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**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registrar: Mr Adama Dieng

Date: 12 September 2006

PROSECUTOR

v.

Tharcisse MUVUNYI

Case No. ICTR-2000-55A-T

JUDGEMENT AND SENTENCE

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CHAPTER I: INTRODUCTION

1. THE TRIBUNAL AND ITS JURISDICTION

1. The Judgement in the case of **The Prosecutor v. Tharcisse Muvunyi** is issued by Trial Chamber II (the “Chamber”) of the International Criminal Tribunal for Rwanda (the “Tribunal”), composed of Judge Asoka de Silva, presiding, Judge Flavia Lattanzi, and Judge Florence Rita Arrey.

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

3. The Tribