick differ according to the nature of the interview or investigation.

96. Rules 42 and 43 establish the standard expected of an interview of a suspect by the Prosecutor. These Rules do not, however, specifically address interviews of the Accused by someone other than the Prosecutor, or interviews involving witnesses.

³⁵Prosecution Closing Argument (25 June 1999).

³⁶*See R. v. B. (K.G.)* (1993), 79 C.C.C. (3d) 257.



97. The issue then arises as to what standards constitute the yardstick against which the probative value of evidence obtained in such interviews may be assessed. The Chamber finds that the relevant standards are embodied in Rules 39(i), 39(ii), 42, 43 and 95, which should be read together. These Rules provide the minimum standards constituting the yardstick against which both the admissibility and probative value of pre-Trial interview testimonies should be measured³⁷.

2.2.3 False testimony

98. On a number of occasions in this case direct, or indirect, implications were made by one of the Parties that one or more of the witnesses had deliberately or otherwise misled the Chamber. The Chamber notes that such submissions, if seriously intended as allegations of false testimony, should be submitted to the Tribunal in proper motion form, under Rule 91(B).

³⁷ The Chamber is of a similar mind to that of the Trial Chamber of the ICTY in “Decision on Zdravko Muci_’s Motion for the Exclusion of Evidence”, IT-96-21-T (RP D5082-D5105) where it stated:

“43Rule 42 embodies the essential provisions of the right to a fair hearing as enshrined in Article 14(3) of the International Covenant on Civil and Political Rights and Article 6(3)(c) of the European Convention on Human Rights. These are the internationally accepted basic and fundamental rights accorded to the individual to enable the enjoyment of a right to a fair hearing during trial. It seems to us extremely difficult for a statement taken in violation of Rule 42 to fall within Rule 95 which protects the integrity of the proceedings by the non-admissibility of evidence obtained by methods which cast substantial doubts on its reliability.

Error! Main Document Only.. The Trial Chamber is of the opinion that the surest way to protect the integrity of the proceedings is to read both Rules 42 and 95 together. We read Rule 95 as a summary of the provisions in the Rules, which enable the exclusion of evidence antithetical to and damaging, and thereby protecting the integrity of the proceedings. We regard it as a residual exclusionary provision.”



99. The Chamber reaffirms its position that false testimony is a deliberate offence, which presupposes wilful intent on the part of the perpetrator to mislead the Judges and thus to cause harm³⁸, and a miscarriage of justice. In such a motion, the onus is on the party pleading the case of false testimony to prove the falsehood of the witness' statements and to prove either that these statements were made with harmful intent or that they were made by a witness who was fully aware both of their falsehood and of their possible bearing upon the Judge's decision. In order to establish a strong basis for believing that the witness may have knowingly and wilfully given false testimony, it is insufficient to raise only doubt as to the credibility of the statements made by the witness. The Chamber affirms its opinion that, inaccurate statements cannot, on their own, constitute false testimony; an element of wilful intent to give false testimony must exist. As the Appeals Chamber has previously confirmed³⁹, there is an important distinction between testimony that is incredible and testimony which constitutes false testimony. The testimony of a witness may, for one reason or another, lack credibility even if it does not amount to false testimony within the meaning of Rule 91⁴⁰.

2.2.4 The impact of trauma on the testimony of witnesses

100. Many of the witnesses who testified before the Chamber in this case have seen or have experienced terrible atrocities. They, their family or their friends have, in many cases, been the victims of such atrocities. The trauma that may have arisen, and may continue to arise, from such experiences is a matter of grave concern to the Chamber. The Chamber notes that recounting and revisiting such painful experiences is likely to be a source of great pain to the witness, and may also affect her or his ability fully or adequately, to recount the relevant events in a judicial context. The Chamber has, accordingly, considered the testimony of those witnesses in this light.

³⁸ *Rutaganda* Judgement, para. 20.

³⁹ See *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, ICTR-96-3-T, "Decision on Appeals Against the Decisions by Trial Chamber I Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by witnesses 'E' and 'CC'" (8 June 1998) para. 28.

⁴⁰ *Rutaganda* Judgement, para. 20.



101. The Chamber also notes that some of the witnesses who testified before it may, in its opinion, have suffered, or may continue to suffer stress-related disorders. The Chamber has assessed the testimonies of such witnesses, in light of this possibility, and has taken into account their personal background and the nature of the atrocities to which they may have been subjected⁴¹.

2.2.5 Interpretation

102. The Chamber notes the difficulties presented by the consecutive translation of three languages (Kinyarwanda, French and English) in assessing evidence. In particular, it notes the significant syntactical and grammatical differences between the three languages. These difficulties have been taken into consideration by the Chamber in its assessment of all evidence presented to it, including evidence for which the source was not available for examination by the Chamber.

2.2.6 Cultural factors affecting the evidence of witnesses

103. The testimonies of many of the witnesses in this case were affected by cultural factors. The Chamber has not drawn any adverse conclusions regarding the credibility of witnesses when cultural constraints appeared to induce them to answer indirectly certain questions regarded as delicate. Further, the Chamber recalls that the assessment of all evidence tendered to it is conducted in accordance with the Rules, in particular Rule 89. Accordingly, as the Chamber noted earlier, evidence which appears to be “second-hand” is not, in and of itself, inadmissible; rather it is assessed, like all other evidence, on the basis of its credibility and relevance. While there appears, as the Defence argued, to be in Rwandan culture a “tradition that the perceived knowledge of one becomes the knowledge of all”⁴², the Chamber notes that, as in other cultures, Rwandan individuals are clearly able to distinguish between what they have heard and what they have seen⁴³. The Chamber made a consistent effort to ensure that this distinction was drawn throughout the trial, and has taken such matters into careful consideration in assessing the evidence before it.

⁴¹ *Akayesu* Judgement, paras 142-156.

⁴² Defence Closing Argument (28 June 1999).

⁴³ *Akayesu* Judgement, para. 155.



104. Finally, the Chamber notes the impact on the testimony of witnesses of cultural factors relating to the use of documents and the witnesses' unfamiliarity with spatio-temporal identification mechanisms and techniques. Certain witnesses had difficulty in being specific as to dates, times, distances and locations, and appeared unfamiliar with the use of maps, films, photographs and other graphic representations. The Chamber has carefully considered witnesses' responses in light of this understanding. It has not drawn any adverse conclusions regarding the credibility of a witness based only on a witness' reticence or circuitousness in responding to questions of such a nature; however, it has taken the accuracy and other relevant elements of such responses into account when assessing such evidence.

105. The Chamber further notes that sensitivity has, and should, be shown by the Parties in addition to the Bench, in relation to these cultural factors. This sensitivity should extend not only to courtroom proceedings but also to the gathering and preparation of evidence. The Chamber notes that it is not in the interests of either Party, let alone the Tribunal, to require witnesses to utilize identification mechanisms which are not familiar to them when other alternatives are readily available to the Parties. In particular, the Chamber draws attention to the use of aerial photography by the Prosecutor⁴⁴.

⁴⁴ See Prosecution exhibits P 20.1 - P 20.10.



2.3 The Defence of alibi

106. Pursuant to Rule 67 (A) of the Rules, (“Reciprocal Disclosure of Evidence”), the Prosecutor shall, as early as reasonably practicable and in any event prior to the commencement of the trial, notify the Defence of the names of the witnesses that he intends to call to establish the guilt of the accused, and in rebuttal of any defence plea of which the Prosecutor has received notice. The Defence shall notify the Prosecutor of its intent to enter 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.

107. Pursuant to Rule 67 (B), failure of the Defence to provide notice under Rule 67(A) shall not limit the right of the accused to rely on the defence of alibi. Although this Rule prevails, the Chamber notes that failure to provide notice may be relevant to the judicial consideration of the merits of the defence. In the *Kayishema and Ruzindana* Judgement, Trial Chamber II noted:

“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 defence presented.”⁴⁵

108. In raising the defence of alibi, the Accused not only denies that he committed the crimes for which he is charged but also asserts that he was elsewhere than at the scene of these crimes when they were committed. The onus is on the Prosecution to prove beyond a reasonable doubt the guilt of the Accused. In establishing its case, when an alibi defence is introduced, the Prosecution must prove, beyond any reasonable doubt, that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence. The alibi defence does not carry a separate burden of proof. If the defence is reasonably possibly true, it must be successful.

⁴⁵ See *Kayishema and Ruzindana* Judgement



3. THE APPLICABLE LAW

3.1 Individual criminal responsibility (Article 6 of the Statute)

109. The Accused is charged under Article 6(1) of the Statute with individual criminal responsibility for all the crimes alleged in the Indictment and under Article 6(3) of the Statute for acts committed by his subordinates.

110. The Chamber will now examine these two forms of criminal responsibility.

3.1.1 Individual criminal responsibility (Article 6(1) of the Statute)

111. Article 6(1) of the Statute provides that: “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.”

112. In the *Akayesu* Judgement⁴⁶, the Chamber issued an opinion on the principle of individual criminal responsibility under Article 6(1) of the Statute. The reasoning of this opinion is similar to that in the *Tadic*⁴⁷, *Celebici*⁴⁸, *Kayishema* and *Ruzindana*,⁴⁹ and *Rutaganda*⁵⁰ Judgements.

113. The Chamber finds that the aforementioned case-law regarding the principle of individual

⁴⁶ The *Akayesu* Judgement

⁴⁷ Judgement of the International Criminal Tribunal for the Former Yugoslavia, Case No.: IT -94-1-T, 7 May 1997.

⁴⁸ Judgement of the International Criminal Tribunal for the Former Yugoslavia, Case No.: IT 96-21-T, The Prosecutor versus Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo, “The Celebici Case”, 16 November 1998.

⁴⁹ The *Kayishema* and *Ruzindana* Judgement.

⁵⁰ The *Rutaganda* Judgement



criminal responsibility, as articulated notably in the *Akayesu* and *Rutaganda* Judgements, is sufficiently established and is applicable in the instant case.

114. The Chamber notes that, under Article 6(1), an accused person may incur individual criminal responsibility as a result of five forms of participation in the commission of one of the three crimes referred to in the Statute. Article 6(1) covers different stages in the commission of a crime, ranging from its initial planning to its execution.

115. The Chamber observes that the principle of individual criminal responsibility, under Article 6(1), implies that the planning or the preparation of a crime actually must lead to its commission. However, the Chamber notes that Article 2(3) of the Statute, pertaining to the crime of genocide, foresees the possibility for the Tribunal to prosecute attempted genocide, among other acts. Since attempt is by definition an inchoate crime, inherent in the criminal conduct *per se*, it may be punishable as a separate crime irrespective of whether or not the intended crime is accomplished.

116. Consequently, the Chamber holds that an accused may incur individual criminal responsibility for inchoate offences under Article 2(3) of the Statute but that, conversely, a person engaging in any form of participation in other crimes falling within the jurisdiction of the Tribunal, such as crimes covered under Articles 3 and 4 of the Statute, may incur criminal responsibility only if the intended crime is accomplished.

117. The Chamber finds that in addition to incurring responsibility as a principal offender, the accused may also be liable for criminal acts committed by others if, for example, he planned such acts, instigated another to commit them, ordered that they be committed, or aided and abetted another in the commission of such acts.

118. The Chamber defines five forms of criminal participation under Article 6(1) as follows:

119. The first form of participation, planning of a crime, implies that one or more persons contemplate the commission of a crime at both its preparatory and execution phases.



120. The second form of participation, incitement to commit a crime, involves instigating another, directly and publicly, to commit an offence. Instigation is punishable only where it leads to the actual commission of an offence intended by the instigator, except with genocide, where an accused may be held individually criminally liable for incitement to commit genocide under Article 2(3)(c) of the Statute, even where such incitement fails to produce a result.⁵¹

121. The third form of participation, ordering, implies a superior-subordinate relationship between the person giving the order and the one executing it, with the person in a position of authority using such position to persuade another to commit a crime.

122. The fourth form of participation in which an accused incurs criminal responsibility is where he actually commits one of the crimes within the jurisdiction *ratione materiae* of the Tribunal.

123. The Chamber holds that an accused may participate in the commission of a crime either through direct commission of an unlawful act or by omission, where he has a duty to act.

124. The fifth and last form of participation where individual criminal responsibility arises under Article 6(1) is “otherwise aid[ing] and abett[ing] in the planning, preparation, or execution of a crime referred to in Articles 2 to 4”.

125. The Chamber is of the view that aiding and abetting alone may be sufficient to render the accused criminally liable. In both instances, it is not necessary that the person aiding and abetting another to commit an offence be present during the commission of the crime. The relevant act of assistance may be geographically and temporally unconnected to the actual commission of the crime.

126. The Chamber holds that aiding and abetting include all acts of assistance in the form of either physical or moral support; nevertheless, it emphasizes that any act of participation must substantially

⁵¹ *Akayesu* Judgement, para. 562.



contribute to the commission of the crime. The aider and abettor assists or facilitates another in the accomplishment of a substantive offence.

3.1.2 Responsibility of the Superior for Subordinates

127. Article 6(3) of the Statute provides that :

“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.”

128. The principle enunciating the responsibility of command derives from the principle of individual criminal responsibility as applied by the Nuremberg and Tokyo Tribunals. It was subsequently codified in Article 86 of the Additional Protocol I of 8 June 1977 to the Geneva Conventions of 1949.

129. It is significant to note that there are varying views regarding the *mens rea* required for command responsibility. According to one view, *mens rea* derives from the legal concept of strict liability that is, the superior is criminally responsible for acts committed by his subordinates solely on the basis of his position of responsibility, with no need to prove the criminal intent of the superior. Another view holds that the superior’s negligence, which is so serious as to be tantamount to consent or criminal intent, is a lesser requirement to establish the accused’s *mens rea*.

130. Another position was articulated in one of the “Commentaries on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949”, which provides that the *mens rea* required, as an essential element, to establish superior responsibility “must be so serious that it is tantamount to malicious intent, apart from any link between the conduct in question and the damage



that took place.”⁵²

131. The Chamber reiterates its determination in the *Akayesu* Judgement, where it found that the requisite *mens rea* of any crime is the accused’s criminal intent. This requirement, which amounts to at least a negligence that is so serious as to be tantamount to acquiescence, also applies in determining the individual criminal responsibility of a person accused of crimes defined in the Statute, for which it is certainly proper to ensure that there existed malicious intent, or, at least, to ensure that the accused’s negligence was so serious as to be tantamount to acquiescence or even malicious intent.

132. As to whether the form of individual criminal responsibility referred to under Article 6(3) of the Statute also applies to persons in both military and civilian authority, it is important to note that during the Tokyo Trials, civilian authorities were convicted of war crimes under this principle.

133. Thus Hirota, former Foreign Minister of Japan, was convicted, *inter alia* of mass rape, known as the “Rape of Nanking”, under a count that he had “recklessly disregarded” his legal duty by virtue of his offices to take adequate steps to secure the observance and prevent breaches of law and customs of war. The Tokyo Tribunal held that:

⁵² Claude Pilloud et al., “Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949”, 1987, p. 1012.



“Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women and other atrocities were being committed daily. His inaction amounted to criminal negligence.”⁵³

134. Judge Roling, dissenting from this finding, held that Hirota should have been acquitted, insofar as:

“[...] a Tribunal should be very careful in holding civil government officials responsible for the behaviour of the army in the field. Moreover, the Tribunal is here to apply the general principles of law as they exist with relation to the responsibility for ‘omissions’. Considerations of both law and policies of [...] justice [...] indicate that this responsibility should only be recognized in a very restricted sense.”

135. In view of such disparate legal interpretations, it is disputable whether the principle of individual criminal responsibility, articulated in Article 6 (3) of the Statute, should be applied to civilians. Accordingly, the Chamber reiterates its reasoning in the *Akayesu* Judgement, with which Trial Chamber II concurred in the *Kayishema* and *Ruzindana* Judgement, that it is appropriate to assess on a case-by-case basis the power of authority actually devolved on an accused to determine whether or not he possessed the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish their perpetration. Therefore the superior’s actual or formal power of control over his subordinates remains a determining factor in charging civilians with superior responsibility.

136. As the Judges of the Tribunal for the Former Yugoslavia observed in *Celebici*, (with whom

⁵³ Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East, reprinted in R. John Pritchard and Sonia Magbanua Zaide (ed), the Tokyo War Crimes Trials, Vol. 20, Garland Publishing : New York and London 1981, Edition Garlands (Tokyo Trials Official Transcripts) 49, 791.



Chamber II concurred in *Kayishema and Ruzindana*), in explaining their reasoning on the application of the principle of the superior-subordinate relationship to persons in non-military positions of authority:

“[N]o express limitation is made restricting the scope of this type of responsibility to military commanders or situations arising under a military command. [The principle of superior-subordinate relationship] extends beyond the responsibility of military commanders to also encompass political leaders and other civilian superiors in positions of authority.”⁵⁴

137. In a previous decision, in reviewing the Indictment against an accused, the ICTY articulated a similar finding:

“[T]he Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able to order the commission of crimes falling within its competence *ratione materiae* or who knowingly refrain from preventing or punishing the perpetrators of such crimes.”⁵⁵

138. From an historical and legal perspective, it is significant to consider different reasoning developed since the Second World War regarding the responsibility of non-military superiors for the actions of their subordinates.

⁵⁴ *Celebici Judgement*, para. 214.

⁵⁵ The Prosecutor v. Milan Martić, Case No.: ICTR 95-11-1, 8 March 1996.



139. It is thus important to note the conviction of General Akiro Muto for acts occurring during his tenure as Chief of Staff to General Yamashita at the time of the “Rape of Nanking”, in which The Tokyo Tribunal reasoned that influential power, which is not power of formal command, was sufficient basis for charging one with superior responsibility.⁵⁶

140. The influence at issue in a superior - subordinate command relationship often appears in the form of psychological pressure.⁵⁷ This is particularly relevant to the case at bar, insofar as Alfred Musema was a socially and politically prominent person in Gisovu *Commune*.

141. It is also significant to note that a civilian superior may be charged with superior responsibility only where he has effective control, be it *de jure* or merely *de facto*, over the persons committing violations of international humanitarian law.

142. In the *Herman Roechling* Judgement, civilian industrial leaders were found guilty, *inter alia*, of failing to take action against abuses committed by members of the Gestapo against forced labourers. It appears that the accused had only *de facto* power insofar as the accused was granted no official authority to issue orders to personnel under Gestapo command. The Superior Tribunal of the Military Government for the French Zone of Occupation in Germany determined that because one of the accused was Herman Roechling’s son-in-law, he had *de facto* influence, which would have allowed him to arrange with the factory police for better treatment of the workers.⁵⁸ The Tribunal rejected his defence of ignorance regarding the actions of his subordinates and held that:

⁵⁶ Tokyo Trial Official Transcript, pp. 49 820-21.

⁵⁷ See Kai Ambos, *Individual Criminal Responsibility in International Criminal Law*, in G. K. McDonald/o. Swaak Goldman, *Substantive and Procedural Aspects of International Criminal Law* (1999, forthcoming).

⁵⁸ The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others, Law Reports, Vol. XIV, Appendix B, p. 1075, para. 1092.



“[n]o superior may prefer this defence indefinitely; for it is his duty to know what occurs in his organization and lack of knowledge, therefore, can only be the result of criminal negligence.”⁵⁹

143. Such power of control, even if it is merely *de facto*, generally implies “indirect subordination”, which, according to Article 87 of Additional Protocol I to the Geneva Conventions, extends beyond the commander’s duty to his direct subordinates to “other persons under his responsibility,” to prevent violations of the Geneva Conventions.⁶⁰

144. In accord with such reasoning that a superior’s authority may be merely *de facto*, deriving from his influence or his indirect power, the determining question is the extent to which Alfred Musema had power of control over persons who *a priori* were not under his authority during the period from April to July 1994, namely, the soldiers, the Gisovu *Commune* police, and the *Interahamwe*.

145. Regarding the criteria to be met to establish superior responsibility of a civilian, it is important to consider the reasoning behind the adoption of Article 86(2) of Additional Protocol I to the Geneva Conventions, which states:

⁵⁹ Ibid, Law Reports, Vol. XIV, Appendix B, p.1097, para. 1106.

⁶⁰ Commentary to the Additional Protocols, n.9



“The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all necessary measures within their power to prevent or repress the breach.”⁶¹

146. During deliberations for adoption of Article 86(2) (which the provisions of Article 6(3) of the ICTR Statute closely resemble in spirit and in form) delegates held that the mental standard “should have known” was too broad and would subject the commander, *a posteriori*, to arbitrary judgements with respect to what he should have known.⁶²

147. Therefore, in an attempt to avoid ambiguities in applying a mental standard to criminal responsibility, the drafters of Article 86(2) followed juridical and legal textual authorities that do not distinguish between civilian or military superior authority.

148. Accordingly, the Chamber finds that the definition of individual criminal responsibility, as provided under Article 6(3) of the Statute, applies not only to the military but also to persons exercising civilian authority as superiors. Thus the fundamental issue is to determine the extent to which the superior -- notably Alfred Musema -- exercised power, whether *de jure* or *de facto*, over the actions of his indirect subordinates.

⁶¹ The ICRC commentary to the Protocol makes it clear that “superior” refers to civilian as well as military leaders. “It should not be concluded that this provision [Article 86] only concerns the commander under whose direct orders the subordinate is placed. The role of commanders as such is dealt with in Article 87 (Duty of Commanders). The concept of a superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.” Yves Sandoz and al. Ed., 1987.

⁶² Analysis of the Additional Protocols to the Geneva Conventions of 12 August 1949, p. 1-86-1



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

3.2.1 Genocide

149. Article 2(3)(a) of the Statute provides the Tribunal with the power to try crimes of genocide. Accordingly, Musema is charged under Article 2(3)(a) of the Statute.

150. The definition of genocide, as provided in Article 2 of the Statute, cites, *verbatim*, Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”).⁶³ Article 2(2) of the Statute reads as follows:

“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.”

⁶³The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948.



151. The Genocide Convention is undeniably considered part of customary international law, as reflected in the advisory opinion issued in 1951 by the International Court of Justice on reservations to the Genocide Convention, and as noted by the United Nations Secretary-General in his Report on the establishment of the International Criminal Tribunal for the Former Yugoslavia.⁶⁴

152. The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 1975⁶⁵, and that the crime of genocide was therefore punishable in Rwanda in 1994.

153. The Chamber notes that the crime of genocide has been defined in several cases considered by the Tribunal, notably in the *Akayesu* and *Rutaganda* Judgements. The Chamber adheres to the definition of the crime of genocide as defined in those judgements.

154. The Chamber is therefore of the opinion that for the crime of genocide to be established, it is necessary, firstly, that one of the acts listed under Article 2(2) of the Statute be committed; secondly, that such an act be committed against a national, ethnical, racial or religious group, specifically targeted as such; and, thirdly, that the “act be committed with the intent to destroy, in whole or in part, the targeted group”.

⁶⁴ Secretary-General’s Report pursuant to para. 2 of Resolution 808 (1993) of the Security Council, 3 May 1993, S/25704.

⁶⁵ Legislative Decree of 12 February 1975, Official Gazette of the Republic of Rwanda, 1975, p.230. Rwanda acceded to the Genocide Convention but stated that it shall not be bound by Article 9 of this Convention.



The acts enumerated under Article 2(2)(a) to (e) of the Statute

155. Article 2(2)(a) of the Statute, like the corresponding provisions of the Genocide Convention, refers to “*meurtre*” in the French version and to “killing” in the English version. The Chamber believes that the term “killing” includes both intentional and unintentional homicides, whereas the word “*meurtre*” covers homicide committed with the intent to cause death. The Chamber holds that, given the presumption of the innocence of the Accused, and pursuant to the general principles of criminal law, the version more favourable to the Accused should be adopted. The Chamber therefore finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder in the Criminal Code of Rwanda, which provides, under Article 311, that “Homicide committed with intent to cause death shall be treated as murder”.

156. For the purposes of interpreting Article 2(2)(b) of the Statute, the Chamber understands the words “serious bodily or mental harm” to include, but not limited to, acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution. The Chamber is of the opinion that “serious harm” need not entail permanent or irremediable harm.

157. In the Chamber’s opinion, the words “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”, as indicated in Article 2(2)(c) of the Statute, are to be construed “as methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group”, but which are, ultimately, aimed at their physical destruction. The Chamber holds that the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include subjecting a group of people to a subsistence diet, systematic expulsion from their homes and deprivation of essential medical supplies below a minimum vital standard.

158. In its interpretation of Article 2(2)(d) of the Statute, the Chamber holds that the words “measures intended to prevent births within the group” should be construed as including sexual mutilation, enforced sterilization, forced birth control, forced separation of males and females, and prohibition of marriages. The Chamber notes that measures intended to prevent births within the group may be not only physical, but also mental.



159. The Chamber is of the opinion that the provisions of Article 2(2)(e) of the Statute, on the forcible transfer of children from one group to another, are aimed at sanctioning not only any direct act of forcible physical transfer, but also any act of threat or trauma which would lead to the forcible transfer.

Potential groups of victims of the crime of genocide

160. It is the Chamber's view that it is necessary to consider the potential groups of victims of genocide in light of the provisions of the Statute and the Genocide Convention, which stipulate that genocide aims at "destroy[ing], in whole or in part, a national, ethnical, racial or religious group, as such."

161. The Chamber notes that, as stated in the *Rutaganda* Judgement, the concepts of national, ethnical, racial and religious groups have been researched extensively and, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context. Moreover, the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as a member of said group.

162. Nevertheless, the Chamber is of the view that a subjective definition alone is not enough sufficient to determine victim groups, as provided for in the Genocide Convention. It appears, from a reading of the *travaux préparatoires* of the Genocide Convention⁶⁶, that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be "non stable" or "mobile" groups which one joins through individual, voluntary

⁶⁶Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly.



commitment. That would seem to suggest *a contrario* that the Convention was presumably intended to cover relatively stable and permanent groups.

163. Therefore, the Chamber holds that in assessing whether a particular group may be considered protected from the crime of genocide, it will proceed on a case-by-case basis, taking into account both the relevant evidence proffered and the specific political, social and cultural context in which the acts allegedly took place.

The special intent of the crime of genocide

164. Genocide is distinct from other crimes because it requires a *dolus specialis*, a special intent. The special intent of a crime is the specific intention which, as an element of the crime, requires that the perpetrator clearly intended the result charged. The *dolus specialis* of the crime of genocide lies in “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. A person may be convicted of genocide only where it is established that he committed one of the acts referred to under Article 2(2) of the Statute with the specific intent to destroy, in whole or in part, a particular protected group.

165. For any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is, therefore, a member of a given group selected as such, which, ultimately, means the victim of the crime of genocide is the group itself and not the individual alone. The perpetration of the act charged, therefore, extends beyond its actual commission - for example, the murder of a particular person - to encompass the realization of the ulterior purpose to destroy the group in whole or in part.

166. The *dolus specialis* is a key element of an intentional offence, which offence is characterized by a psychological nexus between the physical result and the mental state of the perpetrator. With



regard to the issue of determining the offender's specific intent, the Chamber applies the following reasoning, as held in the *Akayesu* Judgement:

“ [...] intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.”⁶⁷

167. Therefore, the Chamber is of the view that, as stated in the *Rutaganda* Judgement: “[...] in practice, intent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused.”⁶⁸

⁶⁷ *Akayesu* Judgement, para. 523.

⁶⁸ *Rutaganda* Judgement, para. 63.



3.2.2 Complicity in Genocide

168. The Prosecutor has charged the Accused with this crime under Count 2 of the Indictment, as an alternative to Count 1 of genocide. The Statute indeed provides, under Article 2(3)(e), the Tribunal with the power to prosecute persons with complicity in genocide.

169. The Chamber notes that complicity is a form of criminal participation both under the Anglo-Saxon legal tradition (or Common Law) and the Roman-Continental legal tradition (or Civil Law).

170. According to the Chamber, the definition of complicity in genocide articulated in the *Akayesu* Judgement, states that an accomplice to an offence may be defined as someone who associates himself in an offence committed by another, complicity necessarily implying the existence of a principal offence.

171. The issue before the Chamber is whether genocide must be committed for a person to be found guilty of complicity in genocide. The Chamber notes that complicity can only exist when there is a punishable, principal act committed by someone, the commission of which the accomplice has associated himself with.

172. In this regard, the Chamber notes from the *Travaux Préparatoires* of the Genocide Convention that the crime of complicity in genocide was recognised only where genocide had actually been committed. The Genocide Convention did not provide the possibility for punishment of complicity in an attempt to commit genocide, complicity in incitement to commit genocide nor complicity in conspiracy to commit genocide, all of which were, in the view of some States, too vague to be punishable under the Convention.

173. Consequently, the Chamber is of the opinion that in order for an accused to be found guilty of complicity in genocide, it must be proven beyond a reasonable doubt that the crime of genocide has been committed.



174. In regard to the issue of whether a person can be prosecuted for complicity, even where the perpetrator of the principal offence has himself not been tried, the Chamber notes that all criminal systems provide that a person may very well be tried as an accomplice, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, the latter's guilt can not be proven. The Rwandan Penal code is clear on this subject, and stipulates under Article 89 that accomplices:

“may be prosecuted even where the perpetrator may not face prosecution for personal reasons, such as double jeopardy, death, insanity or non-identification”.

175. The Chamber notes that the logical inference from the foregoing is that an individual cannot thus be both the principal perpetrator of a particular act and the accomplice thereto. An act with which an accused is charged cannot, therefore, be characterised as both an act of genocide and an act of complicity in genocide. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same act⁶⁹.

176. In regard to the physical elements of complicity in genocide (*actus reus*), three forms of accomplice participation are recognised in most criminal Civil Law systems: complicity by instigation, complicity by aiding and abetting, and complicity by procuring means⁷⁰.

177. Under Common Law, the forms of accomplice participation, namely “*aiding and abetting, counselling and procuring*”, to a large extent, mirror those conducts characterised under Civil Law which, as indicated above, are “*l’aide, l’assistance, et la fourniture des moyens*”.

⁶⁹ In this regard, the Chamber notes that, in the *Akayesu* Judgement, the Trial Chamber, having made this observation on the applicable law and having found Jean-Paul Akayesu guilty of the crime of genocide for certain acts, therefore found him not guilty of the crime of complicity in genocide for the same acts.

⁷⁰ See, for example, Article 46 of the Senegalese Penal Code, Article 121-7 of the *Nouveau code pénal français* (New French Penal Code). It should be noted that the Rwandan Penal Code includes two other forms of participation, namely, incitement to commit a crime through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, and complicity by harbouring or aiding a criminal.



178. Complicity by aiding or abetting implies a positive action which excludes, in principle, complicity by failure to act or omission. Procuring means is a common form of complicity. It covers those persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes.

179. For the purposes of interpreting Article 2 (3) (e) of the Statute, which does not define the concept of complicity, the Chamber is of the opinion that it is necessary to define complicity as per the Rwandan Penal Code, and to consider the first three forms of criminal participation referred to in Article 91 of said Code, which defines the elements of complicity in genocide, thus:

(a) Complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose;

(b) Complicity by knowingly aiding or abetting a perpetrator of a genocide in the planning or enabling acts thereof;

(c) Complicity by instigation, for which a person is liable who, though not directly participating in the crime of genocide, gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited the commission of genocide.

180. The intent or mental element of complicity in general implies that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.

181. As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide. Therefore, the Chamber is of the opinion that



an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.⁷¹

182. Thus, if an accused knowingly aided or abetted another in the commission of a murder, while being unaware that the principal was committing such a murder, with the intent to destroy, in whole or in part, the group to which the murdered victim belonged, said accused could be prosecuted for complicity in murder, and certainly not for complicity in genocide. However, if an accused knowingly aided and abetted in the commission of such a murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer's intent to destroy the group.

183. In conclusion, the Chamber is of the opinion that an accused is liable for complicity in genocide if he knowingly and voluntarily aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.

⁷¹ See the conclusions of the Chamber on the *dolus specialis* of genocide, Section 3.2.2 of the Judgement.



3.2.3 Conspiracy to Commit Genocide

184. Article 2(3)(b) of the Statute provides that the Tribunal shall have the power to prosecute persons charged with the crime of conspiracy to commit genocide. The Prosecutor has charged the Accused with such a crime under Count 3 of the Indictment.

185. The Chamber notes that the crime of conspiracy to commit genocide covered in the Statute is taken from the Genocide Convention. The “*Travaux Préparatoires*” of the Genocide Convention suggest that the rationale for including such an offence was to ensure, in view of the serious nature of the crime of genocide, that the mere agreement to commit genocide should be punishable even if no preparatory act has taken place⁷². Indeed, during the debate preceding the adoption of the Convention, the Secretariat advised that, in order to comply with General Assembly resolution 96 (I), the Convention would have to take into account the imperatives of the prevention of the crime of genocide:

“This prevention may involve making certain acts punishable which do not themselves constitute genocide, for example, certain material acts preparatory to genocide, an agreement or a conspiracy with a view to committing genocide, or systematic propaganda inciting to hatred and thus likely to lead to genocide.”⁷³

186. The Chamber notes that Common Law systems tend to view “*entente*” or conspiracy as a specific form of criminal participation, punishable in itself. Under Civil Law, conspiracy or “*complot*” derogates from the principle that a person cannot be punished for mere criminal intent (“*résolution criminelle*”) or for preparatory acts committed. In Civil Law systems, conspiracy (*complot*) is punishable only where its purpose is to commit certain crimes considered as extremely serious, such as, undermining the security of the State.

⁷²See Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly.

⁷³Note by the Secretariat (1948) 8.



187. With respect to the constituent elements of the crime of conspiracy to commit genocide, the Chamber notes that, according to the “*Travaux Préparatoires*” of the Genocide Convention, the concept of conspiracy relied upon the Anglo-Saxon doctrine of conspiracy. In its Report, the Ad hoc Committee states that conspiracy “is a crime under Anglo-American law”: Ad Hoc Committee Report (1948) 8. This reflected the assumptions made during debates on conspiracy. The French representative initially observed that conspiracy was a foreign concept to French law. The US representative, speaking as Chair, explained that “in Anglo-Saxon law ‘conspiracy’ was an offence consisting in the agreement of two or more persons to effect any unlawful purpose”.⁷⁴ Venezuela’s representative later remarked that in Spanish the word “conspiracy” meant a conspiracy against the Government and that the English term “conspiracy” was rendered in Spanish by “*asociación*” (association) for the purpose of committing a crime.⁷⁵ The representative of Poland observed that in Anglo-Saxon law the word “complicity” extended only to “aiding and abetting” and that the offence described as “conspiracy” did not involve complicity. Poland recalled that the Secretariat draft made separate provision for complicity and conspiracy.⁷⁶ In the Sixth Committee debates, Mr Maktos of the United States of America stated that “conspiracy” had “a very precise meaning in Anglo-Saxon law; it meant the agreement between two or more persons to commit an unlawful act”.⁷⁷ Mr. Raafat of Egypt noted that the notion of conspiracy had been introduced into Egyptian law and “meant the connivance of several persons to commit a crime, whether the crime was successful or not”.⁷⁸

188. For its part, the United Nations War Crimes Commission defined conspiracy as follows:

⁷⁴ See UN Doc E/AC. 25/SR.16, p.4 (USA).

⁷⁵ See UN Doc E/AC. 25/SR.16, p.5.

⁷⁶ See UN Doc E/A.25/SR.16, p.5.

⁷⁷ See Sixth Committee Report art. III(b), at 10.[Lippman (1994) 40].

⁷⁸ *Id.*



“The doctrine of conspiracy is one under which it is a criminal offence to conspire or to take part in an allegiance to achieve an unlawful object, or to achieve a lawful object by unlawful means.”⁷⁹

189. Civil Law distinguishes two types of *actus reus*, qualifying two “levels” of ‘*complot*’ or conspiracy. Following an increasing level of gravity, the first level concerns (*le complot simple*) simple conspiracy, and the second level (*le complot suivi d’actes matériels*) conspiracy followed by material acts. Simple conspiracy is usually defined as a concerted agreement to act, decided upon by two or more persons (*résolution d’agir concertée et arrêtée entre deux ou plusieurs personnes*) while the conspiracy followed by preparatory acts is an aggravated form of conspiracy where the concerted agreement to act is followed by preparatory acts. Both forms of ‘*complot*’ require that the following three common elements of the offence be met: (1) an agreement to act [*la résolution d’agir*];⁸⁰ (2) concerted wills [*le concert de volontés*]; and (3) the common goal to achieve the substantive offence [*l’objectif commun de commettre l’infraction principale*].

190. Under Common Law, the crime of conspiracy is constituted when two or more persons agree to a common objective, the objective being criminal.

191. The Chamber notes that the constitutive elements of conspiracy, as defined under both systems, are very similar. Based on these elements, the Chamber holds that conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide.

⁷⁹ United Nations War Crimes Commission (1948) 196.

⁸⁰ According to the French *Cour de Cassation*, the agreement to act shall consist of a well-decided and positive will to act in relation to the common goal to commit the substantive offence.



192. With respect to the *mens rea* of the crime of conspiracy to commit genocide, the Chamber notes that it rests on the concerted intent to commit genocide, that is to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Thus, it is the view of the Chamber that the requisite intent for the crime of conspiracy to commit genocide is, *ipso facto*, the intent required for the crime of genocide, that is the *dolus specialis* of genocide.⁸¹

193. It emerges from this definition that, as far as the crime of conspiracy to commit genocide is concerned, it is, indeed, the act of conspiracy itself, in other words, the process (“*procédé*”) of conspiracy, which is punishable and not its result. The Chamber notes, in this regard, that under both Civil and Common Law systems, conspiracy is an inchoate offence (“*infraction formelle*”) which is punishable by virtue of the criminal act as such and not as a consequence of the result of that act.⁸²

194. The Chamber is of the view that the crime of conspiracy to commit genocide is punishable even if it fails to produce a result, that is to say, even if the substantive offence, in this case genocide, has not actually been perpetrated.

195. Moreover, the Chamber raised the question as to whether an accused could be convicted of both genocide and conspiracy to commit genocide.

196. Under Civil Law systems, if the conspiracy is successful and the substantive offence is consummated, the accused will only be convicted of the substantive offence and not of the conspiracy. Further, once the substantive crime has been accomplished and the criminal conduct of

⁸¹ See *supra* the Chamber’s findings with respect to the *mens rea* of the crime of genocide, or the *dolus specialis*.

⁸² The crime of conspiracy to commit genocide is to that extent akin to the crime of direct and public incitement to commit genocide. In its findings on the crime of incitement to commit genocide in paragraph 52 of the *Akayesu* Judgement, the Chamber stated with respect to inchoate offences that: “[...] In the opinion of the Chamber, the fact that such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure. The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.



the accused is established, there is no reason to punish the accused for his mere *résolution criminelle* (criminal intent), or even for the preparatory acts committed in furtherance of the substantive offence. Therefore an accused can only be convicted of conspiracy if the substantive offence has not been realized or if the Accused was part of a conspiracy which has been perpetrated by his co-conspirators, without his direct participation.

197. Under Common Law, an accused can, in principle, be convicted of both conspiracy and a substantive offence, in particular, where the objective of the conspiracy extends beyond the offences actually committed. However, this position has incurred much criticism. Thus, for example, according to Don Stuart:

“The true issue is not whether evidence has been used twice to achieve convictions but rather whether the fundamental nature of the conspiracy offence is best seen [...] as purely preventive, incomplete offence, auxiliary offence to the principal offence and having no true independent rationale to exist on its own alongside the full offence. On this view it inexorably follows that once the completed offence has been committed there is no justification for also punishing the incomplete offence.”⁸³

198. In the instant case, the Chamber has adopted the definition of conspiracy most favourable to Musema, whereby an accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts. Such a definition is in keeping with the intention of the Genocide Convention. Indeed, the “*Travaux Préparatoires*” show that the crime of conspiracy was included to punish acts which, in and of themselves, did not constitute genocide. The converse implication of this is that no purpose would be served in convicting an accused, who has already been found guilty of genocide, for conspiracy to commit genocide, on the basis of the same acts.

⁸³Don Stuart, *Canadian Criminal Law: a Treatise*, 1995, 3rd edition, p. 647.



3.3 Crime against Humanity (Article 3 of the Statute)

199. The Chamber notes that the *Akayesu* Judgement traced the historical development and evolution of crimes against humanity as far back as the Charter of the International Military Tribunal of Nuremberg.⁸⁴ The *Akayesu* Judgement also examined the gradual evolution of crimes against humanity in the cases of *Eichmann*, *Barbie*, *Touvier* and *Papon*. After consideration, the Chamber concurs with the historical development of crimes against humanity, as articulated in the *Akayesu* Judgement.

200. The Chamber notes that Article 7 of the Statute of the International Criminal Court defines a crime against humanity as any of the enumerated acts committed, as part of a widespread or systematic attack directed against any civilian population, with the Perpetrator having knowledge of the said attack. These enumerated acts are murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this article, or any other crime within the jurisdiction of the Court: enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health.⁸⁵

⁸⁴ See *Akayesu* Judgement, para. 563 to 576.

⁸⁵ See Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court on 17 July 1998.



Crimes against humanity, pursuant to Article 3 of the Statute of the Tribunal

201. Article 3 of the Statute confers on the Tribunal the jurisdiction to prosecute persons for acts which constitute crimes against humanity. The Chamber concurs with the reasoning in the *Akayesu* and *Rutaganda* Judgements, that offences falling within the ambit of crimes against humanity may be broadly broken down into four essential elements, namely:

- (a) the *actus reus* must be committed as part of a widespread or systematic attack;
- (b) the *actus reus* must be committed against the civilian population;
- (c) the *actus reus* must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds;
- (d) the *actus reus* must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health.⁸⁶

(a) The *actus reus* must be committed as part of a widespread or systematic attack

202. The Chamber is of the opinion that the *actus reus* cannot be a random inhumane act, but rather is an act committed as part of an attack. With regard to the nature of this attack, the Chamber notes that Article 3 of the English version of the Statute reads “as part of a widespread or systematic attack [...]”, while the French version of the Statute reads “dans le cadre d’une attaque généralisée et systématique [...]”. The French version requires that the attack be both of a widespread and systematic nature, while the English version requires that the attack be of a widespread or systematic nature and need not be both.

203. The Chamber notes that customary international law requires that the attack be either of a widespread or systematic nature and need not be both. The English version of the Statute conforms more closely with customary international law, and the Chamber therefore accepts the elements as set

⁸⁶ See *Akayesu* Judgement, para. 578; *Rutaganda* Judgement, para. 66.



forth in Article 3 of the English version of the Statute, and follows the interpretation in other ICTR judgements, namely: that the “attack” under Article 3 of the Statute, must be either of a widespread or systematic nature and need not be both.⁸⁷

204. The Chamber considers that “widespread”, as an element of crimes against humanity, is a massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against multiple victims, while “systematic” constitutes organized action, following a regular pattern, on the basis of a common policy and involves substantial public or private resources. It is not essential for such policy to be adopted formally as a policy of a State. However, there must exist some form of preconceived plan or policy.⁸⁸ The Chamber notes that these definitions were endorsed in the *Akayesu* and *Rutaganda* Judgements.⁸⁹

⁸⁷ See *Akayesu* Judgement, fn 144, *Kayishema* and *Ruzindana* Judgement, fn 63 and *Rutaganda*; para. 68.

⁸⁸ Report on the International Law Commission to the General Assembly, 51 U.N. GAOR Supp. (No 10) at 94 U.N.Doc. A/51/10 (1996)

⁸⁹ See *Akayesu* Judgement, para. 580 and *Rutaganda* Judgement, para. 69.



205. The Chamber notes that “attack”, as an element of a crime against humanity, was defined in the *Akayesu* Judgement, as an unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute. An attack may also be non-violent in nature, such as imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, which may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.⁹⁰ The definition of “attack”, as defined in the *Akayesu* Judgement, was later endorsed in the *Rutaganda* Judgement.⁹¹ The Chamber concurs with this definition.

206. The Chamber concurs with the *Kayishema* and *Ruzindana* Judgement, which held that the perpetrator of an act falling within the ambit of crimes against humanity must have “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.”⁹²

(b) The *actus reus* must be committed against the civilian population

207. The Chamber notes that the *actus reus* for any of the enumerated acts in Article 3 of the Statute must be directed against the civilian population if it is to constitute a crime against humanity. In the *Akayesu* and *Rutaganda* Judgements, “civilian population”, pursuant to Article 3 of the Statute, was defined as people who were not taking any active part in the hostilities.⁹³ The fact that there are individuals among the civilian population who themselves are not civilians does not deprive the population of its civilian character.⁹⁴ The Chamber concurs with this definition.

⁹⁰ See *Akayesu* Judgement, para. 581.

⁹¹ See *Rutaganda* Judgement, para. 70.

⁹² *Kayishema and Ruzindana* Judgement, para. 134.

⁹³ See *Akayesu* Judgement, para. 582; *Rutaganda* Judgement, para. 72.

⁹⁴ See Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict; Article 50.



(c) The *actus reus* must be committed on discriminatory grounds

208. The Statute stipulates that inhumane acts committed against the civilian population must be committed on “national, political, ethnic, racial or religious grounds”. Discrimination on the basis of a person’s political ideology satisfies the requirement of “political” grounds as envisaged in Article 3 of the Statute.

209. Inhumane acts committed against persons not falling within any one of the discriminatory categories may constitute crimes against humanity if the perpetrator’s intention in committing such acts was to further his attack on the group discriminated against on one of the grounds specified in Article 3 of the Statute. The perpetrator must have the requisite intent for the commission of a crime against humanity.⁹⁵

210. In the 15 July 1999 *Tadić* Judgement, the Appeals Chamber held that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. The Appeals Chamber ruled that discriminatory intent is an indispensable element of the offence only with regard to those crimes for which such intent is expressly required: namely, the offence of persecution, pursuant to Article 5(h) of the ICTY Statute.⁹⁶

211. The Chamber has compared the provisions of Article 5 of the ICTY Statute with the provisions of Article 3 of the ICTR Statute. Accordingly, the Chamber notes that, although the provisions of both aforementioned Articles pertain to crimes against humanity, except for the offence of persecution, there is a material and substantial difference in the respective elements of the offences, that constitute crimes against humanity. This difference stems from the fact that Article 3 of the ICTR Statute expressly requires “national, political, ethnic, racial or religious” discriminatory grounds with respect to the offences of murder, extermination, deportation, imprisonment, torture, rape, and, other inhumane acts, whereas Article 5 of the ICTY Statute does not stipulate any discriminatory grounds with respect to these offences.

⁹⁵ See *Akayesu* Judgement, para 584; *Rutaganda* Judgement, para. 72.

⁹⁶ See 15 July 1999 *Tadić* Judgement of the Appeals Chamber, para. 305.



(d) The Enumerated Acts

212. Article 3 of the Statute enumerates various acts that constitute crimes against humanity, namely: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts. This list is not exhaustive. Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are satisfied. This is evident in (i) which caters for all other inhumane acts not stipulated in (a) to (h) of Article 3.⁹⁷

213. The Chamber notes that with respect to crimes against humanity, Musema is indicted for murder, extermination, rape and other inhumane acts. The Chamber, in interpreting Article 3 of the Statute, will focus its discussion on these offences only.

Murder

214. Pursuant to Article 3 (a) of the Statute, murder may constitute a crime against humanity. The Chamber notes that Article 3(a) of the English version of the Statute refers to “Murder”, while the French version of the Statute refers to “Assassinat”. Customary international law dictates that the offence of “Murder”, and not “Assassinat”, constitutes a crime against humanity.

215. In both the *Akayesu* and *Rutaganda* Judgements, murder was defined as the unlawful, intentional killing of a human being. The requisite elements of murder, as a crime against humanity, were defined as follows:

- (a) The victim is dead;
- (b) The death resulted from an unlawful act or omission of the Accused or a subordinate;

⁹⁷ See *id.* para. 585.



- (c) At the time of the killing the Accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless as to whether or not death ensues;
- (4) The victim was discriminated against, on any one of the enumerated discriminatory grounds;
- (e) The victim was a member of the civilian population;
- (f) The act or omission was part of a widespread or systematic attack on the civilian population.⁹⁸

216. The *Rutuganda* Judgement further held that the act or omission that constitutes murder must be discriminatory in nature and directed against a member of the civilian population.⁹⁹

Extermination

217. Pursuant to Article 3 (c) of the Statute, extermination constitutes a crime against humanity. By its very nature, extermination is a crime which is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction, which is not a prerequisite for murder.

218. In both the *Akayesu* and *Rutuganda* Judgements, the elements of extermination were defined as follows:

- (a) the Accused or his subordinate participated in the killing of certain named or described persons;

⁹⁸ See *Akayesu* Judgement, para. 589 and 590.

⁹⁹ See *Rutuganda* Judgement, para. 81.



- (b) the act or omission was unlawful and intentional;
- (c) the unlawful act or omission must be part of a widespread or systematic attack;
- (d) the attack must be against the civilian population;
- (e) the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.¹⁰⁰

219. The *Rutaganda* Judgement further held that the act or omission that constitutes extermination must be discriminatory in nature and directed against members of the civilian population. Further, this act or omission includes, but is not limited to, the direct act of killing. It can be any act or omission, or cumulative acts or omissions that cause the death of the targeted group of individuals.¹⁰¹

Rape

220. Rape may constitute a crime against humanity, pursuant to Article 3(g) of the Statute. In the *Akayesu* Judgement, rape as a crime against humanity was defined as:

“[...] a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed:

- (a) as part of a widespread or systematic attack;
- (b) on a civilian population;

¹⁰⁰ *Akayesu* Judgement, para. 589 and 590; *Rutaganda* Judgement, para.83.

¹⁰¹ *See Rutaganda* Judgement, para. 81.



- (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.”¹⁰²

221. The Chamber notes that, while rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the acts of rape may include acts which involve the insertions of objects and/or the use of bodily orifices not considered to be intrinsically sexual.

222. The Chamber also observes that in defining rape, as a crime against humanity, the Trial Chamber in the *Akayesu* Judgement acknowledged:

¹⁰² *Id.* para. 598.



“that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focussing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁰³

223. The Chamber notes that the definition of rape and sexual violence articulated in the *Akayesu* Judgement was adopted by the Trial Chamber II of the ICTY in its *Delalic* Judgement¹⁰⁴.

224. The Chamber has considered the alternative definition of rape set forth by Trial Chamber I of the ICTY in its *Furundzija* Judgement, which relies on a detailed description of objects and body parts. In this judgement the Trial Chamber looked to national legislation and noted:

“The Trial Chamber would emphasise at the outset, that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault; the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration.”¹⁰⁵

¹⁰³ *Akayesu* Judgement, para. 597.

¹⁰⁴ See *Delalic* Judgement, para. 478-9.

¹⁰⁵ See *Furundzija* Judgement, para. 179.



225. The *Furundzija* Judgement further noted that “most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus”.¹⁰⁶ Nevertheless, after due consideration of the practice of forced oral penetration, which is treated as rape in some States and sexual assault in other States, the Trial Chamber in that case determined as follows:

“183. The Trial Chamber holds that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law, indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.”¹⁰⁷

226. The Chamber concurs with the conceptual approach set forth in the *Akayesu* Judgement for the definition of rape, which recognizes that the essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.

227. The Chamber considers that the distinction between rape and other forms of sexual violence drawn by the *Akayesu* Judgement, that is “a physical invasion of a sexual nature” as contrasted with

¹⁰⁶ *Id.* para. 181.

¹⁰⁷ *Id.* para. 183



“any act of a sexual nature” which is committed on a person under circumstances which are coercive is clear and establishes a framework for judicial consideration of individual incidents of sexual violence and a determination, on a case by case basis, of whether such incidents constitute rape. The definition of rape, as set forth in the *Akayesu* Judgement, clearly encompasses all the conduct described in the definition of rape set forth in *Furundzija*.

228. The Chamber notes that in the *Furundzija* Judgement, the Trial Chamber considered forced penetration of the mouth as a humiliating and degrading attack on human dignity and largely for this reason included such conduct in its definition of rape even though State jurisdictions are divided as to whether such conduct constitutes rape.¹⁰⁸ The Chamber further notes, as the *Furundzija* Judgement acknowledges, that there is a trend in national legislation to broaden the definition of rape.¹⁰⁹ In light of the dynamic ongoing evolution of the understanding of rape and the incorporation of this understanding into principles of international law, the Chamber considers that a conceptual definition is preferable to a mechanical definition of rape. The conceptual definition will better accommodate evolving norms of criminal justice.

229. For these reasons, the Chamber adopts the definition of rape and sexual violence set forth in the *Akayesu* Judgement.

Other Inhumane Acts

230. The Chamber notes that Article 3 of the Statute provides a list of eight enumerated acts that may constitute crimes against humanity. The enlisted acts are murder, extermination, enslavement, deportation, imprisonment, torture, rape and persecution on political, racial and religious grounds. This list of acts is not exhaustive and Article 3(i) of the Statute provides for “Other inhumane Acts” that may constitute crimes against humanity.

¹⁰⁸ *Id.* para. 184-6.

¹⁰⁹ *Id.* para. 179.



231. The Chamber notes that the ICC Statute provides that:

“Other inhumane acts [are acts] of a similar character [to the other specified enumerated acts] intentionally causing great suffering, or serious injury to body or to mental or physical health”¹¹⁰.

232. The Chamber finds that an act or omission will fall within the ambit of “Other inhumane Acts”, as envisaged in Article 3(i) of the Statute, provided the nature and character of such act or omission is similar in nature, character, gravity and seriousness to the other acts, as enumerated in sub-articles (a) to (h) of Article 3. Further, the inhumane act or omission must:

- (a) Be directed against member(s) of the civilian population;
- (b) The perpetrator must have discriminated against the victim(s), on one or more of the enumerated discriminatory grounds;
- (c) The perpetrator’s act or omission must form part of a widespread or systematic attack and the perpetrator must have knowledge of this attack.

233. The Chamber agrees that the perpetrator’s act(s) must be assessed “on a case-by-case basis”¹¹¹, with a view to establishing whether such act(s) fall within the ambit of “Other inhumane Acts”, as envisaged in Article 3 of the Statute.

¹¹⁰ Rome Statute of the International Criminal Court, Article 7(k).

¹¹¹ See *Kayishema and Ruzindana* Judgement, para. 151.



3.4. Violation of Common Article 3 and Additional Protocol II

Article 4 of the Statute

234. Pursuant to Article 4 of the Statute, the 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 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977.

235. According to the Statute, these violations shall include, but shall not be limited to:

- a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
 - b) collective punishments;
 - c) taking of hostages;
 - d) acts of terrorism;
 - e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
 - f) pillage;
 - g) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;
-



h) threats to commit any of the foregoing acts.

Applicability of Common Article 3 of the Geneva Conventions and Additional Protocol II

236. The Chamber esteems that, before discussing the elements for the above cited offences, it is necessary to comment upon the applicability of Common Article 3 and Additional Protocol II regarding the situation which existed in Rwanda in 1994 at the time of the events referred to in the Indictment.

237. In the light of the principle *nullum crimen sine lege*, the Chamber must examine whether the above-mentioned instruments, as incorporated in Article 4 of the Statute, were in force on the territory of Rwanda at the time the tragic events took place within its borders.

238. In the *Kayishema* and *Ruzindana* Judgement, Trial Chamber II adjudged, without addressing the question whether or not the instruments incorporated in Article 4 of the Statute are to be considered as customary international law, that these instruments were indisputably in force in Rwanda at the time, as Rwanda became a Party to the Conventions of 1949 on 5 May 1964 and to Protocol II on 19 November 1984. Moreover, the Trial Chamber stated that, as all the offences enumerated in Article 4 of the Statute also constituted offences under the laws of Rwanda, there was 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 prosecution¹¹².

239. These findings were affirmed by Trial Chamber I in the *Rutaganda* Judgement.¹¹³

240. In the *Akayesu* Judgement, Trial Chamber I acknowledged the binding nature of the obligation as well, but focused upon customary international law as the source of this obligation rather than treaty law. With regard to Common Article 3, the Trial Chamber held that the “norms of Common Article 3 had acquired the status of customary law in that most States, by their domestic penal codes,

¹¹² See *Kayishema* and *Ruzindana* Judgement para. 156-158.

¹¹³ See *Rutaganda* Judgement, para. 90.



have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3”¹¹⁴. This is in line with the view of both the ICTY Trial Chambers¹¹⁵ and the ICTY Appeals Chamber¹¹⁶ stipulating that Common Article 3 beyond doubt formed part of customary international law. In relation to Additional Protocol II, the Trial Chamber in the aforesaid *Akayesu* Judgement stated that, although not all of Additional Protocol II could be said to be customary law, the guarantees contained in Article 4(2) (Fundamental Guarantees) thereof, which reaffirm and supplement Common Article 3, form part of existing customary international law¹¹⁷.

241. All of the norms reproduced in Article 4 of the Statute are covered by Article 4(2) of Additional Protocol II.

242. The Chamber therefore concludes that, at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the provisions of the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the Statute. Violations thereof, as a matter of custom and convention, attracted individual criminal responsibility and could result in the prosecution of the authors of the offences.

243. The question remains however to what extent these instruments are applicable in the instant case.

Test of applicability of Common Article 3 and Additional Protocol II

244. The Chamber having deemed Common Article 3 and Additional Protocol II, as incorporated in Article 4 of the Statute, to be in force in Rwanda at the time of the events alleged in the Indictment, the issue the Chamber must address at this stage is the material requirements of applicability of

¹¹⁴ See *Akayesu* Judgement, para. 608.

¹¹⁵ See ICTY *Tadić* Judgement (7 May 1997).

¹¹⁶ See “Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction” (2 October 1995).

¹¹⁷ See *Akayesu* Judgement, para. 610.



Common Article 3 and Addition Protocol II to be met for an act to be deemed a serious violation thereof.

Ratione Materiae

245. The four 1949 Geneva Conventions and Additional Protocol I thereto generally apply to *international armed conflicts*, whereas Common Article 3 to the Geneva Conventions extends a minimum threshold of humanitarian protection as well to all persons affected by a *non-international conflict*, a protection which was further developed and enhanced in the 1977 Additional Protocol II. Offences alleged to be covered by Article 4 of the Statute must, as a primary matter, have been committed in the context of a *non-international armed conflict*, satisfying the requirements of Common Article 3 and Additional Protocol II.

Common Article 3

246. Common Article 3 applies to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties”¹¹⁸. In absence of a general definition of non-

¹¹⁸ Common Article 3 states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and persons, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regular constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and the sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreement, all or



international armed conflict, which may take very different forms, the Chamber finds it necessary to describe situations of this type in relation to the objective facts characterizing them.

247. First, a non-international conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory.

part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.



248. The expression “armed conflicts” introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflicts in a legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a single State.¹¹⁹

249. Having defined the term in an abstract manner, to the Chamber it is apparent that whether a conflict meets the criteria of Common Article 3 is to be decided on a case by case basis.

250. In dealing with this issue, the *Akayesu* Judgement suggested an ‘evaluation test’ whereby the Trial Chamber evaluated the intensity and organization of the parties to the conflict to make a finding on the existence of an armed conflict not of an international character¹²⁰.

251. This approach, followed as well in the *Rutaganda* Judgement, finds favour with the Trial Chamber of this instance.

Additional Protocol II

¹¹⁹ See ICRC Commentary on Additional Protocol II, para. 4338-4341.

¹²⁰ See *Akayesu* Judgement, para. 619-620.



252. As aforesaid, Common Article 3 does not in itself define “armed conflict not of an international character”. Before the elaboration of Additional Protocol II, the absence of clarity on this concept gave rise to a great variety of interpretations and in practice its applicability was often denied.¹²¹ In order to reinforce and improve the protection granted to victims of non-international armed conflict the Additional Protocol II was adopted in 1977, giving a number of objective criteria which would not be dependent on the subjective judgements of the parties. Additional Protocol II, in other words, develops and supplements the brief rules contained in Common Article 3 without modifying its existing conditions of application. As a result, in circumstances where the material requirements of applicability of Protocol II are met, it is self-evident that they also satisfy the threshold requirements of the broader Common Article 3.

253. Additional Protocol II applies to “all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. The Protocol explicitly does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”¹²²

254. Thus the conditions to be met to fulfil the material requirements of applicability of Additional Protocol II at the time of the events alleged in the Indictment would entail showing that:

- an armed conflict took place in Rwanda, between its armed forces and dissenting armed forces or other organized armed groups;
- the dissident armed forces or other organized armed groups were:

¹²¹ See ICRC Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949, para. 4448.

¹²² See Article 1 of the Additional Protocol II.



- under responsible command;
- able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
- able to implement Additional Protocol II.

255. The Protocol applies automatically as soon as the material conditions as defined in the Article are fulfilled. However, prior to the making of a finding thereon, this Chamber deems it necessary to make a number of precisions as regards the said criteria.

256. The concept of armed conflict has already been discussed under the above section pertaining to Common Article 3. It is sufficient to recall that an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict. Under Additional Protocol II, the parties to the conflict will usually either be the government confronting dissident armed forces, or the government fighting insurgent organized armed groups. The term “armed forces” of the High Contracting Party should be understood in the broadest sense, so as to cover all armed forces as described within national legislation.¹²³

257. Furthermore, the armed forces opposing the government must be under responsible command. This requirement implies some degree of organization within the armed groups or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable of, on the one hand, planning and carrying out sustained and concerted military operations- operations that are kept up continuously and that are done in agreement according to a plan, and on the other, of imposing discipline in the name of the *de facto* authorities¹²⁴.

¹²³ See ICRC Commentary on the Additional Protocol, para. 4460-4462.

¹²⁴ See ICRC Commentary on the Additional Protocol, para. 4463.



258. In addition to this, these dissident armed forces must be able to dominate a sufficient part of the territory so as to maintain these sustained and concerted military operations and the insurgents must be in a position to implement this Protocol¹²⁵.

The nexus between the crime and the armed conflict

259. The Chamber must also be satisfied that there is a link or nexus between the offence committed and the armed conflict for Article 4 of the Statute to apply.

260. In other words, the alleged crimes, referred to in the Indictment, must be closely related to the hostilities or committed in conjunction with the armed conflict.

¹²⁵ *Ibid.*, para. 4464-4471.



261. The *Akayesu* Judgement addressed this subject stating that the acts perpetrated by the accused had to be “[...] acts, committed in conjunction with the armed conflict”.¹²⁶

262. In the *Rutaganda* Judgement it was held that the term nexus should not be defined *in abstracto*. Rather, the evidence adduced in support of the charges against the accused must satisfy the Chamber that such a nexus exists. Thus, the burden rests on the Prosecutor to prove beyond a reasonable doubt, that, on the basis of the facts, such a nexus exists between the crime committed and the armed conflict¹²⁷. This approach finds favor with the Chamber in this instance.

¹²⁶ See *Akayesu* Judgement, para. 643.

¹²⁷ See *Rutaganda* Judgement, para 102-103. The findings on this matter are in line with the findings of the *Kayishema* and *Ruzindana* Judgement, para. 188.



Ratione personae

263. Two distinct issues arise with respect to personal jurisdiction over serious violations of Common Article 3 and Additional Protocol II; the class of perpetrators and the class of victims.

The class of perpetrators

264. Under Common Article 3 of the Geneva Conventions, the perpetrator must belong to a “Party to the conflict”, whereas under Additional Protocol II¹²⁸ the perpetrator must be a member of the “armed forces” of either the government or of the dissidents.

265. Neither the Geneva Conventions nor the Additional Protocols give an exact definition of “Party to the conflict” or “armed forces”. Taken literally, the duties and responsibilities of the Geneva Conventions and the Additional Protocols will only apply to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties.

¹²⁸ See Article 1(1) of the Additional Protocol II.



266. In the *Akayesu* Judgement, the Chamber, however, expressed the opinion that, due to the overall protective and humanitarian purpose of these international legal instruments, the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted.¹²⁹ Indeed, according to the Judgement, a too restrictive definition of these terms would dilute the protection afforded by these instruments to the victims and potential victims of armed conflicts. Hence, in the opinion of the Trial Chamber, the categories of persons covered by these terms should not be limited to individuals of all ranks belonging to the armed forces under the military command of either belligerent parties but should be interpreted in their broadest sense, to include individuals who are legitimately mandated and expected as public officials or agents or persons otherwise holding public authority *de facto* representing the Government to support or fulfil the war efforts. This was affirmed in both the *Rutaganda* Judgement and the *Kayishema* and *Ruzindana* Judgement.

267. It could be objected that the Accused, as a civilian, cannot be considered as being a member of the “armed forces” (in the broadest sense).

268. Yet, jurisprudence on this issue emanating from both the Nuremberg and Tokyo Tribunals and from the ICTR clearly established that civilians can be held responsible for violations of international humanitarian law committed in an armed conflict. The Nuremberg and Tokyo Tribunals, however, dealt with the matter in the context of an international armed conflict, while in the instant case, the question arises in the context of an internal conflict.

269. Nevertheless, the Chamber, in cognisance of the importance and relevance of these trials with respect to the instant case, deems it necessary to review such decisions prior to making its findings thereon.

270. In the *Zyklon B case*, the decision of the British military court was a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of State and other public authorities, but to anybody who is in a position

¹²⁹ See *Akayesu* Judgement, para. 630 to 634.



to assist in their violation. The military court, who sentenced two civilians, Tech-the owner of a gas company- and Weinbacher-his second in command-, to death,¹³⁰ acted on the principle that any civilian who is as accessory to a violation of the laws and customs of war is himself liable as a war criminal.¹³¹

271. In the *Essen Lynching Case*, three civilians -Braschoss, Kaufer and Boddenberg- were found guilty of the killing of unarmed prisoners of war, because they had taken part in the ill-treatment of which eventually led to the death of the victims.¹³²

272. In the *Hadamard Trial* decision, another application was given of the rule that the provisions of laws and customs of war are addressed not only to combatants but also to civilians, and that civilians, by committing illegal acts against nationals of the opponent, may become guilty of war crimes. *In Casu*, part of the staff of a civilian institution - a sanatorium were found guilty for killing allied nationals by means of injections.¹³³

273. These principles were also followed in Tokyo by the International Tribunal for the Far East, that accused Hirota, the former Foreign Minister of Japan, of various violations of war crimes.

274. So it is well-established that the post-World War II Trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where they have a link or connection with a Party to the conflict. The principle of holding civilians liable for breaches of the laws of war is, moreover, favoured by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities.”¹³⁴

¹³⁰ See LRTWC, Vol. I. p. 103.

¹³¹ See LRTWC, Vol.I, p. 103.

¹³² See LRTWC, Vol. I. p.88.

¹³³ See LRTWC, Vol. I. o. 46-55.

¹³⁴ See *Akayesu* Judgement para. 633



275. Therefore, the Chamber concludes that the Accused could fall in the class of individuals who may be held responsible for serious violations on international humanitarian law, in particular serious violations of Common Article 3 and Additional Protocol II.

The class of victims

276. Common Article 3(1) of the Geneva Conventions states that protection must be afforded to “persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat*”. Article 4 of Additional Protocol II refers to “all persons who do not take a direct part in the hostilities or who have ceased to take part in the hostilities”.

277. Article 50 of Additional Protocol I stipulates in its first paragraph 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.

278. On this basis, the ICRC concluded that: “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 or placed *hors de combat*”.¹³⁵

279. Pursuant to Article 13(2) of the Additional Protocol II, the civilian population, as well as individual civilians, shall not be the object of attack. However, if civilians take a direct part in the hostilities, they then lose their right to protection as civilians *per se* and could fall within a class of perpetrators. To take a ‘direct’ part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.

¹³⁵ See ICRC Commentary on the Additional Protocols, p.610, section 1913.



280. The Chamber considers, following the findings of the *Rutaganda* Judgement, that a civilian shall be anyone who falls out with the categories of “perpetrator” developed *supra*, namely individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to 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. The class of civilians thus broadly defined, it will be a matter of evidence on a case by case basis whether a victim has the status of civilian.

281. Concerning this issue, the Chamber recalls that, from a reading of the Indictment, the victims were all allegedly civilians, being usually men, women and children seeking refuge from the massacres.

Ratione loci

282. Having commented upon the criteria *ratione materiae* and *ratione personae*, the Chamber will now evaluate if the criteria of *ratione loci* are met.

283. In spite of the fact that there is no clear provision on the applicability *ratione loci* either in Common Article 3 or Additional Protocol II, the protection afforded to individuals by these instruments applies throughout the territory of the State where the hostilities are occurring, once the objective material conditions for applicability of the said instruments have been satisfied. Indeed, from that moment, persons affected by the conflict are covered by the Protocol wherever they are in the territory of the State engaged in conflict.¹³⁶

¹³⁶ See ICRC Commentary on Additional Protocol II, para. 4490.



284. This approach was confirmed in the *Akayesu* Judgement¹³⁷, the *Rutaganda* Judgement¹³⁸ and the *Tadic* Judgement¹³⁹ (with regard in particular to Common Article 3), which all conclude that Common Article 3 and Additional Protocol II apply in the whole territory where the conflict is occurring and are not limited to the “war front” or to the “narrow geographical context of the actual theater of combat operations”.

Specific violation

285. Musema is charged under Count 8 and 9 of the Indictment for violations of Articles 3 Common to the 1949 Geneva Conventions and of Additional Protocol II thereof, in violation of Articles 4(a) and (e) of the Tribunal’s Statute . If all the requirements of applicability of Article 4 of the Statute as developed *supra* are met, the onus is on the Prosecutor to then prove that the alleged acts of the accused constituted the required *actus reus* and *mens rea* of 4Articles 4(a) and (e) of the Statute.

Required elements of Article 4 (a) of the Statute of the Tribunal

a) *Murder*: The specific elements of murder are stated in Section 3.3. on Crime against Humanity in the Applicable Law.

b) *Torture*: Intentionally inflicting severe pain or suffering, whether physical or mental, on a person for such purposes as obtaining from him or a third person information or a confession, or punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public

¹³⁷ See *Akayesu* Judgement para. 635-636.

¹³⁸ See *Rutaganda* Judgement, para. 104.

¹³⁹ See ICTY “Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction” (2 October 1995), para. 69.



official or other person acting in an official capacity. It does not include pain or suffering only arising from, inherent in or incidental to, lawful sanctions.

c) *Mutilation*: causing severe physical injury or damage to victims.

Required elements of Article 4 (e) of the Statute of the Tribunal

a) *Humiliating and degrading treatment*: Subjecting victims to treatment designed to subvert their self-regard. Like outrages upon personal dignity, these offences may be regarded as a lesser form of torture; moreover ones in which the motives required for torture would not be required, nor would it be required that the acts be committed under state authority.

b) *Rape*: The specific elements of rape are stated in Section 3.3. on Crime against Humanity in the Applicable Law.

c) *Indecent assault*: The accused caused the infliction of pain or injury by an act which was of a sexual nature and inflicted by means of coercion, force, threat or intimidation and was non-consensual.

The violation must be serious

286. Article 4 of the Statute states that “The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Common Article 3 and of the Additional Protocol II”. The Trial Chamber in the *Akayesu* Judgement understood, in line with the Appeals Chamber Decision in *Tadic*¹⁴⁰ that the phrase “serious violation”

¹⁴⁰ See “Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction” (2 October 1995), para. 94.



means “a breach of a rule protecting important values which must involve grave consequences for the victim”¹⁴¹.

287. The list of serious violations provided in Article 4 of the Statute is taken from Common Article 3 of the Geneva Conventions and of Additional Protocol II, which outline “Fundamental Guarantees” as a humanitarian minimum of protection for war victims. The list in Article 4 of the Statute thus comprises serious violations of the fundamental humanitarian guarantees which, as has been stated above, are recognised as customary international law.

288. In the opinion of the Chamber, violations of these fundamental humanitarian guarantees, by their very nature, are therefore to be considered as serious.

¹⁴¹ See *Akayesu* Judgement, para. 616.



3.5 Cumulative charges

289. The Accused, by his alleged acts in relation to the events described in paragraphs 4.1 to 4.11 of the Indictment, is cumulatively charged with eight counts. Assuming that the Chamber is satisfied beyond a reasonable doubt that a specific act alleged in the Indictment was committed and that several legal characterizations under different counts have been established, it should adopt only a singular legal characterization given to such act, or whether it may the Chamber may find the Accused guilty of all the counts arising from the said act.

290. The Chamber notes that the principle of cumulative charges was applied by the Nuremberg Tribunal, especially regarding war crimes and crimes against humanity.¹⁴²

291. Regarding the concurrence of the various crimes covered under the Statute, the Chamber, in the *Akayesu* Judgement, held that:

¹⁴² The indictment against the major German War Criminals presented to the International Military Tribunal stated that “the prosecution will rely upon the facts pleaded under Count Three (violations of the laws and customs of war) as also constituting crimes against humanity (Count Four).” Several accused persons were convicted of both war crimes and crimes against humanity. The judgement of the International Military Tribunal delivered at Nuremberg on 30 September and 1 October 1946 ruled that “[...]from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity.” The commentary on the *Justice* case held the same view: “It is clear that war crimes may also constitute crimes against humanity; the same offences may amount to both types of crimes.” The trials on the basis of Control Council Law No. 10 followed the same approach. *Pohl, Heinz Karl Franslau, Hans Loerner, and Erwin Tschentscher* were all found to have committed war crimes and crimes against humanity. National cases, such as *Quinn v. Robinson*, the *Eichmann* case and the *Barbie* case also support this finding. In the *Tadi_* case, Trial Chamber II of ICTY, based on the above reasoning, ruled that “acts which are enumerated elsewhere in the Statute may also entail additional culpability if they meet the requirements of persecution.” Thus, the same acts, which meet the requirements of other crimes--grave breaches of the Geneva Conventions, violation of the laws or customs of war and genocide, may also constitute the crimes against humanity for persecution.



“[...] it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, [...]or (b) where one offence charges accomplice liability and the other offence charges liability as a principal.”¹⁴³

292. Trial Chamber II of the Tribunal, in its *Kayishema* and *Ruzindana* Judgement, endorsed the afore-mentioned test of concurrence of crimes and found that it is only acceptable:

“(1) where offences have differing elements, or (2) where the laws in question protect differing social interests.”¹⁴⁴

293. Trial Chamber II ruled in the *Kayishema* and *Ruzindana* Judgement that the cumulative charges were legally improper and untenable. It found that in that particular case all elements including the *mens rea* element requisite to show genocide, extermination and murder, and the evidence relied upon to prove the alleged commission of the crimes, were the same. Furthermore, in the opinion of Trial Chamber II, the protected social interests were also the same. Therefore, it held that the Prosecutor should have charged the Accused in the alternative.¹⁴⁵

294. Judge Tafazzal H. Khan, one of the Judges sitting in Trial Chamber II to consider the said case, expressed a dissenting opinion on the application of the issue of cumulative charges. Relying on consistent jurisprudence he pointed out that the Chamber should have placed less emphasis on the overlapping elements of the cumulative crimes.

¹⁴³ *Akayesu* Judgement, para.468.

¹⁴⁴ *Kayishema* and *Ruzindana* Judgement, para. 627.

¹⁴⁵ *Kayishema* and *Ruzindana* Judgement, para. 645, 646 and 650.



“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.”¹⁴⁶

295. In his dissenting opinion, the Judge goes on to emphasize that 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.

“[...] 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.”¹⁴⁷

296. This Chamber fully concurs with the dissenting opinion thus entered. It notes that this position, which endorses the principle of cumulative charges, also finds support in various decisions rendered by the ICTY. In the case of the *Zoran Kupreskic and others*, the Trial Chamber of the ICTY in its decision on Defence challenges to form of the indictment held that:

¹⁴⁶ *Kayishema and Ruzindana* Judgement, “Separate and Dissenting Opinion of Judge Tafazzal Hossain Khan Regarding the Verdicts Under the Charges of Crimes Against Humanity/Murder and Crimes Against Humanity/Extermination”, para. 13.

¹⁴⁷ *Ibid.* para.33.



“The Prosecutor may be justified in bringing cumulative charges when the articles of the Statute referred to are designed to protect different values and when each article requires proof of a legal element not required by the others.”¹⁴⁸

297. Furthermore, the Chamber holds that offences covered under the Statute - genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II - have disparate ingredients and, especially, that their punishment is aimed at protecting discrete interests. As a result, multiple offences may be charged on the basis of the same acts, in order to capture the full extent of the crimes committed by an accused.

298. Finally, the Chamber notes that in Civil Law systems, including that of Rwanda, there a rule of *concours idéal d'infractions* which allows multiple charges for the same act under certain circumstances. Rwandan law allows multiple charges in the following circumstances:

“Penal Code of Rwanda: Chapter VI - Concurrent offences:

Article 92: Where a person has committed several offences prior to a conviction on any such charges, such offences shall be concurrent.

Article 93: Notional plurality of offences occurs:

1. Where a single conduct may be characterized as constituting several offences;
2. Where a conduct includes acts which, though constituting separate offences, are interrelated as deriving from the same criminal intent or as constituting lesser included offences of one another.
3. In the former case, only the sentence prescribed for the most serious offence shall be passed while, in the latter case, only the sentence provided for the most severely punished offence shall be passed, the maximum of which may be exceeded by half.”

¹⁴⁸ The Prosecutor v. Zoran Kupreskic and others, “Decision on Defence Challenges to Form of the Indictment”, IT-95-16-PT, (15 May 1998).



299. Consequently, in light of the foregoing, notably of the *Akayesu* and *Rutaganda* Judgements, the Chamber maintains that it is justified to convict an accused of two or more offences for the same act under certain circumstances.



4. THE DEFENCE CASE

300. Musema pleaded not guilty to all counts of the initial Indictment at his initial appearance on 18 November 1997. Following amendments to the Indictment, Musema, on 20 November 1998 and 6 May 1999, pleaded not guilty to the new charges.

301. The Defence case comprised three general arguments:

1. that the Prosecution did not discharge its burden of proving Musema guilty;
2. that the Prosecution did not present sufficient evidence to satisfy the Chamber beyond reasonable doubt of Musema's guilt; and
3. that the Prosecution did not rebut the Defence alibi¹⁴⁹.

302. In support of these arguments, the Defence made a number of admissions and presented a defence of alibi as well as a number of further arguments. These are dealt with separately in the sections that follow.

¹⁴⁹ See Defence Closing Argument, 28 June 1999



4.1 General admissions

303. Musema made the following admissions pertaining to paragraphs 4.1-4.5, 4.9 and 4.11 of the Indictment.

Paragraph 4.1 of the Indictment

304. During the events referred to in the Indictment, Rwanda was divided into eleven *Préfectures*: Butare, Byumba, Cyangugu, Gikongoro, Gisenyi, Gitarama, Kibungo, Kibuye, Kigali-Ville, Kigali-Rural and Ruhengeri. Each *préfecture* was subdivided into *communes* which were divided into *secteurs*, and each *secteur* was divided into *cellules*.

Paragraph 4.2 of the Indictment

305. During the events that occurred in Rwanda between 1 January and 31 December 1994, the Hutus, the Tutsis and the Twas were respectively identified as racial or ethnic groups.

Paragraph 4.3 of the Indictment

306. On 6 April 1994, the plane carrying, among other passengers, the President of the Republic of Rwanda, Juvénal Habyarimana, was shot down on its approach to Kigali airport. In the hours that followed the crash of President Habyarimana's plane, violence set in and the massacres began in Kigali and in other *préfectures* in the country, marking the beginning of the genocide.

Paragraph 4.4 of the Indictment

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



Paragraph 4.5 of the Indictment

308. The individuals seeking refuge in the area of Bisesero were regularly attacked, throughout the period beginning on or about 9 April 1994 and ending on or about 30 June 1994. The attackers used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis in Bisesero. The attacks resulted in thousands of deaths and numerous injuries to men, women and children within the area of Bisesero.

Paragraph 4.9 of the Indictment

309. By 13 May 1994, Tutsi civilians had sought refuge at Muyira hill located in Gisovu *Commune*, Rwamkuba *Secteur*. Musema further admits that a major attack against these Tutsi civilians occurred on 13 May 1994 at Muyira hill.

310. On 13 May 1994 at Muyira Hill, genocide was committed against the Tutsi population. Musema also admits that on the same day at Muyira Hill, murder, extermination and other inhumane acts occurred as part of a widespread or systematic attack against a civilian population on ethnic grounds.

Paragraph 4.11 of the Indictment

311. The interim government, sworn in on 9 April 1994 and composed solely of prominent Hutus, espoused the objective of extermination of Tutsis. Members of the interim government incited the population to eliminate “the enemy” and its “accomplices”. Musema admits that some members of the interim government participated directly in the massacres. During the genocide, the FAR, particularly units of the Presidential Guard, the Para-Commando Battalion and Reconnaissance Battalion, in complicity with militia men, actively participated in the massacres of the Tutsi population throughout Rwanda.



312. In the years following independence, the political scene was dominated by people identified as Hutus. Those identified as Tutsis were excluded from senior positions in the civil service and the army.

313. Musema admits there were ethnic confrontations between the Hutus and Tutsis and that there was a mass exodus of the Tutsi minority from Rwanda into neighbouring countries. On several occasions individuals perceived and identified as Tutsis were the targets of oppressive treatment. For instance, a few days following the invasion of Rwanda on 1 October 1990 by the FPR (made up mainly of Tutsi refugees), Tutsi and any Hutu political opponents characterized as FPR accomplices were arrested by the MRND Habyarimana regime. Between 1990 and April 1994, according to Musema, the same regime assassinated certain political opponents and massacred many Tutsi civilians in the rural areas. The interim government that was established after Habyarimana's death was characterized by Hutu extremism and overt incitement to extermination of Tutsis and of the enemy and its accomplices. Prominent figures close to Habyarimana carried out propaganda campaigns via the radio and the press with the intention of ensuring widespread dissemination of hate propaganda, calls to ethnic violence, and extermination of Tutsis and their accomplices. The MRND party also organized and trained youth wings of the ethnically founded political parties, notably the *Interahamwe* (the youth wing of the MRND). The interim government executed the objective of exterminating the Tutsis and their accomplices by inciting the public to exterminate the Tutsis and their accomplices.

314. The military and militiamen set up roadblocks throughout Kigali. At the roadblocks, the identity cards of anyone wishing to pass were checked, and people were killed. Military patrols, often involving militia men, scoured the city to execute Tutsis and certain political opponents. Musema admits that all along the road from Kigali to Gitarama there were road blocks manned by individuals, some of whom were drunk, armed with machetes and other weapons. He admits that he saw many bodies by the road side and witnessed pillaging. Musema admits that the people who were killed at the roadblocks were so killed because they were accused of being *Inyenzi*, because they were Tutsis, or because they looked Tutsi.

315. The incitement to ethnic hatred took the form of public speeches by people sharing the extremist ideology.



316. During the months of April, May, and June 1994, in *Gisovu* and *Gishyita communes*, *Kibuye Préfecture*, in the Territory of Rwanda, genocide was committed against the Tutsi population. Musema admits that between 1 January and 31 December 1994, throughout Rwanda, there were widespread or systematic attacks, which were directed against a civilian population on the grounds of political persuasion, ethnic affiliation, and racial origin.



4.2 The Alibi

317. The Defence Case included the submission of an alibi defence. The Defence alleged that Musema was in locations other than those alleged to be crime sites, or was involved in activities other than those alleged during the times at which the crimes specified in the Indictment were allegedly committed. To support these claims, the Defence relied on three sources of evidence:

- (a) the testimony of the Accused, supported by documentary evidence;
- (b) the testimony of Defence Witnesses in support of the testimony of Musema;
- (3) the testimony of Witnesses which tended to confirm the authenticity of certain documents.

318. The Chamber has already addressed the legal requirements of a defence of alibi¹⁵⁰.

319. The arguments raised by the Defence in relation to the alibi were of two forms. Firstly, concerning the content of the alibi; secondly, in response to the Prosecutor's rebuttal of the alibi.

4.2.1 The content of the alibi

The whereabouts of Alfred Musema from 6 to 14 April 1994

¹⁵⁰ See Section 2.3 of the Judgement



320. Defence counsel argued that Musema was absent from the Tea Factory on 6 April 1994 and on subsequent days. This is based on a number of documents, including letters sent by Musema during that period to Rwagapfizi and Pletscher¹⁵¹. Musema testified that he was in Kigali, at the *OCIR-Thé*, from 1 to 12 April, in Gitarama from 12 to 13 April, in Rubona from 13 to 14 April, and in Gisovu from 14 to 17 April. The Defence argued that even if Musema were present at the Gisovu Tea Factory at the time of the alleged crimes, this itinerary reveals that as Musema was not present in the early stages, he did not inspire the atrocities which had already begun.

321. Mrs Claire Kayuku, wife of Musema, testified that he was with the family in their house in Remera, Kigali, from 6 April to 12 April. She stated that they left Kigali on the afternoon of 12 April for Butare, but, due to difficulties at roadblocks, stayed a night in Gitarama. She stated that they left Gitarama on the afternoon of the next day, 13 April, and went to her mother's home in Rubona, 15 kilometres north of Butare.

The whereabouts of Alfred Musema from 14 to 22 April 1994

322. Musema testified that he went to the Gisovu Tea Factory on 14 April, 1994, with one soldier. Upon arrival he saw a number of bodies of employees and their families, including the body of the Chief Accountant, at the factory.

323. Musema testified that he spent 15 April at the tea factory until early 17 April when, learning that the factory was being attacked, he fled towards Butare and then to Rubona. Musema remained in Rubona until 22 April, except for two day-trips to Gitarama on 18 and 21 April, where he met with the Minister of Industry, Trade and Handicrafts and was told that he would be sent on a mission to contact the director-general of *OCIR-Thé*.

324. Claire Kayuku testified that Musema was with the family in Rubona on 13 April. On 14 April he went to Butare to look for an escort, returning very early on 16 or 17 April, having, in the meantime, visited the Gisovu Tea Factory. Musema told her that Annunciata was killed while he was at the factory.

¹⁵¹ See exhibits D 25 & 36





The whereabouts of Alfred Musema from 22 April until the end of April 1994

325. The Defence Counsel submitted as evidence the *Ordre de Mission* of 21 April (*Annex B*), discovered at the Gisovu Tea factory by the Swiss *Juge* in 1995¹⁵². The Defence claimed that this document confirms the activities of Musema between 22 April and 7 May. Musema agreed that the documents referred to and the actual mission did not follow regular procedure, but stated that the *deplacement* of the government, and the unknown whereabouts of the *OCIR-Thé* Director-General, occurred as a result of the prevailing security situation in April 1994.

326. Further documents support that Musema undertook a mission to different tea factories, such as Pfunda Tea Factory in Gisenyi *Préfecture*, between 22 to 25 April¹⁵³. He testified, supported by documentary evidence, that he remained in Rubona during 26 to 29 April, visiting Kitabi Factory on 28 April¹⁵⁴. Reports from meetings of 29 and 30 April from Gisovu Tea Factory indicate that Musema was at the factory as part of his mission, and that he presented an authorisation to travel, dated 30 April, from the *Préfet* of Kibuye¹⁵⁵. The Defence Counsel argued that was this document a forged document, Musema would not have mentioned his presence at Gisovu during this time period. Other documents also provide evidence of Musema's presence in Gisovu until 2 May¹⁵⁶.

327. Claire Kayuku testified that her husband was in Rubona between 16 April and 22 April, travelling once or twice in that period to Gitarama, but spending every night at home in Rubona. According to her, Musema left for Gisenyi *Préfecture* on 22 April. He returned on 26 April.

¹⁵² See exhibits D 10 & 29

¹⁵³ *Id*

¹⁵⁴ *Id*

¹⁵⁵ See exhibits D 30, 31, 32 & 33

¹⁵⁶ See exhibits D 28, 34 & 35



The whereabouts of Alfred Musema in early to mid May 1994

328. Musema presented further documentary material, and oral testimony in support of his alibi defence for the month of May, 1994. The Defence submitted that between 3 May and 19 May, Musema visited Rubona, Butare, and Gitarama. The *Ordre de Mission* has stamps dated 3-5 May from Shagasha and Gisakura Tea Factories, and from Mata Tea Factory 7 May¹⁵⁷. Musema testified that he spent from 5 to 19 May in Rubona, making one day trip to Mata 7 May, and that during such period he never set a foot near Kibuye *Préfecture*.

329. Defence Witness MG testified to having met Musema twice in Gitarama on dates, in late April or in early May, before 16 May, and Defence Witness MH testified to having met Musema in Gitarama on 10 May and in Rubona on 13 May, and Defence Counsel submitted documentary evidence that Musema was present in Rubona on and around 17 May¹⁵⁸.

The whereabouts of Alfred Musema in mid to late May 1994

330. Following the *Ordre de Mission*, Musema returned to Gisovu on 19 May where he remained until 21 May, making a visit to Kibuye on 20 May.¹⁵⁹ Musema returned to Rubona on 21 May, where he allegedly stayed until 27 May. He allegedly returned to Gisovu on 27 May. The Defence presented letters to show that Musema was only present in Gisovu from 19 May to 21 May, dealing with documents for the months of April and May¹⁶⁰. Together, the Defence claimed, these documents demonstrate Musema's absence from Gisovu during the period from 21 May to 29 May, as he had not dealt with administrative matters in his usual pattern.

331. Upon Musema's return on 27 May to Gisovu, he only remained there until 29 May, making a visit to Kibuye on 28 May, before leaving to Shagasha on 29 May. Musema remained in Shagasha

¹⁵⁷ See exhibits D 10 & 35

¹⁵⁸ See exhibits D 92, 101 & 102

¹⁵⁹ See exhibit D 10

¹⁶⁰ See exhibits D 47, 48 & 49



until 30 May when he left for Cyangugu. On 31 May he left Cyangugu to visit Zaïre. Musema's Defence Counsel presented further documentary evidence in support of Musema's whereabouts for the end of May.

332. Claire Kayuku supported Musema's alibi concerning his whereabouts from the end of April until the end of May. She testified that he did not travel a great deal after 26 April, but according to her, he spent most nights in Rubona with her.

The whereabouts of Alfred Musema in June and July 1994

333. According to the testimony of Claire Kayuku, on 10 June, Musema went to the tea factory in Gisovu until 17 June when he went to Shagasha. From Shagasha he visited his family in Gikongoro on 19 June, and left on 20 June for Gisovu and drove towards Gisenyi on 21 June. Claire Kayuku did not see him again until 24 July 1994, in Bukavu in Zaïre.

334. The Defence submitted documentary evidence and witness testimonies in support of the claims that Musema was at the Shagasha Tea Factory from 1 June to 10 June, in Gisovu on 20 June, and on mission to Cyangugu, Gikongoro, Butare and Gisenyi between 17 June and 17 July. When he returned to Gisovu, Musema responded to correspondence received throughout June, which allegedly indicates his prior absence.

335. The Defence introduced further documents as evidence that Musema was in Gisovu from 28 June until 25 July. On or about 4 July 1994, French troops arrived at the tea factory where they stayed until Musema's departure. Musema testified that he had no knowledge of what occurred on 16 July, after which many prominent leaders left Rwanda for Zaïre. The Defence submitted a letter, dated 18 July, from the French military, and correspondence from employees, dated 20 July. Musema testified that he replied to the letter from the French Army, thanking the soldiers for their protection, and that he surrendered his personal pistol¹⁶¹.

¹⁶¹ See exhibits D 81, 82, 83 & 22



4.2.2 Arguments in response to the Prosecutor's rebuttal of the alibi

336. The Prosecutor argued that Musema's alibi is untruthful, and that the documents in the Swiss Files, including a personal calendar written by Musema (Annex C), along with the testimonies of the prosecution witnesses, provide a more accurate representation of Musema's true whereabouts during the relevant period.

337. The Defence presented several arguments to counter the Prosecutions rebuttal. The Defence argued that the Swiss Files are unreliable because of the circumstances and conditions of the Swiss interviews and investigations. Musema testified that during the first two interrogations conducted by Swiss officials he was not represented by counsel, and that at other interrogations he was represented only by a trainee lawyer; that he was not advised of his right to remain silent; that both he and his counsel were denied access to transcripts of the interviews and to his files; that he was pressured to sign every page of the transcript of the interviews without having read it; that the information recorded in the transcripts was at times inaccurate¹⁶²; and that he produced the calendars and schedules without the assistance of his files (or *dossier*).

338. The Defence introduced four exhibits (D85, D86, D87, D88) to prove that Musema did not see his files until more than one year after his arrest. The Defence argued that the files are unreliable because not all interrogations conducted by the Prosecutions are admissible under the Rules.¹⁶³

¹⁶² See Defence Closing Argument, 28 June 1999

¹⁶³ See Defence Closing Argument, 28 June 1999



339. The Defence argued that documents provided by Musema to the Swiss *juge d'instruction*, are, by their nature, truthful. The Defence suggested that, if Musema had fabricated these documents with a view to providing a defence before any future criminal proceedings, he would have known the dates, nine months after the alleged incidents at Muyira Hill, when he provided dates to the Swiss *juge d'instruction*; he would not have given the *juge* a calendar placing him in Gisovu on 13 May if he had known what had happened there at that time; he would have fabricated a document specifically for 13 May 1994, instead of providing documents around that date¹⁶⁴. The Defence further argued that the documents were reliable business records compiled during the normal course of every day proceeding.¹⁶⁵

¹⁶⁴ See exhibits D 36,45 & 46; Defence Closing Argument, 28 June 1999

¹⁶⁵ See *supra*, Section 2.2 of the Judgement



4.3 Further arguments

4.3.1 The requirement that the Accused respond to Counts 7, 8 and 9 of the Indictment

340. The Defence argued that, pursuant to Articles 19(2) and 20(4)(a) of the Statute, and in accord with the spirit of the Rules, the Accused had no cause to answer on the amended or added counts 7, 8 and 9 of the Indictment, since the Indictment, as amended by order of the Chamber on 6 May 1999, was never served on the Accused. The last Indictment served on the Accused was the amended Indictment of 18 November 1998.

341. In relation to this argument the Chamber notes briefly:

- that in its Decision on the Prosecutor's Request for Leave to Amend the Indictment of 6 May 1999, the Chamber reminded "the Prosecutor of her obligation to immediately serve on the Accused and his Counsel the amended indictment in English and in French";
- that the fact that the Accused entered pleas of Not Guilty to Counts 7, 8 and 9 of the amended Indictment on 6 May 1999 is evidence that the Accused received and had knowledge of the amended Indictment; and
- that the failure to formally serve the Accused with the amended Indictment did not infringe his rights under Article 19 and sub-Article 20(4)(a) of the Statute.

342. The Chamber accordingly finds that the Accused does have a cause to answer on Counts 7, 8 and 9.

4.3.2 The authority of Alfred Musema



343. The Defence argued that Musema's political activity was minimal, and that the prosecution failed to produce evidence to support Witness W's claim of Musema's involvement in the regime's politics. Musema testified that he was never involved in political activities at school or at University, but that, like other Rwandan citizens, he was a member of the MRND. He admitted that his father-in-law was a member of Parliament. Musema testified that he was the Director of Gisovu Tea Factory, but denied being the eyes and ears of the government in Gisovu or Kibuye because of his position as director. The Defence argued that the Prosecutor produced no evidence to establish that Musema was an influential person in Kibuye *Préfecture*, or to show that he exercised civic authority.

344. The Defence argued that the nature of Musema's appointment as Director of Gisovu Tea Factory was not conclusive evidence of any association with the government regime. While Musema's appointment by Presidential decree to this position was unusual, it was not unique insofar as one other tea factory director was appointed during the same period by Presidential decree. Since no other tea factory directors were appointed subsequently, it is unclear whether this was a new form of procedure being adopted for such appointments¹⁶⁶.

345. The Defence argued that Musema was a dedicated businessman and nothing more. Musema testified that the Gisovu Tea Factory, one of the top tea factories in Rwanda traded on the London tea market. Defence Exhibit 11, a table of figures from Wilson Smith & Co., was tendered by the Defence as evidence of the quality of tea produced by the factory.

¹⁶⁶ See Defence Closing Argument, 28 June 1999



346. Musema testified that although the factory was situated in Kibuye, his zone of responsibility as Director spanned two *préfectures*, Kibuye and Gikongoro. He stated that the *bourgmestre* and *préfet* had no influence on the management of the tea factory. The only influence either the *bourgmestre* or the *préfet* might exert was in the recruitment of family members for employment. Musema testified that the tea factory was not the largest employer in the region and that his position as a director was not political. He explained that two trips between 1984 and 1994 to the Kenya Tea Development Authority and to Morocco were not related to politics¹⁶⁷.

347. Claire Kayuku testified that Musema, as Director of the Tea Factory, was an influential person in the area. However, he was not part of the interim government, politically or in any other manner.

4.3.3 Arguments concerning the reliability of evidence

348. The Defence argued that much of the Prosecution evidence was unreliable.

349. The Defence argued that much of the investigation, which is the basis of the Prosecution's evidence, was unreliable. Specifically, the Defence challenged the absence of forensic and real evidence, and the Prosecutions failure to introduce relevant evidence from the Gisovu Tea Factory, which the Defence later presented¹⁶⁸.

350. The Defence also challenged the testimonies of Prosecution witnesses whose memories were affected by the passage of time. The Defence also argued that witnesses mistakenly identified Musema by erroneously associating him with vehicles and employees of the tea factory¹⁶⁹.

351. The Defence contended that documents may be more reliable than oral testing to re-establish events which occurred many years ago, especially when such documents relate to the ordinary affairs of an individual. The Defence argued that the passage of time impeded the Musema's defence, since

¹⁶⁷ *Id.*

¹⁶⁸ See Defence Closing Argument, 28 June 1999

¹⁶⁹ See Defence Closing Argument, 28 June 1999



documents may disappear, and access to evidence may become limited¹⁷⁰.

¹⁷⁰ See Defence Closing Argument, 28 June 1999



352. The Defence argued that many of the documents on which Musema relied were intended only as a means of refreshing his memory. The Defence contended that Musema may have made errors concerning dates when he drafted the documents for the Swiss *juge d'instruction*, but only the specific dates, not the events were in error¹⁷¹.

353. The Defence argued that the Prosecutor's allegations that Musema lied are untrue and irrelevant. The Defence claimed that inconsistencies may have arisen not because Musema intentionally lied, but because he was merely mistaken in his recollections. The Defence further argued that, even if the Chamber were convinced that Musema did lie, the Chamber should not necessarily conclude that he is guilty. The Defence argued that Musema might, should he be lying, have many "innocent" reasons for doing so.¹⁷²

¹⁷¹ See Defence Closing Argument, 28 June 1999

¹⁷² See Defence Closing Argument, 28 June 1999



5. FACTUAL FINDINGS

5.1 Context of the events alleged

354. Paragraphs 4.1, 4.2 and 4.3 of the Indictment, under the heading “A concise statement of the facts”, contain allegations on the general context in Rwanda in 1994, as well as general elements of the crimes which the Accused is charged with committing.

355. Musema admits that during the relevant events, Rwanda was divided into eleven *Préfectures*, one of which was Kibuye, as alleged in **Paragraph 4.1** of the Indictment.

356. Musema admits that during the relevant events, Tutsis were identified as members of an ethnic or racial group, as alleged in **Paragraph 4.2** of the Indictment.

357. Musema’s admissions also include the fact that for many years prior to 1994, the Tutsis, like the Hutus and Twas, were perceived and identified as an ethnic or racial group and that the Tutsis were the targets of discrimination and killings as such, which prior to 1994 stemmed from the socio-political situation in Rwanda. As noted under “General Admissions” (*supra*),¹⁷³ Musema admitted that in the years following independence, the political scene was dominated by people identified as Hutus. The targeting of the people identified as Tutsi for oppression and discrimination also involved their exclusion from senior positions in politics, the civil service and the army, their arrest and detention and, toward 1993, the overt incitement to violence and extermination of the Tutsi group.

358. In addition to that, Musema admits that in 1994 widespread or systematic attacks were directed against civilians on the grounds of ethnic or racial origin. Musema testified that the massacres in 1994 were targeted and directed against the Tutsi civilians not as individuals but as members of the said group.

359. Musema admits that on 6 April 1994, the plane transporting President Juvénal Habyarimana of

¹⁷³ Section 4.1 of the Judgement.



Rwanda crashed on its approach to Kigali airport, Rwanda and that attacks and killings of civilians began soon thereafter throughout Rwanda, as alleged in **Paragraph 4.3** of the Indictment.

360. Musema testified that while in his house in Kigali, he heard and saw the shots aimed at the plane, heard an explosion, although he did not see the plane crash, nor was he aware of those who were on board. The following day, on RTL, he learnt of the crash and of those on board. He also admitted the occurrence of this incident and the inception of violence in Rwanda soon thereafter. Musema testified that in the days following the plane crash he witnessed massacres, the destruction of houses and the displacement of people from Kigali. Musema admitted that in the hours following the crash of the President's plane, violence set in and massacres began in Kigali and other *préfectures* in the country, marking the beginning of massacres described by him as a genocide. As he travelled between Kigali and Gitarama during the time of the massacres, he saw individuals manning roadblocks. These persons separated people they identified as Tutsi or those accused of being *Inyenzi* by asking for identity cards which indicated the ethnic group of the holders. Musema stated that these persons manning the roadblock threatened him and his family with death. At the roadsides he saw many bodies. He stated that the victims of the massacres were killed, because they were Tutsis (so-called *Inyenzi*) or because they looked Tutsi or because they were accused of helping the Tutsis. The majority of the victims were Tutsis. Musema stated that the victims included Tutsi children, who naturally could not have been among the FAR or FPR fighters.

361. In light of these admissions, these facts are not in dispute. The Chamber finds, therefore, that the allegations set forth in Paragraphs 4.1, 4.2 and 4.3 of the Indictment have been established beyond reasonable doubt.



5.2 Massacres in the Bisesero region

362. Paragraphs 4.4 to 4.6 and 4.11 of the *Indictment* charge Musema for his involvement in massacres which occurred in the region of Bisesero from 9 April 1994 until 30 June 1994. They read as follows:

- “4.4 The area of Bisesero spans two communes in Kibuye Prefecture. From about 9 April 1994 through 30 June 1994, thousands of men, women and children sought refuge in various locations in 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.
- 4.5 The individuals seeking refuge in the area of Bisesero were regularly attacked, 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.
- 4.6 At various locations and times throughout April, May and June 1994, and often in concert with others, Alfred Musema brought to the area of Bisesero armed individuals and directed them to attack people seeking refuge there. In addition, at various locations and times, and often in concert with others Alfred Musema personally attacked and killed persons seeking refuge in Bisesero.
- 4.11 The attacks described above resulted in thousands of deaths and numerous injuries to the men, women and children within the area of Bisesero in Gisovu and Gishyita communes, Kibuye Prefecture.”

363. As already developed by the Chamber in the section on the General Admissions of the



Defence¹⁷⁴, it is not contested that regular attacks occurred in the Bisesero region from 9 April 1994 until about 30 June 1994. The victims were thousands of men, women and children who were predominantly Tutsis and who had sought refuge in the Bisesero region. The attackers were armed with guns, grenades, machetes, spears, pangas, cudgels and other weapons. Thousands of Tutsis were killed, injured and maimed. On 13 May 1994, thousands of Tutsis who had sought refuge on Muyira hill in Gisovu *Commune*, Rwankuba *Secteur*, were subjected to a major attack and massacred.

364. The Defence, however, denies the involvement, whether by direct participation or by aiding and abetting in the execution of these massacres, of Musema. Reliance is placed upon the alibi and on the lack of credibility of the Prosecution witnesses testifying on these allegations.

365. The evidence adduced by the Prosecutor in this case concentrates on a number of specific massacres mainly in the Bisesero region, in which Musema is said to have participated. The Chamber shall deal with these matters in a chronological manner along with any other sightings and movements of Musema.

April and May 1994

366. A number of witnesses testify they saw Musema in April and May 1994 participate in massacres against Tutsi civilians.

367. The position of the Defence is that Musema went to Rubona from Gisovu by 17 April and that he was then, from 22 April, on mission visiting a number of tea factories and thus was not present at the locations referred to by these witnesses. Support for this alibi stems in the main from exhibit D10, an “*ordre de mission*” (mission order), which was said to be issued to Musema in Gitarama, and then stamped, signed and dated at each tea factory he visited. Other documents and a number of witnesses were also presented by the Defence as further evidence of the movement of Musema. The Prosecutor submitted that this mission order had been falsified so as to hide the extent of Musema’s involvement in the massacres which occurred in the Bisesero region.

¹⁷⁴ See Section 4.1 of the Judgement - “General Admissions”



368. For the sake of clarity, in view of the complexity and number of issues which arise from the pertinent evidence during this period, the Chamber will first recall the testimony of prosecution witnesses relevant to massacres as they occurred in a chronological manner. The Chamber will then deal with the alibi presented by Musema, after which the factual findings will be made.

· Gisovu Tea Factory, 15 April 1994

369. The Chamber notes that evidence presented during trial, namely the testimony of two Prosecution witnesses and Musema, relate to the alleged killing of a number of children at the tea factory. The Chamber is of the opinion that this evidence was unclear and inconsistent, and moreover, the events are not specifically averred to in the Indictment. As such, the Chamber shall not make any findings on these allegations.

· Muko and Musebeya Communes, 15 April 1994

370. Prosecution *Witness BB* testified as to the whereabouts of Musema on 15 April 1994. The witness, who was based at the Gisakura Tea Factory in 1994, was not physically at this tea factory between 12 and 24 April 1994, as he was hiding in the *communes* of Muko and Musebeya. He heard that, on 15 April, the director of the Gisovu Tea Factory was seen in the *communes* of Musebeya and Muko at the wheel of a Daihatsu truck transporting individuals armed with spears and machetes. He received this information from workers from Gisakura and Muko.

• Karongi hill FM Station, 18 April 1994

371. Prosecution *Witness M* testified that, on 15 April 1994, his mother, his three children and himself went to the Karongi hill FM station, which he identified in exhibit 20.18. According to the witness, the hill is about 2000 metres high, with only one access road to the top. They hid there with friends of his who were guards at the FM station. On 18 April, he saw Musema lead a meeting of approximately 150 people. Some of these people came on foot whereas others, about 80 people, including Musema, had arrived aboard two vehicles, both Daihatsus, each bearing the inscription



“*Usine à thé Gisovu*”. The witness recognized the driver of the Daihatsu transporting Musema and knew him to be an employee of the tea factory.

372. The witness stated that he was hiding in the guard’s hut 10 metres away from where the meeting had convened and was able to see everything through holes in the walls of mud and wood. The hut was three metres by four metres, with one main door, no windows, was split into two rooms and was used by the guards while working at the FM station. He saw people from Gisovu and Mwendo, having first spotted them as the vehicles had commenced the ascent of the hill while he was at the summit. Most of the people at the meeting wore banana leaves and grass on their heads. Musema wore a sports tracksuit. Certain employees of the tea factory were dressed in blue “*Usine à thé*” overalls. Musema was carrying a medium length gun and a small number of other people were also carrying weapons, namely machetes, clubs and some rifles. The witness was only able to recognize Rekayabo, a communal policeman from Gisovu *Commune*, and Munyanziza, unemployed and a member of the MRND, because he was too scared and he could not observe very well.

373. According to the witness, Musema addressed those who had convened in Kinyarwanda, telling them to rise together and fight their enemy the Tutsis and deliver their country from the enemy. Questions were put to him by the crowd, asking what would be their rewards considering that they might lose their lives in this war. Musema answered that there would be no problem in finding rewards, that the unemployed would take the jobs of those killed, and that they would appropriate the lands and properties of the Tutsis. He stated that those who wanted to have fun could rape the women and girls of the Tutsis without fearing any consequences. The crowd applauded Musema. Musema then told the crowd to be patient and wait for all those who had hidden to come out and go to the camp where the Tutsis had sought refuge.

374. Witness M went on to state that, at this point, Musema asked the witness’ friend, the only guard then on duty at the Station, to hand over rifles and ammunition as the crowd wanted to attack the camp on that very day. It was common knowledge that there were weapons at the Station. The guard hesitated in complying, saying that there was a need to get authorization from the commander of Kibuye. Musema shouted at him, telling him that it was a crime not to hand over weapons to defend the country and that if the commander knew of this refusal, the guard could be severely



punished.

375. The witness stated that he observed that the guard, unaccompanied, then went to the hut to collect the rifles and ammunition. According to the witness, the Lee Enfield rifles and ammunition were stored in the room next to the one in which he was hiding. The ammunition was stored in a metallic box against a wall. In the same room were a few pots and pans, foodstuffs and a large folded military tent. The bed was simply grass strewn onto the floor. He described that on walking into the hut, one would first see stones on which the cooking was carried out. Witness M was in the first room and his family were in the adjoining room with the ammunition and rifles. When the guard came to collect the rifles, the witness joined his family in the other room, the walls of which he was unable to see through. When the guard left, closing the front door behind him, the witness went back into the front room so that he could see what was happening outside.

376. According to the witness, the guard then gave Musema the two Lee Enfield rifles and some ammunition, and showed him how to use the weapons, and then loaded bullets into the magazine. Musema and the crowd left immediately thereafter in the direction of the Gitwa “Tutsi” refugee camp. During the whole meeting, none of those who had gathered at the top of Karongi hill had gone to the hut to see what or who was inside.

377. Witness M concluded his testimony in this regard by stating that he saw Musema, in the company of two policemen from the factory, stay with the vehicles which were parked away from the camp so that they would not be damaged if the refugees pushed the attackers back. The rest of the attackers went towards the refugee camp in Gitwa, Rubazo *Secteur*, Gitesi *Commune*. According to the witness, who had an electronic watch, the attack commenced between 12:30hrs and 13:00hrs and finished around 15:00hrs. The victims were mainly the refugees. After the attack, Musema left Gitwa with the attackers who had come from different regions. Some were on foot, others aboard vehicles.

378. During cross-examination, witness M affirmed the testimony he had given in direct examination. He provided further details regarding the hut, access to the Karongi hill FM Station and other physical aspects of the locality. Witness M also confirmed that he was able to see and hear the meeting and that he saw Musema, as he had testified in direct examination.



Near the Gisovu Tea Factory, on or about 20 April 1994

379. Prosecution *Witness K*, who hid in tea plantations in Twumba, in the Gitabura *Secteur* from 8 April 1994 for two weeks, stated that he saw Musema during this period transporting assailants to the Bisesero region.

380. Questioned as to his hiding place during this period, the witness specified that he was in the “*villageois*” tea plantation, which he identified on the left hand side of photo exhibit P27.1. However, when asked to point out in the same photo the Gikongoro road about which he testified, he was unable to do so, indicating rather that it would be easier for him to be on the terrain as it was not very clear from the photo.

381. Witness K went on to say that in April 1994, he saw Musema in his Pajero driving in front of a tea factory Daihatsu going in the direction of Gikongoro. Aboard the Daihatsu, a person using a microphone was calling for others to come to help as the tea factory had been attacked by *Inyenzi*. The Witness said that “*Inyenzi*” meant “Tutsis” and that in April 1994 the tea factory had not been attacked by the Tutsis. According to the witness, this was a way of assembling at the tea factory people from Gikongoro and tea factory workers so as to take them to Bisesero.

382. When questioned as to how he knew the vehicles were going to Gikongoro, the witness stated that he first saw Musema as he returned from Gikongoro with a vehicle loaded with persons armed with spears and clubs. On arriving at a bridge where there was an “*arc de triomphe*”, Musema showed them the road to take while he went up to the factory. The witness testified that they were singing “Let’s exterminate them, let’s finish them from the forest in which they are hiding”. The witness added that he was able to see all of this from the tea plantation in which he was hiding. After the vehicle from Gikongoro had been to the tea factory, all three tea factory Daihatsus went to Bisesero. The vehicles were identifiable as belonging to the tea factory as they bore the inscription “*Usine à thé Gisovu*”.

383. Amongst those who were taken to Bisesero, Witness K said he recognized employees of the



tea factory. The names of these people form part of exhibit P35. Only a certain Mushoka was armed; the others were dancing in the back of the vehicle. The witness added that there were also Twas with them and that they were armed with spears and clubs.

384. According to the witness, after the attack in Bisesero, certain of the people from Gikongoro were on foot and had cattle and crops in their possession. Musema was travelling in front of the Daihatsu. The witness indicated that fewer people returned from Bisesero than had gone there. The vehicles then parked at the tea factory.

385. The Chamber notes that it became apparent during the proceedings that there exist discrepancies between the witness' testimony and previous statements he had made to the Prosecutor and to the Swiss authorities. In his statement of 13 October 1995, Witness K stated that for three days from 7 April 1994, there were killings in Gitabura, after which he went to Bisesero. Thus, no mention of the tea plantation. The witness denies having stated this and reaffirmed that he went to the tea plantation on 8 April 1994 where he stayed for two weeks, and then he went to Bisesero. He explained that the investigator must have presumed that everyone sought refuge in Bisesero which would explain why in the statement it was indicated that he had gone to Bisesero after three days.

386. In his statement of 17 June 1995 to the Swiss authorities, Witness K said that he had stayed in the tea plantations from 8 April to 20 May 1994. In responding to questions on this statement, the witness testified that the date of 20 May should rather be 20 April.

387. The Chamber notes that the date of 20 May 1994 is mentioned seven times in the statement, while there is no mention of 20 April 1994.

388. The witness then explained that although the statement read that he did not see Musema before "20 May", it should actually read "20 April". In answer to the next question, he confirmed that he had seen Musema before 20 April 1994.

389. Furthermore, in the statement, the witness says that he remembered the date of 20 May as he had written it on a piece of paper, and that he had not seen Musema prior to that date. He added that



this note was in actual fact the one he referred to as regards 13 May 1994, being the note he had found amongst cadavers after an attack, and which had been read by many people. Witness K continued by explaining that on 20 May he did see vehicles, and that as he was on a hill in the rain he had not written the date but had memorized it. Thus the verb “to write”, he stated, should read “to memorize”.

390. In his statement of 17 November 1998, the witness had asked for the date of 20 May 1994 to be changed to 20 April 1994 in his statement of 17 June and 13 October 1995.

- Gitwa Hill, 26 April 1994

391. *Witness M* is the sole prosecution witness to have specifically testified about an attack which occurred on Gitwa hill on 26 April 1994. The witness who had been hiding in a hut at Karongi hill FM station, as discussed above, left his hiding place on 20 April 1994 having been told by his friend that other guards were coming to the FM station to replace those who had left their posts. He and his family hid in the bush.

392. *Witness M* told the Tribunal that on 26 April 1994 he witnessed an attack led by Musema. The attack started between 12:00hrs and 12:30hrs on Gitwa hill where the refugees had assembled. A total of eight vehicles, three Toyotas and a Suzuki belonging to the Gasenyi school group, two yellow MINITRAPE vehicles, and two Daihatsus from the Gisovu Tea Factory came to the hill. According to the witness, in addition to those in the vehicles, the people on the road and paths going to the hill numbered the same as people coming out of a stadium after a great event, “a manifestation”.

393. *Witness M* said he saw Musema aboard one of the Daihatsus with tea factory workers wearing blue uniforms. He was carrying a firearm, while the other attackers bore traditional weapons and were dressed in banana leaves and grass belts called “*Umuhurura*”¹⁷⁵ in Kinyarwanda. The attackers killed with a determination unlike before to such an extent that, apart from a few men, no woman or child was able to survive. Musema and others shot into the crowd as such, individuals fell as they fled. Thousands were killed, including many of the witness’ relatives.

¹⁷⁵ In plural “*Imihurura*”



394. The witness said he knew that the attack took place on 26 April as he had consulted his electronic watch which worked during that period. He explained that as this was the biggest attack he had seen, he consulted his watch so that he could remember the date while alive. He had also consulted his watch during the meeting of 18 April 1994, as he had done for all other important events. However, when questioned as to the date of his statement (in fact 13 January 1999), the witness recalled that it was in January but was not sure of the precise date.

· End of April - beginning of May

395. *Witness F* testified that, between 17 and 30 April 1994, assailants coming on the one hand from the *commune* of Gishyita, and, on the other hand, from Gisovu, converged on Muyira hill. Amongst the Gisovu group he saw Ndimbati, *bourgmestre* of Gisovu *Commune*, Eliezer Niyitegeka, Minister of Information, and the Director of the tea factory in Gisovu. The witness testified that the assailants were pushed back after the first attack but returned after 30 minutes to launch a second attack. He specified that it was during this second attack that he saw Musema amongst the assailants. Musema shot at refugees who had surrounded a policeman, and then ran away to his car, which was red. The witness affirmed that Musema was carrying a black rifle of medium length.

396. *Witness R* testified about an attack which took place around the end of April, or the beginning of May, on Rwirambo hill opposite Muyira hill in Bisesero, during which he was injured.

397. He explained that this attack started in the morning and came from Gisovu. The leaders of the attack were Aloys Ndimbati, the *bourgmestre* of Gishyita, and Musema, the Director of the tea factory. Musema, who was armed with a rifle of unspecified length, was within rifle range of the witness. Musema had arrived in his red Pajero, followed shortly afterwards by the vehicle of Ndimbati. Other vehicles seen by the witness were 4 tea factory Daihatsu “*camionettes*” aboard which were *Interahamwe*. The witness was able to identify the *Interahamwe* as they wore blue uniforms, on the back of which was printed “*Usine à thé de Gisovu*”. Two of the *camionettes* were green, one was yellow and one was white. All had “*Usine à thé Gisovu*” printed on their side panelling.



398. The witness said he saw that the attackers were armed with clubs, rifles and spears. While in a nearby valley looking for water, Witness R was injured from a shot which came from the direction of Ndimbati and Musema. In cross-examination he described how he was injured on Rwirambo hill, which is two hills and a river away from Muyira hill. The hill was next to the road going to Gishyita from Gisovu.

399. Witness R explained that as the attackers arrived, the refugees fled in two groups. He fell behind as he was weak from lack of food, and was shot in the arm near the elbow, the bullet entering the front of his body and exiting behind as he had turned to look at the attackers.

400. In cross-examination, Witness R confirmed that he had already testified in the *Kayishema* and *Ruzindana* case. Defence Counsel indicated that he appeared under the pseudonym “JJ” on 13 November 1997. During his testimony in that case, the witness had advanced the date of 29 April as that on which he had been injured.

401. When details of his previous testimony were put to the witness, he stated that he was injured on the arm between 27 April and 3 or 4 May. He was able to remember the date as there had been a week of calm before the attacks of 13 and 14 May. The witness told the Chamber that as he had been unable to get hospital treatment, a benefactor put cow butter on his injury. To this statement, the Defence noted that in the *Kayishema* and *Ruzindana* case, the witness, in answer to a question from Judge Khan, had stated that “[a]t that time the situation was not yet too serious and one could find one or two Hutus who were kind hearted and one could give them money for the purchase of penicillin”. The witness also testified that he had been treated in Rwirambo.

402. Witness R denied having ever said anything about going to Rwirambo as he couldn’t have gone to Rwirambo hospital as there were barriers. He was able to recall however that he did speak about penicillin as regards to serious injuries and that some individuals were able to find ways of getting penicillin. The witness stated, after being asked by the Defence and the bench, that he did apply penicillin to his injury much later when his injury had scarred, and that he had never gone to a Hutu to ask for penicillin.



- Muyira hill, 13 May 1994

403. On 13 May 1994, after a period of calm, Tutsis, estimated by witnesses to number between 15000 and 40000, had sought refuge on Muyira hill and in neighbouring areas. These unarmed Tutsi civilians were subjected to the biggest attack to date, during which thousands lost their lives. The Defence admitted that such an attack occurred and that Tutsi civilians were murdered and exterminated. However, as with all other massacres in which Musema is alleged to have participated, the Defence, by way of alibi, denies Musema's presence at this attack. The Chamber shall thus consider the testimonies of prosecution witnesses specifically in light of this argument.

404. *Witness F* testified that, following two weeks of calm a large scale attack took place on Muyira hill on 13 May 1994. He stated that around 08:00hrs, a large number of vehicles, including lorries and a bus, arrived from Gishyita and Gisovu *Communes* and stopped on the border of the said two *communes*. *Witness F* explained how the attackers approached the hill from all sides, splitting up into groups, those from Gisovu including the *bourgmestre* of the *commune*, Eliezer Niyitegeka, Alfred Musema, and the *conseillers* of the *secteurs* of Gisovu *Commune*, and amongst those attacking from the other side of the hill were Kayishema, the *Préfet* of Kibuye, Charles Sikubwabo, the *bourgmestre* of Gishyita, Karasankima Charles, Sikubwabo's predecessor, *conseillers* of the *commune* of Gishyita, and many armed persons. The witness said the weapons carried by the assailants included firearms, traditional weapons, and bamboo sticks cut into spears. The refugees on Muyira hill were overpowered by the assailants and consequently had to flee. During the attack many old people, women, and children, including his five children, aged from 1 year and 1 month old to 10 years old, who were trying to flee, were killed. His wife was seriously injured leaving her disabled today. *Witness F* estimated that only 10000 of the 40 - 50000 refugees on Muyira hill on 13 May 1994 survived the attack. As far as he knew, all the victims were Tutsis, while all the assailants were Hutus. Questioned by the Bench, he confirmed that the assailants used to chant slogans as they approached the hills. The witness quoted two such slogans, "Exterminate them"¹⁷⁶, "them" meaning the Tutsis, and "Even the Tutsi God is dead"¹⁷⁷.

¹⁷⁶ Kinyarwanda "badutsembatsembe".

¹⁷⁷ Kinyarwanda "Imana y' Abatutsi barayishe. Nta Mana bakigira".



405. The witness added that he saw Musema carrying a firearm, although he did not personally see Musema fire the weapon.

406. In cross-examination, the Defence put to the witness prior statements he had given to the Office of the Prosecutor. As pertains to the first statement (20 March 1996), the Defence asked why the witness had made no specific mention of Musema during the May attacks, whereas the witness had specified Musema's presence during the April attacks. Witness F explained that he had mentioned Musema in connection with the May attacks, and referred to the phrase "[...] [l]eading these attackers who were divided into groups were the same persons I listed before. [...]". The Defence then put the second statement (14 and 16 February 1998) to the witness and asked the same question, namely why there was no specific mention of Musema in the 13 May 1994 attack. Again, the witness explained that he did re-cite the names of the leaders of the April attacks and reaffirmed that the leaders of the 13 May attack were the same as those of April.

407. In re-direct examination of Witness F, the Prosecutor entered into evidence page 52 of the transcripts of 11 February 1998 in the *Kayishema* and *Ruzindana* case, where Witness F appeared as Witness QQ. Witness F confirmed having testified on that day that he had seen Musema, the director of the Gisovu Tea Factory, amongst others, during the Muyira attacks of 13 May 1994.

408. *Witness P* had sought refuge on Muyira hill with many others up until 13 May 1994. On that day he and other refugees, numbering 40000, on Muyira hill, were the victims of a massive attack during which his wife and two children were killed. Such was the attack, that the refugees were unable to resist the assailants and as a result had to flee. He identified attackers from Rwamatamu, Gisovu, Gitesi, Gishyita and Cyangugu. He said that amongst the attackers from Gitesi were the *Préfet* Clément Kayishema, a communal policeman by the name of Claude, and Mucungurampfizi, who worked at Electrogaz. Amongst the leaders of the Gisovu group were the *bourgmestre* Aloys Ndimbati, Alfred Musema, communal policemen called Rukazamyambi and Sebahire, and the *conseiller* Segatarama. He said that he was also able to recognize workers from the tea factory, who wore a blue uniform on which was written "*Usine à thé de Gisovu*".



409. However, Witness P testified that, because he was fleeing, he did not personally see Musema during the attack of 13 May 1994, although he did see the Daihatsus of the tea factory, and Musema's red Pajero.

410. In cross-examination, Witness P testified that he did not see Musema on that particular day, but that he saw the tea factory vehicles which could only be taken from the factory with the permission of Musema, and that he also saw the vehicle of Musema which only Musema ever drove. Witness P presumed that Musema must have been present as his vehicle was there.

411. *Witness R* testified that on 13 May 1994, because he was unable to climb Muyira hill as he was injured, he was hiding in bushes near the Gisovu-Gishyita road, from where he saw the refugees on Muyira hill being attacked.

412. He explained that the leaders of the attackers regrouped on the Gishyita and Gisovu boundary before attacking the Tutsi refugees on Muyira hill. The first vehicle belonged to Kayishema, *Préfet* of Kibuye, which was followed by the businessman Ruzindana's car and a number of buses. From the direction of Gisovu came the vehicles of the tea factory led by Musema and Ndimbati. Witness R stated that each of the leaders bore long rifles.

413. Witness R further testified that when the two groups met on the boundary of the two *communes*, Kayishema gave instructions on the attack. He heard Kayishema give instructions to the attackers and assign one or more leaders to each group. Musema, Ndimbati and Eliezer Niyitegeka were assigned to the Gisovu and Gikongoro groups, while Elizaphan Ntakirutimana and Ruzindana were assigned to another group. The witness explained that Kayishema then fired the first shot in the direction of Muyira hill after which the leaders, including Musema, and their respective groups, went towards Muyira hill. The witness was unable to see what happened on the hill, but he heard gunfire, grenade explosions and people screaming.

414. Witness R stated that he stayed hidden until the departure of the attackers, including Musema, at which point he went to Muyira hill to find the bodies of his family. He found the cadavers of his wife, child, mother and older brothers, amongst the many bodies which covered Muyira hill. All the



dead were Tutsis and all were civilians.

415. In cross-examination, Witness R gave more details as to where he hid, namely, in bushes below Muyira hill, approximately 30 metres from the roadside. These bushes were not very far from where the attackers had gathered.

416. The Defence noted that in the *Kayishema* and *Ruzindana* case, Witness R had stated that he was three hundred metres from where Kayishema had stood. The witness confirmed this during this trial and explained that he was able to hear Kayishema give instructions as everyone was quiet and listening to him, and that Kayishema had a megaphone. Witness R stated that all the attackers had their backs to him. The witness testified that the leaders used the megaphone while they were forming the groups. However, the leaders did not use the megaphone when speaking amongst themselves and as such, said the witness, he could not hear everything that they were saying. However, Witness R then stated that as Niyitegeka was speaking in a loud voice, he heard Niyitegeka tell others that they must not go towards their *secteurs* of origin but that they should go towards Muyira and push the Tutsis to the other side.

417. Witness R testified further in cross-examination that all the Hutus and the Twas wore white clothing so as to be distinguishable from the Tutsis. The Defence noted that on page 130 of the English transcripts of 13 November 1997 in the *Kayishema* and *Ruzindana* case, the witness had said that the *Interahamwe* of Kayishema wore black, and those from Cyangugu wore white, and that Kayishema had said that to recognise one another, those wearing black should be on one side, and those wearing white should be on another side. The witness remembered having said that and added that although most of the attackers wore white, some of the leaders chose a different colour to set their groups apart.

418. Witness Z, who had sought refuge on Muyira hill, testified that attackers came on 13 May 1994 to the hill from Gisenyi, Ruhengeri, Gitarama, Kibuye, Gikongoro, Cyangugu, from Yusufu's, and from the Gisovu Tea Factory. He listed the leaders of the attack as the *Préfet* Kayishema, Obed Ruzindana, Musema, and the *bourgmestres* Ndimbati and Sikubabwo. The witness identified Musema as he saw him arrive alone in his car.



419. Witness Z explained that Musema, who was armed with a rifle, led the group of attackers coming from Gisovu, while Ruzindana and Kayishema led a group coming from another direction. All the attackers grouped on the border of Gishyita and Gisovu *Communes*. The witness stated that amongst the attackers were civilians belonging to the MDR, CDR and MRND, while amongst Musema's group were *Interahamwe* trained by Musema, *Interahamwe* from Cyangugu, soldiers, gendarmes, and employees of the tea factory, including guards. Witness Z explained that from his position on the side of the hill he was able to see Musema addressing the attackers aloud as though he was using a microphone, and that, although Musema was at a distance which would take 5 minutes to cover by running, he was still able to hear Musema give instructions to the attackers. He heard Musema say "Go that way, the attackers from Kibuye and Gishyita will come from the other direction", and indicate the directions with his arms.

420. Witness Z then stated that the leaders of the various groups, including Musema, distributed weapons to attackers trained in the use of such weapons. The weapons, he said, were returned at the end of each day, and redistributed at the start of each day.

421. In cross-examination, Witness Z added that from his position at the top of Muyira hill, he was able to hear Musema at the bottom of the hill give instructions to various groups of attackers. The witness was able to hear all that was being said as everyone else on Muyira hill was quiet, and the attackers were listening attentively to the authorities as they gave instructions. The Defence also referred to the statement of the witness dated 13 May 1995, wherein the witness lists the attackers he saw yet makes no mention of Musema. The witness explained that, unlike in statements to the Prosecutor, before the court he would speak of everything he knew.

422. Witness Z described how the attackers made their way up the hill, while the refugees threw stones at them. As the refugees were overpowered by the attackers, a group of about two or three hundred refugees charged the attackers to force a way through them. He told the Chamber that many of the refugees were killed, including his family members.



423. During cross-examination, Witness Z explained that at the end of the attack, the military kept their weapons, whereas those who had been trained returned their weapons to Musema and were given rewards such as cattle. In the morning the weapons were distributed to the attackers, and if an attacker did not receive a weapon then that attacker would complain that another had received his. Witness Z testified to having seen all of this.

424. The witness said that he sustained his eye injuries from a grenade thrown by attackers coming from Gishyita while near the road on the Gishyita-Gisovu borders. In cross-examination, Witness Z testified that he could not remember the exact date on which he sustained his injuries. As such the Defence referred the witness to transcripts from the *Kayishema* and *Ruzindana* case, of 2 March 1998, wherein the witness, then under the pseudonym NN, testified as to how he was injured on 13 May 1994. The Defence Counsel referred to other pages of the said transcripts, in which the witness states that he can clearly remember the day of 13 May 1994 as it was on this day that he lost many members of his family.

425. In response to these questions from the Defence, Witness Z stated that he was now testifying in the Musema case and not in the *Kayishema* and *Ruzindana* case. The witness then stated that he was indeed injured on 13 May 1994, but that he could not remember clearly the dates during that period.

426. Witness N testified that there were many attacks on Muyira hill on 13 May 1994, and that very few people survived. He explained that the attackers arrived around 10:00hrs from Gisovu, Kibuye, Rwamatamu, Mubuga and Cyangugu. With regard to the group that came from Gisovu, Witness N specified that, because of the distance between him and the group, he was only able to recognize those in the cars at the front. He stated that he saw the car of Musema, nicknamed a “Benz” by the witness as it was an expensive car, at the head of the others, three Daihatsus from the Gisovu tea factory, three buses belonging to the ONATRACOM and a lorry from Gisovu prison. Witness N was unable to see any other vehicles as they were hidden by the forest. These vehicles came to a stop near a road sign



on meeting vehicles coming from “the road below”.¹⁷⁸

427. Witness N stated that he was unable to say precisely how many people formed the Gisovu group, but he estimated that in total there must have been 50000 people, which included people from Gikongoro and Burundi. When asked how many people came on foot, the witness explained that those on foot had come from neighbouring *secteurs*, namely Rugaragara and Gitabura, whereas those in vehicles had come from further afield, namely the commune of Gisovu. Questioned from the bench as to the number of people, the witness explained that when speaking of 50000 people, he was talking about the Gisovu group. The witness clarified that he saw Musema aboard his vehicle, and that this was first time that he had seen Musema during the attacks.

428. Witness N testified that all the attackers had regrouped and that he could see them move their arms and speak, although he was unable to hear what they were saying. He said he was able to hear Musema once the group moved to within a few metres of him. The witness testified that Musema spoke to a policeman named Ruhindura, and asked him whether a young woman called Nyiramusugi was already dead, to which the policeman answered “no”. He stated that Musema then asked that before anything, this young woman be brought to him. In cross-examination, the witness specified that he was able to hear Musema as the refugees were speaking amongst themselves softly and the attackers were getting organized. He added that the attackers spoke loudly so that everyone could hear them.

429. The witness stated that he knew this young woman, who was a teacher, as he used to see her when she walked to school, and that he used to take his cows to graze in front of her parents’ house.

430. Immediately after these instructions, stated Witness N, those from Gishyita started shooting so that everyone else would start shooting. The attacks lasted until 15:00hrs, at which point the witness fled to the commune of Ruhindura. He added that some of the “refugees” fled towards the top of the hill and others towards the bottom of the hill. The witness explained that Musema searched for the

¹⁷⁸ French Transcript 28 April 1999, “Ces véhicules qui venaient de la route d’en bas et les gens qui étaient à bord des véhicules sont descendus et tout le monde s’est regroupé près du panneau de signalement, près du panneau routier”.



young woman throughout this period and also shot at people.

431. In cross-examination, the witness confirmed his above testimony. The Defence questioned the witness as to why it had taken him five years to come forward with this statement, to which Witness N explained that he had been approached by two investigators to do so and that he had already brought charges in 1997 against Musema at the prosecutor's office of Kibuye. He indicated that when one knows somebody has committed a crime, it is one's duty to report it.

432. *Witness G*, who is not originally from the Bisesero region, testified that he saw Musema participate in an attack on 13 May 1994, shooting at refugees, with all the other leaders of the region, whom he said he knew as he visited Kibuye regularly during his holidays. Musema was seen by the witness at Kucyapa on the Gishyita and Gisovu border with Kayishema, Ruzindana and Sikubabwo and many other persons. The witness saw Musema when he was fleeing an attack on Muyira hill.

433. *Witness G* testified that the attackers had arrived aboard a number of vehicles, including buses belonging to ONATRACOM and at least two vehicles bearing the inscription "*Usine à thé Gisovu*". According to the witness, he was able to see from where he had sought refuge on Muyira hill, attackers come from Mugonero, Ngoma, Gisovu, Gishyita, Mubuga, Gitesi and Rubazo.

434. *Witness G* explained that as he fled from Muyira hill, attackers caught a woman by the name of Goretti Mukangoga, whom the witness knew as a teacher from his time in primary school. Musema, who was still with Kayishema, Sikubwabo, Ruzindana and Mika, asked for her to be brought to him. According to the witness, he then proceeded to cut open her stomach with a long sword "to see what the insides of a Tutsi woman looked like". The victim crumbled to the ground and was then encircled by the attackers. When asked by the Prosecutor to give more details as to the attackers surrounding the victim, the witness stated that there were men and women, and after a long explanation stated that he could not say how many they numbered.

435. *Witness G* described that, as he was tired and thought he would not be found, he hid in a bush near the vehicles of the attackers at which point he saw Musema's red car.



436. In cross-examination, when photo exhibits of the Bisesero region were put to Witness G, except for one where he thought he recognized the summit of Muyira hill, for all the others he explained that he was not from Bisesero and that it would be easier for him to be able to identify the various hills on site. When pressed as to details on distances and the numbers of vehicles and people that he saw while hidden in a bush in Kucyapa, the witness stated that he was unable to give such details, even though he was an educated man. Further, the witness was unable to explain where and how Musema came into possession of a sword or why in his testimony he had failed to make mention of blood, which, according to the Defence would have inevitably spurted out as Goretti was cut open.

437. *Witness T*, who had sought refuge on Muyira hill, stated that on 13 May 1994 a large attack occurred on the hill. Numerous attackers including policemen, civilians, *Interahamwe*, tea factory workers, soldiers and some officials arrived in an array of vehicles, namely eight ONATRACOM buses, one white and one green Daihatsu belonging to the tea factory and pick-up trucks, all seen by the witness. Witness T explained that the attackers had come from Mwendo, Gisenyi, Gitesi, Rwamatamu, Ruhengeri and Cyangugu.

438. From Gisovu, said Witness T, came armed civilians, tea factory workers in blue and khaki uniforms, prison guards in yellow uniforms carrying firearms, soldiers with rocket launchers, and policemen wearing green uniforms and bearing firearms. Amongst the leaders of the attack the witness saw Ndimbati, Musema, Sikubabwo, Segatarama and Mika.

439. The witness explained how the attackers gathered for an hour before launching the attack with gunfire around 10:00hrs. According to the witness, those who had firearms, including Musema, would protect the attackers armed with traditional weapons who were in close proximity against the refugees during the attack. The witness stated that although he did not personally see Musema shoot at the refugees, he presumed that he had done so as he was carrying a rifle. The attackers chased the refugees and threw grenades at them when in range, the refugees retaliating with stones. Witness T testified that the refugees were forced to flee and many were killed during that attack.

440. In cross-examination, the Defence put to Witness T his previous statement taken during the Swiss investigations in which the witness makes no specific mention of Musema as being present at



the massacres or being a leader thereof, although he did mention a number of the leaders he named in his testimony. Moreover, the Defence referred to passages in the statement where explicit mention is made by the witness of the tea factory vehicles transporting killers from Gikongoro to Bisesero without there being any mention of Musema. The only mentions therein of Musema by the witness are “I know Musema, we saw each other sometimes” and after having identified him from a photograph, he states “After the arrival of the French, I saw Musema about 2-3 days later [...]”.

441. In response, Witness T explained that, during that interview, he had not been asked specific questions about Musema, save whether he knew him and could identify him, and whether he had seen him after the arrival of the French.

442. The Chamber notes at this juncture that, during the cross-examination of Witness T on this issue, as a consequence of a suggestion by the Defence relating to the apparent discomfort of the witness, Witness T requested the permission of the Chamber to continue his testimony standing up as he felt tired.

14 May 1994, Muyira hill

443. Witnesses for the Prosecutor also testified that a second large scale attack took place on Muyira hill on 14 May 1994.

444. Witness AC described a big attack which took place on 14 May 1994 on Muyira hill and which resulted in the deaths of many children and old persons. The attack, he said, was led by Musema, who arrived at the site in a red Pajero followed by four other vehicles, one being from Gisovu. He said that other “*dirigeants*” were Ndimbati, *bourgmestre* of Gisovu, Niyitegeka, the Minister of Information, as well as Kayishema, Ruzindana, Sikubwabo, *bourgmestre* of Gishyita, Samson, the Minister of Agriculture, Elizaphan Ntakirutimana, the Mugonero pastor, Gérard Ntakirutimana, and Kajerijeri from Mukingo.

445. Witness AC explained there were about 5000 predominantly Hutu attackers, many armed with



rifles, clubs called “*ntampongano*”, and small axes. Amongst the attackers were members of the Presidential Guard, military personnel and gendarmes from Kigali and Gitarama who had been informed that *Inkotanyi* had hoisted their flag in Bisesero, and workers from the Gisovu Tea Factory. The witness testified that he was able to recognize these workers as their clothes bore the words “*Thé Gisovu*”. Other identifiable emblems worn by the attackers as seen by the witness were “MRND”, “MDR” and “CDR”, while other attackers wore banana leaves.

446. Witness AC described the first attack which was led by Ndimbati and Musema. He testified that the attackers disembarked from their vehicles on the Gisovu road at approximately 50 metres from the position of the Tutsi refugees. He further specified that Musema was on the Mirambi side of the river, the refugees being on the Muyira side of the river. The attack started when Ndimbati shot in the air, followed by Musema who fired his rifle. The witness added that Musema’s rifle had a belt of ammunition around it. According to AC, Musema’s shots hit an old man by the name of Ntambiye and another person by the name of Iamuremye.

447. Witness AC stated that, on being attacked, the refugees threw stones to defend themselves but the military fired tear gas at them, after which the *Interahamwe* entered the fray using bladed weapons. The refugees were attacked on the one side by the Musema group and on the other by the Ndimbati group. The refugees were forced towards the attackers from Gisenyi and Ruhengeri, but managed to flee into the Muyira forest. Around 18:00hrs the attackers left.



448. Although there was no cross-examination specific to Witness AC's testimony regarding Muyira, other issues raised and cross-examined during his testimony are relevant inasmuch as they go to the credibility of Witness AC.

449. Witness AC testified that, on the night of 6 April 1994, he had taken a lift with gendarmes going to Kibuye. Asked as to the names of the gendarmes, he explained that he was unable to remember them as it had been over five years since the events and being an old man his memory was failing him. However, after having been reminded by the Defence of his testimony in the *Kayishema* and *Ruzindana* case, the witness recalled having cited the names of the gendarmes.

450. The witness then testified that a certain Innocent came on the trip and that they had met a certain Major Jabo in Kibuye. Yet, when transcripts of the hearing of 6 October 1997 in the *Kayishema* and *Ruzindana* case were put to the witness, he testified that Major Jabo, a friend of his in charge of the Kibuye military camp, a person by the name of Cyprien, a Lieutenant, were on the trip. Witness AC confirmed having said this but continued that, because it all happened so long ago that, he could not remember; had he known these questions would have been asked, Witness AC said, he would have consulted his documents. He added he could not even remember the names of his wife and children. Witness AC then reaffirmed that Major Jabo was in Kibuye and that others, namely Cyprien and Munyankindi, were on the trip. When re-questioned about the presence of Major Jabo on the trip, the witness explained that there were two persons by the name of Jabo, both Majors, one who worked in Gisenyi and the other in Kibuye. Witness AC said it was only at this point that he remembered Major Jabo who went from Karago to Kibuye.

451. Furthermore, Witness AC testified that during the above trip, he and his travelling companions stopped over in Kibuye before going to Bisesero. Witness AC explained that as he did not have access to the gendarmes' camp in Kibuye, he remained by the side of the road, until his companions rejoined him to continue the trip.

452. Defence Counsel referred to a statement given by Witness AC on 12 June 1996 to the



investigators of the Office of the Prosecutor. In the statement Witness AC describes a meeting he attended in Kibuye during his trip to Bisesero. He explained therein how, by staying close to a certain Lieutenant Kaburuga Cyprien, he was able to attend the meeting which was being held by the authorities, and saw Niyitegeka and Bagasora. He said that he stayed at the meeting for two to three hours while waiting for the soldiers with whom he was travelling.

453. When questioned by the Defence as to the contents of this statement, Witness AC refused to answer the questions on the basis that he was not called to testify in the Bagasora case. Furthermore, Witness AC refused to answer questions emanating from the Chamber on his attendance at the meeting in Kibuye, saying he did not attend the meeting and that he would prefer to be questioned on matters in relation to the Musema case. After further cross-examination, Witness AC testified that on arrival at Kibuye, he found out that there was a meeting but that he was unable to attend it as he was a simple civilian, and not a gendarme nor a civil or political authority.

454. In re-examination on these divergences, Witness AC confirmed that the divergence in his answers emanated from the specific questions relating to certain events and people as put to him by the investigators of the Office of the Prosecutor.

455. *Witness R* stated that on 13 May 1994 he had heard Niyitegeka tell the other attackers to be aware of Tutsis hiding in Hutu areas. As a result, testified the witness, on 14 May he went back to the place where he had hidden the day before. The witness testified that the attackers who came on Friday 13 May to Muyira Hill also came on Saturday 14 May to kill the survivors. Witness R said that Musema came back on 14 May in his own vehicle with attackers and with all the tea factory vehicles. Witness R stated he had heard that Musema had brought with him people from Gikongoro. The witness specified that as he was not standing very far from the attackers, he was able to hear Kayishema, who was speaking aloud, thank Musema for bringing the attackers from Gikongoro. Witness R said that Kayishema also thanked Ruzindana for having brought people from afar.

456. *Witness F* testified that on 14 May 1994 the attacks continued on Muyira hill and surrounding hills during which he was shot in his right arm and was hit by shrapnel in his shoulder. Though he saw Musema's red car amongst the vehicles of other attackers he was able to identify, the witness



testified that he did not personally see Musema on that day. The witness added that the hills were strewn with bodies of those who had died the day before.

457. Issues raised during the cross-examination of this witness have been dealt with above as regards his testimony of 13 May 1994.

458. *Witness Z* testified that the refugees on Muyira hill were also attacked on 14 May 1994. At around 09:00hrs, the witness saw Musema arrive with vehicles of the tea factory. He explained that, on seeing the vehicles, he fled. The witness stated that three members of his family were shot by Musema as the refugees came down the hill to break through the attackers. He saw this from where he was standing approximately 15 metres away.

459. Issues raised during the cross-examination of *Witness Z* have been dealt with above by the Chamber as regards his testimony of 13 May 1994.

460. *Witness T* testified that he saw Musema participate in a large scale attack against Muyira hill on 14 May. The witness indicated that Musema was on an opposite hill and carried a rifle which the witness presumed was used by Musema during the attack.

461. The Chamber dealt with the cross-examination of *Witness T* in the context of his testimony on the events of 13 May 1994.

462. *Witness D* spoke of a large scale attack which took place on a day of Sabbath, thus a Saturday, between 08:00hrs and 16:00hrs. The Chamber notes that 14 May 1994 was indeed a Saturday. During this attack at Muyira *Witness D* saw Musema, Sikubabwo, Kayishema and Ndimbati. She saw attackers, numbering approximately 15000, armed with rifles, grenades and traditional weapons arrive in numerous vehicles, including lorries and nine buses, and heard them sing "Let's exterminate them". According to the witness, those with traditional weapons were to finish off refugees who had been injured by bullets. The refugees numbering approximately 15000 fought back with stones.

463. In cross-examination, *Witness D* specified that as the vehicles approached, she was unable to



identify the vehicles or those aboard. Moreover, she indicated, when the vehicles parked, they were out of her sight. She only saw the attackers once they had disembarked and were making their way towards the refugees, after which she fled. The Defence noted that in her previous statements she had described how as refugees, including her, fled, they mixed with the attackers so as not to be shot.

- A mid-May attack 1994 on Muyira hill

464. The Chamber notes that “mid-May” means at some time between 10 May and 20 May.

465. Prosecution, *Witness H*, spoke of an attack which took place on Muyira hill directed against the Tutsi refugees. He testified that attackers came from Gisovu led by Musema, while those who came from Mugonero were led by Ruzindana and those from Gishyita by the *bourgmestre* Sikubwabo.

466. Witness H explained that he saw four vehicles from the tea factory and Musema’s red Pajero in front of them which stopped at Kurwirambo. The Chamber notes that at a later stage in his testimony, the witness indicated that Musema’s Pajero was behind the convoy of vehicles coming from the tea factory and stopped first at Kurwirambo. Aboard the vehicles were *Interahamwe* who were, according to the witness, living with Musema in Gisovu. When asked whether he could see anyone else aboard Musema’s vehicle, Witness H stated that he was not close to the area and observed everything from a distance. When asked by the Prosecutor whether he was correct in identifying Musema, the witness simply replied that he knew his vehicle. The witness explained that he had seen Musema’s vehicle on numerous occasions before 1994, specifically in 1992 while he worked on a Swiss road project.

467. Witness H described the attackers he saw on that day as being made up, firstly, of workers from the tea factory, dressed in blue factory uniforms with inscriptions on the back and armed with machetes and clubs, secondly, of *Interahamwe* dressed in white who came on a bus from Kigali to assist the local population, armed with rifles and clubs, thirdly, of soldiers in “smoke” uniform with black berets and gendarmes wearing red berets, all of whom were armed with rifles, and, fourthly, civilian Hutus (men, young people) who had come on foot from Gisovu.



468. The witness testified that, upon reaching the foot of the hill, Musema came forward and gathered the assailants who were scattered. He then fired a shot which marked the beginning of the attacks around 09:00hrs. Although the villagers only had stones to defend themselves, they were able to drive the assailants back down to the foot of the hill, with the intention of grabbing Musema. However, other assailants, led by Ruzindana and Sikubwabo, surrounded them, and they had to flee. Many refugees, including his wife and children, were killed during this attack. According to the witness, Musema was leading the *Interahamwe* and personally shot at the refugees, although the witness could not say whether Musema actually hit anyone. Witness H stated that the attack finished around 18:00hrs.

469. In cross-examination, Witness H specified that during the attack on Muyira hill, he was at the top of the hill from where he could see the vehicles parked on the road about twenty to thirty minutes from where he stood, there being a valley and a river between the road and the top of the hill. He was able to recognize the factory vehicles, because he had seen them several times before. The witness added that he was able to read the inscriptions on the factory uniforms as during the attack he had been close to the workers of the tea factory.



An attack in mid-May 1994, Mumataba hill

470. *Witness S* stated that sometime near the middle of May while he was in refuge on Mpura hill, he saw Musema participate in an attack in Birembo. The witness testified that, around 10:00hrs he saw Musema and many other people (between 120 and 150) on the Gishyita and Gisovu road. He also saw three Daihatsu vehicles, one yellow, one green and one blue, belonging to the tea factory and bearing the inscription “*OCIR-thé Gisovu*” and Musema’s red Pajero. The group of attackers included communal policemen recognizable from their uniforms, people dressed in white, and employees of the factory in blue uniforms and *casquettes* all bearing the inscription “*Usine à Thé*”. The factory employees carried traditional weapons, machetes, spears and clubs.

471. The vehicles dropped off the attackers and then all, save Musema’s, went to pick up other individuals in Gisovu, returning 45 minutes to an hour later. Other attackers led by Ruzindana and Sikubwabo were also seen by the witness coming from Gishyita with two vehicles, a lorry and a Toyota Stout. Witness S said the attackers first grouped and had a “meeting” before blowing their whistles and launching the attack against Sakufe’s house on Mumataba hill. The attack was aimed at between 2000 and 3000 Tutsis who had sought refuge in and around the house. The majority of the refugees, including relatives of the witness, were killed during the attack. The witness stated that Musema stayed by his car during the attack in the company of persons dressed in white.

472. At the end of the attack the assailants headed towards Gisovu. Musema left the site at the end of the day around 17:00hrs heading in the same direction, while Ruzindana and Sikubwabo went towards Gishyita.

473. In cross-examination, Witness S described the locations of Mpura hill and Birembo in exhibits P20.1 and P20.2, and their situation in relation to Sakufe’s house. He stated that Sakufe’s house was ten minutes walk from the Gisovu road, while Birembo is one kilometre from Mpura hill. Even though the vehicles had parked less than one kilometre from where the witness and another person were hiding, the Defence called into question the witness’ assertion that he was able to read the inscriptions on the tea factory vehicles.



- End of May at the Nyakavumu cave

474. *Witness AC* recalled an incident which took place at a cave in Kigarama *Commune*, Nyakavumu *cellule*. He testified that he was 40-50 metres away from the cave and saw Kayishema, Musema, Ruzindana and the *bourgmestres* of Gishyita and Gisovu come to the cave and order it to be sealed by having it covered in firewood. The witness told the Chamber that a man from Gisovu was ordered by Ndimbati, Ruzindana, Musema, Niyitegeka and Kayishema to light the wood. The man then set the wood on fire using grass and kerosene.

475. *Witness AC* recalled that of the 300 people inside the cave, only one survived, all others being suffocated to death by the smoke. Following questions from the bench, the witness affirmed that he had heard Musema give orders at the cave, however, he gave two answers, namely that he had heard Musema say on the one hand, “Bring some wood, make some fire”, and, on the other hand, “Bring some wood, bring some sods of earth”. The witness also reaffirmed that Musema ordered that a fire be lit.

476. In cross-examination of *Witness AC*, the Defence put questions to *Witness AC* pertaining to his previous testimony in the *Kayishema* and *Ruzindana* case during which he made no mention of Musema in the attack perpetrated at the cave. The witness explained that on all the previous occasions he had been interviewed by the Office of the Prosecutor, the questions had been relevant to specific individuals, and so he did not mention Musema. However, in a previous statement of *Witness AC* of 12 June 1996 which contained the witness’ description of events at the cave with a list of people he had seen there, there was no mention of Musema. The Defence further questioned the witness as to his sighting of Prime Minister Kambanda at the cave, Kambanda not being mentioned when *Witness AC* testified in the *Kayishema* and *Ruzindana* case, whereas in the said statement the witness cited Kambanda as one of the attackers taking a prime role in the events. The witness said he did not find it surprising that a person as important as the Prime Minister should be present at the cave.

477. *Witness H* testified that around the end of May or early June, an attack led by Musema and Ndimbati was directed against a cave in Nyakavumu. Although he was not present at the attack, he had seen Musema shortly before it in a convoy with others going in the direction of the cave and thus



~~presumed that Musema must have been at the attack. This convoy was made up of vehicles of the tea factory, buses from Kibuye, vehicles belonging to the *commune*, and Musema's Pajero.~~

478. During the attack on the cave, said Witness H, he had hid on the hill at about thirty minutes walk from the cave. This hill was separated from the cave by a small valley and hillock. He explained that the assailants proceeded to destroy the fence of the surrounding houses for firewood to the set the entrance of the cave alight, and gathered branches to produce more smoke. After the attack, the witness said he went to the cave and saw that everything was burnt. He testified that only one person survived.

479. In cross-examination, the witness confirmed that he was able to see the events as he testified above and explained to the Chamber that it was only recently that he had developed eye problems.

480. *Witness S* testified seeing Musema lead attackers towards Nyakavumu cave. He explained that near the end of May, while on Nyirandagano hill with 2000 other refugees, in Gitwa *cellule*, he saw Musema arrive with tea factory vehicles aboard which were attackers, comprised of tea factory workers and inhabitants of Gisovu. These vehicles, explained the witness, stopped at Birambo around 09:00hrs and 10:00hrs, and Musema's vehicle stopped behind them.

481. The witness testified that the refugees sent "spies" to see what the attackers were up to. Having received information from these spies that the attackers were too numerous to fight, the refugees fled to Kigarama hill. Witness S described how the attackers chased the refugees who were forced to separate into three groups, the first going to Nyakavumu cave, the second group went towards Nyarukagarata, and the third group, including the witness, fled to Gitwa hill. Witness S said that his group was not chased by the attackers as they had gone to Nyarukagarata and to Nyakavumu cave. The witness testified that, through trees, he saw Musema with a long rifle following the assailants.

482. Witness S said that those with Musema then blew whistles and shouted out three times for the attackers ahead of them to backtrack as they had passed by the Nyakavumu cave. Those who returned gathered around Musema for approximately two minutes. The witness explained that the attackers exchanged a few words after which they destroyed the house of a certain Munyanbamutsa



for firewood which they took to the cave. Witness S was unable to see what then happened at the cave, but saw smoke rise a short while later. The witness indicated to the Chamber that he had hidden his wife in the cave that very same day. The attackers, said the witness, stayed at the cave for four hours after which they left for Gisovu.

483. Witness S said that he went down to the cave with eight other men after the attackers had left and noted that wood and leaves had been burnt at its entrance. Only three survivors, one man, one woman and one child were pulled out; the last two died during an attack the next day.

484. The witness indicated that Musema's group had been joined at some point by attackers from Gishyita led by Sikubabwo, Rutagananira and Ruzindana. The Chamber notes that it is unclear exactly where the witness saw these individuals.

485. In cross-examination, Witness S specified that the vehicles from the Gisovu tea factory had parked at Birembo, while those of the other groups of attackers parked at Gisoro and Mubuga. The Defence referred to the witness' written statement in which he describes in more detail the attack on the cave after having seen Musema with three soldiers and a gun slung over his shoulder. Witness S confirmed that he could not see the attack on the cave from his position on Gitwa hill.

486. *Witness D* described an attack which occurred at a cave, although no indication was forthcoming from her testimony as to exactly where and when this attack occurred. She testified that approximately 400 people, including children and women, had sought refuge in the cave. From where she was hiding she was able to see attackers start a fire with grass at the entrance of the cave, the smoke thus suffocating those inside. Amongst those who started the fire, Witness D recognized Musema and Ndimbati. Once the attackers had left, said the witness, she went with others to the entrance of the cave where she saw many bodies. She then fled.

487. In cross-examination, Witness D specified that she was unable to see any vehicles from where she was hiding on the side of the hill.

488. *Witness AB* testified that he saw Musema sometime in the month of June at the military camp in Kibuye in the company of Second Lieutenant 'Buffalo' Ndagijimana, Ndimbati and Doctor Gérard



Ntahiruhimana. Ndimbati was carrying a pistol and wearing military trousers and a black jacket. He said that Musema was armed with a pistol and was wearing a military jacket. The witness said that he overheard them discussing one last operation that had to be carried out in Bisesero. Witness AB added that he was able to hear them as they were speaking with raised voices, and as he was responsible for the camp security he had the right to know who was there and why they were there.

489. According to the witness, Musema said that information that he had received indicated that Tutsi were hiding in the tin mines. Musema explained that he therefore needed a lorry load of firewood to start a fire at the entrance of the hole where they were hiding, and consequently to block the hole to prevent anyone getting out. The witness said that Musema asked the second Lieutenant for the firewood. The witness explained that although it was with 'Buffalo' that they carried out the operations, permission for the wood could only be given from Masengesho, the camp commander. Witness AB testified that he was unable to say whether they succeeded in getting the wood as he did not spend all day at the camp.

490. In cross-examination, Witness AB confirmed that Musema had come to the camp in his red Pajero and had requested a pick up full of firewood. When questioned as to why Musema had not used a tea factory pick-up, the witness stated that Musema would be in a better place to answer. The witness testified that he knew that there was a plantation of wood for burning at the tea factory, but that he did not know whether during the war the wood had become Musema's personal property, whether Musema had come for assistance by asking for this pick-up or whether there remained any wood at the tea factory. He stated that he had never been to the cave where many people had died.

· Attack of 31 May 1994, Biyiniro

491. *Witness E* testified that during an attack on Muyira hill directed against 20000 refugees, he and others fled to Biyiniro hill at which point he saw Musema on the road with soldiers, guards, *Interahamwe*, tea factory workers who were wearing "*Usine à thé Gisovu*" caps, uniforms and tea leaves, and gendarmes who had come from Gisovu, Gishyita and Kibuye in array of vehicles including a green and a blue Daihatsu from the tea factory. The attackers, who were armed with firearms and traditional weapons, continued shooting at these refugees. The witness explained that the refugees decided to catch Musema as they saw him as a leader and because he had provided vehicles



for the attackers. Musema then fled in his Pajero while soldiers continued firing at the refugees, many of whom, including the witness' older brother, were killed during the attack.

492. In cross-examination, Witness E specified that he fled from Muyira hill before midday in the direction of Biyiniro. According to him, it would take five minutes to walk from the summit of Muyira hill to the Bisesero road. He gave further details as to the vehicles he saw on that day but was unable to enlighten the Chamber as to the exact number of attackers.

- Attack of 5 June 1994, near Muyira hill

493. In addition, *Witness E* also saw Musema on 5 June 1994 near Muyira hill. He explained that he saw Musema's car and tea factory Daihatsus, among others, parked on the road at the Gishyita-Gisovu border, near Muyira hill. Aboard these vehicles were gendarmes, tea factory workers, communal policemen, *Interahamwe* and guards. The witness said he saw Musema carrying a rifle, and other leaders, including Kayishema, Sikubabwo and Ruzindana, give instruction to the attackers. Witness E said the attackers killed many refugees, including his younger sister, and that Musema also fired shots with a rifle during the attack.

- 22 June 1994, Nyarutovu cellule

494. Prosecution *Witness P* said that in June 1994 while in Nyarutovu *cellule* he witnessed a number of attacks, and particularly remembered that of 22 June 1994, which he testified was led by Musema, and which occurred six days before the arrival of the French.

495. The witness described how this particular attack took place near a precious stone mine belonging to a company called Redemi, between 11:00hrs and midday. Musema and a number of tea factory workers, whom he recognized by virtue of their uniforms, were in a blue Daihatsu. The witness said that the vehicle stopped on the Gishyita road next to him and the young woman with whom he was.

496. He explained that he was with a young woman and a certain François who was crossing the road looking for somewhere to hide. The witness was 30 metres from the road but was unable to



~~specify how many people there were aboard the Daihatsu as he fled while they disembarked.~~ He testified that Musema was standing on the road next to the vehicle when he shot him, Musema holding the firearm with two hands. The witness stated that when the shot was fired he had his back to Musema. In his mind, there was no doubt that it was Musema who fired because he saw him aim at him and because Musema was the only person in the group who had a rifle. Witness P testified that after being shot in the ankle, he fell to the ground face down and feigned death. He then heard another gunshot and he again presumed that it was Musema who fired the shot. When the attackers left, the witness saw the body of François, so he concluded that it was Musema who had killed him. Most of these details pertinent to the gunshots came out during cross-examination.

497. Witness P stated that after the gunshots, the young woman ran away. He then heard Musema tell his workers to catch this young woman and to bring her back alive, so that they could see how Tutsi women were made. The attackers ran after the young woman, caught her, and put her in the vehicle. The witness said the attackers, including Musema, then drove off in the direction of Gisovu. He said that he never saw the young woman again.

The Alibi

- 15/17 April to 22 April 1994

498. According to the alibi, around 03:00hrs on 17 April 1994 Musema and a soldier who was with him in Gisovu were woken by the supervisor of the Gisovu Tea Factory and by two guards who had come to the residence to warn him that the factory was being attacked. Musema testified that the supervisor told him that he had heard that Musema was going to be killed. The soldier suggested the only course of action was to flee. Musema thus fled towards Butare and then to Rubona aboard the red Pajero, registration A7171. He arrived in Butare around 09:00hrs. During the journey, he came across more roadblocks than he had seen before.

499. Musema testified that once at Butare, he dropped off the soldier and sought out a certain gendarme to inform him of his brother's death in Gisovu. Musema then went to his mother-in-law's in Rubona where he rested for the remainder of the day. Musema explained that, at this time, what was happening in Rwanda was "*du jamais vu*"; people were desperate not knowing what was going to



happen, hoping that the massacres would stop in the region and that the war would cease in Kigali and in the north of the country.

500. Claire Kayuku, Musema's wife, testified that he returned to Rubona on either 16 April or 17 April in a state of shock, as a result of the killing of the tea factory employees. She specified that Musema had gone to Gisovu and returned two days later.

501. The Prosecutor referred in her cross-examination of Musema to exhibit P63, a Swiss asylum interview, wherein Musema states that he left the factory on the night of 15 April 1994. The Chamber notes that Musema then explained that this particular document was not the interview but rather his notes in preparation for an asylum request. The questions/headers were inserted by himself, he said.

502. In exhibit P56, a Swiss interview of 8 March 1995, Musema states he arrived at Gisovu on 14 April 1994 and left on 15 April around 03:00hrs, and in exhibit P54, a Swiss interview of 11 February 1995, he states he left Gisovu on the night of 15-16 April after being warned by factory guards of an imminent attack. Similarly the calendar of Musema, exhibit P68, indicates that he went to Butare (Rubona) on 15 April 1994. In exhibit P68, it is also indicated that Musema was on mission from 18 April 1994 to 21 April 1994 in tea factories.

503. During trial, the Chamber sought clarification as to the discrepancies concerning the dates of departure from the factory and the start of the mission. Musema then explained that at the time of preparing the calendar he was not certain of the exact dates of his mission(s). He added that it was only after the Swiss *juge d'instruction* returned with documentation from a visit of the Gisovu Tea Factory that he was able to recall that between 18 and 22 April he was in Rubona, and that the mission started on 22 April 1994.

504. Exhibit D27, tendered by the Defence, is a document entitled "*Préparation réunion du 15 Avril 1994*". Musema confirmed in Court that his annotations appeared on the document which, he stated, had been given to him by the Chief of the Secretariat at either some time in the afternoon of 15 April or in the morning of 16 April, although no meeting was held on 15 April 1994. He also confirmed that, as could be seen from the document, he was concerned about the security situation at the factory, and the human and material damage which had occurred at the factory.



- 18 April 1994

505. On the morning of 18 April 1994, testified Musema, he went to Gitarama, the “transit” area for those fleeing Kigali, in the hope of meeting authorities, including the Director-General of *OCIR-thé*, who he thought had fled the seat of *OCIR-thé* in Kigali and, considering the war situation, would have had to go to or through Gitarama. By then the government had already left Kigali, although the transfer to Gitarama had been very disorganized. Once in Gitarama, Musema went to look for the heads of service of *OCIR-thé* and searched for relatives who could be among the refugees.

506. According to Musema, he did not meet anyone from *OCIR-thé*, but spoke with the Minister of Industry, Trade and Handicraft, Justin Mugenzi, to whom he reported the events and situation at the Gisovu Tea Factory, and asked for protection for the factory. According to Musema, the Minister appeared shocked at the news and assured him that he would take the appropriate measures to ensure the security of the factory. Musema testified that it was on this day that the Minister had indicated to him that he would be sent on mission to contact the Director-General of *OCIR-thé* to start up the factories. Musema returned the same day to Rubona where he stayed until 22 April 1994, although he did visit Gitarama on 21 April 1994, again to look for relatives among the refugees.

507. In support of the movements of Musema on these dates, the Defence tendered exhibit D45, a document in the name of Musema, requesting payment of expenses incurred for the Pajero, registration A7171. The form was filled out by the secretary of the factory and signed by the accountant and Musema. Attached are receipts from a garage in Butare, for cash payment for a broken windscreen, dated 19 April 1994, and from a garage in Gitarama for petrol on 14 May 1994.

508. Claire Kayuku told the Chamber she remembered that between 16 and 22 April Musema went to Gitarama twice to see his family. During that period Musema would spend every night at his mother-in-law’s. She testified that on 22 April, he went on mission to Gisenyi and returned to Rubona on 26 April.



509. ~~Exhibit D89, tendered by the Defence, is an undated letter from Claire Kayuku to Nicole Pletscher in which it is written “[i]magine how we all came together on 18 April whereas each one thought the other person was dead”¹⁷⁹.~~

510. With reference to exhibit P56, where he states that he left Gitarama around 19 April¹⁸⁰, Musema affirmed that at the time of this interview, the dates were just estimations and not necessarily correct, and that it was only after receiving documentation collected by the *juge d’instruction* and his lawyers that he was able to say with certainty on which dates his mission was effected.

The mission order and the subsequent mission

511. The Defence tendered exhibit D10, an “*ordre de mission*” (mission order), dated 21 April 1994. Musema testified that this order was given to him in Gitarama on 21 April 1994, even though it is written “*fait à Kigali*” on the document. By accident he met Minister Justin Mugenzi near a FINA petrol station at the entrance of Gitarama, who told him that he had tried to contact the *Gendarmerie* for protection at the factory, and that he had not been able to reach the Director-General of *OCIR-thé*, Michel Baragaza. The minister then ordered him to go to the north of the country, in particular Gisenyi, to find Michel Baragaza so that the status of each factory could be established.

512. Musema went on to testify that the minister said he would arrange the security modalities and prepare a mission order necessary for circulation around Rwanda. Musema was to collect the mission order at the residence of Faustin Nyagahima, a director within the Ministry of Industry, Trade and Handicraft. The Minister of Public Works, Water and Energy, Hyacinthe Nsengiyumva, who was also at the station, gave him petrol coupons. The Minister of Industry, Trade and Handicraft authorized the Minister of Public Works, Water and Energy to sign the mission order on his behalf as he had to take care of other business. The meeting lasted 30 minutes.

¹⁷⁹ French original “Imaginez que tout le monde s’est retrouvé le 18/04 alors que chacun croyait tout les autres morts”.

¹⁸⁰ Exhibit P56A, English translation of P56, refers, incorrectly, to 17 April.



513. On 22 April 1994, said Musema, Faustin Nyagahima told him that the Ministry of Foreign Affairs was the only ministry at that time which possessed a stamp/seal and that consequently it is this stamp which appears on the bottom of the mission order.

514. Musema declared that the mission was in the context of the *OCIR-thé*, but not in the name of *OCIR-thé* or for the government. He explained that, in normal times, such missions were ordered by the Director-General of *OCIR-thé*. Musema believed that he had been given the mission as the minister had found no one else from *OCIR-thé* to whom to assign it. The expenses were to be met by *OCIR-thé*/Gisovu Tea Factory. The length of the mission, indicated Musema, must have been decided by the Minister of Industry, Trade and Handicraft. The mission order was not drafted on the basis of particular factories but rather on the basis of *Préfectures* where tea factories or tea projects were located. In normal times, Musema stated that a memorandum would be drafted outlining the objectives of the mission whereas during this period he had received the objectives of his mission orally.

515. According to Musema's testimony, the mission extension on the document was typed on at a later stage, around 7-10 May 1994 in Gitarama. Musema explained that more ministries had stamps by then, thus the stamp of the Minister of Defence, Augustin Bizimana, and his signature appear on the document. Musema conceded that to have the stamp of the Minister of Defence as authority for the extension of his mission was not usual practice, though he recalled that, during that whole period, the situation in Rwanda was not normal, which would explain why the Minister of Defence had signed the extension.

516. Musema further specified that he happened to meet the Minister of Defence in Gitarama. The Minister was an agronomist, originally from Byumba, and he and Musema had begun discussing the situation of finding relatives and about the past four years' conflict. The situation was still very unstable and although Musema's mission had come to an end he still had to visit a number of factories to establish inter-factory contacts. The stamp was to serve as a travel document. It did not extend his original mission with *OCIR-thé* but came into the context of the visits he wanted to make to other factories, to facilitate his movements and so as to provide him with more personal security. He added that there was no need for him to have the stamp of his ministry as the extension did not



have any administrative value but only practical value. Musema was unable to explain why the Minister of Defence had not just given him a travel document for safe passage.

517. Musema conceded that it was a mistake that there was no indication as to the date on which the extension was issued. He testified that he would not have gone on the mission had the minister not guaranteed his security, and that he had to respect the mission order from a superior.

518. The Prosecutor contested the veracity of the mission order, submitting that the circumstances in which the mission order was provided, namely through a chance encounter at a petrol station, were unconvincing. Had the mission been simply to contact the Director-General of *OCIR-thé*, as Musema had indicated in his testimony, then, argued the Prosecutor, the mission should have been terminated on the day Musema established contact with the said Director-General. The Prosecutor did not accept the explanations given by Musema in relation to the stamps on the mission order of the Ministry of Foreign Affairs and of the Ministry of Defence and contended that the documents and stamps are complete fabrications. The mission order, in the mind of the Prosecutor, was designed simply to mislead the Chamber and to conceal the extent of the involvement of Musema in the massacres. Other supposed inconsistencies in the mission order were raised by the Prosecutor during the testimony of Musema as to his whereabouts.

519. Prosecutor's *Witness BB* testified that the mission order was unusual and not one normally used in *OCIR-thé*. Details missing included the length of time to be spent away from one's factory and space for expenses incurred. He also stated that it was odd that a minister should sign the order and also that it was odd to send a director of a factory to visit other factories.

- 22 April 1994

520. Musema testified that on 22 April 1994, he went to Gitarama to pick up the mission order from Faustin Nyagahima who was in a house in the commercial district¹⁸¹.

¹⁸¹ It should be noted that later in his testimony, Musema named the person as Faustin Nyavihima and spelt the name for the Court.



521. ~~Musema also said that he then went to the military camp in Gitarama where he was given two~~ gendarmes to escort him, and then drove off in the direction of Kabaya around 10:00hrs. In Kabaya, Musema stopped at the house of the Director-General of *OCIR-thé*, where he met the Director-General's wife. She informed him that the Director-General was somewhere in Gisenyi. Musema asked the Director-General's wife to tell her husband that he would like to meet with him.

522. Musema stated that he reached the tea factory of Pfunda at the end of the day, around 16:00hrs - 17:00hrs. The director of the tea factory of Pfunda signed the back of the mission order and stamped it with the factory seal. Musema wrote next to the stamp "*arrivée à Pfunda le 21/04/1994*". Although the date of 21 April 1994 appears next to the signature, Musema was adamant that he arrived at the tea factory of Pfunda the following day, on 22 April 1994.

523. Musema explained that at the time they did notice the error. He said that the mistake was rectified for accounting purposes but not so reflected on the mission order as it was not expected to be used as an itinerary.

524. In support of this explanation, the Defence tendered exhibit D28, a "*Déclaration de Créances*" for expenses incurred by *OCIR-thé* (Gisovu Tea Factory) for the use of two gendarmes from 22 April 1994 up to 2 May 1994. This document is signed by the chief accountant and Musema and dated 2 May 1994.

525. Musema stated in his testimony that he stayed at the factory until 25 April 1994. The factory was operational and most of the troubles and massacres were outside the vicinity of the factory. Although he did not see him while at Pfunda, Musema had hoped that the Director-General of *OCIR-thé* would pass by the factory on his way back from Gisenyi.

526. The Defence tendered exhibit D29, a "*Rapport de Mission*" and a covering letter, dated 24 April 1994 and written and signed by Musema in Gisenyi. According to the Defence, these documents were found by the Defence in the archives of the Gisovu Tea Factory.

527. Musema testified that the interim report was typed at Pfunda factory and was to be sent to the Director-General of *OCIR-thé*, although Musema acknowledged that the lack of the recipient's full



address was an oversight on the part of the typist. Musema explained that he had planned to drop off the report and annexes on his way back to Rubona at the house of the Director-General in Kabaya, but that by accident he bumped into him at Mukamura. He was thus able to hand over the documents in person. Other copies were also given by Musema to the directors of the Pfunda and Nyabihu tea factories whom he also met.

528. During cross-examination, Musema gave further details as to his mission. He only visited in person the factory of Pfunda, having gone to the factory of Nyabihu which was closed although he met its director. Besides the directors of these two factories Musema also met the director of Rubaya.

529. The Prosecutor referred to exhibit P56, the Swiss interview of 8 March 1995, where Musema says “[...] I left Gitarama to visit the factories in Gisenyi (Nyabihu, Rubaya and Pfunda)” and to exhibit P58, Swiss interview of 6 April 1995, where he states “Pfunda factory was the first I visited. I met there the factory director, we discussed, and I was accommodated at his house. [...] At Nyabihu, I met the director Mr. Gasongero at his residence. I did not reach Rubaya, but I met the factory director Mr. Jaribu”.

530. Musema explained during the trial that he was able to make a report on these factories based on the discussions he had had with the respective directors. The mission report D29, dated 24 April 1994, contains recommendations for the above three factories.

531. The Prosecutor argued that this report was “strikingly thin” considering the importance of the alleged mission and the calibre of the requesting official, a minister. The recommendations and issues contained in the report were vague and could have been written at any time without having been on mission, stated the Prosecutor.

- 25 April 1994

532. Musema testified that he and the gendarmes left Pfunda factory on 25 April 1994 around 08:00hrs and met the Director-General of *OCIR-thé*, who was with his wife, and the director of the Nyabihu tea factory, at Mukamura. The Director-General of *OCIR-thé* read the mission report, approved it, added a couple of aspects, and confirmed that Musema could continue his mission.



Musema stated that the meeting lasted approximately one hour, after which he drove to Gitarama. He arrived there late at night because of the number of dangerous road barriers, and stayed overnight because of the curfew.

- 26 April 1994

533. According to Musema, on 26 April 1994, Musema went to Rubona where by now the security situation had completely deteriorated. Pillagers and killers had taken over the ISAR. He stayed overnight with the rest of his family at the house of his brother-in-law, who worked at ISAR.

534. Claire Kayuku testified that Musema returned to Rubona on 26 April from Gisenyi.

- 27 April 1994

535. Musema stated in Court that he remained in Rubona on 27 April 1994. Although he did not see any killings he witnessed much pillaging of cattle and plantations.

- 28 April 1994

536. During his testimony, Musema stated that on 28 April 1994, he went to Kitabi where he stayed for the day before returning to Rubona in the evening. The director of the Kitabi tea factory signed and stamped Exhibit D10. Musema heard that some of the factory staff had been massacred but on his visit there, it was calm at the factory.

- 29 April 1994

537. Musema declared that he left Rubona with the gendarmes between 09:00hrs and 10:00hrs, still in the red Pajero, and travelled back to Gisovu via Butare, Gikongoro and Gasaranda. They arrived in



late afternoon. On the mission order appears the Gisovu tea factory stamp with "Arrivée Gisovu 29/04/94" written next to it.

538. Musema described the situation then as being calmer, with fewer people on the barriers and no movement of groups of killers. The factory was calm, the guards were present while the other employees were in their homes. The bodies he had seen previously on the roads were no longer there.

539. Musema confirmed that he held a meeting with the higher factory officials between 16:00hrs and 17:00hrs at the factory. There were four participants, excluding Musema, according to the report on the meeting. The report was made by the secretary Nyarugwiza and filed. The minutes were tendered as exhibit D30. The second paragraph of the minutes reads that "[t]he director informed the participants that he had not neglected the workers but rather that the Government had entrusted him with the assignment of going round factories to see how to ensure resumption of operations in such factories".

540. Musema testified that he stayed at the factory that night.

- 30 April 1994

541. Exhibit D31, the minutes of a meeting held on 30 April 1994 at the tea factory, was tendered by the Defence.

542. Musema confirmed that he signed the minutes that were taken by the secretary Nyarugwiza. Musema explained that the meeting took place in two phases, the first with the department heads of service and the second with the technicians so as to hear their opinions on restarting the factory. During the meeting, it was decided that Musema, as director of the factory should be the one to ask for fuel from the *Préfet* of Kibuye, because in time of war, the *Préfets* would requisition petrol stations and control the distribution of fuel.

543. Point 2.7 of the minutes reflects that the disappearance of employees of the tea factory was discussed. Musema stated that the atmosphere at the meeting was cold as everyone knew that there still existed dangers and that there was a general situation of insecurity in the region. Issues discussed



included security at the factory, the date for the start of the picking of tea and the amount to be picked and the route to be used for the transport of tea.

544. Exhibit D32, a letter dated 30 April 1994 from Musema to a Ms Annociathe Nyiratabaruka assigning her as storekeeper, was tendered by the Defence to show the implementation of a decision taken at the meeting of 30 April 1994.

545. Exhibit D33, dated 30 April 1994 and signed and stamped by the Préfet Clément Kayishema, is an “*Autorisation de Circulation*”. In this particular document, travel permission is granted with reference to the mission order of 21 April 1994.

546. Musema testified that he met the *Préfet* on 30 April 1994 for the issuance of this authorization needed to further his mission and travel outside of the *Préfecture*. The *Préfet* had previously decreed that all travel outside the *Préfecture* had to be authorized by him and that all travel between *communes* had to be authorized by a *bourgmestre*.

547. Musema went on to tell the Chamber that during his trip to Kibuye along Lake Kivu he saw burnt and destroyed houses. In Kibuye, the Stadium doors had been destroyed. There were red stains on the walls, and a putrid smell of decomposing bodies hung in the air. The Home Saint Jean and the catholic church had been damaged, and the church’s front entrance damaged by fire.

- 1 May 1994

548. Exhibit D34 was tendered by the Defence to show that, during this period, Musema was still taking care of the running of the tea factory. The exhibit is a letter sent by Musema from Gisovu to Gaspard Bitihuse, in which he reprimands the addressee for not attending the meeting of 30 April 1994 and delegating instead to his subordinates. Musema indicated therein that work at the factory was to restart on 2 May 1994.

- 2 May 1994



549. According to Musema, exhibit D28, the "*Déclaration de Créances*" dated 2 May 1994, was drafted prior to him leaving Gisovu on that same day. He left for Shagasha tea factory between 10:00hrs and 11:00hrs and arrived between 18:00hrs and 18:30hrs. Musema stated that the reference of 3 May 1994 as the date of arrival at Shagasha on Exhibit D10 was an error and that he arrived in Shagasha on 2 May 1994. The visit to the factory took place the next day, which may explain the date of 3 May 1994.

550. During cross-examination the Prosecutor referred to exhibit P56, a Swiss interview of 8 March 1995, where Musema states that he travelled on 2 May 1994 to the factory of Kitabi where he met with the director.

- 3 May 1994

551. Musema said he carried out his visit to Shagasha tea factory on the morning of 3 May 1994 and then visited the Gisakura factory afterwards. At Shagasha the teamaker signed the *ordre de mission* but did not have a stamp. Musema could not explain to the Chamber why the Shagasha signature appears further down the page after the Gisakura stamp, but assured the court that he did visit the former first. He stated that he came back to Shagasha after visiting Gisakura and that it may have been then that the teamaker signed.

552. Musema stated that the chief accountant of the Gisakura factory put his factory's stamp on the mission order on 3 May 1994. Musema visited Gisakura on at least two more occasions before leaving Shagasha on 5 May 1994.

553. However, prosecution *Witness BB* stated that on 3 May 1994, he was at the Gisakura tea factory. He also stated that Musema did not meet with the director of the Gisakura factory, although the stamp of the factory appears on Musema's mission order (exhibit D10, discussed below). In the opinion of the witness, had they met, the Gisakura director would have signed mission order, and not the chief accountant, whose signature the witness recognized.

554. According to *Witness BB*, the factory had two stamps: one was kept by the director and the other by the chief of personnel. In his opinion, the chief accountant, who was superior in rank to the



chief of personnel, must have requested the latter for the stamp of the factory at the time of stamping the mission order for Musema. The usual procedure was to have the chief of personnel stamp the document if the director was unavailable. The witness added that as the chief accountant was a member of MDR Power, he would have had good relations with Musema.

555. The witness added that he believed that it was peculiar that the director had not been informed by his staff or wife of the visit of Musema.

556. During cross-examination of Claire Kayuku, the Prosecutor suggested in a question to her that on 3 May 1994, Musema attended a meeting in Kibuye town with the Prime Minister. The witness had no knowledge of this.

- 5 May 1994

557. Musema testified he left for Rubona on 5 May 1994, and hoped to visit the tea factory of Mata. He departed from Shagasha around 08:00hrs and arrived in Rubona around 18:00hrs, staying there overnight. Although there were no massacres at Rubona, tension had risen as a result of all the refugee movements and because of all the news of the intensifying war.

- 6 May 1994

558. Musema said he believed he stayed in Rubona on 6 May 1994.

559. The Prosecutor put exhibit P56 to Musema wherein he states that “[o]n 3 May, I once again visited the factories in the south west, that is, Gisakura and Shagasha. I then returned to Butare. On 7 or 8 May, I returned to Gisovu and on 9 May, I supervised the resumption of operations of the factory. I remained there until 19/20 May and travelled to Butare to join my family.”

560. During his testimony, Musema affirmed that between 7 and 19 May 1994 he was at Rubona and visited Gitarama on occasions.



- 7 May 1994

561. Musema testified that on 7 May 1994, he went to Mata tea factory. The visit lasted no more than six hours after which he returned to Rubona. The chief accountant of Mata tea factory affixed his stamp to the mission order which is dated 7 May 1994.

562. According to Claire Kayuku, Musema visited a number of tea factories at the end of the month of April and the beginning of May.

- 7 to 19 May 1994

563. Musema stated that he stayed in Rubona from 7 May 1994 until 19 May 1994, never going beyond the towns of Butare and Gitarama and thus did not set foot in Kibuye *Préfecture*, and that he did not visit any other factory.

564. Exhibit D35, a letter dated 8 May 1994, to which is annexed the mission report, was typed up by the secretarial services of ISAR at Rubona. Reference is made therein to the date of the start of the mission, its objectives and to the interim report of 24 April 1994. There is mention of the dates on which the various tea factory started up production and existing stocks at the Gisakura and Shagasha factories. These last figures, according to Musema, could be made available by the teamaker, the accountant or even by the director. Conclusions rendered by Musema deal with fuel provisions, payment of salaries, security of the tea factories, recruitment of new staff and the setting up of transport routes for black tea via Gisenyi.

565. Musema indicated that he made approximately ten copies of the report for transmission to the directors of the visited tea factories. Musema handed a copy for the Director-General of *OCIR-thé* on 10 May 1994 to the commercial bank in Gitarama which had a convoy going to Gisenyi. The manager of the bank had promised to deliver this report to the Director-General.

566. Defence *Witness MH* said he saw Musema on 10 May and 13 May 1994. On 10 May, the witness saw Musema in Gitarama. He talked with him but did not remember asking him where he had



come from or what he was doing. Musema had arrived in a vehicle, but Witness MH could not remember the type of vehicle it was, nor the colour of the vehicle. He recalled that these events dated back five years which may account for his inability to remember such details.

567. MH added that, on 13 May 1994, he was fleeing on his own to Burundi and had left Gitarama in the afternoon between 12:00hrs to 13:00hrs, travelling in his vehicle from Gitarama to Butare, towards the Kanyaru-Haut border post. After 45 minutes to an hour, he stopped at Rubona where he spent no more than 20 minutes. In Rubona, the witness went to the residence of the Kayuku family, being the family of Musema's mother-in-law, to say goodbye to them and to inform them that he was leaving Rwanda for Burundi, in transit to Kenya. He saw and spoke with Musema. Although he was unable to specify exactly when he met with Musema, he estimated it to have been around 14:00hrs, roughly one hour after leaving Gitarama.

568. A copy of Witness MH's passport with the entry stamp for Burundi on 13 May 1994 was introduced by the Defence as exhibit D102. On the same page as this stamp is a stamp issued at the Bujumbura airport showing the exit of Witness MH from Burundi territory on 15 May 1994.

569. Exhibit D45 contains a copy of a receipt dated 14 May 1994 from a FINA petrol station in Gitarama for a cash payment made by Musema for fuel for the Pajero, registration number A7171. This document, contends the Defence, strikes at the Prosecutor's case by placing Musema elsewhere than at the scene of the massacres in Bisesero.

570. Defence *Witness MG*, the wife of MH, said she saw Musema on two occasions between mid-April and 16 May when he came to visit her family in Gitarama. Although she was not sure of the exact dates, she believes that one of these visits was in May. MG left Gitarama on 15 May and Rwanda on 17 May. On 7 June 1994, she wrote a letter (exhibit D92) from Nairobi to Nicole Pletscher in which she indicates that on 17 May 1994 Musema and his family were in Butare at the house of Claire Kayuku's mother. She specified in her testimony that she did not personally see Musema in the days preceding her departure from Rwanda, but that she had heard of his whereabouts from one of her brothers and indirectly from her husband. MG indicated that she had written the date of 17 May in her letter as it was then that she had finally left Rwanda, and that she would be unable to confirm whether or not Musema had left the house of his mother in law on 16 May.



571. Defence witness Claire Kayuku, Musema's wife, declared she remembered that he returned to Gisovu at some time around the middle of May to pay the tea factory employees. She recalled that at the beginning of the month of May, Musema's red Pajero spent one or two weeks in a garage in Butare for repairs.

572. Exhibit D36, a letter, was tendered to demonstrate that Musema was a man not taking part in the events but just watching the events unfold and that by being in Butare on 14 May 1994, he could not have been in Muyira as alleged¹⁸².

573. According to Musema, this letter was written by him on 14 May 1994 in Butare and addressed to a Swiss friend called Nicole Pletscher. He gave it to a person going to Burundi on 14 May 1994, and hoped that it would be posted in Bujumbura. Musema had known Nicole Pletscher since 1986 and his family and hers had become friends. The last time he saw her was on 3 April 1994 in Kigali. The next time he saw this letter was during his testimony in this case.

574. In further support of Musema's absence from Gisovu, the Defence tendered exhibit D46, a letter from Musema sent to the prefect of Kibuye, dated 18 May 1994 requesting gendarmes for the factory. On the letter is written ACL, meaning "*à classer*". Annexed to this letter is a note, headed "*A qui de droit*", which Musema said was given to him by the Minister of Defence then based in Gitarama on 10 May 1994. By this note drafted by the minister, the commander of Kibuye *groupement* is requested, taking into account its importance, to ensure the close security of the tea factory. Musema stated that on 18 May 1994, as he still had car trouble, the letter and annex were given by Musema to someone in Gitarama who was going to Kibuye.

575. Were Musema in Gisovu, contends the Defence, he would not have waited eight days to transmit this note.

576. A number of other documents were tendered by the Defence to prove that Musema was absent from the Gisovu tea factory in mid-May 1994. Exhibit D41, a request for employment, received 5

¹⁸² See Defence Closing Brief para. 263.



May 1994 at the tea factory, was only dealt with by Musema on 14 June 1994. Exhibit D42, a request for accommodation for security reasons, was received on 11 May 1994, yet there appears no date as to when the request was dealt with. Exhibit D44, a request for accommodation, received at the tea factory on 16 May 1994 was dealt with by Musema on 14 June 1994.

577. Exhibit D43, is a letter sent from Joseph Nyarugwiza, head of personnel to the *bourgmestre* of Gisovu, dated 16 May 1994. Before the Chamber, Musema stated that the author of the letter forwarded the list of security personnel who requested to be trained in weapons, in furtherance of their discussions of 13 May and 16 May 1994. Musema was not aware of this letter, the first time he had seen it being upon its discovery by his Counsel during investigations at the Gisovu Tea Factory.

578. The Defence contends that, were Musema acting in concert with the *bourgmestre* Ndimbati during the massacres, Musema would have acted on the letter D43 or commented upon it, yet he did neither.

579. Exhibit D49, entitled “*demande de trésorerie*” and dated 21 May 1994, according to the Defence, was written by Musema for the attention of the Director-General of *OCIR-thé*. Annexed thereto is the *trésorerie* for April and May 1994. The annex is dated 7 May 1994 and signed by Musema.

580. Musema testified that this date referred to the date document D49 was prepared and not when it was signed by him, being 21 May.

581. Musema continued his testimony to say that as the situation was deteriorating in Rwanda, he and his family tried to formulate a plan in case they had to leave the country. Exhibit D37 is a certificate of complete identity issued for his eldest son Patrick Olivier Rukezamiheto, certified by the *bourgmestre* of Ruhashya *Commune* on 16 May 1994. By having this identity certificate, Musema hoped, the task of getting a passport for his son would be facilitated. Copies of the passports of his sons were tendered as exhibit D38, D39 and D40. According to Musema, all the passports were issued in Gitarama on 18 May 1994 in his presence. The passport tendered as exhibit D40 was signed by Musema as his son was not old enough to hold an identity card, and was then personally given to Musema.



582. Musema said he also went to the Commercial Bank in Gitarama on 18 May 1994 to find out about operations since the bank had moved from Kigali. He left his mission report for the Director-General of *OCIR-thé* with the manager of the bank who would deliver it on the occasion when funds were to be taken to Gisenyi.

583. Musema added he spent the night of 18 May in Rubona.

584. During cross-examination, reference was made to Musema's handwritten calendar, exhibit P68, which indicates that he was in Gisovu from 4 May to 14 May. Musema testified that this was an error and that he was not in Gisovu at that time.

585. In exhibit P57, a Swiss interview of 16 March 1995, Musema said that he was in Gisovu in the week of 4 to 13 May. The Prosecutor also recalled exhibit D49, the "*demande de trésorerie*". Musema reiterated that the date of 7 May referred to the date the document was prepared and not the date when signed by him, which was on 21 May.

586. Musema confirmed that, although he did not know the specific names of hills in the Bisesero region, he knew that there had been attacks in the Bisesero region on 13 and 14 May and before. When asked how he knew that there had been attacks when he had not been there, he stated that the agronomists had informed him during the meeting of 19 May 1994 and that he had so heard on radio RTLM and the FPR radio, Muhabura. He also testified that he did not participate in attacks on Muyira hill or elsewhere on 13 and 14 May. Musema did not have any proof or reason to suspect that employees of the tea factory participated in the attacks or that tea factory vehicles were used. He did add, however, that there were times when he was absent from the tea factory, and as such could not be sure that a certain individual or a certain vehicle was not part of the attacks.

- 19 May 1994

587. Musema testified that on 19 May 1994, he returned to the Gisovu Tea Factory. He travelled in the company of two soldiers, Félicien and Alphonse, who had been with him since the start of the mission, and a locksmith who came to help with the safes and doors. They travelled aboard the



~~Pajero. Having left around 09:00hrs they arrived between 15:00hrs and 16:00hrs. The stamp of the Gisovu Tea Factory and “Arrivée à Gisovu le 19.05.94” appear on Exhibit D10. The writing is that of Musema and the signature imposed on the seal that of the chief of personnel.~~

588. Musema went on to say that a meeting was held at the factory. Those present were Musema, Gaspard Bitihuse, teamaker, James Barawigirira, chief mechanic *ad interim*, Joseph Nyarugwiza, chief of personnel, and François Uwamugura, accountant of the factory. The minutes of the meeting, drafted by Joseph Nyarugwiza and signed by him and Musema, were tendered by the Defence as exhibit D47. Most issues dealt with stocks and operations of the tea factory. Paragraph 2 of the minutes indicates that the Director of the tea factory had been on “*tournée*” and that when he was to return his car had broken down and that although he had sought assistance from the factory, none had been forthcoming.

589. During his testimony, Musema explained that his Pajero had developed problems on 7 May 1994 during his visit to Mata tea factory. As the problems were not solved, he had to stay in the Butare region. He had asked for a replacement car from the factory which was only sent on 19 May 1994 by which time the Pajero had been repaired. Exhibit D45, the “*Déclaration de Créance*”, requesting payment of expenses incurred by Musema for the Pajero reg. A7171, is dated 19 May 1994. The form was filled out by the secretary of the factory and signed by the accountant and Musema. Attached, *inter alia*, is a bill from a garage in Butare, for spare parts, dated 19 April 1994.

590. Also tendered by the Defence was exhibit D48, a letter dated 19 May 1994, from Musema to the manager of the *Banque Commerciale du Rwanda* requesting withdrawal of funds. The letter also explained that the chief accountant, Canisius Twagura-Kayego, the usual co-signatory, had not been seen since 13 April 1994. In cross-examination, Musema stated that he could not indicate explicitly in the letter that people had died, but that it was implied by saying that they had disappeared. The bench confirmed that in French the term “*disparu*” could be used to indicate that someone had died.

591. Musema told the Chamber that he stayed at the Gisovu Tea Factory on the night of 19 May 1994.

- 20 May 1994



592. Musema testified that on 20 May 1994, he went to the Commercial Bank in Kibuye to deliver the letter and collect funds for the salaries. He was accompanied by the two soldiers and the cashier. They stayed at the Gisovu Tea Factory on the night of 20 May 1994.

- 21 to 27 May 1994

593. Musema testified that he returned to Rubona to see his family on 21 May 1994. He left Gisovu Tea Factory with the locksmith around 11:00hrs after having distributed the salaries.

594. Musema added that he stayed in Rubona until 27 May 1994. While in Rubona, Musema and his family again discussed leaving the country. At some point during this period, he said he travelled to Gitarama to drop off documents for the factory at the commercial bank and to search for family members. He also went to Nyanza one day to visit a friend of his who was a priest.

- 27 May 1994

595. Musema stated that he returned to the tea factory on 27 May 1994. His family had moved to Kitabi as result of the advancing soldiers. He stayed the night of 26 May in Rubona and then passed via Kitabi to collect his family on his return to the factory in Gisovu. His wife, two of his children and the soldiers, Alphonse and Félicien, accompanied him to the tea factory.

596. According to Musema, a meeting with eight participants and chaired by himself was held at the factory 27 May. The report of such a meeting was tendered as exhibit D51. The report refers to the meetings of 29 April, 30 April and 19 May. The atmosphere at the tea factory was tense due to news of the war and the ongoing massacres in the Bisesero region. The meeting addressed a number of issues pertaining to the security and production of the tea factory, including losses incurred due to a breakdown which had not been repaired. This breakdown had occurred ten days before 19 May. This, concludes the Defence, demonstrates that Musema was not in the vicinity of the tea factory during these ten days, i.e. 10 - 19 May 1994.



597. One recommendation of the meeting referred to an agreement reached between Musema and the *bourgmestre* of Gisovu for weapons training. It was also decided that gendarmes would come and help the factory guards due to the general insecurity.

598. Musema added that he and his family stayed at the Gisovu Tea Factory on 27 May 1994.

599. The Prosecutor referred to exhibit D51, and to the recommendation regarding civil defence as proof of Musema's involvement in the training of tea factory employees. Musema stated that this point constituted an issue raised by an employee. He did not send people for training as it was not of direct concern for the tea factory, but was rather the concern of the *bourgmestre* and the *commune*. This, Musema explained, was the agreement between him and Ndimbati.

- 28 May 1994

600. Musema testified that, by 28 May 1994, he had two plans in mind, one to evacuate his family to the border, and the other to participate in a technical mission headed by a certain Claudien Kanyarwanda, to prospect a corridor for import and export.

601. According to Musema, a meeting was held on 28 May 1994 at the factory in which he participated. Exhibit D52 is a report thereof, signed by Musema. In the report it is stated that Musema handed over three Kalashnikov rifles. During his testimony, Musema stated that he had obtained them in Gitarama, from the military camp on the order of the Minister of Defence, Augustin Bizimana after having explained to the minister his security concerns for the tea factory, and that no help had been forthcoming from the *Préfet*. The minister agreed to give Musema three rifles to complement the two at the factory and to equip all five military reservists.

602. Support for the movements of Musema was put forward by the Defence in exhibit D53, "*Autorisation de sortie de fonds*" dated 28 May 1994, which authorized the payment of funds for expenses to Harelimana for mission expenses with Musema from 21 May to 29 May 1994. Exhibit D55, "*Déclaration de créance*" confirmed the payment of funds to corporal Félicien Harélimana for the mission with Musema from 21 to 29 May 1994. This is signed by Musema and the accountant of the tea factory.



603. Exhibit D54, “*Autorisation de sortie de fonds*” dated 29 May 1994, authorized advance payments of funds to Musema for his mission to Zaïre.

604. In the penultimate paragraph of a letter from the witness Claire Kayuku to the witness Nicole Pletscher, tendered by the Defence as exhibit D90, there is mention of the fact that Musema and she stopped over in Gisovu on 27 and 28 May on their way from Butare to Shagasha.

- 29 May 1994

605. Defence exhibit D10, shows a stamp of Gisovu Tea Factory, with “*Fin de mission: 29/05/94*” written by Musema. The signatures of the chief of personnel and of Musema also appear.

606. Musema testified that he left Gisovu with his family on 29 May 1994. They first went to Shagasha tea factory where they stayed at the “*maison de passage*”.

607. Musema explained in cross-examination that the date of 29 May 1994 pertained to the end of the mission with the *OCIR-thé* and that between 19 May and 29 May he finalized his reports. Although he dealt with personal issues, the expenses he incurred during this eleven day period were billed only for the official work he carried out. Normal procedure required more precise dates, usually on a daily basis, than those on the exhibit D10 for payment of expenses. For this particular period, stated Musema, he was paid for six to eight days, on the basis of his oral representations.

608. Musema affirmed that the date of 29 May was clearly indicated on the exhibit and that the “2” had not been written over a “1”. The bench accepted this statement.

609. The Defence filed exhibit D63, a “Prime” for Corporal Ndindabahizi for the period 29 May to 17 June 1994 signed by Musema on 17 June 1994. The corporal was one of two gendarmes who had been sent to the tea factory by the Kibuye gendarmerie for security purposes.



• 30 May 1994

610. Musema testified that on 30 May 1994 he left Shagasha between 08:00hrs and 09:00hrs and went to Cyangugu to join the technical mission. After a number of meetings, he returned to Shagasha where he stayed overnight.

• 31 May 1994

611. On 31 May 1994, stated Musema, he rejoined the mission in Cyangugu and stayed overnight at the Chutes Hotel.

612. The Defence tendered photocopies of the passport of Musema as exhibit D56. On page 12 of the passport are stamps dated 31 May 1994. Musema explained that he travelled with the technical mission to Zaïre leaving Rwanda through Bugarama and entering Zaïre at Kamanyoma. He testified that they came back from Zaïre on the same day. Exhibit D54 is an “*Autorisation de sortie de fonds*” dated 29 May 1994, which authorized advance payments of funds to Musema for his mission to Zaïre.

613. Also tendered was exhibit D59, letter of 2 June 1994, sent to Musema and received at the tea factory on 4 June 1994. In annex are the minutes of a meeting held by the agronomists on 31 May 1994, Musema not being marked as present at the meeting.

• 1 to 10 June 1994

614. Musema testified that after meeting a delegation from Bukavu in Cyangugu, he travelled back to Shagasha where he stayed at the *maison de passage*. His family and he remained at Shagasha until 10 June 1994. He testified that for the first few days he stayed at the *maison de passage*, and that he also spent one night in Kitabi where he searched for his mother-in-law. He stated that he had to wait longer than he expected for the return of the directors of the Shagasha and Gisakura tea factories with news from the Director-General of the *OCIR-thé*.



615. ~~The Defence produced exhibit D57, an “Autorisation spéciale de circulation CEPGL”, issued on 3 June 1994 in Cyangugu. Musema explained that this document was valid for travel in Burundi, Rwanda and Zaïre.~~

616. Exhibit D58 is a letter signed by Musema, dated 6 June 1994, sent to a merchant in Cyangugu requesting fuel for the Gisovu Tea Factory and the calculation of costs. Although the letter is addressed from Gisovu, Musema testified that he was in Shagasha when he drafted it. He explained that the directors of Shagasha and Gisakura Tea Factories had recommended the merchants based in Cyangugu who were buying fuel from Zaïre.

617. Defence Witness Claire Kayuku testified that from 29 May 1994, until 7 or 10 June, Musema stayed with her and the family at the Shagasha tea factory, except for one or two nights which he spent in Bukavu as the border had closed. She explained that during this period he was with a delegation working between Cyangugu and Zaïre looking for ways to export tea to Zaïre.

- 10 - 17 June 1994

618. Musema testified that he returned to Gisovu Tea Factory on 10 June 1994, without the two soldiers who had received the order to return to Gitarama. Musema testified that this order had been sent by Colonel Bagarameshe head of the Cyangugu Gendarmerie. As such, the colonel had given him a gendarme from Cyangugu to accompany him to Gisovu.

619. On 10 June, said Musema, the factory was functioning normally save for the uncertainty that hung in the air as regards the war. He said that he stayed at the factory until 17 June 1994 and carried out his normal duties.

620. He denied ever transporting people in factory cars to massacres, and stated that he could not have control over all the factory workers, especially not those outside the premises of the factory. He stated that he had noted an unusual increase in fuel consumption since 6 April 1994.

621. A number of exhibits were filed by the Defence to demonstrate that Musema worked as per normal during this period. Exhibit D60 is a “*note de service*” requesting drivers to maintain certain



standards, to service their vehicles and to account for all fuel consumption, dated 14 June 1994, and signed by Musema. Exhibit D63 is the “prime” authorizing payment to Corporal Ndinbahizi signed on 17 June 1994 by Musema. Exhibit D61 is a *fiche de déplacement*, dated 16 June 1994, signed and stamped by the *Préfet* of Kibuye, Clément Kayishema, giving Musema the two gendarmes, and a driver permission to travel for 30 days (17 June to 17 July) between Cyangugu, Gikongoro, Butare and Gisenyi on mission in vehicle reg. A9095. Musema stated that this last document was collected by an agronomist who went to Kibuye on 16 July.

622. The Defence produced exhibit D64, a letter dated 31 May 1994, sent to Musema by the two gendarmes ensuring security at the factory, wherein they request means of transport to make a trip to their camp in Kibuye. Musema testified that he never received the letter, and that it must have been signed by one gendarme only as the other had accompanied Musema on his trip during the first ten days of June.

623. In cross-examination, the Prosecutor referred to this exhibit and suggested that Musema exerted control over the gendarmes. Musema denied this saying that they were at all times under the command of the *Gendarmerie* of Kibuye.

- 17 June 1994

624. Musema testified that on 17 June 1994 he went to Shagasha tea factory to see his family and to buy some goods. He was accompanied by a gendarme and travelled aboard a Daihatsu to bring the goods back to Gisovu.

625. He arrived in Shagasha around 15:00hrs or 16:00hrs. He first went to see his family at the Shagasha Tea Factory *maison de passage*, and then went to the tea factory and to Cyangugu to inquire and purchase the necessary goods. He spent the night with his family at Shagasha.

626. Exhibit D65, a mission order given to the gendarme accompanying Musema, and delivered to the commanding officer of the *Gendarmerie* of Kibuye, was filed by the Defence as support for the alibi during this period. Dates thereon are those of departure from Gisovu to Cyangugu, 17 June 1994,



~~return to Gisovu from Cyangugu, 20 June 1994, departure from Gisovu to Gisenyi, 21 June 1994, and return to Gisovu from Gisenyi, 28 June 1994.~~

627. The Defence produced exhibit D66, "*Pièce de Caisse Sortie*", dated 17 June 1994, which indicates the amount advanced to Musema for the purchase of goods for the factory. Also produced was exhibit D67, a handwritten note dated 17 June 1994 and left by Kanyarwanda Claudien - the director of Magerwa who headed the earlier mission to Zaïre, with Musema's family at Shagasha. The Defence submitted that this note clearly indicates that the author expected to meet Musema in the near future.

628. Defence Witness Claire Kayuku testified that she remained in Shagasha until 18 July 1994.

- 18 June 1994

629. On 18 June 1994, stated Musema, he went to Gihundwae, Cyangugu to visit family members who had come from Rubona. At Cyangugu he also bought the goods he needed and met with a merchant called Elias Bakundukiza. Musema added that he stayed in Shagasha overnight.



- 19 June 1994

630. Musema testified that on 19 June 1994 he travelled to Kitabi and Gikongoro to see other relatives including his mother-in-law. He went to Rubona to look for other relatives and spent the night in Gikongoro.

631. In support of this travel, the Defence filed exhibit D90, a letter from its Witness Claire Kayuku dated 21 June 1994 from Shagasha. She writes therein “Alfred is still on the move, he is going back and forth and serving as a link between everybody, Butare, where my elder sister is, my mother who has fled to Gikongoro with two brothers and three children, with us in Cyangugu guest house [...]”.

- 20 June 1994

632. Musema stated that he returned to Shagasha in the morning of 20 June and later on the same day he travelled to Gisovu. He explained that he returned to Gisovu as his family had heard a *communiqué* on the radio from a Mr Kanyarwanda asking him to join him in Gisenyi. Musema testified that as he arrived late in Gisovu he stayed overnight.

633. The Defence presented a number of exhibits to show that Musema had returned to Gisovu on this date. Exhibit D70 is a letter from the tea factory to the *bourgmestre* of Gisovu, Ndimbati, dated 21 June 1994, on which appear handwritten notes of Musema, also dated 21 June. The subject concerned a night guard, a “Zamu”, who had been working at the tea factory and who, according to Musema, was suspected of participating in massacres and had thus been sent to the *bourgmestre*. Exhibit D52 is the report of a meeting held on 28 May 1994 on which Musema wrote on 21 June that this report should be circulated to a number of individuals.

634. During cross-examination concerning exhibit D70, Musema explained that this night guard “Zamu” was paid and worked on a day-to-day basis. Contrary to the feeling of the Prosecutor, Musema did not find anything peculiar in this system. The Prosecutor tendered exhibit P70, a response to exhibit D70, indicating that the guards’ training would be terminated. Musema explained



that this training was that given by the gendarmes to guards at the factory, in the context of the factory security. The rest of the cross examination on this exhibit and on exhibits P71 and P72 pertained to the type of training received by the guards and others, and whether this involved weapons and was carried out with the full knowledge of Musema. Such matters are not alleged in the Indictment and have thus been left out here.

- 21 to 28 June 1994

635. Musema stated that he drove to Gisenyi on 21 June 1994, leaving around 09:00hrs in the A7171 Pajero with a gendarme, and arriving around 18:00hrs. He stayed in Gisenyi to finalize the tea export mission and to access funds from the *Banque Commerciale* which had moved from Kigali to Gisenyi. He indicated that he was very concerned for his family and tried to contact individuals outside Rwanda.

636. During this period, and in the context of the tea exportations, Musema said that he went to Goma in Zaïre, only returning to Gisovu on 28 June with the gendarmes who had accompanied him. Musema explained that he returned on this day to Gisovu so as to deposit cash at Kibuye bank for the salaries of the tea factory personnel, to supervise the factory and also to be able to join his family for whom he was concerned. On their return trip, they followed a French military convoy and arrived in Gisovu late afternoon.

637. As regards these dates, the Defence referred to exhibit D65 again, the mission order given to the gendarme accompanying Musema, and delivered to the commanding officer of the *Gendarmerie* of Kibuye. The departure from Gisovu to Gisenyi is 21 June 1994, and the return to Gisovu from Gisenyi is on 28 June 1994. The Defence also referred to exhibit D69, a letter written by Musema on 23 June 1994 from Gisenyi and addressed to Swiss friends. The letter was sent through the intermediary of the Belgian director of SOTRAG who was returning to Europe.

638. The Defence presented two exhibits to show that Musema travelled to Gisenyi during this period. In exhibit D90, a letter dated 21 June 1994 from Defence Witness Claire Kayuku in Shagasha, it is written of Musema that “for the time being he is in Gisenyi after satisfying everybody’s needs especially to make them secure. [...] He will certainly try to contact you through Goma [near



Gisenyi], he has been called urgently by his Minister we do not know for what reason.” In exhibit D91, another letter from Claire Kayuku, this one dated 6 July 1994, she writes “Alfred has not returned since 20/6. On his return from Gisenyi last week he passed through Gisovu. On arrival there he fell ill and was confined to bed without medication for 3 days. He wrote a short letter to inform me yesterday [...]”.

639. During the cross-examination of Claire Kayuku, the Prosecutor suggested that during this period Musema was part and parcel of the interim government, and that he was in Kagitumba and Gisenyi at the same time as the interim government were in these locations. The witness refuted these allegations and stated that she described Musema in the letter as “*imperturbable*” because he would go to any length to ensure that the factory was safe and that it stayed in operation as directed by the Minister.

- 29 June to 24 July 1994

640. Musema testified that he stayed at the Gisovu Tea Factory until 24 July 1994. On or about 4 July 1994, French troops came to the tea factory where they stayed until the departure of Musema. Some moved into a church being built by Musema, while others stayed in the houses of the tea factory.

641. Musema explained that on 16 July, “there was an event” after which the *Préfet*, gendarmes, shopkeepers, *bourgmestres* - everybody - left the *Préfecture* of Kibuye and went to Zaire. The *bourgmestre* of Gisovu and his colleagues fled in the night of 17 July. Musema said he did not know what was happening and that he was not associated to it. Employees of the tea factory also wanted to flee, but Musema believed that they should wait to see how the situation developed in the south of the country at the Shagasha and Gisakura factories.

642. He testified that tea production ended on 19 July 1994 at the factory.

643. On 20 July 1994, said Musema, he sent a messenger to the Shagasha tea factory to contact his wife. However the messenger found the factory destroyed and abandoned. When he received this information, being worried, he decided to leave for Cyangugu and Shagasha.



644. Musema stated that on 24 July, he drove to Cyangugu and crossed the border by foot into Zaïre where he went to Bukavu blindly looking for his family amongst the thousands of refugees. By luck, he saw one of his sons near a petrol station and managed to meet his family and other relatives. Musema said that he explained to his wife that he couldn't just abandon the factory and thus returned to Gisovu the same day.

645. A number of exhibits were presented by the Defence to show that Musema was present at the factory during this period and that he dealt with matters left unattended during his travels between 21 and 28 June. Exhibit D71, are two letters from the prefect of Kibuye, dated 21 June 1994, the first addressed to Musema requesting information on the personnel status at the Gisovu tea factory, and the second, addressed to the *bourgmestre* and to the head of service of the tea factory informing them of the need for funds and the bank account for the civil defence. Musema's handwritten notes dated 29 June 1994 appear on both letters. Musema stated that he did not deem it necessary to respond to the second letter, an inaction which, according to the Defence, goes against the Prosecutor's allegation as regards Musema's participation in the massacres.

646. Exhibit D72, is a letter received by the tea factory on 29 June 1994. Musema confirmed that the date of 28 June 1994 as written by him on this letter was an error on his part. The letter was sent by the *bourgmestre* Ndimbati informing the addressees of the bank account for the civil defence and of the need to contribute funds to fight and vanquish the *Inkotanyi*. Musema testified that he did not provide any funds in this regard. His handwritten remarks are that the letter should be circulated to the heads of service for dissemination.

647. Other evidence tendered by the Defence include exhibit D73, a letter received 27 June 1994 by the tea factory, with handwritten notes of Musema dated 29 June; exhibit D74, a letter received 8 July 1994 by the tea factory, sent by the *bourgmestre* of Gisovu to Musema in response to the letter filed as exhibit D70. Musema wrote comments on the letter on 9 July 1994. The individual, the "Zamu" was not to be allowed to be trained in the use of weapons. Also tendered were exhibit D75, an inventory of materials given to the French troops, dated 5 July 1994 and signed by the Adjutant Jean-Pierre Peigne; exhibit D76, a letter dated 8 July 1994 and sent by Musema to Swiss friends through the French troops; exhibit D77, dated 13 July 1994 and signed by Musema, a payment of



Corporal Ndimabahizi for his expenses while he stayed at the tea factory from 18 June to 13 July 1994; exhibit D78, a letter dated 13 July 1994 from Musema forwarding to the Director-General of OCIR-*thé* the figures of the Gisovu Tea Factory for the first quarter of 1994; exhibit D80, a letter sent on 18 July 1994 from Musema to the directors of the Gisakura and Shagasha Tea Factories enquiring as to the possibility of housing the families of his personnel at their factories in view of the security situation; exhibit D81, a letter from Captain Lecointre of the French military, addressed to Musema and dated 18 July 1994, in which the author of the letter explains that he is leaving to go to another zone and that Lieutenant Beauraisain is henceforth in charge of the troops staying in Gisovu; exhibit D82, a letter dated 20 July 1994, sent from employees to Musema requesting overtime payment; exhibit D83, a letter sent from Musema to Colonel Sartre on 22 July 1994 thanking him for the security provided at the factory; and exhibit D22, a handwritten note indicating the return of a gun by Musema to the French army on 24 July 1994.

- 25 July 1994

648. Musema testified that he finally left Gisovu tea factory on 25 July 1994, passing into Zaïre without a vehicle, leaving Rwanda for the last time.

Factual Findings

649. The Chamber has considered the testimonies of the witnesses, the evidence in support of the contested facts and the alibi of Musema. It shall now present in chronological order, its factual findings thereon. The burden of proof being on the Prosecutor, the Chamber will first consider the Prosecutor's evidence, and then, if the Chamber deems there to be a case to answer, it will consider the alibi before finally making its findings.

- 15 April 1994

As pertains to the facts alleged:

650. Although *Witness BB* testified, concerning the alleged events of 15 April 1994, that he received information from workers from Gisakura and from Muko that Musema had been seen in the



~~communes of Musebeya and Muko at the wheel of a Daihatsu truck transporting individuals armed with spears and machetes, the Chamber notes that this testimony is hearsay corroborated by no other witness brought to testify. Furthermore, the Prosecutor did not advance any other arguments or evidence in support of this testimony.~~

651. Consequently, the Chamber finds that it has not been established beyond reasonable doubt that Musema was in the *communes* of Musebeya and Muko at the wheel of a Daihatsu truck transporting individuals armed with spears and machetes.

- Karongi hill FM Station, 18 April 1994

As pertains to the facts alleged:

652. The Chamber has considered the testimony of *Witness M* with regard to the meeting at Karongi hill on 18 April 1994. As already indicated in the section on evidentiary matters, the Chamber may in principle rely on the testimony of a single witness as to certain events, without necessitating corroboration thereof.

653. The Chamber finds Witness M to be credible, his evidence proving to be consistent throughout his testimony. Under cross-examination, no inconsistencies with prior testimony emerged and the Chamber was satisfied that the witness was able to see and hear Musema make statements to the people at the meeting on Karongi hill. Among these statements, he said that they had to rise together and fight their enemy the Tutsis and deliver their country from the enemy. Musema also said that as compensation the unemployed would take the jobs of those killed, and that they would appropriate the lands and properties of the Tutsis. Witness M also heard Musema say that those who wanted to have fun could rape the women and girls of the Tutsis without fearing any consequences.

654. The Defence, in its closing brief, submitted that Witness M was not credible on the grounds that it was improbable that the witness would not have been discovered in the hut; that it was improbable that the meeting would have been held at the top of the hill rather than at the bottom of the hill; and that it was peculiar that the witness should wait nearly five years (the witness statement being dated 13 January 1999) before making a statement on the events he witnessed.



655. The Chamber has considered all of these arguments and finds that they do not impair the credibility of the witness. The Chamber does not find it inherently improbable that his presence at the hut would not have been discovered. The witness clearly described his movements from one room to another within the hut to avoid detection. He gave two reasons as to why the meeting should be held at the top of Karongi hill - firstly that the assailants could get the guns there and secondly because from this vantage point they could see the refugee camp which was subsequently attacked. In the opinion of the Chamber, for the witness to have waited five years before making a statement is not significant because he only made the statement in response to an approach from the Office of the Prosecutor at that time.



As pertains to the alibi:

656. According to the alibi, Musema was in Rubona and Gitarama on 18 April 1994 having left Gisovu on 17 April.

657. The Prosecutor contested this last date by referring to numerous previous interviews and a calendar prepared by Musema in 1996, all of which tend to suggest that Musema left Gisovu two days before that date, namely on 15 April. Furthermore, the Defence Witness Claire Kayuku, Musema's wife, testified that she saw him on his return to Rubona on 16 or 17 April 1994.

658. Although there appears to be some doubt as to the exact date of departure of Musema, in the opinion of the Chamber, the submissions of the Prosecutor on this issue, the testimony of Musema and of Claire Kayuku and the other evidence, all tend towards demonstrating not that Musema was at or in the vicinity of Karongi hill FM Station on 18 April, but rather that he had actually left Gisovu on a date earlier than that which he indicated in his testimony during the trial. No evidence, save the testimony of Witness M, places Musema at Karongi FM station on that day. The Prosecutor has not demonstrated how and when Musema may have traveled from Rubona to Kibuye *Préfecture* to lead the meeting. This, in the opinion of the Chamber, creates doubt in the facts as alleged by the Prosecutor as pertains to the participation of Musema in a meeting convened at Karongi hill FM Station on 18 April 1994.

Findings:

659. Therefore, in the opinion of the Chamber, there still remains doubt on Musema's presence at the 18 April 1994 meeting on Karongi hill, taking into account his and Claire Kayuku's testimonies on the alibi, and the arguments of the Prosecutor which indicate only that Musema had left Gisovu earlier than he stated, without questioning whether he was in Gitarama on 18 April or not.

660. Under these circumstances, the Chamber finds the sole testimony of Witness M in the matter to be insufficient to prove beyond reasonable doubt that Musema participated in a meeting at the Karongi hill FM Station on 18 April 1994.



· On or about 20 April and on 26 April 1994

661. Prosecution witnesses testified in relation to events which occurred on or about 20 April and on 26 April 1994 respectively. As the alibi of Musema is not specific to these dates but covers the period as a whole, the Chamber shall first consider each of the events alleged and the credibility of the witnesses, and it shall then consider the alibi for that period before making its findings.

· On or about 20 April 1994, near the Gisovu Tea Factory

As to the facts alleged:

662. Witness K testified that on or about 20 April 1994, while in hiding, he saw Musema transport armed attackers in the vicinity of the Gisovu Tea Factory. The witness stated that the assailants, including tea factory employees and persons from Gikongoro, were taken to the Bisesero region to kill *Inyenzi*.

663. Regarding the alleged events on or about 20 April 1994, the Chamber has considered the testimony of Witness K, including his previous statements. A number of discrepancies arose during the course of his cross-examination between his oral testimony and previous statements. Questions were addressed to the witness by the Chamber and by the Defence regarding these discrepancies, in particular with regard to the dates during which he was hiding in the tea plantation, the note allegedly discovered by the witness on Muyira hill after a massacre, and the basis of his remembering important dates.

664. The Chamber finds that, in answering these questions, the witness was evasive and often contradictory as to a number of important details. The witness sought during his testimony to have the verb “to write” substituted by the verb “to memorize” in one of his statements, essential to his testimony inasmuch as it supports the means by which he could remember the dates of the events about which he was testifying.

665. The Chamber accepts that, considering the prevailing circumstances in which pre-trial statements are taken, errors and inaccuracies may occur therein. However, in the present instance, the



alleged errors which the witness is seeking to amend are key to his testimony of the participation of Musema in events and in the way he remembers such events. Furthermore, in the opinion of the Chamber, such discrepancies cannot be solely attributed to the investigators and the methods used in the taking of pre-trial statements. Rather, the Chamber deems such discrepancies to cast doubt as to the veracity and consistency of the witness' testimony and to be contradictions serious enough to put into doubt the credibility of the witness. Consequently, the Chamber deems the testimony of Witness K insufficiently reliable to be admitted as evidence.

666. Therefore, the Chamber is not satisfied beyond reasonable doubt that on or about 20 April, Musema transported tea factory workers and attackers from Gikongoro in tea factory vehicles to massacres in the Bisesero region as alleged by Witness K.

- Gitwa hill, 26 April 1994

As pertains to the facts alleged:

667. The Chamber has considered the sole testimony of *Witness M* as regards to an attack he described seeing on 26 April 1994 led by Musema on Gitwa hill, six days after having left his hiding place at the Karongi hill FM station. The witness said that during this attack he saw Musema aboard a tea factory Daihatsu, and a number of other vehicles which he described during his testimony. Musema and many others, some of whom wore banana leaves and *Imihurura* belts, are then said to have taken part in a large scale attack on Gitwa hill. Musema fired shots into the crowd of refugees.

668. The witness stated that this had been the most sweeping attack he had seen and one he had memorized very well by consulting his electronic wrist-watch at the time. Although in cross-examination the witness was unable to remember the precise date of the statement he had given three months earlier, the Chamber does not find such a lapse of memory sufficient to cast doubt on the credibility of the witness. Rather, the Chamber finds Witness M overall to be credible and consistent, without at any time being evasive during his testimony.

As pertains to the Alibi:



669. The Chamber notes that the alibi of Musema is not specific to 26 April 1994, but is linked with the mission order and travel consequent thereto. The Defence purports that on 18 April 1994, Musema, while searching for the heads of service of *OCIR-thé* in Gitarama, ran into the Minister of Industry, Trade and Handicraft, Justin Mugenzi. Having conveyed to Musema his concerns for the Gisovu Tea Factory, the minister indicated to him that he would be sent on mission to contact the Director-General of *OCIR-thé* to start up the tea factories.

670. According to the alibi, Musema, who during this period was staying in Rubona, returned to Gitarama on 21 April 1994 where again he ran into Justin Mugenzi and also the Minister of Public Works, Water and Energy, this time at a FINA petrol station. Mugenzi told Musema of the security measures he had taken for the factory, and informed him that he had been unable to contact Mr Baragaza the Director-General of *OCIR-thé*. As such, Musema was to go to the north of the country to find him. The minister said he would prepare the necessary paperwork which Musema should pick up from the residence of Faustin Nyagahima, a director within the Ministry of Industry, Trade and Handicraft. During the meeting at the FINA station, Mugenzi authorized the Minister of Public Works, Water and Energy to sign the eventual mission order.

671. On 22 April, Musema picked up the mission order (exhibit D10) from Faustin Nyagahima. The order was stamped by the Minister of Foreign Affairs, who, according to Musema, was the only minister at that time in Gitarama to possess a stamp. Musema was given two gendarmes from the military camp in Gitarama and then traveled up to the factory of Pfunda where he stayed until 25 April. With reference to exhibit D10, where Musema wrote "*arrivée à Pfunda le 21/04/1994*", Musema attributed this date to an error, and affirmed that he arrived at the factory in Pfunda on 22 April. Exhibits in support of this contention include exhibit D28, a "*Déclaration de Créances*" for expenses incurred by *OCIR-thé* (Gisovu Tea Factory) for the use of two gendarmes from 22 April 1994 up to 2 May 1994, which is signed by the Chief accountant of the Gisovu tea factory.

672. Although he only visited the Pfunda Tea Factory during this part of his mission, Musema admitted that he was able to include the factories of Nyabihu and Rubaya in his interim report (exhibit D29), having met the respective directors during the trip.



673. According to the alibi, on 25 April Musema returned to Gitarama after meeting the Director-General of *OCIR-thé* at Mukamara, who read the interim report and confirmed that Musema could continue his mission. Having stayed overnight in Gitarama, Musema traveled on to Rubona.

674. Defence Witness Claire Kayuku testified that Musema left Rubona on 22 April for Gisenyi and returned on 26 April where he stayed overnight.

675. The Chamber has considered the contentions of the Prosecutor that the mission order was false and that the stamps of the ministries were fabrications. The Prosecutor also contends that chance encounters with ministers, as described by Musema, were hardly convincing as the basis of the mission. In the opinion of the Prosecutor, the mission order was designed simply to mislead the Chamber and to conceal the extent of Musema's involvement in the massacres. The Prosecutor further contends that the interim report was strikingly thin considering the apparent nature of the mission. Moreover, Prosecution Witness BB stated that the mission order was unusual, and not one normally used by *OCIR-thé*.

676. The Chamber has considered the alibi and the Defence witness. The Chamber finds that the documentary evidence, read in conjunction with the testimony of Musema, raised a number of contradictions, many of which were addressed by the Prosecutor. These contradictions related, *inter alia*, to the plausibility of the chance meetings, the date the mission actually started, the array of ministry stamps on the mission order and the content of the interim report prepared by Musema.

677. The Chamber moreover considered the answers given by Musema to explain these discrepancies. However, the Chamber was not convinced by the relevant explanations, and, as such, must reject the alibi for this period.

Findings:

678. As stated above, the Chamber finds that Witness M appeared credible during his testimony as regards the attack on Gitwa hill of 26 April 1994. Moreover, the Chamber finds that the alibi of Musema for this date is doubtful and contains a number of material inconsistencies. The explanations given by Musema for these inconsistencies were unconvincing, in the opinion of the Chamber.



679. As such, the Chamber finds that it has been proved beyond reasonable doubt that Musema led and participated in the attack of 26 April 1994 on Gitwa hill. It has been proved beyond reasonable doubt that Musema arrived aboard one of the Gisovu Tea Factory Daihatsus. It has been established beyond reasonable doubt that Musema and others, some of whom wore *Imuhura* belts and banana leaves, participated in a large scale attack against refugees. The Chamber finds that it has been established beyond reasonable doubt that Musema shot into the crowd of refugees.



- End of April - beginning of May 1994, Muyira and Rwirambo hills

As pertains to the facts alleged:

680. The Chamber has considered the testimonies of Witnesses F and R as regards the alleged participation of Musema in attacks near the end of April and the beginning of May 1994.

681. *Witness F* spoke of an attack he witnessed at some point between 17 and 30 April 1994 on Muyira hill. He described how assailants from Gisovu and Gishyita converged on the hill and launched a first attack on Muyira hill during which they were forced back by the refugees. Half an hour later, they regrouped, and launched a second attack. Witness F told the Chamber that he saw Musema during these attacks, carrying a medium length black rifle and firing shots at refugees who had surrounded a policeman, before running away to his own red car.

682. As for *Witness R*, he described to the Chamber an attack which he said took place on Rwirambo hill around the end of April or the beginning of May 1994. The witness identified Musema, armed with a rifle, amongst others, and saw a number of vehicles, including four tea factory pick-ups aboard of which were *Interahamwe*. The witness explained that as he fled the attackers, he was wounded in the arm by a gunshot coming from the direction of Musema and another.

683. The Chamber notes that Witness R previously testified in the *Kayishema* and *Ruzindana* trial under the pseudonym “JJ”. The Defence raised a number of apparent contradictions between the witness’ testimony in that trial and in this trial as regards the treatment he received for his gun shot wound.

684. Having considered the arguments of the Defence as to these discrepancies and the answers of the witness thereon, the Chamber finds Witness R to be credible. The questions raised by the Defence relating to the date of his injury and the manner in which it was treated did not elicit inconsistencies between the witness’ testimony in this trial and his earlier testimony in the trial of *Kayishema* and *Ruzindana*. He clarified that he had obtained penicillin not soon after the injury, which is when it was treated with cow butter, but much later. With regard to dates, the Chamber notes that the 29 April falls



within the time period 27 April to 3-4 May. While the specific date testimony is clearly more precise, the two testimonies are not inconsistent.

As pertains to the alibi:

685. The Chamber notes that the Prosecutor has alleged that the attack of 13 May followed a week and a half to two weeks of calm. The Chamber is therefore to assume that the attacks witnessed by R and F occurred before 3 May 1994.

686. It remains, as a result, for the Chamber to consider the alibi from 26 April to 2 May.

687. Musema stated that on 27 April he was in Rubona. On 28 April, he said he visited Kitabi factory, the stamp and date of arrival appearing on exhibit D10, and then returned to Rubona. These dates and movements were not contested by the Prosecutor. On 29 April he travelled to Gisovu with two gendarmes via Butare, Gikongoro and Gasaranda, arriving in Gisovu late in the afternoon. Exhibit D10 carries the stamp of Gisovu Tea Factory and the date of arrival, namely, 29 April 1994. Musema remained at the factory until 2 May taking care of business. A number of exhibits, including reports of minutes of meetings held on 29 and 30 April, and correspondence, were tendered by the Defence to support this. On 30 April he visited the *Préfet* of Kibuye who issued Musema with an “*Autorisation de Circulation*”, in which reference is made to the mission order. On 2 May, Musema said he left for Shagasha, departing between 10:00hrs and 11:00hrs and arriving there before 19:00hrs. Musema explained that he visited the Shagasha Tea Factory the next day which would explain why the date of 3 May 1994 appears on D10 as the date of arrival at this factory.



Findings:

688. The Chamber has considered the testimonies of Witnesses F and R and finds them to be credible. Musema admits to being in Gisovu from 29 April to 2 May attending to factory business. Thus, in the opinion of the Chamber, it is not excluded, considering the distance between Gisovu and the locations of the attacks, that Musema was both at the tea factory working and taking part in attacks, although at different times. Also, to have visited Kibuye on 30 April does not rule out that an attack involving Musema may have occurred on the same day.

689. However, of concern to the Chamber is the lack of specificity on the part of the Witness F as regards the date of the attacks. Witness F speaks of an attack which occurred between 17 and 30 April. Witness F's approximation, which takes 17 April as the earliest date, would suggest the attack he witnessed occurred closer to the middle of the month rather than later in the month.

690. For further guidance on this issue, the Chamber also considered the closing arguments of the Prosecutor, which includes a detailed chronology of the events and massacres as they evolved during April and May. However, no mention is made therein of the testimonies of Witness F and the attack involving Musema. This thus creates further ambiguity and doubt in the matter.

691. Consequently, the Chamber finds that it has not been established beyond reasonable doubt during the trial that Musema participated in the alleged attacks which occurred between 17 and 30 April.

692. As regards Witness R, who testified to Musema's participation in an attack which occurred around the end of April and the beginning of May, the Chamber notes that there also existed ambiguity during this testimony as to the exact date of the attack. Notwithstanding this, while testifying in the *Kayishema* and *Ruzindana* case, the witness was clear that he was injured on 29 April, the date of the attack. Thus, the Chamber is satisfied that it has been established beyond reasonable doubt that an attack occurred between 27 April and 3 May 1994 on Rwirambo hill.

693. Furthermore, the Chamber is of the opinion that the alibi does not cast doubt on the testimony of Witness R, and that his testimony is consistent and reliable. The Chamber consequently finds that



Musema, who was armed with a rifle, others unknown and *Interahamwe* aboard a number of vehicles, including four tea factory pick-ups, participated in an attack between 27 April and 3 May 1994 on Rwirambo hill. The Chamber also finds that as Witness R fled the attackers, he was wounded in the arm by a gunshot coming from the direction of Musema.

· The mid-May 1994 attacks, Muyira hill

694. The Chamber will now consider events which are alleged to have taken place in the middle of May 1994, namely the 13 and 14 May attacks and two other mid-May attacks. As the alibi pertains to this period as a whole, the Chamber will first deal with all the relevant witnesses for these attacks, and, if there is a case to answer, will consider the alibi for the period, before finally making its findings.

As pertains to the facts alleged:

· 13 May 1994, Muyira hill

695. As already stated, the attack which occurred on 13 May 1994 on Muyira hill took place after two and a half weeks of relative calm. This day was to see the biggest attacks so far launched against unarmed Tutsi refugees, who numbered between 15000 and 40000. According to witnesses, thousands of attackers came from all over the region in vehicles and on foot intent on killing the refugees.

696. The Prosecutor presented a number of witnesses to this attack. However, having considered the testimonies, the Chamber disregards the testimonies of Witnesses Z and G for a lack of reliability.

697. As regards *Witness Z*, it is questionable whether the witness could have heard what he claims to have heard Musema say, at the distance he says he was, namely the length of a five minute run, and from his position at the top of Muyira hill. The Chamber notes that in his prior statement dated 13 May 1995, Witness Z made no mention of the presence of Musema at the 13 May 1994 attack. His explanation for this omission in the main was that unlike in statements, before the court he could speak of everything he knew. The Chamber is not convinced by this explanation. Similarly, when questions were put to him relating to his testimony in the *Kayishema* and *Ruzindana* case and the discrepancies



with his testimony in this case, he was resistant and evasive. Consequently, the Chamber does not find the testimony of Witness Z to be reliable.

698. Considering *Witness G*, who said he saw attackers catch a woman on the instructions of Musema and subsequently that she was killed by Musema, the Chamber is also not convinced of the reliability of this witness. The Chamber notes that, whenever pushed for further details as to the number of attackers around the victim, the number of vehicles and distances, the witness consistently evaded the questions and presented long winded explanations as to why he could not remember such details, although he is an educated man. Whenever pressed for more information the witness seemed uncomfortable and very evasive. The Chamber notes, in contrast, that the witness had no difficulty in remembering the exact words of Musema during the unfolding of the events. Consequently the Chamber does not find the testimony of Witness G reliable.

699. Notwithstanding this, many witnesses presented a consistent account of events as they unfolded in the attack of 13 May 1994.

700. Witnesses F, P, T, and N all described how attackers from Gisovu, Gishyita, Gitesi, Cyangugu, Rwamatamu and Kibuye arrived in an array of vehicles, including Daihatsus belonging to the tea factory and ONATRACOM buses. Amongst the attackers, who were armed with traditional weapons, firearms, grenades and rocket launchers, the witnesses saw communal policemen, workers from the Gisovu Tea Factory wearing their uniforms, *Interahamwe*, prison guards, armed civilians, and soldiers. Leading the attackers from Gisovu were the *bourgmestre* of the commune Aloys Ndimbati, Eliezer Niyitegeka, Alfred Musema, and the *conseillers* of the *secteurs* of Gisovu *Commune*. Leading attackers from other regions were Kayishema, the *Préfet* of Kibuye, Charles Sikubwabo, the *bourgmestre* of Gishyita, Charles Karasankima, Sikubwabo's predecessor, *conseillers* of the *commune* of Gishyita, Obed Ruzindana and others. As the attackers approached the hill, they sang slogans such as "Exterminate them" and "Even the Tutsi God is dead".

701. *Witness F* said the attack against the Tutsi refugees started around 08:00hrs. He saw Musema, amongst the Gisovu group and bearing a firearm, although he did not personally see him fire the weapon. Witness F estimated that only 10000 or so of the 40-50000 Tutsi refugees survived the attack, those killed being old people, women and children, including five of his own children.



702. The testimony of Witness F, in the opinion of the Chamber, went virtually unchallenged by the Defence. On cross-examination the witness was questioned as to why he had not specifically mentioned Musema in his description of the May attack in his 1996 statement to the Prosecutor but had mentioned him in his description of an April attack. The witness in response cited the passage in his statement where he said of the May attack, “Leading these attackers who were divided into groups were the same persons I listed before [...]”. The Chamber notes that the cross-examination of Witness F, which was brief, in no way impaired his credibility, and the Chamber considers his evidence to be reliable. Moreover, the Chamber recalls that during his testimony in the *Kayishema* and *Ruzindana* case, as confirmed during his examination in this case, Witness F stated that he had seen Musema during the 13 May 1994 attacks.

703. *Witness P* lost his wife and two children during the attack. He explained how the assailants overpowered the refugees who, including himself, were forced to flee. Although the witness did not personally see Musema during the attack, he saw Musema’s red Pajero and tea factory Daihatsus which led him to conclude that Musema must have been present. Amongst the attackers he recognised tea factory workers by virtue of their uniforms.

704. The Chamber notes that in cross-examination, asked as to how he could conclude that Musema was present during the attack, Witness P stated that, in his view, the tea factory vehicles could not have been used without the permission of Musema, and that only Musema ever drove the red Pajero. While the Chamber finds the witness to be credible, his evidence is not probative of Musema’s presence at or participation in the attack at Muyira on 13 May. Nevertheless, it corroborates the testimony of other witnesses in important respects.

705. *Witness T* saw a green and a white Daihatsu belonging to the tea factory and tea factory workers wearing blue and khaki uniforms. Musema was seen by the witness amongst the leaders of the attack, bearing a firearm. The witness described how the attackers who had firearms protected those who were fighting in close against the refugees. Many refugees were killed and the survivors fled, their stones useless against the grenades of their assailants. The witness specified that he did not see Musema fire his weapon but presumed that he had.



706. The Chamber notes that in cross-examination, the witness was questioned by the Defence as to his previous statements and the lack of mention therein of Musema in relation to the above attack. Witness T explained that at the time he had not been asked specific questions about Musema save whether he knew him and could identify him, and whether he had seen him after the arrival of the French. The Chamber is satisfied with this explanation. The Chamber also notes that the cross-examination as a whole did not impair the credibility of the witness and the Chamber thus finds his evidence to be reliable.

707. *Witness N*, whose specific testimony on the fate of a certain Nyiramusugi will be dealt with in section 5.3 below, witnessed many attacks on Muyira hill on 13 May 1994. Amongst the attackers who arrived around 10:00hrs from Gisovu, the witness saw Musema aboard his vehicle which he described as a “Benz” because it was expensive, leading other vehicles, including three Daihatsus from the Gisovu Tea Factory. He elaborated, saying that save for these and four or five other vehicles, he was unable to identify others as they were hidden by trees.

708. He could not hear the attackers when they regrouped, though he could see them gesticulating and speaking. Witness N was able to hear Musema once the group had moved to within a few metres of him. Musema asked a policeman named Ruhindira to fetch a young woman called Nyiramusugi after having found out from him that she was still alive. Immediately after this, said the witness, the attackers from Gishyita launched the attack with gunfire. The attack lasted until 15:00hrs, and, according to the witness, Musema searched for the young woman throughout this period and shot people.

709. The Chamber notes that in cross-examination, the witness confirmed his testimony. To the issue of when and how he made his statement, the Chamber is satisfied with his explanation and does not find his credibility to have been impaired. Consequently, the Chamber finds the testimony to be reliable.

14 May 1994, Muyira hill

710. A number of witnesses testified that the attacks continued on 14 May 1994 against the surviving refugees on Muyira hill.



711. *Witness AC* described a big attack he saw on 14 May. He saw Musema arrive in his red Pajero and recognized a number of other “*dirigeants*”, which he cited in his testimony. The 5000 or so attackers, armed with rifles and traditional weapons, were predominantly Hutu and comprised gendarmes, soldiers, *Interahamwe*, tea factory workers recognizable by their uniforms and other assailants some of whom wore political party emblems.

712. The witness described the attack which was led by Musema and Ndimbati. It was started by Ndimbati who fired a gunshot into the air. Musema, carrying a firearm and a belt of ammunition then fired gunshots, which, according to Witness AC hit an old man by the name of Ntambiye and another person by the name of Iamuremye. On being attacked by the assailants led by Musema and Ndimbati, the refugees defended themselves with stones but the military fired tear gas at them. Overpowered, the refugees fled. Around 18:00hrs the attackers left.

713. The Chamber notes that there was no cross-examination of this witness specific to this attack. Other issues raised on cross-examination, however, raise questions as to the reliability of the witness’ testimony. There are many confusing elements in the testimony. It is unclear, for example, whether or not he attended the meeting in Kibuye. It is also unclear why he had such difficulty remembering names of gendarmes, whose names he was able to recall during his testimony in the *Kayishema* and *Ruzindana* case. When asked to explain these divergences in his testimony he was willing to provide them in this case. The Chamber considers that the Defence did not establish that the testimony of Witness AC was untruthful in any material respect. However, in light of the confusion which emerges from the cross-examination, the Chamber is willing to accept the evidence of this witness only to the extent that it is corroborated by other testimony.

714. *Witness F* was injured by shrapnel and a gunshot during an attack of 14 May on Muyira hill and surrounding hills. Although he did not see Musema during the attacks, he did see Musema’s red car among the vehicles of other attackers. As previously stated with regard to the 13 May 1994 attack, the Chamber finds the testimony of Witness F to be reliable.

715. *Witness T* also saw Musema participate in a large scale attack on Muyira hill. He explained that he saw Musema on an opposite hill, armed with a rifle which he presumed Musema utilized during the



attack. The Chamber recalls its findings as pertains to this witness on his testimony on the 13 May attack, and thus considers him to be reliable.

716. *Witness D* spoke of a large scale attack which took place on the day of Sabbath, 14 May 1994, during which she saw Musema and other leaders including Kayishema and Ndimbati. The assailants, numbering 15000, armed with firearms, grenades and traditional weapons, and singing “Let’s exterminate them”, arrived in an array of vehicles and attacked the refugees, the attackers being armed with traditional weapons, and finishing off the refugees who had been injured with bullets.

717. In cross-examination, *Witness D* confirmed her above testimony. The Chamber notes that she was careful to explain that she could only see certain vehicles but could not identify those aboard and that when the vehicles parked she lost sight of them. *Witness D* gave the further precision that she only saw the attackers once they had disembarked and were making their way to the refugees, after which she fled. The Chamber notes that the cross-examination did not impair the credibility of the witness’ testimony and therefore finds it to be reliable.

The two attacks in mid-May 1994

718. The Chamber notes that, in its opinion, the expression mid-May would seem to indicate a day between 10 and 20 May, and shall thus consider the testimonies of *Witnesses H* and *S* with this in mind.

719. *Witness H* testified about a first attack which occurred in mid-may 1994 against Tutsi refugees on Muyira hill, Musema leading attackers from Gisovu, including *Interahamwe*, and tea factory workers in blue uniforms. The witness saw Musema’s red Pajero and four tea factory vehicles stop at Kurwirambo. The witness gave a detailed description of the attackers he saw, in terms of dress and weapons. Amongst the attackers were soldiers, gendarmes and civilians. According to the witness, Musema launched the attack with a gunshot and personally shot at refugees although he could not say whether he actually hit anyone.

720. At some point during the attack, the refugees were able to drive back the assailants and attempted to grab Musema but were prevented from doing so by other attackers.



721. The Chamber is satisfied with the explanations given in cross-examination by Witness H as to how he could identify the tea factory vehicles and Musema's Pajero. Other issues raised in cross-examination did not impair the credibility of Witness H. The Chamber therefore considers the testimony of Witness H to be reliable.

722. *Witness S* saw Musema take part in an attack involving between 120 and 150 assailants sometime near the middle of May on Mpura hill and in Birembo. The witness saw three Daihatsus belonging to the tea factory and Musema's red Pajero. Amongst the attackers were communal policemen and tea factory employees wearing tea factory uniforms and caps, and armed with traditional weapons.

723. The vehicles, except Musema's, collected more assailants from Gisovu, while more persons arrived from Gishyita. Once all the assailants were in place, they held a small "meeting" and, with a blow of whistles, launched their attack against Sakufe's house on Mumataba hill, the place of refuge for 2000-3000 Tutsis. Most of the refugees, including relatives of the witness, were killed. Throughout the attack, Musema stayed by his car with persons dressed in white, and left for Gisovu with other attackers around 17:00hrs.

724. In cross-examination, Witness S described in more detail the area of the attack by reference to Prosecutor photo exhibits 20.1 and 20.2. Other issues raised during the cross-examination of the witness, in the opinion of the Chamber, in no way lessened his credibility and his testimony is, as such, reliable.

As pertains to the alibi for all the Muyira hill mid-May attacks:

725. The Chamber has considered the alibi of Musema for the period of 7 to 19 May, during which Musema testified that he was in Rubona and visited Gitarama on occasions. The Defence presented a number of documents to support the alibi and also the testimony of Witnesses MG, MH and Claire Kayuku.



726. The Chamber notes that Musema stated that he visited Mata tea factory on 7 May 1994, the signature of the chief accountant of the Mata tea factory and the stamp appearing on the mission order not being specifically contested by the Prosecutor. After this visit, asserts Musema, he returned to Rubona where he stayed until 19 May 1994, not visiting any other factories, nor going beyond the town of Butare and Gitarama and thus not setting foot in Kibuye *Préfecture*.

727. Witness MH remembers meeting Musema in Gitarama on 10 May and in Rubona on 13 May 1994. In direct examination, Witness MH stated that he met Musema only once in Gitarama, most probably on 10 May 1994, although he was unable to provide the Chamber with details as to the length or subject of the conversation he had with Musema on this day, save that he believed they may have discussed the situation in Rwanda. The Chamber notes that in cross-examination, he indicated that they did not speak about why Musema had come to Gitarama and that he could not remember five years later the type and colour of the vehicle driven by Musema. In support of the alibi for this date, the Defence presented exhibit D46, a letter 18 May 1994, and a note entitled “*A qui de droit*” dated 10 May 1994 in Gitarama. Musema testified to receiving this note from the Minister of Defence on 10 May 1994, and contended that, had he been in Gisovu, he would not have waited eight days to transmit it.

728. As regards 13 May 1994, Witness MH, who on this day was fleeing to Burundi, stated that he saw Musema on 13 May 1994 for approximately 20 minutes in Rubona at the residence of the Kayuku family. He confirmed this in cross-examination.

729. The Chamber notes that the witness testified that he had last used his passport in 1994, when in fact it was evident from the document that it had been used in 1995.

730. According to Claire Kayuku, Musema returned to Gisovu around the middle of May to pay the tea factory employees. She added that, in the beginning of May, Musema’s Pajero spent one or two weeks in a Butare garage undergoing repairs. Musema had explained that he had developed car problems on 7 May while in Mata, and that he remained in the Butare region until the car was repaired. A replacement car from the factory only reached him on 19 May by which time his Pajero was roadworthy. Exhibit D47, the minutes of a 19 May 1994 meeting at the factory, refers to Musema’s broken down car and the resultant delay in returning to the factory.



731. According to Exhibit P68, the handwritten calendar personally made by Musema, he was in Gisovu from 4-14 May 1994. The Chamber recalls also that according to the record of an interview with Swiss authorities which took place on 16 March 1995, Musema again said he was in Gisovu during the week of 4-13 May 1994. When presented with these dates during the cross-examination, Musema indicated that these were errors. The Chamber notes at this juncture that, according on the handwritten calendar (P68) Musema indicated that the Gisovu Tea Factory started production again on 9 May 1994.

732. A number of documents were tendered by the Defence to demonstrate that Musema was absent from Gisovu Tea Factory between 7 and 19 May 1994. Exhibit D35 is a letter dated 8 May 1994 from Musema to the Director-General of *OCIR-thé* in Kigali, annexed to which is the mission report, which Musema says was typed by the secretarial services of ISAR at Rubona. Musema explained that he made ten copies of the report for transmission to the directors of the visited tea factories and handed over a copy for the Director-General of *OCIR-thé* on 10 May 1994 to the Commercial Bank in Gitarama which had a convoy going to Gisenyi. The Chamber notes that this letter, signed by Musema, is on Gisovu Tea Factory headed paper and moreover would appear to have been written in Gisovu.

733. Exhibit D45 contains a copy of a receipt dated 14 May 1994 from a FINA petrol station in Gitarama for a cash payment made by Musema for fuel for the Pajero, registration number A7171. Exhibit D36 is a letter written by Musema on 14 May 1994 in Butare, by which the Defence alleges Musema appears to be a man just observing the events. Exhibit D92 is a letter written by MG in Nairobi on 7 June 1994, in which she writes that, before 17 May, the Musema family was still in Butare. During her testimony Witness MG specified that she could not confirm whether or not the family was in Butare at that date. Exhibit D37, dated 16 May 1994, is a certificate of complete identity issued for one of Musema's sons and required for the issuance of a passport. Exhibits D38, D39 and D40 are copies of passports issued on 18 May 1994 in Gitarama, for Musema's sons, D40 being signed by Musema for his thirteen year old son. Numerous other documents were produced, including letters which were received at the tea factory during this period but which were either not acted upon until much later by Musema or not even seen by Musema, for instance exhibit D43, a letter dated 16 May 1994 from the Chief of Personnel to the *bourgmestre* of Gisovu, in furtherance of discussions held on 13 and 16 May respectively and regarding weapons training of security personnel. Exhibit D41, a



request for employment, received 5 May 1994 at the tea factory, was only dealt with by Musema on 14 June 1994. Exhibit D42, a request for accommodation for security reasons, was received on 11 May 1994, yet there appears no date as to when the request was dealt with. Exhibit D44, a request for accommodation, received at the tea factory on 16 May 1994 was dealt with by Musema only on 14 June 1994.

734. The Chamber has considered all the above evidence. As regards the testimony of MH, the Chamber notes that, as regards the meeting of 10 May with Musema, the witness was unable to provide any specific details, this contrasting with his testimony on the meeting of 13 May 1994, which is detailed and specific in a number of ways. The Chamber notes however that the latter testimony is uncorroborated by other Defence evidence, including Musema's testimony. Claire Kayuku testified that Musema returned to Gisovu during the middle of May to pay the employees, whereas the handwritten calendar drafted by Musema, exhibit P68 and his statement to the Swiss *juge d'instruction* of 16 March 1995, similarly place Musema in Gisovu between 4 and 14 May. The testimony of MH is thus of little probative value as it is unsupported by any other direct evidence.

735. Other evidence would suggest that Musema was indeed in Gisovu during this period. Exhibit D35, the cover letter for the mission report, is dated 8 May 1994 in Gisovu. According to Musema, this letter was typed up in Rubona.

736. In the handwritten calendar, Musema clearly indicates that on 9 May 1994, the tea factory re-started production. This date is confirmed in his mission report. Moreover in exhibit P56 Musema states that "[o]n 3 May, I once again visited the factories in the South West, that is, Gisakura and Shagasha. I then returned to Butare. On 7 or 8 May, I returned to Gisovu and on 9 May, I supervised the resumption of operations of the factory. I remained there until 19/20 May and travelled to Butare to join my family."

737. The Chamber finds Musema's supposed absence from the factory on this occasion irreconcilable with his evidence during this case, evidence which tends to portray Musema as a dedicated director of the tea factory who at all times shared equivalent concerns for the safety of his family and for the factory, often, according to him, leaving the former to rejoin the latter, for example



in April, May, June and July 1994, despite threats to his safety. Moreover, in exhibit D51, the report of the meeting of 27 May 1994, recalls the minutes of the meeting of 19 May 1994, and states “[t]he meeting of 19 May 1994 also discussed the breakdown that the manager had asked the Agronomist Benjamin KABERA to repair and which was not done in good time (after 10 days) giving rise to heavy loses (*sic*);[...]”. This would presuppose that the Agronomist had received instructions on 9 May 1994. The Chamber also presupposes that as it was now Musema himself dealing with this breakdown, as the Director of the tea factory, he must have either directly or indirectly given the original instructions.

738. Musema, throughout his testimony, affirmed that his handwritten calendar and the Swiss statements were inaccurate, and that any errors therein were subsequently corrected as documents were uncovered during investigations from, amongst other places, Gisovu Tea Factory. In some instances, such an explanation is valid. However, as regards the present period, the Chamber cannot accept such an explanation. In the said calendar and the 16 March 1995 Swiss statement, Musema clearly remembers being in Gisovu between 4 and 14 May 1994, and recalls that he was present the day the tea factory started up production. To remember such an occasion and one’s presence thereat, is not, in the opinion of the Chamber, something one forgets and recalls only after seeing newly uncovered documents. Rather, it is an event which, as Director of the tea factory, Musema would beyond any doubt not have forgotten.

739. The Chamber notes other discrepancies in the alibi as regards his vehicle, registration A7171, which he says developed problems on 7 May 1994 and was not repaired until 19 May 1994 in Butare, being the date on which he finally returned to Gisovu. Exhibit D45, dated 19 May 1994, includes a bill for repairs to the vehicle in April 1994 and a petrol receipt from a FINA petrol station in Gitarama dated 14 May 1994. The Chamber must raise a number of issues as regards this exhibit. If the Chamber were to follow Musema’s version of the events, the Pajero, registration A7171, could not have been fit enough to drive from Butare, where he says it was being repaired, to Gitarama before 19 May 1994. Thus, notes the Chamber, the above mentioned petrol receipt puts into doubt Musema’s testimony.

740. Whereas, if the Chamber accepts the handwritten calendar and the said Swiss statement, the FINA receipt would support the dates therein by confirming that Musema travelled on 14 May 1994. In the opinion of the Chamber, the receipt, and the letter of 14 May 1994 which Musema says he wrote



in Butare, are by themselves, insufficient to refute the possibility that on the same day, yet at a different time, Musema was in the Bisesero region.

741. Moreover, the Chamber notes that Musema advanced no details, namely with which vehicle or other mode of transport, as to how he travelled to Gitarama on 18 May 1994 to collect the passports of his sons. The Chamber finds this at odds with his alibi, as, to have indicated such details would have given support to his testimony.

742. The Chamber notes that Musema kept his receipt for car repairs dated 19 April 1994, and the petrol bill of 14 May 1994, yet kept no such receipts kept for the repairs, which according to Musema, occurred between 7 and 19 May 1994.

743. As regards the specific attacks of 13 and 14 May 1994 and the name of the hills, the Chamber considers, as put to Musema, at trial, that one would remember where one was when such momentous massacres in the Bisesero region occurred, without having to consult a calendar. The Chamber cannot accept the explanations given by Musema that he only knew of these massacres from hearing of them on the radio and because they were discussed at a meeting at the Gisovu tea factory on 19 May 1994. Nor can the Chamber accept that Musema did not know the names of specific hills in the Bisesero region, considering that he had been director of the Gisovu tea factory since 1984 and that, as testified by numerous witnesses, there were many “*thé villageois*” plantations on hills around the Bisesero region. Such plantations, in the opinion of the Chamber, would undoubtedly have been visited by Musema in his capacity as director of the tea factory.

744. The Defence has argued that certain documents, such as receipts and correspondence, and even Musema’s delays in replying to correspondence, should be interpreted as supporting his defence of alibi. In the Chamber’s view, this evidence, while it may in some cases be consistent with the alibi, is not probative thereof. For example, the failure of Musema to reply to correspondence received in May 1994 until June 1994 could be explained by his absence from the tea factory in Gisovu, or it could be explained in many other ways, for instance that he was attending to other issues. Such delays, in the opinion of the Chamber, do not, in themselves, support the alibi that Musema was absent from the Gisovu tea factory in mid-May 1994.



745. In light of the above, the Chamber must reject the alibi of Musema as regards 13 May, 14 May and mid-May 1994, as it is not supported by evidence sufficient to cast any doubt on the overwhelming reliable evidence for this period presented by the Prosecutor.

Findings on all the mid-May Muyira hill attacks:

746. The Chamber therefore finds that, on the basis of consistent and reliable evidence presented by the Prosecution witnesses discussed above, it has been established beyond reasonable doubt that Musema participated in attacks against Tutsi refugees in the Bisesero region in mid-May 1994, including on 13 and 14 May.

747. Consequently, the Chamber finds that it has been established beyond reasonable doubt that on 13 May 1994, a large scale attack occurred on Muyira hill against up to 40000 Tutsi refugees. The attack started in the morning. The attackers, who had arrived at Muyira hill on foot and in an array of vehicles including Daihatsus belonging to the Gisovu Tea Factory, were comprised of Gisovu Tea Factory workers in uniform, gendarmes, soldiers, civilians, and *Interahamwe*. The attackers were armed with firearms, grenades, rocket launchers and traditional weapons, and sang anti-Tutsi slogans.

748. The Chamber finds that it has been established beyond reasonable doubt that Musema was one of the leaders of the attackers coming from Gisovu and drove his red Pajero to the attack. Musema was armed with a rifle. The Chamber finds that it has been established beyond reasonable doubt that he used the weapon during the attack. The Chamber finds that it has been proved beyond reasonable doubt that thousands of unarmed Tutsi men, women and children were killed during the attack at the hands of the assailants and that many were forced to flee for their survival.

749. The Chamber finds that it has been established beyond reasonable doubt that during the attack, Musema asked one of the attackers, a certain policeman by the name of Ruhindara to fetch a young woman called Nyiramusugi after having found out from him that she was still alive. The Chamber finds that Musema searched for the young woman throughout this period.



750. ~~As regards 14 May 1994, the Chamber finds that it has been established beyond reasonable~~ doubt that a large scale attack occurred on Muyira hill 14 May 1994 against Tutsi civilians, and that the attackers, numbering as many as 15000, were armed with traditional weapons, firearms and grenades, and sang slogans.

751. The Chamber finds that it has been established beyond reasonable doubt that Musema was amongst the leaders of the attack of 14 May 1994 and that his red Pajero was at the site of the attack. The Chamber finds that it has been proved beyond reasonable doubt that Musema was armed with a rifle during the attack.

752. The Chamber does not find that it has been established beyond reasonable doubt that Musema shot a certain Ntambiye and a certain Iamuremye during the attack.

753. The Chamber is satisfied that it has been established beyond reasonable doubt that Musema participated in an attack in mid-May 1994 on Muyira hill against Tutsi refugees. The Chamber finds that it has been established beyond reasonable doubt that Musema led attackers, including *Interahamwe* and tea factory workers from Gisovu. It has been established beyond reasonable doubt that Musema's red Pajero and tea factory vehicles were seen at the attack.

754. The Chamber finds that it has been proved beyond reasonable doubt that Musema launched the attack with a gunshot and personally shot at refugees. It has not been established, however, that Musema actually hit anyone with his gunshots.

755. The Chamber is satisfied beyond reasonable doubt that Musema participated in an attack on Mumataba hill in mid-May 1994. It has been established that the assailants, numbering between 120 and 150, included tea factory employees, armed with traditional weapons, and communal policemen.

756. The Chamber finds that it has been established beyond reasonable doubt that in the presence and with the knowledge of Musema, tea factory vehicles transported attackers to the location. It has been established beyond reasonable doubt that the attack was launched on the blowing of whistles, and



that the target of the attack were 2000 to 3000 Tutsis who had sought refuge in and around a certain Sakufe's house.

757. The Chamber finds that it has been proved beyond reasonable doubt that Musema remained next to his vehicle, with others, throughout the attack, and left with attackers for Gisovu around 17:00hrs.

- End of May attack at Nyakavumu cave

As pertains to the facts alleged:

758. Witnesses AC, H, S and D, all testified about an attack which occurred at Nyakavumu cave.

759. *Witness AC* saw Musema amongst others arrive at the cave in which 300 people had sought refuge. Following orders from Ndimbati, Ruzindana, Musema, Niyitegeka and Kayishema, the cave was sealed with wood, then a man from Gisovu set the wood on fire with kerosene and grass. Only one of the refugees survived, while the others were asphyxiated to death by the smoke.

760. The Chamber has considered the issues raised during cross-examination and is satisfied by the explanations given by the witness. Notwithstanding this, and as the Chamber stated in its factual findings on 14 May 1994, the testimony of Witness AC shall only be accepted as evidence to the extent that it is corroborated by other testimony.

761. Sometime around the end of May early June, said *Witness H*, he saw Musema shortly before the attack, in a convoy going in the direction of the cave, and thus presumed that he must have been present at the cave. Within the convoy was Musema's Pajero and tea factory vehicles. The witness observed from a nearby hill assailants destroy the fence of houses in the vicinity for firewood and set light to the entrance of the cave. Only one person survived the fire.

762. The Chamber considered the issues raised in cross-examination and deems them not to have impaired the reliability and testimony of Witness H.



763. *Witness D* observed the attack from a cave and said she saw Musema amongst the assailants. From where she was hiding, she said that she was able to see the attackers start a fire at the entrance of the cave and that the smoke suffocated the 400 refugees inside. After the attack she went down to the cave and saw many bodies, and then fled. The Chamber notes that during her testimony, she was unable to say exactly when the attack occurred.

764. In cross-examination, *Witness D* specified that she was unable to see any vehicles from where she was hiding on the side of the hill. The Chamber found this witness to be consistent and reliable throughout her testimony.

765. *Witness S* described how sometime near the end of May, attackers chased refugees who were fleeing towards Kigarama hill. Amongst the attackers he saw Musema, who was armed with a long rifle, and tea factory workers aboard factory vehicles. The refugees were forced to split into three groups, one of which went towards Nyakavumu cave.

766. According to the witness, the assailants with Musema blew their whistles and shouted three times to call back those attackers who had gone beyond Nyakavumu cave. The attackers then gathered around Musema for a couple of minutes and exchanged a few words, after which they destroyed a nearby house for firewood which they took to the cave.

767. A short while later, although he did not see the attack on the cave, *Witness S* saw smoke rise. The witness indicated that he had hidden his wife in the cave the very same day.

768. After the attackers had left, he and eight others went to the entrance of the cave, and pulled out three survivors, two of whom died the next day.

769. In cross-examination, the Defence referred to a previous statement of the witness in which he provided more details on the involvement of Musema in the attack. In this regard, the witness stated, as he had in direct-examination, that he did not actually see the attack on the cave. This and other issues



raised in cross-examination did not impair the credibility of Witness S, and thus the Chamber finds him to be credible.

770. The Chamber has also considered the testimony of *Witness AB* who testified that sometime in the month of June he saw Musema, who was armed and wearing a military jacket, at the Kibuye military camp in the company of second Lieutenant 'Buffalo' Ndagijimana, Ndimbati and Doctor Gérard Ntakirutimana. The witness overheard them discussing one last operation that had to be carried out in Bisesero. According to the witness, Musema said that information that he had received indicated that Tutsis were hiding in the tin mines and that, according to the witness, Musema said that he therefore needed a lorry load of firewood to start a fire at the entrance of the hole where they were hiding, and consequently to block the hole to prevent anyone getting out. Although Musema asked an officer of the camp for the wood, the witness could not say whether any was given to him.

771. In cross-examination, Witness AB confirmed that Musema had come to the camp in his red Pajero. The witness added that he had never been to the cave where many people had died. Other issues raised in cross-examination did not impair on the consistency of the witness' testimony.

772. The Defence admitted that such an attack took place near the end of May or in June 1994 and that those who had sought refuge in the cave were Tutsi civilians.

773. Having considered all the above evidence, it would appear, in the opinion of the Chamber, that the attack on the cave occurred at some point between the end of May and early June.

As pertains to the alibi:

774. The Chamber has considered the alibi for this period.

775. The alibi places Musema in Gisovu on 27 and 28 May 1994, at the Gisovu Tea Factory, and is supported by documentary evidence and the testimonies of Claire Kayuku and of Musema. Musema travelled to Shagasha with his family on 29 April 1994. Then, according to the alibi, on 30 May 1994 until 10 June 1994, Musema was away from the Gisovu Tea Factory, having traveled on 30 May to



Shagasha. He rejoined a technical mission in Cyangugu and spent the day in Zaire on 31 May. Copies of his passport and the pertinent border stamps were filed in support of this alibi.

776. On 1 June 1994, according to the alibi, Musema went to Shagasha where he stayed with his family until returning to Gisovu on 10 June. Exhibit D57, issued in Cyangugu, was produced to support the alibi of Musema for 3 June, and exhibit D58 for 6 June 1994.

777. Claire Kayuku confirmed that Musema stayed with her and the family until 7 or 10 June 1994. The Chamber notes that all of the above evidence is corroborated by Musema's handwritten calendar (P68), which indicates that he left Gisovu on 29 May with his family and returned to Gisovu only on 10 June.

Findings:

778. The Chamber notes that the alibi does not specifically refute the presence of Musema at the cave. Although the exact date of the attack is unclear from the testimonies, the Chamber notes that the witnesses all provided an overall consistent account of the events at Nyakavumu cave throughout their testimonies. The fact that the date of the attack is unclear does not, in the opinion of the Chamber, impair on the reliability of the witnesses.

779. The Chamber therefore finds that on the basis of the overwhelming evidence of four Prosecution witnesses, all of whom presented consistent testimonies as to the attack on the cave, the Chamber rejects the alibi and finds that it is established beyond reasonable doubt that Musema participated in the attack on Nyakavumu cave.

780. The Chamber consequently finds that it has been established beyond reasonable doubt that Musema participated in the attack on Nyakavumu cave at the end of May 1994. It has been established that Musema was aboard his Pajero in a convoy, which included tea factory Daihatsus aboard of which were tea factory workers, travelling towards the cave. It has been proved beyond reasonable doubt that Musema was armed with a rifle. It has been established beyond reasonable doubt that Musema was present at the attack during which assailants closed off the entrance to the cave with wood and leaves,



and set fire thereto. The Chamber finds that it has been proven beyond reasonable doubt that over 300 Tutsi civilians who had sought refuge in the cave died as a result of the fire.

· Attack of 31 May 1994, Biyiniro hill

As pertains to the facts alleged:

781. *Witness E* saw Musema during an attack on Biyiniro hill after fleeing from the adjacent Muyira hill where 20000 refugees were being attacked by assailants from Gishyita and Gisovu. Amongst the attackers were tea factory employees in uniform and gendarmes who had arrived aboard an array of vehicles including tea factory Daihatsus. The refugees, who identified Musema as one of the leaders and as a provider of vehicles for the attackers, tried to catch him. Musema fled in his Pajero under the cover of gunshots of soldiers. The attack continued after the departure of Musema.

782. In cross-examination, the witness provided more details as to the geographical location of the attack and as regards the types of vehicles he saw.

As pertains to the alibi:

783. According to the alibi, Musema, after having spent the night in Shagasha, returned to Cyangugu on 31 May 1994 to continue his participation in a technical mission. Musema travelled with the rest of the mission to and from Zaïre on that day. In support of the alibi, the Defence tendered exhibit D56, containing a photocopy of page 12 of Musema's passport, showing two signed stamps by the Rwandese immigration authority in Bugarama, one of exit and one of entry, and also two signed stamps by the "*Poste frontalier*" of Kamanyoma in Zaïre, all four stamps dated 31 May 1994. The Defence also tendered exhibit D54, being an "*Autorisation de sortie de fonds*" dated 29 May 1994, authorising advance payment of funds to Musema for a mission to Zaïre.

Findings:



~~784. Although the Chamber finds that the evidence presented by *Witness E* was consistent throughout his testimony, the alibi and the documents tendered in support thereof are such as to cast doubt on the allegations of the Prosecutor. Therefore, the Chamber does not find Musema's alleged participation to the attack on Biyiniro Hill on 31 May 1999 to have been established beyond reasonable doubt.~~



Attack of 5 June 1994, near Muyira hill

As pertains to the facts alleged:

785. Witness E saw Musema in his car on 5 June 1994 near Muyira hill and a number of tea factory Daihatsus parked on the road at the Gishyita-Gisovu border, near Muyira hill. The attackers seen by the witness included gendarmes, tea factory workers, communal policemen, *Interahamwe* and guards. Musema, who carried a rifle, and other leaders, including Kayishema, Sikubabwo and Ruzindana, gave instructions to the attackers who subsequently killed many refugees, including the witness' younger sister. Musema is said also to have fired shots with a rifle during the attack.

786. The Chamber recalls its recent findings as regards the cross-examination of this witness on the attack on 31 May 1994 near Biyiniro Hill, and notes that the evidence presented by the witness was consistent throughout his testimony. The Chamber confirms this also with respect to his above testimony.

As pertains to the alibi:

787. Musema's alibi alleged that after meeting in Cyangugu, Musema travelled back to Shagasha where he and his family remained until 10 June 1994. This alibi was supported by exhibits D57, 58 and 59, the testimony of Musema and that of Defence Witness Claire Kayuku. The Chamber notes that cross-examination during Musema's testimony did not specifically challenge the alibi for this period.

Findings:

788. In light of the above, although the evidence presented by Witness E was found to be consistent throughout his testimony, the alibi of Musema for these dates, supported by documentary evidence and oral testimony, and scrutinized by the Chamber is, in the opinion of the Chamber, such as to cast a reasonable doubt on the allegation of the Prosecutor as to the involvement of Musema in the attack of 5 June 1994 as alleged.



789. ~~As such, the Chamber finds that it has not been proved beyond reasonable doubt that Musema participated in the attack of 5 June 1994.~~

- 22 June 1994, Nyarutovu cellule

As pertains to the facts alleged:

790. It was alleged by *Witness P* that Musema led an attack on 22 June 1994 in Nyarutovu *cellule*. *Witness P* described how Musema stopped in a blue Daihatsu on the Gishyita road, about 30 metres from where he was. Musema was standing on the road next to the vehicle when he shot him, holding a firearm with two hands. He described how two shots were fired, one of which hit him in the ankle, and one of which hit and killed a certain François, who was with him.

791. *Witness P* also stated that Musema instructed Tea Factory workers who were with him to catch a young woman that was with the witness, who had run away, and to bring her back alive, so that “they could see how Tutsi women were made”. After the attackers caught the young woman and put her in the vehicle, Musema drove off with them in the direction of Gisovu.

792. In cross-examination the witness advanced more details relating to the allegations, including the fact that he had not seen Musema fire the shots, but that he assumed it was he who had fired, since he saw Musema aim, before he was shot in the ankle, and Musema was the only one in the group with a firearm.

793. The Chamber notes that this cross-examination did not undermine his testimony, and, accordingly, finds the evidence presented during his testimony to be consistent.

As to pertains to the alibi:

794. According to the alibi, Musema was in Gisenyi on 22 June until 27 June, conducting business. During this period he also visited Goma, in Zaïre. He returned to Gisovu on 28 June 1994. This alibi was supported by exhibits D65, 90 and 91, and by the testimony of Claire Kayuku.



Findings:

795. Despite the consistent evidence of Witness P, the Chamber finds that Musema's alibi for this date, heavily scrutinized by the Chamber, supported by documentary evidence and oral testimony, is such as to cast doubt on the allegation of the Prosecutor as to the involvement of Musema in the events alleged of 22 June 1994.

796. As a result, the Chamber finds that it has not been proved beyond reasonable doubt that Musema led or participated in an attack in Nyarutovu *cellule* on 22 June 1994.



5.3 Sexual crimes

797. The Chamber will now assess, one by one, four paragraphs (4.7 to 4.10) of the Indictment according to which Musema allegedly committed crimes connected with sexual offences (cf. *Annex A* to the Judgement).

General allegations of rape and of encouraging others to capture, rape and kill Tutsi women throughout April, May and June 1994 (paragraph 4.7)

798. Paragraph 4.7 of the Indictment states the following:

“At various locations within the area of Bisesero and Gisovu, in the prefecture of Kibuye, throughout April, May and June 1994, Alfred Musema, committed acts of rape and encouraged others to capture, rape and kill Tutsi women, seeking refuge from attacks within the area of Bisesero in Gisovu and Gishyita communes, Kibuye Prefecture.”

799. Musema admitted that there had been mass killings at the Gisovu Tea Factory and around.

800. *Witness M* testified that during the meeting held on Karongi hill on 18 April 1994, Musema said that “those who wanted to have fun could rape their women and their children, without fearing any consequences”¹⁸³, referring to Tutsi women and children.

¹⁸³ The French transcript reads “Pour ceux qui voulaient s’amuser, ils pouvaient violer leurs femmes et leurs filles, sans craindre aucune conséquence”(transcript of 30 April 1999, p.30).



801. ~~Witness M also testified that subsequently, the day after, on 19 April, two of the men who had~~ attended this meeting, together with three other men, took part in the rape of his cousin and niece, on the hill of Rushekera, opposite to Mount Karongi. Witness M was hiding in the undergrowth on a hillside opposite the hillside where the rapes took place. He said that he was at no more than 300 metres from where the attackers were. In the course of the cross-examination, witness M confirmed that he saw the five rapists at a distance of between 250 and 300 meters. The witness explained that the women were dragged out of the bushes to a more visible area on the “terraces” on the hillside used for cultivation.

Factual Findings:

802. According to the Chamber, the Prosecutor has not proven beyond reasonable doubt that Musema was present at the meeting on 18 April 1994 on Karongi hill. The Chamber here refers to its factual findings in Section 5.2 above, under the heading “Karongi hill FM Station, 18 April 1994”.

803. Under these circumstances, the Chamber considers that there is no evidence that Musema ordered the rapes.

804. Concerning the general allegations in paragraph 4.7 that Musema himself committed acts of rape throughout April, May and June 1994, the Chamber refers to its conclusions below regarding paragraphs 4.8 to 4.10 of the Indictment.

Alleged acts of rape and murder of Annunciata Mujawayezu on 14 April 1994 (paragraph 4.8)

805. Paragraph 4.8 of the Indictment reads as follows:

“On 14 April 1994, within the area of the Gisovu Tea Factory, Twumba Cellule, Gisovu Commune, Alfred Musema, in concert with others, ordered and encouraged the raping of Annunciata, a Tutsi woman, and thereafter, ordered, that she be killed together with her son Blaise”.



806. ~~Witness I~~, a 32 year-old Tutsi woman, testified that in 1994 she was working as a teacher in a primary school. Her husband worked in the Gisovu Tea Factory from 1992 to 1994, and they lived within the factory premises. The witness testified that when the killing began at the tea factory, she and her youngest child took refuge in the Guest House where they were discovered by *Interahamwe*. The *Interahamwe* showed her a list of people to be killed. The first name on the list was her husband's, and her own name was second. Next on the list were the names of Canisius, the Chief Accountant of the factory, and his wife Annunciata Mujawayezu and their children. Two of Annunciata Mujawayezu's children were killed at that time by the *Interahamwe*. Annunciata Mujawayezu escaped and went to hide in the tea plantations. The witness testified that on that day, 13 April, Canisius was killed.

807. Witness I was held by the *Interahamwe* to wait for the arrival of Musema, together with the children of a certain Ndoli. On the next day, 14 April, the witness saw Musema arrive in his vehicle at the tea factory. He was accompanied by two soldiers, whom she named, in a second vehicle. She said they told her that they had come for her children and for the children of Ndoli. Ndoli's children were killed on the spot by an old man who did not want them to suffer. The witness testified that Musema asked where her children were and ordered them to be taken away to be drowned or put in bags and beaten like rats. Her two children, one and three years old, were then taken from the house. The witness followed the vehicle, throwing stones at it. Though she was later reunited with her own children, Witness I testified that she subsequently discovered sacks which had been thrown away in the forest containing bodies of dead children, some of which had been decapitated, as well as some children still alive, in the throes of death. The witness recognized many of these children whom she named at trial.

808. When asked whether they should kill Witness I, the witness heard Musema say no, that they should take her with him to the guest house. The witness testified that with the help of someone called Mushoka, she was able to escape and hid in a nearby bush. She then met Annunciata Mujawayezu who said she was hiding in Ndoli's house. They decided to go and hide close to the guest house in the tea plantation so that they could hear what was being said and know where attacks would be made and where they could hide. Annunciata Mujawayezu was with her child Blaise.



809. ~~Witness I testified that Musema and other people came to the bungalow, close enough for~~ her to hear what they were saying. Annunciata Mujawayeze's child Blaise, a five year old, then began to cry from hunger, and she told Witness I that she did not want everyone to be killed so she was leaving with the child. She then stood up, and Musema called her from the bungalow and told her, "come we are going to kill you like the Inyenzi killed our own people." According to Witness I, Musema then called the Twas and told them to rape her and to cut one of her breasts off and give it to the child to eat if the child was hungry. There were then many cries. Witness I testified that she was sure the breast was cut because she heard them say to Annunciata Mujawayeze that since she only had one breast nobody could "treat" her for that. Witness I further testified that she was sure that Annunciata Mujawayeze was raped because she heard them say "you slept with the Tutsi now you have slept with the Twa."¹⁸⁴ Witness I said she continued to hear the cries of Annunciata Mujawayeze and later on sounds which she described as snoring. She thought the child was killed before because she heard something like a blow and the child died immediately. Witness I stated that Musema then told Ndimbati and another man, called Bayingana, that they had done a good job, that the list no longer had many names and that he was going to pay them.

810. Witness I testified, on cross-examination, that, she recognized Musema's voice and distinctly heard the cries and comments. Although many people were speaking at the same time, and there was a lot of noise when Musema was speaking, she added that she only heard when Musema ordered Annunciata Mujawayeze's breast to be cut off. Further, the witness said that somebody else told her, after she had taken refuge at her house, that Annunciata Mujawayeze's killers had driven stakes into her corpse.

811. Still on cross-examination, Witness I was presented with a handwritten statement of hers dated 15 April 1995. In this statement she wrote that Musema had undressed Annunciata Mujawayeze. The Witness explained that in her handwritten statement she included information she had been told but that in her testimony she had only related what she herself had seen and heard. She said she did not herself hear anything about Musema undressing Annunciata Mujawayeze. Similarly, she was presented with having written that the hands and ears of Annunciata

¹⁸⁴ French transcript reads "Tu as couché avec des Tutsi et maintenant tu viens de coucher avec des Twa".



Mujawayeze, as well as her breast, were cut off and given to her son Blaise to eat. She again explained that this handwritten statement, which she had done for a priest, was an account of everything she had heard others say, and not limited to what she herself heard, which was only related to the cutting off of the breast. Witness I was presented with another portion of the pre-trial statement in which she was recorded as saying that some men in the crowd ordered the Twas to rape Annunciata Mujawayeze without specifically mentioning Musema.

812. The Defence extensively cross-examined Witness I on her physical location and the extent to which she could have been able to see from where she was hiding. In her testimony, which she reaffirmed on cross-examination, she stated that she was approximately 1.5 metres from the bungalow. She clarified that she could not see Musema because she was lying on the ground of the plantation but that she knew and recognized his voice. She also clarified that pieces of wood were missing from the fence, differentiating it from the picture of the fence introduced by the Defence and dated 1995. When questioned about the statement made to a Swiss judge on 16 June 1995 in which she said she saw Musema on 15 April 1994 but that she was not sure of the day, Witness I acknowledged that she had thought it was the following day but had not been able to be specific with regard to the dates.

813. Defence counsel extensively questioned Witness I regarding discrepancies between her pre-trial statements and her testimony as to how she was reunited with her children the night following the death of Annunciata Mujawayeze. The witness maintained repeatedly that she had not spent the night in the forest with her children, as recorded in a statement, but that the watchman had taken the children to his home after he had come to the forest looking for her unsuccessfully. The witness noted on cross-examination that with regard to the long period of several weeks in which she was hiding it would be difficult to recount every single detail of where she stayed and when. She stated that she had in fact hidden in all of the places mentioned in her pre-trial statements at various times.

814. *Witness L*, a thirty nine year-old Hutu employed at the tea factory, testified that Musema returned to the factory around the 18th of April. Witness L said he knew Annunciata Mujawayeze. He recounted that on the day Musema returned, the bourgemestre Ndimbati arrived with some young people, and they said that they had come from Bisesero to have a drink at the guest house. He said he saw them there with Annunciata Mujawayeze and they were drinking, that Musema came



~~and joined them there together with Annunciata Mujawayeze, all standing close to the fence which~~ surrounded the guest house. He said Musema stood by Ndimbati but that the witness was up the road and did not hear what they were saying to each other. The witness testified that after a short while Musema went into his car but in the meantime Annunciata Mujawayeze was made to enter the guest house by those who were with her, through the back door. Witness L, who was observing from the road, continued on his way. The next morning he asked a child whether he had seen a woman in the guest house and the child replied that the woman had been killed.

815. On cross-examination, Witness L stated that he did not see Musema go into the guest house and that he did not see Musema at the guest house with Annunciata Mujawayeze.

816. On re-examination, the witness clarified that he saw Musema standing near the pergola (bungalow) and that Annunciata Mujawayeze was standing with the others behind the pergola. He added that Annunciata Mujawayeze was holding a child in her arms which he was told was hers.

817. In the course of the cross-examination, the witness also said that the killings at the tea factory started before the return of Musema and that the killing at the Guest House occurred a few days after the other killings at the tea factory.

818. In re-examination, the witness added that he was not at the Tea Factory when the killings took place there, as he was off duty. Witness L confirmed that when he saw Musema at the Guest House in the company of the *bourgmestre*, Musema had only just returned from Kigali and not even gone to his residence. The witness further said that he saw Nzamwita but not Musema with Annunciata Mujawayeze enter the Guest House.

819. *Witness PP*, a 46 year-old Hutu was employed at the Gisovu tea factory in 1994, testified that on 13 April 1994 he saw a number of bodies, including the body of Annunciata Mujawayeze, whom he knew, which was below the road near the canteen. He said her body had clothes on its lower part, and the face was turned towards the canteen. The witness testified that he did not observe any injuries on the body from that position. Witness PP identified a number of the bodies as those of Tutsi employees of the factory. Witness PP further testified that he knew Musema was around on the evening of 14 April 1994 because he saw his vehicle near the canteen, which was



below the factory. He clarified that this was the same canteen near which he saw the body of Annunciata Mujawayezu.

820. The only witness for the Defence on the allegations relating to the rape and killing of Annunciata Mujawayezu is Musema. According to his testimony, Musema was at the Guest House on 14 April 1994, talking with the *bourgmestre* Ndimbati, when they suddenly heard a woman's cough and the cry of a child. He realized later that it was Annunicata. He then saw a few people, among them a soldier and Emmanuel, a school teacher, going into the Guest House. Emmanuel came out and was wiping blood off his sword. Musema testified that he suspected some complicity between the *bourgmestre* and the others. When the others had gone, he asked his Chief of Personnel what had happened. He did not ask Emmanuel. The Chief of Personnel told him that Annunciata Mujawayezu had been killed and that they had arrived too late. No mention was made of the child.

821. On cross-examination, Musema was confronted with his other accounts of this incident, which differ substantially from his testimony. Prosecution brought forward notably three interviews of Musema given to the Swiss Judge, namely on 12 May and 13 July 1995, and on 4 March 1996, respectively.

822. In a statement he made on 12 May 1995 to Swiss authorities (Exhibit P59), Musema was reported to have said that Annunciata Mujawayezu was murdered while he was touring the factory and en route to the Guest House where the *bourgmestre* joined them. A pick-up truck arrived carrying many people including a teacher and a police inspector. People shouted that Annunciata Mujawayezu had been found and Musema said he shouted back that she was not to be killed. The people with the *bourgmestre* then ran towards her and killed her and the people at her residence. In a statement made on 13 July 1995 to Swiss authorities (Exhibit P60), Musema was reported to have said that Annunciata Mujawayezu was killed at the residence of the Chief Accountant¹⁸⁵. People

¹⁸⁵ The French states "Elle a été assassinée dans l'habitation du chef comptable. Les gens l'ont prise dans le thé, à proximité du guest house, puis ils sont montés vers les habitations, au-dessus du guest house, soit à plus de 300m. Moi-même, je me trouvais au guest house, à l'intérieur. J'étais à ce moment avec Ndimbati, un enseignant, l'IPJ de la commune, deux militaires venus avec moi de Butare et Baragiwira". Musema made no mention of the bloodied sword carried by the teacher nor the coughs coming from the plantation behind him and said he was in the Guest. In Court he said he was outside.



took her from the tea plantation near the guest house to the staff quarters above the guest house more that 300 metres away. He was inside the guest house together with Ndimbati and several others. He noted that the guest house referred to both the main building and the pergola (bungalow). He said that he and Ndimbati heard cries from the tea plantation, that they both stayed inside while others went out. In a statement made on 4 March 1996 to Swiss authorities (Exhibit P61), Musema was reported to have said that Annunciata Mujawayezu had been killed in her house from where the cries were heard.

Factual Findings:

823. The Chamber notes that the testimony of Witness I was confusing in certain respects, particularly with regard to the details of her movement and the chronology of events. However, her testimony was consistent on cross-examination, and she did provide reasonable and clear answers to the questions raised on cross-examination with regard to her various pre-trial statements. The Chamber noted the determination of the witness to clarify the distinction between what she had heard others say and what she herself witnessed. She also carefully indicated on numerous occasions what she did not see or hear, as well as what she did see or hear. With regard to her account concerning the rape and murder of Annunciata Mujawayezu, the Chamber finds Witness I to be clear and consistent and accepts her testimony.

824. The testimony of Witness L is limited with respect to its probative value because the witness was not able to hear Musema from where he was standing. What he saw, that is Musema standing near the pergola (bungalow), Annunciata Mujawayezu standing by the fence with the others and subsequently being taken by them into the guest house, is consistent with Witness I's much more detailed account of the event. On cross-examination, the witness clearly stated that Musema did not enter the guest house. This is not inconsistent with the other accounts, all of which indicate that he remained outside and left shortly thereafter in his vehicle.

825. It, it is clear, from Witness L's testimony, Witness I's testimony and Musema's own testimony, that Musema and Annunciata Mujawayezu were at the Guest House on 14 April 1994. It appears that Annunciata Mujawayezu was near the Guest House at the beginning but afterwards she was taken in by the back door. According to Musema's testimony to the Swiss Judge, he was inside



the Guest House. The Chamber notes that Witness L places the date of this incident as around 18 April. In light of the evidence of Witness I and Musema himself that this incident took place on the 14 April, the Chamber considers that the witness is mistaken about the date, which he indicated in any event as an estimation.

826. The testimony of Witness PP is limited with respect to its probative value because Witness PP was not present when the killing of Annunciata Mujawayezu occurred. The witness saw her body and testified that there was no clothing on the upper half of the body. This evidence would be consistent with the account of Witness I that sexual violence might have been directed to her upper body. However, Witness PP noted that he did not see injuries to the body from its position. The testimony does not make it clear whether the body was face down or on its back. For this reason, the Chamber finds that the evidence of Witness PP, while credible, is not helpful in establishing what happened other than to corroborate that Annunciata Mujawayezu was killed and that Musema was present at the factory on 14 April. The Chamber further notes that the witness testified that he saw the body of Annunciata Mujawayezu on 13 April, whereas both Witness I and Musema date the death of Annunciata Mujawayezu to 14 April. The Chamber considers that the witness is mistaken about the date.

827. The Chamber has considered the testimony of Musema in light of the pre-trial statements he made to Swiss authorities which differ not only from his testimony but from each other in material respects. In one version of the incident, Musema tried to stop the killing of Annunciata Mujawayezu. In another version, he came too late. In each version, she was killed in a different place. In light of these gross inconsistencies, for which Musema does not have any reasonable explanation, the Chamber concludes that the only reasonable explanation for the inconsistencies is that he is not being truthful.

828. Having considered the evidence, as set forth above, the Chamber finds that the Prosecution has established beyond a reasonable doubt that Musema ordered the rape of Annunciata Mujawayezu, a Tutsi woman, and the cutting off of her breast to be fed to her son. No evidence was introduced to indicate that he ordered her to be killed, although there is conclusive evidence that she was in fact killed. Considering Musema's high position in the *commune*, he must have known that his words would necessarily have had an important and even binding impact on his interlocutors.



829. There is no conclusive evidence that Annunciata Mujawayezu was raped, or that her breast was cut off, although there is some evidence to support an inference that these acts were perpetrated.

**Alleged acts of rape and murder of Immaculée Mukankuzi and others on 13 May 1994
(paragraph 4.9)**

830. Paragraph 4.9 of the Indictment states the following:

“On 13 May 1994, within the area of Bisesero, in Gisovu and Gishyita communes, Kibuye Prefecture, Alfred Musema, in concert with others, raped and killed Immaculée Mukankuzi Mukankusi, a pregnant Tutsi, and thereafter ordered others accompanying him to rape and kill Tutsi women seeking refuge from attacks.”

831. *Witness J*, a 49 year-old Tutsi woman, testified that she had five children, four girls and one boy. In 1994 the girls were 25, 23, 19 and 12 respectively, and the boy was 9 years old. The witness testified that she arrived in Bisesero in April 1994 seeking refuge on Muyira hill with two of her children. The other three children had been shot by Charles Sikubwabo, the *bourgmestre* of the Gishyita *Commune* on 7 April as she was fleeing.

832. Witness J testified that she first saw Musema on 13 May, leading the attackers, although she stated that she knew him previously as the managing Director of the Gisovu Tea Factory, where her husband worked. He was with about thirty young men, many *Interahamwe* wearing red shirts and white shorts and armed with clubs, sticks and machetes. Witness J testified that she was with five other Tutsi women and that when they saw Musema they ran and hid in a bush. He fired in the air, and they came out of the bush and tried to run away. Musema told his men to run after them, and they were caught. She said Musema told the men that he was going to take one of the women and rape her and that they should follow his example and do the same thing. The assailants followed the instructions. Witness J heard Musema tell them in Kinyarwanda “What I do, you will imitate after me.” Musema also told the youths to take the Tutsi women and to check and note their constitution, which the witness understood to mean they were to be raped. The witness stated that Musema regrouped and instructed the assailants by using a megaphone and a whistle, and by speaking to them.

833. According to Witness J, Musema then raped one of the women, a Tutsi woman named Immaculée Mukankusi who was 25 years old and eight months pregnant. He hit her with the butt of his gun, she fell down, he dropped his trousers and underwear to the knees and jumped on her. The witness said Immaculee was struggling and she was crying because he was saying that he was going to kill her. Musema was on top of her for about four minutes. After raping her, he put on his clothes, got up and killed her, stabbing her with the knife attached to his gun between the neck and the shoulder.

834. Witness J testified that the killing of Immaculée Mukankuzi gave the men with Musema the courage to kill the other women. The other five women, including Witness J and her 18 year-old daughter, were then raped. After raping them, the men stuck sharpened sticks into their private parts. The witness said that she was raped last because the others were much younger than she was and she was considered as an old woman. She said the other women were still alive when the sticks were inserted into them and that they were screaming, and she clarified that they were killed with the sticks. Those who did not die were finished off with clubs or machetes. Witness J testified that she saw her daughter dying. The rapes, killings and other acts took place at less than two metres from her.

835. The witness said that while all this was happening Musema was further off but still in the area, shooting at the men who were fleeing. He told his men that when they had finished killing the women they should all leave. The witness testified that Musema was watching while she was raped and that her clothing was removed by her attackers. She said that the man who raped her was on top of her for four hours. On further questioning she said that because of the pain she was feeling she thought it went on for four hours and then she lost consciousness. On further questioning of the four hours, the witness said that maybe it was one year because the suffering was so much. Witness J said that nothing was inserted into her private parts because she was almost unconscious but that they cut her head with a machete and on her right shoulder and hand with a panga. She was also kicked in the stomach. When she recovered consciousness she noticed that she was bleeding and she

saw the cadavers of the other victims, including that of her daughter. As a result of the attack, the witness said she has lost feeling in her arm and still has bleeding for which she cannot be treated. She said that while other widows were able to remarry she was not as she has become disabled.

836. On cross-examination, Witness J testified that her three older children - the 25 year-old, the 23 year-old and the 19 year-old were the ones shot by the *bourgmestre* when she was fleeing to Bisesero. She said the other two were killed in Bisesero. Defence counsel also questioned Witness J on the discrepancies between her testimony in court and a radio interview that she did in January 1998 for Radio Rwanda. In the interview, the witness gave an account of the killings that took place in Bisesero. Defence counsel noted that the witness did not mention certain killings, including the killing of her three children by Sikubwabo and also that she mentioned details in the interview that she had not mentioned in her testimony, such as that she went to the Mubunga church on the day she fled to Bisesero. The witness explained that she was asked questions and was not testifying against anybody, that she did not think it necessary to mention the church as she did not think there was anyone there against whom she was testifying. Defence counsel accused the witness of lying in her testimony because she felt that somebody should be responsible for her loss and injury. The witness emphatically insisted that her testimony was what she herself had witnessed and experienced. Defence counsel noted that the witness had not mentioned Musema, or the fact that she was raped or that others were raped, in the radio interview. She replied that she had not wanted to raise this matter and on re-direct examination she stated that before testifying she had not told anyone about the rape.

837. On cross-examination, Defence counsel noted that Witness J had said that her three oldest children had been shot by Sikubwabo, leaving her two children ages 12 and 9. He asked how then her 18 year-old daughter could have been raped by Musema's men subsequently. The witness responded that the child was her own baby that she had brought into this world and said that Defence counsel was trying to make her lose her mind with questions about the ages. She then said insistently that it was Musema who ordered the killing of her children, together with all those who

were with her. At the request of the Chamber, the Prosecution introduced documentary evidence establishing that the witness had five children and giving their names.

838. Defence counsel questioned the witness extensively with regard to the physical location of the rape and killing showing her a number of photographs and asking her to identify Muyira hill. She was unable to do this from the photographs, which she attributed to the fact that the hills were all similar in nature and did not have distinguishing characteristics that could be identified, such as crop plantations.

839. According to the Defence, the allegations based on Witness J' testimony falls, since the witness lacks integrity and is unfaithfull.

Factual Findings:

840. The Chamber notes that witness J is the sole witness of the rape and killing of Immaculée Mukankuzi by Musema and the rape and killing of other women by the men with him at Muyira Hill on his instruction. The Chamber found her, generally speaking, to be a balanced witness. Her evidence on direct and cross-examination was notably consistent and additional details which emerged through extensive questioning provide a clear picture of the events she was describing.

841. Yet, the Chamber notes that the witness made several time estimates which appeared to be inaccurate. For example, she testified that the man who raped her was on top of her for four hours, saying subsequently that it felt like four hours or even a day. She testified that a distance which would take a young man five minutes to cover would take her two hours. The Chamber considers that these estimates reflect a general difficulty of the witness in measuring time which do not detract from the credibility or her testimony.

842. On cross-examination, Defence counsel challenged the witness on several grounds. The Chamber considers that with regard to the interview she did on Radio Rwanda, that it is inaccurate

to characterize the interview as “different” from her testimony, as if it were therefore inconsistent with her testimony. Defence pointed out that she did not say everything in the interview that she said in her testimony and that she did not say everything in her testimony that she said in the interview. The witness had a reasonable explanation for these differences - the radio interview was of short duration with a specific purpose and controlled by the interviewer. The fact that she did not mention Musema is not, in the view of the Chamber, significant, particularly in light of the fact that she did not mention the killing of her children and other very significant events to which she testified. The chamber recognizes that it is especially difficult to testify about rape and sexual violence, moreover in a public forum. No inconsistencies between the radio interview and the testimony were identified.

843. The Chamber considers that the principal inconsistency in the testimony of Witness J relates to her account of the circumstances surrounding the killing of her 19 year-old daughter by Sikubwabo and the rape and killing of her 18 year-old daughter by the young men with Musema at Muyira hill. The witness clearly testified several times that she had five children, who were aged 25, 23, 19, 12, and 9. This has further been established by documentary evidence at the request of the Chamber. She clearly testified several times that her three eldest children were killed by Sikubwabo, leaving her with two children aged 12 and 9. Yet she also testified that one of the five young women raped with her at Muyira hill was her 18 year-old daughter. On cross-examination when the question was put to her to explain how this was possible, she did not provide any answer. On re-direct examination, in reply to a specific question on this point by the Prosecutor, she provided a very general answer to the effect that Musema had ordered her children to be killed. She did not explain the apparent inconsistency.

844. While the Chamber found the testimony of Witness J to be generally credible, it is deeply troubled by this unexplained inconsistency regarding the rape of her daughter. Without any reasonable explanation, the Chamber must question the accuracy of the account. The Chamber believes that there is likely to be a reasonable explanation, based on its evaluation of the witness.



845. However, recalling the high burden of proof on the Prosecutor and the lack of any other evidence produced to corroborate the account of Witness J, the Chamber cannot find beyond a reasonable doubt that the allegations have been established relating to the rape and killing of Immaculée Mukankuzi by Musema and the rape and killing of others with her by his men and on his order on 13 May 1994.

Alleged acts of rape and murder of a woman called Nyiramusugi on 13 May 1994 (paragraph 4.10).

846. Paragraph 4.10 of the Indictment reads as follows:

“On 13 May 1994, within the area of Bisesero, in Gisovu and Gishyita communes, Kibuye prefecture, Alfred Musema, acting in concert with others, raped Nyiramusugi, a Tutsi woman, and encouraged others accompanying him to rape and kill her”.

847. *Witness N*, a 39 year old Tutsi, testified that he sought refuge in the Bisesero area from 26 April to 13 May 1994. He stated that there were many attacks on Muyira hill on 13 May 1994 and that he stayed on Muyira hill until that date, after which he had to flee again. He testified that he knew Musema. He saw Musema arrive at Muyira hill aboard his red vehicle on 13 May 1994. He said that this was the first time that he had seen Musema during the attacks. He explained that he was able to hear Musema once the group moved to within a few metres of him.

848. The witness testified that Musema spoke to a policeman named Ruhindura, and asked him whether a young woman called Nyiramusugi was already dead, to which the policeman answered ‘no’. He stated that Musema then asked that before anything, this girl had to be brought to him.¹⁸⁶

¹⁸⁶ French transcript, 28 April 1999, page 75, lines 1 and 2, ‘Musema a dit, qu’avant toute chose, on devait lui amener cette jeune fille.’

He and the *bourgmestre* fired the first shots so the others would start shooting. Ruhindura while fighting and looking for the young woman caught her. The Witness stated that he knew Nyiramusugi. He used to see her when she walked to school and he used to take his cows to graze in front of her parents' house. He said that she was a young unmarried teacher.

849. Witness N testified that Nyiramusugi was caught around 15.30hrs. He said that he saw Ruhindura with four youths drag the young woman on the ground and take her to Musema. He said that Musema was carrying a rifle which he then handed to Ruhindura. The four people holding Nyiramusugi brought her to the ground. They pinned her down, two holding her arms and two holding her legs. The two holding her legs then spread them, and Musema placed himself between them. The witness saw Musema rip off Nyiramusugi's clothes and underclothes and then took off his own clothes. The witness stated that Musema said aloud "Today, the pride of the Tutsi shall end"¹⁸⁷ and then raped the young woman. Witness N said that Nyiramusugi was a very well known Tutsi girl who was very beautiful.

850. The witness explained that because of the echo at Muyira hill, it was possible to hear everything that was said and to recognize the voice of certain of the attackers. The Witness also explained that he was able to see the rape as he had fallen in a bush when fleeing to the top of the hill. Musema was at 40 metres, bird flight, on a little hill at Muyira, walking distance being further because to get to Musema from the Witness' position on the hill, one had to walk down and back up the other side.

851. The witness affirmed that the victim was Tutsi and explained that Musema took her by force. He stated that during the rape, Nyiramusugi struggled until Musema grabbed one of her arms and held it against her neck. The four assailants who initially held down the victim watched from nearby while the policeman, Ruhindura, stood further away. Witness N stated that after the rape, which he estimated lasted forty minutes, Musema walked over to Ruhindura, took his rifle back and left with him.

187 French transcript, 28 April 1999, "il a dit 'Aujourd'hui, l'orgueil des Tutsis va finir.'"

852. Witness N also testified that the four other men, who initially pinned down the victim, went back to the girl and took turns raping her. She was struggling and started rolling down toward the valley. He was able to see them rape Nyiramusugi until they were out of sight. During the rape, he heard the victim scream and say “the only thing that I can do for you is only to pray for you.”¹⁸⁸

853. Witness N added that he later saw the four attackers on the rise of the other side of the valley and saw that Nyiramusugi had been left for dead in the valley. That night, the witness and three other people went to the victim and found her badly injured. She was cut all over her body, covered with blood and nail scratches around her neck. He stated that they took her to her mother. The witness testified that the mother died the next day and that he learnt from Nyiramusugi’s brother that she had been shot.

854. On cross-examination, Defence counsel extensively questioned the witness as to how he came to testify and the circumstances of his statement which was made on 13 January 1999 to the Prosecutor. The witness explained that he had previously made a statement about Musema to the local court in 1997. The witness further testified that he was able to hear Musema as the refugees were speaking amongst themselves softly and the attackers were getting organized. Moreover, the attackers spoke loudly so that everyone could hear them.

855. The witness was asked why Nyarimusugi was not killed after she was raped. He replied that he did not know. When asked again, he replied that what they did to her was worse than killing her. When pressed further as to whether it was not strange that she was not killed he replied that in a way they did kill her, and that sometimes they would leave people to die if they thought they had been sufficiently weakened. He added that if she had been left there without any help through the night, she would have died. The witness was asked whether he had been paid any money to come and testify, and he replied that he had not. Finally, it was put to him that he was lying, and he

¹⁸⁸ French transcript, 28 April 1999, “la seule chose que je peux faire pour vous, c’est de prier pour vous seulement.”

replied that he had not come to lie but rather to talk about what he himself had seen and that Musema would know that he was telling the truth.

856. According to the Defence, Musema was not in Kibuye during the period covering 13 May 1994. Several letters were presented in support of the alibi.

Factual Findings:

857. The Chamber accepts the testimony of Witness N as credible.

858. It is clear and consistent, and nothing emerged from the cross-examination of the witness which cast any doubt on the evidence presented. In the view of the Chamber, the reasons given by witness N as to why he waited five years to come forward with this statement, namely that he reported Musema to his local court in 1997, is satisfactory.

859. The reasons given by the witness as to how he had been able to hear Musema's exclamations are also convincing. The witness indeed explained that, *firstly*, the attacks had not yet started when Musema asked for the girl to be brought to him, *secondly*, he was able to hear Musema since the refugees were speaking amongst themselves softly and the attackers were getting organized, and *thirdly*, the attackers spoke loudly. Moreover, the witness explained that because of the echo at Muyira hill, it was possible for him to hear everything that was said and to recognize the voice of certain attackers, taking into account that the bush in which he was hiding was approximately at 40 metres bird flight from Musema. In the light of exhibits D7-A, D7-B and P21, Witness N's observation and description of the area of Muyira hill is convincing.

860. Concerning the alibi, the Chamber recalls its finding in Section 5.2 above as regards mid-May attacks. The Chamber here confirms that this alibi does not stand.



861. Based on this evidence, the Chamber finds, beyond a reasonable doubt, that Musema, acting in concert with others raped Nyiramusugi, and by his example encouraged the others to rape her on 13 May 1994.

862. According to the Chamber, there is no evidence, however, that he encouraged them to kill her, as alleged in the Indictment.

5.4 Musema's Authority

863. Paragraph 5 of the Indictment states that Musema is individually criminally responsible pursuant to Articles 6(1) and 6(3) of the Statute for the crimes with which he is charged in the Indictment.

864. In Section 3.1 of the Judgement, the Chamber discussed the legal principles pertaining to individual criminal responsibility under Articles 6(1) and 6(3) of the Statute. As it determined there, the authority, whether *de facto* or *de jure*, or the effective control, exercised by Alfred Musema in the context of the events alleged, may provide the basis for such individual criminal responsibility.

865. In relation to Article 6(1), the nature of the authority wielded by an individual affects the assessment of that individual's role in planning, instigating, ordering, committing or otherwise aiding and abetting the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the Statute. In particular, the presence of an authority figure at an event could amount to acquiescence in the event or support thereof, and, in the perception of the perpetrators, legitimize the said event.

866. In relation to Article 6(3) of the Statute, the nature of the authority exercised by an individual is crucial to an assessment of whether that individual exercised a superior responsibility over perpetrators of acts detailed in Articles 2 to 4 of the Statute, and whether, as a result, that individual attracts individual criminal responsibility for those acts.

867. It is, therefore, necessary for the Chamber to assess the nature and extent of the authority, whether *de facto* or *de jure*, and the effective control exercised by Musema in the context of the events alleged in the Indictment. The Chamber will make that assessment of Musema's authority, firstly by examining the testimonies of witnesses before the Chamber and the documents tendered to it, and secondly by presenting its factual findings on the matter.

The Evidence

868. Many of the witnesses testified that Musema was perceived as a figure of authority and considerable influence in the Gisovu region. *Witness H* stated that Musema was “very well respected” in the locality. *Witness W* testified that Musema “occupied an important position in Rwanda”, and that he occupied a place higher in the regime than others of equivalent or higher age or qualifications. *Witness E* stated that Musema was considered to have the same powers as a *Préfet*. *Witnesses R* and *D* both testified to seeing Musema sitting with officials or authorities at political meetings.

869. Witnesses offered two different, and overlapping, explanations for Musema’s influence. According to some witnesses, his power stemmed from his control of socio-economic resources. According to other witnesses, his power was politically based.

870. *Witness BB* stated that Directors of Tea Factories became well respected in their respective *Préfectures* as a result of their provision to the local communities of social services (such as clinics and schools) ancillary to the factories. This respect extended their influence beyond their direct control over factory employees. *Witness G* stated that Musema was a “very important personality” because he employed many people at the factory.

871. *Witnesses W, E* and *AB* all testified in relation to Musema’s political activities, and that he played an important political role within the Gisovu region.

872. The Expert Witness of the Prosecutor, *André Guichaoua*, provided testimony linking these two explanations of the source of Musema’s authority. Guichaoua emphasized the political importance in the Second Republic of controlling key posts and positions which controlled the distribution of resources, including export earnings. These positions included management positions in parastatal organizations, such as *OCIR-thé*. *OCIR-thé* was a key parastatal because it controlled the “coming in of external resources” in the form of export earnings from tea. Guichaoua stated that

according to the National Commission of Agriculture reports of 1991, it was one of the central export earners in Rwanda.

873. According to Guichaoua, the importance of the Tea Factory in Gisovu was magnified by the relative poverty of the region. Musema's influence as Tea Factory Director extended not only to the people, whom he could employ, but to the communal authorities, since by employing the people, and providing them with financial resources with which to pay communal taxes, he made it possible for the *commune* to pay its employees. As a result there was, according to Guichaoua, generally an extensive solidarity between the communal authorities and the parastatal enterprises. He stated that a Director of such an enterprise could "buy social peace".

874. Guichaoua also testified that Musema's appointment to the directorship of the Tea Factory was politically motivated, and to his links with the central government. He stated that Musema's influence and "prerogatives" would have expanded after the instalment of the new government on 8 or 9 April, 1994, because of the unprecedented presence of citizens of Kibuye in that government. Guichaoua outlined many personal affiliations between Musema and a range of governmental ministers. According to Guichaoua, during times of conflict, it was the role of a Tea Factory Director to maintain infrastructure and exports, but also to "ensure peace". The economic importance of Tea Factories meant Directors were closely surveyed by the central government. In Guichaoua's opinion it would not have been possible, being in a position such as that Musema occupied, not to have participated in the decision-making process at the time.

875. The Defence contested these allegations concerning Musema's authority. Their representations are contained in Section 4.3 of the Judgement. Generally, it was argued that no evidence had been presented of Musema's alleged civic authority; that the nature of Musema's appointment to the Directorship of the Gisovu Tea Factory was not conclusive evidence of any link between him and the regime; and that he was not in any way part of the interim government.

876. Musema's legal status as a Tea Factory Director was clarified by *Witness BB*. He stated that Tea Factory Directors, as heads of the factories in the independent legal entity, the parastatal *OCIR-thé*, were appointed by the President. They reported to the Managing Director of OCIR-thé, who in turn reported to the Ministry of Agriculture. Witness BB stated that the *Préfet* represented the Head of State in the *Préfecture*, and that the Factory Director was bound to respect him. However, the day-to-day administration of the factory, including the appointment of staff, was the prerogative of the Director, with no need of consultations with the *Préfet* nor the *bourgmestre*. In the Witness' opinion, the Director "exercised control" over his staff.

877. The Chamber notes that Musema testified that he could visit certain military camps, and that he was authorized to carry a firearm. Moreover, notes the Chamber, the fact that Musema was accompanied by military personnel also shows the importance of his general position.

878. In conclusion, the Chamber notes that the Defence also tendered numerous documents, including meeting reports and minutes and official correspondence, which all tend to demonstrate that at the time of the events alleged in the Indictment, Musema exercised *de jure* and *de facto* authority over tea factory employees in his official capacity as Director of the Tea Factory.

Factual findings

879. Having reviewed the evidence presented to it, and in light of its assessments of the credibility and reliability of witnesses in the Sections 5.2 and 5.3 of the Judgement, the Chamber will now make its factual findings regarding the nature and extent of authority and control, if any, exercised by Musema in the context of the events alleged in the Indictment.

880. The Chamber finds that it has been established beyond reasonable doubt that Musema exercised *de jure* authority over employees of the Gisovu Tea Factory while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory, even if those duties were performed outside factory premises. The Chamber notes that Musema exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory. The Chamber notes that Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. The Chamber also finds that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes. The Chamber finds that Musema exercised *de jure* power and *de facto* control over Tea Factory employees and the resources of the Tea Factory.

881. In relation to other members of the population of Kibuye *Préfecture*, including *thé villageois* plantation workers, while the Chamber is satisfied that such individuals perceived Musema as a figure of authority and as someone who wielded considerable power in the region, it is not satisfied beyond reasonable doubt on the basis of the evidence presented to it that Musema did, in fact, exercise *de jure* power and *de facto* control over these individuals.

882. The Chamber finds, therefore, that it has been established beyond reasonable doubt that there existed at the time of the events alleged in the Indictment a *de jure* superior-subordinate relationship between Musema and the employees of the Gisovu Tea Factory.

883. In Section 6 of the Judgement in its legal findings, the Chamber will evaluate whether Musema's individual criminal responsibility is engaged under Article 6 of the Statute with respect to paragraphs 4.6 to 4.11 of the Indictment.

6. LEGAL FINDINGS

6.1 Count 1 - Genocide & Count 2 - Complicity in Genocide

884. *In Count 1*, relating to all the facts alleged in the Indictment, the Prosecutor charges Musema with criminal responsibility, under Article 6 (1) and (3) of the Statute, for the crime of *genocide*, a crime punishable under Article 2 (3) (a) of the Statute.

885. As an alternative, the Prosecutor also charges Musema with *Count 2*, in which Musema is held criminally responsible, under Article 6 (1) and (3) of the Statute, for having committed the crime of *complicity in genocide*, a crime punishable under Article 2 (3) (e) of the Statute. Count 2 also relates to all the acts alleged in the Indictment.

886. The Chamber recalls, as it indicated *supra* in its findings on the applicable law, that it holds that an accused is guilty of the crime of genocide if he committed one of the acts enumerated under Article 2 (2) of the Statute against a national, ethnical, racial or religious group, specifically targeted as such, with the intent to destroy, in whole or in part, said group.

887. Furthermore, the Chamber holds that an accused is liable for complicity in genocide if he knowingly and voluntarily aided or abetted or instigated a person or persons to commit genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, specifically targeted as such.

888. As Count 2 stands in the alternative to Count 1, the Chamber will now present its findings with respect to both counts by examining, firstly, on the basis of the factual findings set forth above in Chapter 5, which of the acts alleged in the Indictment to have been committed by Musema it considers to have been established beyond a reasonable doubt and for which he incurs responsibility.

The Chamber will then determine whether those acts are constituent elements of the crime of genocide and, if not, whether they constitute elements of the crime of complicity in genocide.

With respect, firstly, to the facts alleged in the Indictment, the Chamber is satisfied beyond any reasonable doubt, on the basis of the factual findings, of the following:

889. *Firstly*, regarding the allegations presented under paragraph 4.8 of the Indictment, according to which Musema, in concert with others, ordered and abetted in the rape of Annunciata, a Tutsi, and thereafter ordered that she and her son be killed, the Chamber holds that even if it is proven that Musema ordered that Annunciata be raped, such order, by and of itself, does not suffice for him to incur individual criminal responsibility, given that no evidence has been adduced to show that the order was executed to produce such result, namely the rape of Annunciata. Nor has it been proven that Musema ordered that she and her son be killed.

890. *Secondly*, the Chamber is satisfied that it has been established beyond a reasonable doubt that on 26 April 1994, Musema led and participated in an attack on Gitwa Hill. Musema arrived at the site of the attack in a Daihatsu vehicle belonging to the Gisovu Tea Factory. He carried a firearm and was accompanied by employees of the Gisovu Tea Factory wearing blue uniforms. Musema and other persons, some of whom wore banana leaves and *Imihurura* belts, attacked Tutsi refugees. It has also been established beyond a reasonable doubt that Musema shot into the crowd of refugees. The attackers killed resolutely, and few refugees survived the large-scale attack.

891. The Chamber finds that Musema incurs individual criminal responsibility for the above-mentioned acts, on the basis of the provisions of Article 6 (1) of the Statute, for having ordered and, by his presence and participation, having aided and abetted in the murder of members of the Tutsi ethnic group, and for the causing of serious bodily and mental harm to members of the said group.

892. With respect to the Prosecutor's contention that Musema could additionally be held criminally responsible, under Article 6 (3) of the Statute, the Chamber finds that for an accused to be

held criminally responsible under these statutory provisions, the Prosecutor must establish: (1) that one of the acts referred to under Articles 2 to 4 of the Statute was, indeed, committed by a subordinate of the Accused; (2) that the accused knew or had reason to know that the subordinate was about to commit such act or had done so; and (3) that the accused failed to take the necessary and reasonable measures to prevent the commission of said act by the subordinate or to punish him for the criminal conduct.

893. The Chamber notes that, in the instant case, it has been established that employees of the Gisovu Tea Factory were among the attackers. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, causing serious bodily and mental harm to members of the Tutsi group.

894. The Chamber finds that it has also been established that Musema was the superior of said employees and that he held not only *de jure* power over them, but also *de facto* power.¹⁸⁹ Considering that Musema was personally present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused nevertheless failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

895. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack of 26 April 1994 on Gitwa Hill, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6 (3) of the Statute.

896. *Thirdly*, the Chamber is satisfied beyond a reasonable doubt that between 27 April and 3 May 1994, Musema participated in the attack on Rwirambo Hill. Musema arrived in a red Pajero, followed by four Daihatsu pick-ups from the Gisovu Tea Factory which were carrying persons that Witness R described as *Interahamwe*. The witness recognized those persons from their blue

¹⁸⁹ See section 5.2 of the Judgement.

uniforms which had the name “*Usine à thé Gisovu*” printed on the back. Musema was armed with a rifle. While trying to flee, Witness R’s arm was injured from a bullet which came from Musema’s direction.

897. The Chamber finds that, for the above-mentioned acts, Musema incurs individual criminal responsibility, on the basis of the provisions of Article 6 (1) of the Statute, for having committed and, by his presence and participation, having aided and abetted in the causing of, serious bodily and mental harm to members of the Tutsi group.

898. With respect to the Prosecutor’s argument that Musema could also be held responsible under Article 6 (3) of the Statute, the Chamber finds, firstly, that among the attackers at Rwirambo were persons identified as employees of the Gisovu Tea Factory. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, causing serious bodily and mental harm to members of the Tutsi group.

899. The Chamber finds that it has also been established, as held *supra*, that Musema was the superior of said employees and that he held not only *de jure* power over them, but also *de facto* power. Noting that Musema was personally present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that Musema, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in their commission, by his presence and by his personal participation.

900. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack on Rwirambo Hill, Musema incurs individual criminal responsibility, as their superior, on the basis of the basis of Article 6 (3) of the Statute.

901. *Fourthly*, on the basis of numerous corroborating testimonies, the Chamber is satisfied that it has been established beyond any reasonable doubt that on 13 May 1994 a large-scale attack was launched at Muyira Hill against 40,000 Tutsi refugees. The attack began in the morning. Some of the attackers arrived on Muyira Hill on foot while others came in vehicles, including Daihatsus belonging to the Gisovu Tea Factory. Employees of the Gisovu Tea Factory dressed in their uniforms, gendarmes, soldiers, civilians and members of the *Interahamwe* were among the attackers. The attackers were armed with firearms, grenades, rocket launchers and traditional weapons. They chanted anti-Tutsi slogans.

902. The Chamber is satisfied beyond a reasonable doubt that Musema was among the leaders of the attack. He arrived at the location in his red Pajero. He was armed with a rifle which he used during the attack. Thousands of unarmed Tutsi men, women and children were killed during the attack, while others were forced to flee for their lives.

903. The Chamber finds that, for the acts mentioned *supra*, Musema incurs individual criminal responsibility, on the basis of the provisions of Article 6 (1) of the Statute, for having ordered and, by his presence and participation, aided and abetted in the murder of members of the Tutsi group and the causing of serious bodily and mental harm to members of said group.

904. The Chamber notes, on the basis of the factual findings set forth *supra*, that it has been established beyond a reasonable doubt, that employees of the Gisovu Tea Factory were among the attackers. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the killing of members of the Tutsi group and causing serious bodily and mental harm to members of the said group.

905. The Chamber also finds that it has been established that Musema was the superior of the said employees and that he had not only *de jure* power over them, but also *de facto* power. Noting that Musema was himself present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The

Chamber notes that the Accused, nevertheless, failed to take necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

906. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack of 13 May 1994, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6 (3) of the Statute.

907. *Fifthly*, the Chamber finds that it has been established beyond a reasonable doubt that on 13 May 1994, during the above-mentioned attack on Muyira Hill, Musema, having been told by a policeman called Ruhindara that a young Tutsi woman, a teacher by the name Nyiramusugi, was still alive, asked Ruhindara to catch her and to bring her to him. With the help of four young men, Ruhindara dragged the woman on the ground and brought her to Musema who had his rifle in his hand. The four young men, who were restraining Nyiramusugi, dropped her on the ground and pinned her down. Two of them held her arms, while the other two clamped her legs. The latter two opened the legs of the young woman and Musema tore her garments and undergarments, before undressing himself. In a loud voice, Musema said: “The pride of the Tutsi is going to end today”. Musema raped Nyiramusugi. During the rape, as Nyiramusugi struggled, Musema immobilized her by taking her arm which he forcibly held to her neck. Standing nearby, the four men who initially held Nyiramusugi to the ground watched the scene. After Musema’s departure, they came back to the woman and also raped her in turns. Thereafter, they left Nyiramusugi for dead.

908. The Chamber finds that Musema incurs individual criminal responsibility under Article 6 (1) of the Statute, for having raped, in concert with others, a young Tutsi woman and for thus having caused serious bodily and mental harm to a member of the Tutsi group. The Chamber also finds that Musema incurs individual criminal responsibility under Article 6(1) of the Statute, for having abetted others to rape the girl, by the said act of rape and the example he thus set.

909. With respect to the Prosecutor's argument that Musema could also be liable under Article 6(3) of the Statute, the Chamber notes that the Prosecutor has not established, nor even alleged, that among the assailants who attacked Nyiramusugi there were employees of the Gisovu Tea Factory or other persons who were Musema's subordinates. Therefore, the Chamber holds that Musema does not incur individual criminal responsibility under Article 6(3) of the Statute for Nyiramusugi's rape.

910. *Sixthly*, the Chamber is satisfied beyond a reasonable doubt that another large-scale attack took place on Muyira Hill on 14 May 1994 against Tutsi civilians. The attackers, who numbered about 15 000, were armed with traditional weapons, firearms and grenades. They chanted slogans. Musema, who was armed with a rifle, was one of the leaders of that attack.

911. Furthermore, the Chamber is satisfied beyond a reasonable doubt that Musema participated in an attack which took place in mid-May 1994 on Muyira Hill against Tutsi civilians and that Musema led the attackers, who included the *Interahamwe* and employees of the Gisovu Tea Factory. Musema's red Pajero and vehicles belonging to the Gisovu Tea Factory were seen at the site of the attack. Musema launched the attack by shooting his rifle, and he personally shot at the refugees, although it has not been established beyond a reasonable doubt that he killed anyone.

912. The Chamber finds that, for the above-mentioned acts, Musema incurs individual criminal responsibility, under Article 6(1) of the Statute, for having ordered, committed and, by his presence and participation, aided and abetted in the causing of serious bodily and mental harm to members of the Tutsi group.

913. The Chamber notes that, on the basis of the factual findings set forth *supra*, it has been established beyond a reasonable doubt that employees of the Gisovu Tea Factory were among the attackers. The Chamber holds that the participation of said employees resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the causing of serious bodily and mental harm to members of the Tutsi group.

914. The Chamber finds that it has also been established that Musema was the superior of said employees and that he not only held *de jure* power over them, but also *de facto* power. Considering that Musema was personally present at the attack sites, the Chamber is of the view that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

915. Consequently, the Chamber finds that for the acts committed by the employees of the Gisovu Tea Factory on Muyira Hill, Musema incurs individual criminal responsibility as their superior, on the basis of the provisions of Article 6(3) of the Statute.

916. *Seventhly*, the Chamber is satisfied that it has been established beyond a reasonable doubt that Musema participated in an attack on Mumataba Hill in mid-May 1994. Among the attackers, who numbered between 120 and 150, were employees of the Gisovu Tea Factory armed with traditional weapons, and communal policemen. In the presence of Musema, vehicles of the tea factory transported the attackers to the sites. The attack, which was carried out against some 2000 to 3000 Tutsis who had sought refuge in the house of one Sakufe and in the vicinity of the said house, was sparked off by blowing whistles. The Chamber is satisfied beyond any reasonable doubt that Musema was present, that he stayed with the others near his vehicle during the attack, and that he left the site with the attackers.

917. The Chamber finds that, for these acts, Musema incurs individual criminal responsibility, on the basis of the provisions of Article 6(1) of the Statute, for having, by his presence and the fact that he witnessed the attack, aided and abetted in the murder of members of the Tutsi group and in the causing of serious bodily and mental harm to members of the said group.

918. The Chamber notes that it has been established beyond a reasonable doubt that employees of the Gisovu Tea Factory were among the attackers and that they were transported to the attack sites

by vehicles of the factory, in the presence of Musema. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the killing of members of the Tutsi group and causing serious bodily and mental harm to members of the said group.

919. The Chamber finds that it has been established that Musema was the superior of the said employees and that he had not only *de jure* power over them, but also *de facto* power. Considering that Musema was himself present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that Musema, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said act by his subordinates, but rather abetted his subordinates in the commission of those acts, by his presence and by his personal participation.

920. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the Mumataba attack, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6(3) of the Statute.

921. *Eighthly*, the Chamber is convinced beyond reasonable doubt that Musema participated in the attack on Nyakavumu cave. Musema was aboard his Pajero in a convoy, travelling towards the cave, which included tea factory Daihatsus aboard of which were tea factory workers. It has been proved beyond reasonable doubt that Musema was armed with a rifle, and that he was present at the attack during which assailants closed off the entrance to the cave with wood and leaves, and set fire thereto. The Chamber finds that it has been proven beyond reasonable doubt that over 300 Tutsi civilians who had sought refuge in the cave died as a result of the fire.

922. The Chamber finds that, for the above-mentioned acts, Musema incurs individual criminal responsibility, under Article 6(1) of the Statute, for having committed and, by his presence, aided and abetted in the commission of serious bodily and mental harm to members of the Tutsi group.

923. The Chamber notes that, on the basis of the factual findings set forth *supra*, it has been established beyond reasonable doubt that Gisovu Tea Factory workers were among the attackers. The Chamber holds that the participation of these employees resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the causing of serious bodily and mental harm to members of the Tutsi group.

924. The Chamber finds that it has also been established that Musema was the superior of said employees and that he not only held *de jure* power over them, but also *de facto* control. Considering that Musema was personally present at the attack sites, the Chamber is of the view that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

925. Consequently, the Chamber finds that for the acts committed by the employees of the Gisovu Tea Factory on Muyira Hill, Musema incurs individual criminal responsibility as their superior, on the basis of the provisions of Article 6(3) of the Statute.

926. It emerges from the foregoing findings that the Chamber is satisfied beyond any reasonable doubt that Musema is criminally responsible, under Article 6 (1) of the Statute, for having ordered, committed and, by his presence and his participation aided and abetted in the killing of members of the Tutsi group, to whom he caused serious bodily and mental harm. Moreover, the Chamber is satisfied beyond any reasonable doubt that Musema incurs further criminal responsibility under Article 6(3) of the Statute for the acts committed by the employees of the Gisovu Tea Factory.

Regarding ,secondly, whether the above-mentioned acts were committed against the Tutsi group as such, and whether Musema possessed genocidal intent at the time those acts were committed:

927. As held in the findings regarding the applicable law on the determination of genocidal intent, the Chamber is of the view that it is necessary to infer such intent by deduction from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by Musema.

928. The Chamber notes, firstly, that based on numerous submissions of evidence proffered at the trial, and, in particular, on acts referred to in paragraphs 4.4, 4.5, and 4.11 of the Indictment¹⁹⁰, it has been proven that, at the time of the facts alleged in the Indictment, numerous atrocities were committed against the Tutsis in Rwanda. Musema acknowledged that roadblocks manned by individuals, some of whom were armed with machetes and an assortment of weapons, were erected at the time all along the road from Kigali to Gitarama. Musema testified that he personally saw several bodies along the road and also witnessed incidents of looting. Musema conceded that those people had been killed at the roadblocks because they were accused of being *Inyenzi*, a term which at the time was equivalent to Tutsi.

929. In particular, Musema acknowledged that from April to June 1994, thousands of men, women and children, predominantly Tutsis, sought refuge in the Bisesero area. Musema admitted that those people were targets of regular attacks from approximately 9 April to 30 June 1994. The assailants used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis. In the Bisesero area, the attacks resulted in thousands of deaths and injuries among these men, women and children.

930. Musema also conceded that around 13 May 1994 a large-scale attack was launched against Tutsi civilians who had taken refuge on Muyira Hill in Gisovu *Commune* and that those Tutsis then became victims of acts of genocide. Musema admitted, in general, that during the months of April, May and June 1994, in the *communes* of Gisovu and Gishyita, in Kibuye *Préfecture*, acts of genocide were committed against the Tutsi ethnic group.

¹⁹⁰ See Section 4.1. of the Judgement..

931. Consequently, the Chamber notes that the above acts, with which Musema and his subordinates are charged, were committed as part of a widespread and systematic perpetration of other criminal acts against members of the Tutsi group. Furthermore, the Chamber notes that Musema acknowledged that genocide directed against the Tutsis took place at the time of the events alleged in the Indictment and at the very sites where the acts with which he is charged were committed.

932. Next, and foremost, the Chamber notes that, on the basis of corroborating testimonies presented, the participation by Musema in the attacks against members of the Tutsi group has been proved beyond a reasonable doubt. The anti-Tutsi slogans chanted during the attacks, including the slogan “Let’s exterminate them”, directed at the Tutsis, clearly demonstrated that the objective of the attackers, including Musema, was to destroy the Tutsis. The Chamber is satisfied that Musema, who held *de facto* authority, by virtue *inter alia* of his position as Director of the Gisovu Tea Factory and as an educated man with political influence, ordered the commission of crimes against members of the Tutsi group and abetted in said crimes by participating personally in them. These attacks were pointedly aimed at causing harm to and destroying the Tutsis. The victims, namely men, women and children, were deliberately and systematically targeted on the basis of their membership in the Tutsi ethnic group. Certain degrading acts were purposely intended to humiliate them for being Tutsis.

933. Accordingly, the Chamber notes that on the basis of the evidence presented, it emerges that acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole. The Chamber notes, for example, that during the rape of Nyiramusugi Musema declared: “The pride of the Tutsis will end today”. In this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such. Witness N testified before the Chamber that

Nyiramusugi, who was left for dead by those who raped her, had indeed been killed in a way. Indeed, the Witness specified that “what they did to her is worse than death”.

934. Therefore, the Chamber is satisfied beyond a reasonable doubt that at the time of commission of the above-mentioned acts, which the Chamber considers to have been established, Musema had the intent to destroy the Tutsi ethnic group as such.

935. On that basis, the Chamber recalls that, with regard to the issue of whether the Tutsis were, indeed, a protected group within the meaning of the Genocide Convention, at the time of the events alleged in the Indictment, the Defence did admit that acts of genocide were committed against the Tutsi ethnic group. Consequently, after having considered all the evidence submitted, and the political, social and cultural context prevailing in Rwanda, the Chamber holds that, at the time of the alleged events, the Tutsi group did constitute and still constitutes a protected group within the meaning of the Genocide Convention and , thereby, under Article 2 of the Statute.

936. In conclusion, from all the foregoing, the Chamber is satisfied beyond a reasonable doubt that: *firstly*, Musema incurs individual criminal responsibility for the above-mentioned acts, which are constituent elements of the crime of genocide; *secondly*, that said acts were committed by Musema with the specific intent to destroy the Tutsi group, as such; and *thirdly*, that the Tutsi group is one of the groups legally protected from the crime of genocide. Musema incurs individual criminal responsibility under Article 6(1) and (3) of the Statute for the crime of genocide, a crime punishable under Article 2(3)(a) of the Statute.

6.2 Count 3 - Conspiracy to commit genocide

937. Under Count 3, which relates to all acts alleged in the Indictment, the Prosecutor charges Musema with the crime of conspiracy to commit genocide, a crime punishable under Article 2 (3) (b) of the Statute.

938. The Chamber notes that the acts thus alleged by the Prosecutor under Count 3 are the same as the acts alleged under Count 1(genocide) and Count 2 (complicity in genocide).

939. Regarding the law applicable to the crime of conspiracy to commit genocide, the Chamber held *supra* that:

“... conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide”.¹⁹¹

940. The Chamber notes that the Prosecutor has neither clearly alleged, nor, above all, adduced evidence that Musema, indeed, conspired with other persons to commit genocide and that he and such persons reached an agreement to act to that end.

941. Therefore, the Chamber holds that Musema does not incur criminal responsibility for the crime of conspiracy to commit genocide, under Count 3, all the more so as, on the basis of the same acts, the Prosecutor presented evidence of Musema’s participation in the commission of genocide, the substantive offence in relation to conspiracy.

¹⁹¹ See Section 3.2.3 of this Judgement.

6.3 Legal Findings - Count 5: Crime against Humanity (extermination)

942. *Count 5* of the Indictment charges Musema with *crime against humanity (extermination)*, pursuant to Articles 3(b), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.

943. The Chamber notes that the Defence has made certain admissions *inter alia*: that the Tutsi were either a racial or ethnic group; that there were widespread or systematic attacks throughout Rwanda, between the period 1 January and 31 December 1994 and these attacks were directed against civilians on the grounds, ethnic affiliation and racial origin. The Chamber finds that the Prosecutor is discharged of the burden of proving these elements in respect of crime against humanity (extermination).

944. The Chamber notes that Article 6(1) of the Statute, provides that 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.” It is also noted that Article 6(3) of the Statute provides that “acts [...] 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”.

945. The Chamber has found, beyond a reasonable doubt that Musema:

- was armed with a rifle and that he ordered, aided and abetted and participated in the commission of attacks on Tutsi civilians who had sought refuge on Muyira hill on 13 and 14 May 1994, and in mid-May 1994. The Accused was one of the leaders of the attacks and

some of the attackers were employees of the Gisovu Tea Factory who had traveled to Muyira hill in motor vehicles belonging to the Gisovu Tea Factory;¹⁹²

- participated in an attack on Tutsi civilians, who had sought refuge on Mumataba hill in mid-May 1994. Some of the attackers were tea factory employees who were transported to Mumataba hill in motor vehicles belonging to Gisovu Tea Factory. The Accused was present through out the attack and left with the attackers;¹⁹³
- participated in an attack on Tutsi civilians who had sought refuge in the Nyakavumu cave;¹⁹⁴
- participated in an attack on Tutsi civilians who had sought refuge on Gitwa hill on 26 April 1994¹⁹⁵; and;
- participated in an attack on Tutsi civilians between 27 April and 3 May 1994 in Rwirambo.

946. The Chamber finds that in 1994, the Accused had knowledge of a widespread or systematic attack that was directed against the civilian population in Rwanda. This finding is supported by the presence of Musema at attacks in different locations in Kibuye *Préfecture*, as found above, by the testimony of the Accused, and by Defence exhibits. The Chamber recalls, in particular, the following testimony of the Accused:

“[...] compte tenu d’abord d’une part les massacres qui se faisaient à l’intérieur [...] il y avait ce génocide qui venait de se commettre, qui était encore en train de se commettre [...]”¹⁹⁶;

¹⁹² See *Supra* Section 5.2.

¹⁹³ See *Supra* Section 5.2.

¹⁹⁴ See *Supra* Section 5.2.

¹⁹⁵ See *Supra* Section 5.2.

¹⁹⁶ See *Testimony of the Accused, transcript of 24 May 1999*. English translation: “considering the killings that were taking place inside the country there was this genocide which had been committed, and which was being committed”.

“[...] des gens ont été massacrés à Kibuye, dans d’autres préfectures [...]”¹⁹⁷;

“[...] Ce bébé qui est mort, cette vieille femme, ce petit enfant qui est mort, qui a été massacré, par des bourreaux impitoyables, pour moi ce sont des martyrs.”¹⁹⁸

947. The Chamber further recalls statements made by Musema in letters written to Nicole Pletscher, which were tendered as Defence exhibits, specifically:

“Depuis le 06/04 le pays a vécu un bain de sang incroyable: troubles ethniques - massacres - vols - tout ce qu’on puisse ou plutôt qu’on ne peut pas s’imaginer sur le plan de l’horreur humaine ... Ruhengeri est plus ou moins touché. Mais Byumba est occupé à 100% ... Mais on indique que les morts dépassent des centaine de milliers de gens [...] Des milliers et des milliers de déplacés de guerre, quelle horreur qui s’ajoute à des milliers de cadavres!”¹⁹⁹

“Au niveaux des droits humanitaires des massacres se sont arrêtés dans la Zone gouvernementale mais se perpètrent toujours dans la Zone FPR. L’aide humanitaire est attendue mais n’arrive pas.”²⁰⁰

¹⁹⁷ See *Testimony of the Accused, transcript of 24 May 1999*. English translation: “people were massacred in Kibuye and other Prefectures ...”.

¹⁹⁸ See *Testimony of the Accused, transcript of 24 May 1999*. English translation: “Babies, elderly women, children who died, who were massacred by butchers. They were butchered.”

¹⁹⁹ See Defence exhibit D36. English translation: “ Since 06/04, the country has been living through an incredible blood bath: ethnic unrests - massacres - thefts - all that can or rather all that cannot be imagined at the level of human horror ... Runegeri is more or less affected. But Byumba is 100% affected ... It is estimated that about hundred of thousands of people [*sic*] have been killed ... Thousands and thousands of displaced people, how dreadful in addition to the thousands of corpses!”

²⁰⁰ See Defence exhibit D76. “At the level of human rights, the massacres have been halted in the Government zone but still to continue in the FPR zone. Humanitarian assistance is expected but has not arrived”. [Unofficial translation]

948. The Chamber finds that, Musema's criminal conduct was consistent with the pattern of the then ongoing widespread or systematic attack on the civilian population and his conduct formed a part of this attack.

949. The Chamber finds, that Musema's conduct: in ordering and participating in the attacks on Tutsi civilians who had sought refuge on Muyira hill and on Mumataba hill; in aiding and abetting in the aforementioned attacks by providing motor vehicles belonging to Gisovu Tea Factory, for the transport of attackers to Muyira hill and Mumataba hill; and in his participation in attacks on Tutsi civilians who had sought refuge in Nyakavumu cave, Gitwa hill and Rwirambo, renders the Accused individually criminally responsible, pursuant to Article 6(1) of the Statute.

950. The Chamber has already found that there existed at the time of the events alleged in the indictment a *de jure* superior-subordinate relationship between Musema and the employees at the Gisovu Tea Factory.²⁰¹ The Chamber also found that the Accused had the authority to take reasonable measures to prevent the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of the attacks²⁰². The Chamber finds that the Accused, despite his knowledge of the participation of Gisovu Tea Factory employees in these attacks and their use of Tea Factory property in the commission of these attacks, failed to take any reasonable measures to prevent or punish such participation or such use of Tea Factory property.

951. The Chamber therefore finds beyond a reasonable doubt that Musema is individually criminally responsible for crime against humanity (extermination), pursuant to Articles 3(b), 6(1) and 6(3) of the Statute, as charged in Count 5 of the Indictment.

²⁰¹ See *Supra* Section 5.4.

²⁰² See *Supra* Section 5.4.

6.4 Count 4: Crime against Humanity (murder)

952. *Count 4* of the Indictment charges Musema with *crime against humanity (murder)*, pursuant to Articles 3(a), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.

953. The Chamber notes that the Accused is also charged, under count 5 of the Indictment, for crime against humanity (extermination), pursuant to Articles 3(b), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment, which acts include the attacks on civilians at various locations in Bisesero. The allegations in the aforementioned paragraphs of the Indictment also form the basis for Count 4, crimes against humanity (murder).

954. The Chamber concurs with the reasoning in *Akayesu* that:

“[...] it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide.”²⁰³

²⁰³ See *Akayesu* Judgement, para. 468.

955. The Chamber also concurs with the reasoning in the *Rutaganda* Judgement which states that:

“murder and extermination, as crimes against humanity, share the same constituent elements of the offence, that it is committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. Both murder and extermination are constituted by unlawful, intentional killing. *However*, murder is the killing of one or more individuals, whereas extermination is a crime which is directed against a group of individuals.....”²⁰⁴ (*Emphasis added*)

956. The Chamber notes that in the *Akayesu* Judgement, a series of acts of murder, as alleged in individual paragraphs of the Indictment were held collectively to constitute an act of extermination. In the *Rutaganda* Judgement a single act of an attack on the “ETO”, although charged *inter alia* both as murder and as extermination, was held to constitute extermination, and not murder, because it was found to be a killing of a collective group of individuals.

957. In this case, the killings at Gitwa hill, Muyira hill, Rwirambo hill, Mumataba hill and at the Nyakavumu cave are killings of collective groups of individuals, hence constituting extermination and not murder. Therefore, the Accused cannot be held culpable for crime against humanity (murder), in respect of these killings. The Chamber recalls its findings in Section 6.3 above.

958. The Chamber therefore finds that Musema is not individually criminally responsible, for crime against humanity (murder), pursuant to Article 3(a), 6(1) and 6(3) of the Statute, and as charged in Count 4 of the Indictment.

²⁰⁴ See *Rutaganda* Judgement, para.422.



6.5 Count 6: Crime against Humanity (other inhumane acts)

959. *Count 6* of the Indictment charges Musema with *crime against humanity (other inhumane acts)*, pursuant to Articles 3(i), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.

960. The Chamber has already defined “Other inhumane Acts”, as envisaged in Article 3 of the Statute.²⁰⁵

961. The Chamber finds that the Prosecutor has failed to prove beyond a reasonable doubt that Musema is individually criminally responsible for any act, falling within the ambit of crime against humanity (other inhumane acts), pursuant to Articles 3(i), 6(1) and 6(3) of the Statute, as charged in Count 6 of the Indictment.

²⁰⁵ See *Supra* Section 3.3.

6.6 Count 7: Crime Against Humanity (rape)

962. *Count 7* of the Indictment charges Musema with *crime against humanity (rape)*, pursuant to Articles 3(g), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.

963. In light of its factual findings with regard to the allegations in paragraph 4.10 of the Indictment²⁰⁶, the Chamber considers the criminal responsibility of the Accused, pursuant to Articles 6(1) and 6(3) of the Statute.

964. The Chamber notes that the Defence has made certain admissions *inter alia*: that the Tutsi were a racial or ethnic group; that there were widespread or systematic attacks through out Rwanda, between the period 1 January and 31 December 1994 and these attacks were directed against civilians on the grounds of ethnic affiliation and racial origin. The Chamber finds that the Prosecutor is discharged of the burden of proving these elements in respect of crime against humanity (rape).

965. The Chamber has adopted the definition of rape set forth in the *Akayesu* Judgement, as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”²⁰⁷ and the definition of sexual violence set forth in the *Akayesu* Judgement as “any act of a sexual nature which is committed on a person under circumstances which are coercive.”²⁰⁸

966. The Chamber has made the factual finding that on 13 May 1994 the Accused raped a Tutsi woman called Nyiramusugi. The Chamber recalls its finding in Section 6.3 *supra*, that the Accused had knowledge of a widespread or systematic attack on the civilian population. The Chamber finds that the rape of Nyiramusugi by the Accused was consistent with the pattern of this attack and formed a part of this attack.

²⁰⁶ See *Supra* Section 5.3.

²⁰⁷ See *Supra*, Section 3.3.

²⁰⁸ See *Supra*, Section 3.3.



967. The Chamber therefore finds, that Musema is individually criminally responsible for crime against humanity (rape), pursuant to Articles 3(g) and (6)(1) of the Statute.

968. However, the Chamber finds, that the Prosecutor has failed to prove beyond a reasonable doubt any act of rape that had been committed by Musema's subordinates and that Musema knew or had reason to know of this act and he failed to take reasonable measures to prevent the said act or to punish the perpetrators thereof, following the commission of such act. The Prosecutor has therefore not proved beyond a reasonable the individual criminal responsibility of Musema, pursuant to Articles 3(g) and 6(3) of the Statute, as charged in Count 7 of the Indictment.

6.7 Counts 8 and 9 -Violation of Common Article 3 and Additional Protocol II

969. *Counts 8 and 9 of the Indictment charge Musema with serious violations of Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto, as incorporated in Article 4 of the Statute of the Tribunal.*

970. The Chamber notes that the Defence admitted that, at the time of the events alleged in the Indictment, there existed an internal armed conflict meeting the temporal and territorial requirements of both Common Article 3 and Additional Protocol II. Further, evidence presented during the trial, in particular the testimony of Musema, demonstrated the full extent of the conflict between the dissident armed forces, the FPR, and the Government forces, the FAR, in Rwanda throughout the period the offences were said to have been perpetrated.

971. On the basis of the above, the Chamber finds that it has been established beyond reasonable doubt that at the time of the events alleged in the Indictment there existed a non-international armed conflict meeting the requirements of Common Article 3 and Additional Protocol II.

972. The Chamber is also satisfied beyond reasonable doubt that the victims of the offences alleged, comprised of unarmed civilians, men, women and children, are protected persons under Common Article 3 and Additional Protocol II. Moreover, the Chamber notes that the Defence admitted that the victims of the alleged crimes were individuals protected under Common Article 3 and Additional Protocol II.

973. The Chamber recalls, as developed in Section 3.4 of the Judgement on the Applicable Law, that offences must be closely related to the hostilities or committed in conjunction with the armed conflict to constitute serious violations of Common Article 3 and Additional Protocol II. In other words, there must be a nexus between the offences and the armed conflict.

974. The burden rests on the Prosecutor to establish, on the basis of the evidence adduced during trial, that there exists a nexus, on the one hand, between the acts for which Musema is individually



criminally responsible, including those for which he is individually criminally responsible as a superior, and, on the other, the armed conflict. In the opinion of the Chamber, the Prosecutor has failed to establish that there was such a nexus.

975. Consequently, the Chamber finds Musema not guilty of serious violations of Common Article 3 and Additional Protocol II as charged in Counts 8 and 9 of the Indictment.



7. VERDICT

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments,
THE CHAMBER finds Alfred Musema-Uwimana:

- Count 1: Guilty of Genocide
- Count 2: Not Guilty of Complicity in Genocide
- Count 3: Not Guilty of Conspiracy to commit Genocide
- Count 4: Not Guilty of Crime against Humanity (murder)
- Count 5: Guilty of Crime against Humanity (extermination)
- Count 6: Not Guilty of Crime against Humanity (other inhumane acts)
- Count 7: Guilty of Crime against Humanity (rape)
- Count 8: Not Guilty of Violation of Common Article 3 to the Geneva Conventions and Additional Protocol II thereto (Article 4 (a) of the Statute)
- Count 9: Not Guilty of Violation of Common Article 3 to the Geneva Conventions and Additional Protocol II thereto (4 (e) of the Statute)

8. SENTENCING

976. The Chamber will now summarize the legal provisions relating to sentences and penalties and their enforcement, before discussing the scale of sentences and the general principles applicable in the determination of penalties.

8.1 Applicable texts

977. The Chamber will apply the following statutory and regulatory provisions: Article 22 of the Statute on judgement, Articles 23 and 26 of the Statute dealing respectively with penalties and enforcement of sentences, and Rules 101, 102, 103, and 104 of the Rules covering, respectively, sentencing procedure upon a conviction, status of the convicted person, and place and supervision of imprisonment.

8.2 Scale of sentences applicable to an accused convicted of one of the crimes listed in Articles 2, 3, or 4 of the Statute of the Tribunal

978. The Tribunal may sentence an accused who pleads guilty or is convicted to imprisonment for a fixed term or the remainder of his life. The Statute of the Tribunal does not allow for other forms of punishment, such as the death penalty, penal servitude or a fine.

979. In most national systems the scale of penalties is determined in accordance with the gravity of the offence. The Chamber notes that the Statute of the Tribunal does not rank the various crimes within the Tribunal's jurisdiction. The same scale of sentences applies to each of the crimes, with the maximum penalty being life imprisonment.

980. It should be noted, however, that in imposing a sentence, the Chamber should take into account, as one of the factors specified in Article 23(2) of the Statute, the gravity of the offence. In the opinion of the Chamber, it is difficult to rank the gravity of genocide and crime against

humanity relative to each other. Both genocide and crime against humanity are crimes which are particularly shocking to the collective conscience.

981. Regarding the crime of genocide, the preamble of the Genocide Convention recognizes that at all periods of history, genocide has inflicted great losses on humanity and reiterates the need for international co-operation to liberate humanity from such an odious scourge. The crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent “to destroy in whole or in part, a national, ethnic, racial or religious group as such”, as stipulated in Article 2 of the Statute. The Chamber is thus of the opinion that genocide constitutes the “crime of crimes”, and that this must be taken into account in deciding the sentence.

982. Crime against humanity must also be punished appropriately, duly recognizing their gravity. Article 27 of the Charter of the Nuremberg Tribunal empowered that Tribunal to sentence any accused found guilty of crimes against humanity, as defined in Article 6(c) of the said Charter, to death or other punishment deemed to be just.

983. Rwanda, like all the States that have incorporated crime against humanity or genocide in their domestic legislation, provides the most severe penalties for these crimes in its criminal legislation. The Rwandan Organic Law on the Organization of Prosecutions for Offences constituting Genocide or Crimes against Humanity, committed since 1 October 1990,²⁰⁹ groups accused persons into four categories, according to their acts of criminal participation. Included in the first category are the masterminds of the crimes (planners, organizers), persons in positions of authority, persons who have exhibited excessive cruelty and perpetrators of sexual violence. All such persons may be punished by the death penalty. The second category covers perpetrators, conspirators or accomplices in criminal acts, for whom the prescribed penalty is life imprisonment. Included in the third category are persons who, in addition to committing a substantive offence, are

²⁰⁹ Organic Law No. 8/96 of 30 August 1996, published in the Gazette of the Republic of Rwanda, 35th year. No. 17, 1 September 1996.

guilty of other serious assaults against the person. Such persons face a short-term imprisonment. The fourth category is that of persons who have committed offences against property.

984. Reference to the practice of sentencing in Rwanda and to the Organic Law is for purposes of guidance. While referring as much as practicable to such practice, the Chamber maintains its discretion to pass on persons found guilty of crimes within the Tribunal's jurisdiction any sentence authorized by the Statute, taking into account the circumstances of the case and the individual circumstances of the convicted person.

8.3 General principles regarding the determination of sentences

985. In determining the sentence, the Chamber shall be mindful of the fact that the Security Council, acting under Chapter VII of the United Nations Charter, established the Tribunal to prosecute and punish perpetrators of genocide and serious violations of international humanitarian law in Rwanda in 1994 with a view of ending impunity, promoting national reconciliation, and restoring peace.

986. The penalties imposed by this Tribunal must be directed at retribution, so that the convicted perpetrators see their crimes punished, and, over and above that, at deterrence, to dissuade for ever others who may be tempted to commit atrocities by showing them that the international community does not tolerate serious violations of international humanitarian law and human rights.

987. The Chamber also recalls that in the determination of sentences it is required, under Article 23(2) of the Statute and Rule 101(B) of the Rules, to take into account a number of factors including the gravity of the offence, the individual circumstances of the convicted person, and the existence of aggravating and mitigating circumstances. It is a matter, as it were, of individualizing the penalty.

988. In individualizing the penalty, the Chamber is not limited to consideration of the factors enumerated above. The Judges may consider any factor or fact that will enable the penalty to reflect the totality of the circumstances present in the given case and thus to ensure justice in sentencing.

989. Finally, the Chamber recalls that nothing in the Statute or the Rules requires a separate penalty for each proven count. In other words, the Chamber may impose one penalty for all the counts on which the accused has been found guilty.

8.4 Submissions of the Parties

Prosecutor's submissions

990. In her closing brief and in her closing argument made in open court on 24 June 1999, the Prosecutor submitted that the crimes committed by Musema, in particular genocide and crime against humanity, are crimes of extreme gravity. She submitted that the Chamber should take into account the status of Musema in society at the time of the commission of the crimes, including his resulting duty vis-à-vis the population; his individual role in the execution of the crimes; his motivation and his goals, as well as the extent of planning and premeditation; his disposition and will in regard to the criminal acts and the extent of behaving in a manner contrary to his duty; the way the crimes were executed; and his behaviour after the criminal acts.

991. The Prosecutor submitted that the following aggravating circumstances should be taken into account in this case:

1. Musema was known in society;
2. His criminal participation extended to all levels;
3. He was committed to the genocidal program of the interim government. At the same time, he seized the occasion to promote his personal ambitions;
6. He abused his position as Director of a parastatal company by diverting workers and property to further unlawful acts;
7. The way the crimes were committed;
8. After the criminal acts, Musema did nothing to punish the perpetrators. Indeed, he was one of the main perpetrators;
9. He lied before the Chamber when dealing with the defence of alibi; and
10. He showed no remorse whatsoever with respect to the role he played in the commission of the unlawful acts.

992. Furthermore, the Prosecutor submitted that there are no mitigating circumstances. Musema did not co-operate with the Prosecutor. Nor has he shown that in committing the unlawful acts he was following orders.

993. With regard to the issue of multiple sentences which could be imposed on Musema as envisaged by Rule 101(c) of the Rules, the Prosecutor asked for a separate sentence for each of the counts on which Musema was found guilty while requesting that he serve the more severe sentence. The Prosecutor submitted that the Chamber should impose a sentence for each offence

committed in order to fully recognise the severity of each crime and the particular role of the convicted person in its commission.

994. In conclusion, the Prosecutor recommended life imprisonment for each count on which Musema is convicted.

Defence's submissions

995. In its closing argument, the Defence submitted that the Prosecutor failed to prove Musema's guilt and that Musema should be set free.

996. The Defence further submitted that Musema deeply regrets that factory facilities may have been used by the perpetrators of atrocities and that he was unable to prevent this.

997. Moreover, it was submitted that Musema admitted publicly the genocide against the Tutsi people in Rwanda in 1994 and that he publicly expressed his distress about the deaths of so many innocent people and that he paid tribute to all victims of the tragic events which took place in Rwanda.

998. Finally, the Defence underlined that Musema co-operated with the Prosecutor by admitting facts to facilitate an expedient prosecution and trial.

8.5 Personal circumstances of Alfred Musema

999. Musema was born in 1949. At the age of 35, Musema was appointed Director of the Gisovu Tea Factory by a presidential decree and he continued to serve in that capacity during April, May, and June 1994. The Gisovu Tea Factory was one of the most successful tea factories in Rwanda and it was a major economic enterprise in Kibuye. As Director of the factory, Musema exercised legal and financial control over its employees.

8.6 The Chamber

1000. The Chamber has examined all the submissions presented by the parties in determination of the sentence, and finds as follows.

Aggravating circumstances

1001. Amongst the aggravating circumstances, the Chamber finds, first of all, that the offences of which Musema is found guilty are extremely serious, as the Chamber already pointed out when it described genocide as the ‘crime of crimes’.

1002. As to Musema’s role in the execution of the crimes, the Chamber notes that he led attackers who killed a large number of Tutsi refugees in the Bisesero region on 26 and between 27 April and 3 May 1994, in mid-May 1994, including on 13 and 14 May, and at the end of May 1994. Musema was armed with a rifle and used the weapon during the attacks. He took no steps to prevent tea factory employees or vehicles from taking part in the attacks.

1003. The Chamber recalls that it found that individuals perceived Musema as a figure of authority and as someone who wielded considerable power in the region. The Chamber is of the opinion that, by virtue of this capacity, Musema was in a position to take reasonable measures to help in the prevention of crimes.

1004. The Chamber however finds that Musema did nothing to prevent the commission of the crimes and that he took no steps to punish the perpetrators over whom he had control. As the Chamber found in Section 5, Musema had powers enabling him to remove, or threaten to remove, an individual from his or her position at the Gisovu Tea Factory if he or she were identified as a perpetrator of crimes punishable under the Statute.

Mitigating circumstances

1005. The Chamber, amongst the mitigating circumstances, takes into consideration that Musema admitted the genocide against the Tutsi people in Rwanda in 1994, expressed his distress about the deaths of so many innocent people, and paid tribute to all victims of the tragic events in Rwanda.

1006. Additionally, the Chamber notes that Musema expressed deep regret that the Gisovu Tea Factory facilities may have been used by the perpetrators of atrocities.

1007. Furthermore, the Chamber notes that Musema's co-operation through his admission of facts pertaining to the case, not the least the fact that a genocide occurred in the Bisesero region in April, May, and June 1994, facilitated an expeditious trial. Finally, the Chamber notes that Musema's co-operation continued throughout the trial and similarly contributed to proceedings without undue delay.

Conclusion

1008. Having reviewed all the circumstances of the case, the Chamber is of the opinion that the aggravating factors outweigh the mitigating factors, especially as on several occasions Musema personally led attackers to attack large numbers of Tutsi refugees and raped a young Tutsi woman. He knowingly and consciously participated in the commission of crimes and never showed remorse for his personal role in the atrocities.



TRIAL CHAMBER I

FOR THE FOREGOING REASONS,

DELIVERING its decision in public, *inter partes* and in the first instance;

PURSUANT to Articles 22, 23, and 26 of the Statute and Rules 101, 102, 103, and 104 of the Rules;

NOTING the general practice regarding sentencing in Rwanda;

NOTING that Musema has been found guilty of:

Genocide	- Count 1,
Crime against humanity (extermination)	- Count 5, and
Crime against humanity (rape)	- Count 7;

NOTING the closing briefs submitted by the Prosecutor and the Defence; and

HAVING HEARD the Prosecutor and the Defence;

IN PUNISHMENT OF THE ABOVE MENTIONED CRIMES,

SENTENCES Alfred Musema to:

**A SINGLE SENTENCE OF LIFE IMPRISONMENT
FOR ALL THE COUNTS ON WHICH HE HAS BEEN FOUND GUILTY**



RULES that the imprisonment shall be served in a State designated by the President of the Tribunal in consultation with the Trial Chamber; the Government of Rwanda and the designated State shall be notified of such designation by the Registrar;

RULES that this Judgement shall be enforced immediately, and that, however:

1. until his transfer to the designated place of imprisonment, Alfred Musema shall be kept in detention under the present conditions;
2. upon notice of appeal, if any, the enforcement of the sentence shall be stayed until a decision has been rendered on the appeal, with Musema nevertheless remaining in detention.

Judge Aspegren and Judge Pillay append their Separate Opinions to this Judgement.

Arusha, 27 January 2000.

Lennart Aspegren
Presiding Judge

Laïty Kama
Judge

Navanethem Pillay
Judge

(Seal of the Tribunal)

SEPARATE OPINION OF JUDGE LENNART ASPEGREN

As to the factual findings:

1. I agree and share the factual findings by the Trial Chamber in its Judgement with the exception of certain findings which I am not able to support, namely:
 - those in Section 5.2 of the Judgement relating to events which are said to have occurred on 26 April 1994 at Gitwa hill, between 27 April and 3 May 1994 on Rwirambo hill, and at the end of May 1994 at Nyakavumu cave; and
 - those in Section 5.3 of the Judgement relating to events which are said to have occurred on 14 April 1994 (paragraph 4.8 of the Indictment).
2. For these dates and events, I remain unconvinced that it has been established beyond reasonable doubt that Musema participated in the events as alleged.
3. Below is the reasoning behind this partially dissenting position of mine.
4. Reference should of course be made to the relevant facts and presentation of the alibi as developed in said Sections 5.2 and 5.3 of the Judgement.

26 April 1994, Gitwa hill

5. As noted in the Judgement, the alibi of Musema is not specific to 26 April 1994, but is linked with the mission order (exhibit D10, Annex B to the Judgement) and the travel consequent thereto. I agree with the facts set forth below, as presented in the Judgement, but dissent on the rejection of the alibi for 26 April. Rather, it is my opinion that the alibi here stands.
6. I recall, as stated in the Judgement, that the Defence purports that on 18 April 1994, Musema, while searching for the heads of service of *OCIR-thé* in Gitarama, had run into the Minister of Industry, Trade & Handicraft, Justin Mugenzi. Having conveyed to Musema his concerns for the Gisovu Tea Factory, the Minister indicated that Musema would be sent on mission to contact the Director-General of *OCIR-thé* to start up the factories.
7. According to the alibi, Musema, who during this period was staying in Rubona, returned to Gitarama on 21 April 1994 where again he ran into Justin Mugenzi and also the Minister of Public Works, Water & Energy, this time at a FINA petrol station. Mugenzi told Musema of the security measures he had taken for the factory, and informed him that he had been unable to contact the Director-General of *OCIR-thé*, Baragaza. As such, Musema was to go to the North of the country to find him. Mugenzi said he himself would prepare the necessary paperwork which Musema should pick up from the residence of Faustin Nyagahima, a director within the Ministry of Industry, Trade & Handicraft. During the meeting at the FINA station, Mugenzi authorized the Public Works, Water & Energy Minister to sign the eventual mission order.
8. On 22 April, Musema said, he picked up the mission order (exhibit D10) from Faustin Nyagahima. This order was stamped by the Minister of Foreign Affairs, who, according to Musema, was the only minister at that time in Gitarama to possess an official stamp. For security reasons, Musema was given two gendarmes from the military camp in Gitarama to accompany him and then travelled up to the tea factory of Pfunda where he stayed until 25 April. With reference to the said exhibit D10, where Musema wrote "*arrivée à Pfunda le 21/04/1994*", he attributed this date to an error, and affirmed that he arrived at the factory in Pfunda on 22 April. Evidence in support of this include exhibit D28, a "*Déclaration de Créances*" for expenses incurred by *OCIR-thé* (Gisovu Tea Factory) for the use of two gendarmes from 22 April 1994 up to 2 May 1994, which is signed by the factory's Chief Accountant of the Gisovu Tea Factory.
9. Although he only visited the Pfunda Tea Factory during this part of his mission, Musema stated that he was able to include the tea factories of Nyabihu and Rubaya in his interim report (exhibit D29), having met the respective directors during the trip. I note, at this juncture, that the Defence uncovered this report in the Gisovu Tea Factory archives.
10. According to the alibi, on 25 April Musema returned to Gitarama after meeting at Mukamara the Director-General of *OCIR-thé*, who read the interim report and confirmed that Musema could continue his mission. Having stayed overnight in Gitarama, Musema travelled on to Rubona.

11. Defence Witness Claire Kayuku, Musema's spouse, confirmed that he left Rubona on 22 April for Gisenyi and on 26 April returned to Rubona where he stayed overnight.
12. I have also considered the contentions of the Prosecutor that the mission order was false and that the stamps of the ministries were fabrications. She contends that chance encounters with ministers, as described by Musema, were hardly convincing as the basis of the mission. In the Prosecutor's opinion, the mission order was designed simply to mislead the Tribunal and to conceal the extent of Musema's involvement in the massacres. The Prosecutor further contends that the interim report was strikingly thin considering the apparent nature of the mission. Moreover, Prosecution Witness BB stated that the mission order was unusual, and not one normally used by *OCIR-thé*.
13. I have specifically considered the issue of the alleged falsification by Musema of the mission order so as to camouflage his participation in the massacres.
14. In my view, it should be recalled, first and foremost, that this document, exhibit D10, was uncovered by the Swiss investigating magistrate while in Rwanda, and was thus afterwards brought to the attention of Musema while he was under arrest in Switzerland. As such, until it was appropriately disclosed, whether it be by the Swiss authorities or the Prosecutor, Musema did not have possession of it.
15. With this in mind, as regards the issue of alleged falsification, as addressed by the Prosecutor, I thus find it hard to see why, had Musema taken the time and care meticulously to create a false mission order in 1994 in Rwanda before fleeing abroad, he would have abandoned the document, a document which he must have deemed essential to his alibi in case of a possible investigation or trial concerning the events. Surely, were the mission order falsified to create such an alibi, Musema would most probably have seen to it that it was not left behind at the end of the conflict in Gisovu, especially in view of the advancing war front, and the uncertain fate of the Gisovu Tea Factory.
16. As pertains to the allegedly unconvincing nature of Musema's chance encounters with the ministers in Gitarama, I note that the prevailing circumstances during this period were far from normal. Indeed, evidence has shown that, around 18 April 1994 in Rwanda, an armed conflict was raging between the FAR and the FPR, widespread massacres of civilians were occurring, thousands of civilians were displaced, and the interim government was fleeing Kigali to seek temporary refuge in Gitarama. Consequently, it is my opinion that, in these circumstances, such chance encounters with ministers in Gitarama cannot be ruled out or deemed unconvincing *per se*.
17. As such, I find that the arguments advanced by the Prosecutor in support of the allegation that the mission order was a fake are insufficient to demonstrate that Musema purposefully falsified this order to conceal for the future his involvement in the 1994 massacres.
18. During Musema's testimony, he also dealt with the other issues pertaining in the main to the plausibility of such a mission. He explained that the prevailing circumstances, namely the insecurity caused by the armed conflict and the displacement of the interim government to Gitarama, would account for stamps of ministries other than that governing *OCIR-thé* appearing on the mission order.
19. I note that, although Musema included the Nyahibu and Rubaya tea factories in his interim report, yet did not visit them in person, he did meet and discuss these factories with the respective Director. It was on the basis of these discussions that Musema compiled this report. The contentions of the Prosecutor that the report is not derived from information gathered by Musema during his mission and is "strikingly thin" compared to the importance of the mission are, as I see it, unsubstantiated by evidence within the trial. It should be recalled that Musema had explained that this was just an interim report covering the initial stages of his mission, and that it did not even represent the "half-way" stage of his mission. Moreover, the argument of the Prosecutor that the report could have been written anywhere is similarly unsubstantiated during trial.
20. The Defence Witness Claire Kayuku, although married to Musema, appeared credible during her testimony, and testified that Musema returned to Rubona on 26 April.
21. This supports his alibi.
22. I agree with the majority as regards the testimony of *Witness M*. However, I do not share the majority position that the alibi should be rejected on this point. Rather, I am of the opinion that the alibi of Musema for these dates, which was heavily scrutinized during the trial and supported by documentary evidence and oral testimony, is such as to at least cast a reasonable doubt on the allegation of the Prosecutor as to the involvement of Musema in the attack of 26 April 1994 on Gitwa hill.

•27 April - 3 May, Rwirambo hill

23. Like the majority, I have considered the testimony of *Witness R* and the arguments of the Defence as to the discrepancies and the answers of the witness thereon between the witness' testimony in this case and his testimony in the *Kayishema* and *Ruzindana* case. However, unlike the majority, I find the evidence of *Witness R* must be considered to be unreliable and to cast doubt in the present matter.
24. There, of particular concern to me are the discrepancies which relate to *Witness R*'s injuries and the

treatment he received for them. I recall that R had indicated to the Chamber that as he had been unable to get hospital treatment, a benefactor put cow butter on his injury. However, this contrasts with his testimony as a witness in the *Kayishema* and *Ruzindana* case, where, in answer to a question from Judge Khan, he stated: "At that time the situation was not yet too serious and one could find one or two Hutus who were kind hearted and one could give them money for the purchase of penicillin". R had also testified that he had been treated in Rwirambo.

25. Yet, during the course of his testimony in this trial, Witness R denied having ever said anything about going to Rwirambo, it being impossible to reach Rwirambo hospital as there were barriers. He was able to recall before the Chamber that he did speak about penicillin as regards to serious injuries and that some individuals were able to find ways of getting this medicine. Following more questions from the Defence and the Chamber, he added that he did apply penicillin to his injury much later when his injury had scarred, but that he had never gone to a Hutu to ask for penicillin.
26. Although the divergent answers given by Witness R during his testimonies are not specific to the involvement of Musema in the attack, they touch upon serious matters and represent discrepant answers given under solemn declaration before this Tribunal. By their very nature therefore, their reliability should be equivalent, and discrepancies between such testimonies in my view must affect the credibility of the witness. Consequently, I am of the opinion that the contradictions raised by the Defence are serious and important enough to cast doubt on R's credibility in the present matter and that he is not, therefore, reliable enough.
27. I therefore find that it has not been established beyond reasonable doubt that Musema participated in an attack on Rwirambo hill around 27 April - 3 May 1994.

•End of May attack at Nyakavumu cave

28. Like the majority, I have considered the testimonies of Prosecution Witnesses H, S, D, AC and AB, and Musema's and Claire Kayuku's testimonies, as well as documentary evidence in support of the alibi. However, unlike the majority, I cannot find that it has been proven beyond reasonable doubt that Musema participated in the attack on Nyakavumu cave.
29. My reasons follow.
30. *Witness H* speaks of the attack occurring around the end of May or early June, *Witness S* testifies to it taking place near the end of May, while *Witnesses D* and *AC* make no specific mention of dates in their testimony. *Witness AB* stated that Musema came to the Kibuye military camp asking for firewood sometime in June.
31. The alibi places Musema in Gisovu on 27 and 28 May 1994, leaving for Shagasha on 29 May. According to the alibi, on 31 May he visited Zaire as part of a technical mission. Copies of his passport were tendered in support thereof. His absence from the Gisovu tea factory lasted until 10 June 1994. It should be noted that all these dates are corroborated by exhibit P68, being Musema's handwritten calendar (Annex C to the Judgement).
32. The majority finding in the Judgement is based on the overwhelming consistent evidence of the Prosecution witnesses. The fact that the exact date of the attack is not clear from the said evidence, does not, in the opinion of the majority, deter from the reliability of the evidence. The alibi, in its opinion, does not refute this evidence.
33. I have to disagree. The witnesses, as I have indicated above, speak in turn of the 'end of May', 'early June' and 'sometime in June' as the possible time of the attack. One could, therefore, logically imply therefrom that the attack would have occurred on any date between the end of May and the end of June. Of course, I agree, in view of the prevailing situation in the Bisesero region during the events alleged, the likely trauma suffered by witnesses to the events, and the time lapse between the events and testimony thereon before this Tribunal, that it may be harder than usual for the witnesses to remember dates from five years ago with exactitude. Even though the evidence presented by these witnesses, is, I concede, consistent, there remains the fact that doubt prevails in the matter, inasmuch as it cannot be adduced with more precision when the attack occurred.
34. To state that the attack has taken place, and merely place it in a loose temporal setting, cannot be considered as removing doubt from the matter, and consequently, in my opinion, shall not be the basis of a finding of guilt, proved beyond reasonable doubt. Moreover, as in all cases, the burden being on the Prosecutor to prove the facts alleged, a lack of specificity in such a serious matter should not be of prejudice to the Defence. As the alibi stands from the end of May to early June, to find the events proved beyond reasonable doubt on the basis of consistent witness testimonies as to the events and yet, not as to time, is to place the burden of proof on the Defence. Moreover, an inability to be more precise as to the date of the attack in this instance does not allow Musema to adequately answer the relevant charges against him.
35. Therefore, I find that Musema's participation in the attack on Nyakavumu cave is not established beyond reasonable doubt.

•Annunciata Mujawwezu, 14 April 1994

36. I agree with the Chamber's majority that it has not been proven that on 14 April 1994, Annunciata Mujawwezu was raped or that Musema ordered that she be killed together with her son, Blaise.
37. However, the majority is convinced that the rape was ordered by Musema. In my view, this was not proven.
38. The main evidence on the raping comes from witness I, whose testimony was partially inconsistent, and to some extent contradicted by witnesses L and PP.
39. In my mind, these inconsistencies and contradictions cast doubt on witness I's testimony.
40. Therefore, I am not convinced, beyond reasonable doubt, by the evidence presented that on 14 April 1994, Musema, as alleged in paragraph 4.8 of the Indictment, ordered or encouraged the raping of Annunciata Mujawwezu.

As to the legal findings, verdict and sentencing:

41. I concur with the legal findings in the Judgement (Section 6) to the extent they pertain to the acts other than those above.
42. Concerning the alleged rape of Annunciata Mujawwezu on 14 April 1994, as just pointed out, the majority in its factual findings found it proved that Musema ordered the rape. On this point, as I have stated, I disagree, since I am not convinced that he did.
43. Being overruled in this matter, I join the majority in its legal findings on this point in Section 6.1 of the Judgement, to say, in short, that the order as such is not punishable.
44. I also agree with the majority's findings of guilt in the Judgement to the extent they pertain to the acts other than those above. Being partially overruled as to the factual and legal findings, I concur with the verdict (Section 7) and the sentence (Section 8).

Arusha, 27 January 2000,

Lennart Aspegren

Presiding Judge

(Seal of the Tribunal)

SEPARATE OPINION OF JUDGE NAVANETHEM PILLAY

The judgement is unanimous with the exception of the partial dissents on factual findings that have been recorded.

1. I dissent with the factual finding of the majority in respect of the evidence presented in support of the allegations in paragraph 4.7 of the Indictment, in particular that the Accused encouraged the killing of Tutsis and the rape of Tutsi women at a meeting on 18 April 1994 and that following the meeting he participated in an attack of Tutsis, by securing weapons and ammunition for the attack.
2. My approach to the examination of the defence alibi presented by the Accused is at variance with the majority, even though the conclusions reached with regard to the other allegations in the Indictment are the same. For this reason, I am recording a separate opinion.
3. Evidence of an alibi was tendered by the Accused and other Defence witnesses. I have

assessed the evidence of alibi presented at trial as a whole, rather than on a piece meal, or a day by day basis. My assessment depends on the credibility findings I have made with regard to each witness, and the extent to which any documentary or other additional evidence presented supports or undermines their testimony.

4. In my view, once the credibility of a witness has been impaired, the testimony of that witness is inherently unreliable in all of its parts, unless it is independently corroborated. Similarly, once the Chamber has made a finding of credibility with respect to a witness, the testimony of that witness should be accepted, unless there is a compelling reason to find otherwise.
5. As set forth in the Judgement, the evidence given by the Prosecution witnesses has been evaluated and findings of credibility have been made with regard to each witness. The witnesses who testified specifically in relation to the allegations regarding events at Karongi Hill on 18 April are Witness M (for the Prosecution), and the Accused, and Claire Kayuku, the wife of the Accused (for the Defence).

6. The Chamber has reviewed the evidence presented by Witness M and found Witness M to be a credible witness. Witness M testified that he heard the Accused make a statement at the meeting held on Karongi Hill on 18 April 1994 in which he encouraged those present to kill Tutsis and stated that "those who wanted to have fun could rape their women and their children." Subsequently, according to the testimony, the Accused ordered a guard to hand over rifles and ammunition for an attack on Tutsi refugees. Witness M also saw his cousin and niece being raped by five men, two of whom he recognized as having attended the meeting.

7. The majority has in effect rejected this evidence on the grounds that they accept the alibi of the Accused with respect to 18 April 1994. The Accused testified that on 18 April he was in Gitarama, and the Defence argued that therefore he could not have been at the meeting on Karongi hill or the subsequent attack. Claire Kayuku, the Accused's wife, recalled in her testimony that the Accused went to Gitarama during this period but could not recall the exact date. Without specificity regarding dates, the testimony of Claire Kayuku, in my view, does not corroborate the alibi of the Accused.

8. Having found that the Accused is not a credible witness for the reasons set forth below, I cannot accept his uncorroborated testimony, as the Majority does, when it directly conflicts with the testimony of Witness M, whom the Chamber has found to be credible. The Majority finds that with regard to the meeting at Karongi Hill, the sole testimony of Witness M is insufficient to prove beyond reasonable doubt that the Accused was present. The majority further states that with regard to the rapes about which Witness M testified, "there is no evidence that Musema ordered the rapes."

9. Witness M, who the Chamber unanimously declared to be credible, did provide compelling testimony constituting evidence that the Accused participated in the Karongi meeting and subsequent attack, that he instigated rape through the suggestion he made at the meeting that those who wanted to "have fun" could rape Tutsi women, and that two women were subsequently raped by two men who had attended the meeting.

10. I accept Witness M's testimony as a true account of events which took place on 18 April, and I reject the testimony of the Accused in presenting an alibi for this date on account of the following findings with regard to the alibi defence. The evidence of the Accused is so riddled with inconsistencies, as set forth below, that I do not consider his testimony, that he was in Gitarama on 18 April, which is not confirmed by

any other witness or any other evidence, to raise reasonable doubt as to the credibility of the testimony of Witness M.

11. Witness M is the sole prosecution witness for both the 18 April and 26 April attacks. He was found to be credible by the Chamber. The Majority accepted Witness M's evidence and rejected the Accused's alibi and found that the Accused was present and participated in the 26 April attack. In respect of 18 April attack, the Majority accepted Witness M's evidence and also accepted the Accused's defence of alibi. In my view, without additional evidence with regard to either event, the testimony of Witness M cannot be rejected in one instance on the basis of testimony from the Accused and accepted in another instance despite testimony from the Accused.

12. For these reasons I disagree with the factual findings of the majority. I find that the Accused addressed a meeting on 18 April 1994, at which he encouraged the killing of Tutsi civilians and the raping of Tutsi women. I hold that these factual findings should be considered as cumulative evidence, when assessing the culpability of the Accused, in respect of the Counts which charge Genocide and Crimes against Humanity (extermination and rape).

The Alibi Defence

13. The Accused acknowledges his presence in Gisovu on 14 April but denies that he was present at Gisovu on 18 April, the date on which he is alleged to have addressed a meeting on Karonge hill FM Station and participated in the attack which ensued. He denies his presence in Gisovu on 13 and 14 May, the dates of the Muyira hill massacres, and he denies his presence at the entombment and asphyxiation of people in a cave at Nyakavumu at the end of May. He denies his presence in the region when there were attacks on 31 May and 5 June at Gishyita and on 22 June, the date of the attack on the Nyarutovu *cellule*.

14. There are a number of documents which are relevant to the alibi defence. Exhibit P54 is a record of an interview of the Accused by Swiss authorities on 11 Feb 1995. In this document, the Accused is recorded as having stated that he left Gisovu on the night of 15 to 16 April. Exhibit P56 is a record of an interview with Swiss authorities on 18 March 1995. In this document, the Accused is recorded as having said that he arrived at Gisovu on 14 April and left on 15 April at 0300. Exhibit P63 is a document written by the Accused, consisting of his notes for his asylum request to Swiss authorities. In these notes he says he left Gisovu on the night of 15 April 1994. Exhibit P68 is a hand written calendar drawn by the Accused, in which he indicates that he went to Butare from Gisovu on 15 April. The Accused testified, contrary to the documents cited above, that he left Gisovu on 17 April at 0300 and arrived in Butare at 0900 on the same day. His wife testified that he returned to their home in Butare on either 16 or 17 April.

15. The handwritten calendar (Exhibit P68), further indicates that the Accused was on mission from 18 to 26 April. Exhibit D10, an *ordre de mission*, records that the date on which the mission commenced was 22 April. A handwritten notation by the Accused next to the first stamp, on page 2 of this document, records that he started the mission on 21 April 1994. The Accused testified that his date of departure on mission was 22 April. He explained his handwritten entry of 21 April on the *ordre de mission* as an error.

16. The Accused does not maintain that he remained in Butare throughout the period 17 to 22 April. He testified that he went to Gitarama on 18 April in the hope of meeting authorities and searching for relatives. He testified that he went again to Gitarama to look for relatives on 21 April. The Accused's wife, Claire Kayuku, testified that between 16 and 22 April the Accused went twice to Gitarama to see his family but she did not specify exact dates. There is no testimony to corroborate the Accused's testimony that he was in Gitarama on 18 April. According to Exhibit P68, the hand written calendar written by the Accused, he should have been on mission to the tea factories on 18 April. There is no tea factory in Gitarama. The Accused testified, under cross-examination, that when he prepared the calendar he was not in possession of documents collected by the Swiss magistrates and by his defence lawyers and that it was only upon sight of these documents that he could say with certainty on which dates his mission was effected.

17. With regard to the whereabouts of the Accused on 13 and 14 May, the Accused testified that he remained in Rubona from 7 to 19 May 1994 and was not in Gisovu during this period. According to Exhibit

P68, the handwritten calendar made by the Accused, he was in Gisovu from 4 to 14 May 1994. According to the record of an interview with Swiss authorities which took place on 16 March 1995, the Accused again said he was in Gisovu during the week of 4 to 13 May 1994. His wife, Claire Kayuku, testified that she remembered that the Accused returned to Gisovu sometime around the middle of May to pay the tea factory employees. She recalled that at the beginning of May the motor vehicle used by the Accused (the red Pajero), was under repair at a garage in Butare for one or two weeks. The Accused testified that the Pajero, registration number A7171, developed mechanical problems on 7 May 1994 and he submitted exhibit D45, a request for payment of expenses for the vehicle's repair. The date of the request was 19 May 1994. There is also a petrol receipt in exhibit D45, for fuel purchased on 14 May in Gitarama for a Pajero, registration number A7171. This document, the Defence contends, places the Accused away from the scene of the massacres in Bisesero on 14 May, but it is inconsistent with his testimony that the vehicle was out of order from 7 May to 19 May and that he was only able to travel to Gisovu on 19 May following its repair. The Chamber also notes that the other receipt submitted with exhibit D45, an invoice for a vehicle part, is dated 19 April 1994.

18. Other than his wife, who was not sure of the exact dates, the only witness to corroborate the statement of the Accused that he was in Rubona, Butare on 13 and 14 May was Defence Witness MH, who testified that he saw the Accused in Rubona on 13 May. Witness MH testified that when he was fleeing from Gitarama to Burundi he stopped in Rubona for twenty minutes in the early afternoon of 13 May 1994. He said he saw and spoke with the Accused there at the house of his mother-in-law and then proceeded to Burundi where he arrived on the same day. His passport was produced with an entry stamp for Burundi on 13 May 1994. Witness MH also testified that the Accused came to see him in Gitarama on 10 May 1994.

19. When asked on cross-examination how he knew the Accused, Witness MH was very vague and evasive, repeating several times that it is very difficult to explain how one comes to know people. He said that he knew the Accused through his family-in-law but insisted that he had no relationship with the family-in-law of the Accused. Then subsequently Witness MH testified that one of his brothers-in-law was married to someone from the Accused's wife's family and that the two families knew one another through marriage. Witness MG, the wife of Witness MH, testified that the Accused came to their house one time in May but that she did not remember the exact date. She described him as a friend and did not mention any family relationship. Neither the Accused nor his wife Claire Kayuku testified to having met Witness MH.

20. On direct examination, Witness MH stated, in response to a question as to whether he had seen the Accused in Gitarama, that he only saw him once, on 10 May. I note that it was only at the prompting of Defence counsel that Witness MH recalled that he saw the Accused again on 13 May, the day he left the country. Initially he testified simply that he left Gitarama for Burundi, saying subsequently that he had forgotten to mention his stop in Rubona where he saw the Accused. The Chamber notes that the cross-examination of Witness MH elicited further memory lapses. The witness testified on cross-examination that he did not remember the make or the color of the vehicle driven by the Accused on May 10th, when he came to Gitarama. The witness testified that he had last used his passport in 1994, when in fact it was evident from the document that it had been used in 1995.

21. On cross-examination, Witness MH testified that before moving to Gitarama he had lived with his wife in Remera. When confronted with her testimony that they lived in Kicukiro, the witness claimed that the area was called Remera Kicukiro. He was unable or unwilling to describe a major landmark near his house in Remera. He was resistant to the questions put to him and did not provide any information on this matter.

22. The manner in which Witness MH testified casts doubt on the credibility of his testimony. He appeared to be very uncomfortable and hesitant to answer questions relating to his relationship with the Accused and to provide details relating to his testimony. In some instances, he virtually refused to answer questions put to him, even relatively straightforward questions. Some of these questions, while undermining his credibility as a witness, did not go directly to the relevant substance of his testimony. Some of these questions, however, are material to the alibi defence, such as his relationship with the Accused and the reason he went to Rubona in the midst of his flight from the country. He is the only witness presented at trial who testified that he saw the Accused somewhere other than in Bisesero on 13 May. There is no defence testimony that the Accused was in Rubona specifically on the date of 14 May, other than that of the Accused.

23. The evidence of Witness MH that he saw the Accused in Rubona on 13 May cannot be accepted, based on his demeanor, his reluctance to answer questions forthrightly, and the many inconsistencies in his

testimony. There is no corroboration of his account, even from testimony of the Accused.

24. I put to the Accused at trial, that momentous events like the massacre at Muyira on 13 and 14 May are such that one would remember where one was when they occurred, without having to consult a calendar. The Accused prepared his own handwritten calendar, meticulously shading in the dates of his movement, less than a year after these massacres took place. The Accused testified that he knew these massacres had occurred because he had heard about them on the radio and because they were discussed at a meeting at the Gisovu Tea Factory on 19 May. The Accused further testified that when he prepared the handwritten calendar, he believed it to be accurate.

25. Having carefully considered the evidence of alibi presented by the Defence, I note the numerous inconsistencies between the testimony of the Accused, the Defence exhibits and prior statements made by the Accused, which was tendered as evidence at the trial. These inconsistencies are material and go to the heart of the alibi defence, particularly in respect to the dates of his travel to and from Gisovu. Witness MH was the only witness, other than the Accused's wife, who testified in support of his alibi, and the Chamber does not accept the testimony of this witness.

26. The Accused relies heavily on the document referred to as Exhibit D10, the *mission de ordre*. The authenticity of this document is in question for numerous reasons. The circumstances, as described by the Accused, of both its issuance and the extension affixed to it, seem highly unlikely and give rise to many questions which have not been satisfactorily explained. The document purports to have been issued by the Minister of Industry and Commerce but it is signed by the Minister of Justice and was extended by the Minister of Defence. The extension is not dated, and all the dates of arrival and departure noted next to the stamps on the second page of the document, are, by the Accused's own admission, in his own handwriting. Moreover, the Accused stated in his testimony that the first entry dated 21 April is not accurate. For these reasons, I do not accept the document as corroborating evidence of the alibi. Moreover, even if Exhibit D10 were to be accepted, it would not support the alibi defence in that it does not contain evidence of his whereabouts on the 18 April, 13 or 14 May, and other dates on which the crimes are alleged to have been committed.

27. The Defence has argued that certain documents, such as receipts and correspondence, and even the Accused's delay in replying to correspondence, should be interpreted as supporting his defence of alibi. In my view, this evidence while it may in some cases be consistent with the alibi, is not probative. For example, the failure of the Accused to reply to correspondence received in May 1994 until June 1994 could be explained by his absence from the tea factory in Gisovu, or it could be explained in many other ways. Moreover, some of the documents presented by the Defence raise more questions than they answer. For example, the receipt for petrol purchased on 14 May 1994 for a Pajero motor vehicle, registration A7171, suggests that the vehicle was in use at that time, although the Accused testified that it had developed mechanical problems on 7 May and was under repair until 19 May 1994. His submission of a request for reimbursement that is dated 19 May is not evidence that he returned to the factory on 19 May, rather than before 19 May, nor is it evidence that he was not there on other dates.

28. Having already found, the testimony of Witness MH to be unreliable, for the reasons set forth above, I note that the only other witness who testified on behalf of the Defence, in support of the alibi, is the testimony of the Accused's wife, Claire Kayuku. The Accused also testified on his behalf. Claire Kayuku's testimony, in large measure does not specifically corroborate the account by the Accused of his whereabouts. For example, she testified that the vehicle was under repair in the first week of May and that the Accused went to Gisovu sometime in the middle of May to pay the tea factory workers. This evidence could as easily be interpreted to support the allegation that the Accused was in Gisovu on 13 and 14 May, when the massacres took place, as to support his claim that he only went to Gisovu on 19 May. Moreover, I note that Claire Kayuku's testimony is consistent with the handwritten calendar of the Accused, in which he places himself at Gisovu through 14 May.

29. In light of the above, I reject the alibi defence, as it is not supported by sufficient evidence to make it even possible to cast reasonable doubt on the other evidence the Chamber finds to be credible. In coming to this conclusion, I note the evidence presented by the Prosecution placing the Accused at the scenes of the crimes he is alleged to have committed. For example, ten witnesses testified that they saw the Accused at Muyira hill in mid-May. Witnesses S and H testified that they saw him in mid-May. Witnesses R and F saw him on the 13 and 14 May. Witnesses N and T saw him on 13 May, Witness D saw him on 14 May and

Witness P saw his vehicle on the 13 May. The Chamber found these witnesses to be credible and to have corroborated each other's evidence.

30. For these reasons, I reject the testimony of the Accused as inherently unreliable in its entirety.

31. With regard to the 31 May attack on Biyiniro hill, the Majority finds that the defence of alibi raised by the Accused casts a reasonable doubt on the evidence presented by the Prosecutor, although they find Witness E to be a "reliable witness", who was "consistent through out his testimony". Hence, the majority finds that the allegations in respect of the aforementioned attack have not been proved beyond a reasonable doubt. I concur with this finding of the Majority. I have reached this conclusion for reasons different to those of the Majority. I am of the view that the alibi defence does not diminish the evidence presented by the Prosecutor, in respect of this allegation. However, I find that the testimony of Witness E does not provide sufficient evidence, with regard to the participation of the Accused in the 31 May attack on Biyiniro hill, to satisfy the required standard of proof. It is solely for this reason that I find that the Prosecutor has failed to prove her case beyond a reasonable doubt, that the Accused participated in the 31 May attack on Biyiniro hill attack.

32. With regard to the 5 June attack, near Muyira hill, the Majority finds that the defence of alibi raised by the Accused casts a reasonable doubt on the evidence presented by the Prosecutor, although they find Witness E to have been "consistent through out his testimony". I concur with this finding of the Majority. I have reached this conclusion however, for reasons different to those of the Majority. I am of the view that the alibi defence does not diminish the evidence presented by the Prosecutor, in respect of this allegation. However, I find that the testimony of Witness E does not provide sufficient evidence, with regard to the participation of the Accused in the 5 June attack, near Muyira hill, to satisfy the required standard of proof. It is solely for this reason that I find that the Prosecutor has failed to prove her case beyond a reasonable doubt that the Accused participated in the 5 June attack near Muyira hill.

33. With regard to the 22 June attack in Nyarutovu *cellule*, the Majority finds that the defence of alibi, "documentary evidence and oral testimony" presented by the Defence, cast a reasonable doubt on the evidence presented by the Prosecutor, although they find Witness P to have given "consistent evidence". I concur with the finding of the Majority that allegations in respect of the aforementioned attack have not been proved beyond a reasonable doubt. I have reached this conclusion for reasons different to those of Majority. I am of the view that the alibi defence does not diminish the evidence presented by the Prosecutor, in respect of this allegation. However, I find that the testimony of Witness P does not provide sufficient evidence, with regard to the participation of the Accused in the 22 June attack, to satisfy the required standard of proof. I therefore find that the Prosecutor has failed to prove beyond a reasonable doubt that the Accused participated in the 28 June attack in Nyarutovu *cellule*.

Done in English and French, the English being authoritative.

Arusha, 27 January 2000

Navanethem Pillay

Judge

(Seal of the Tribunal)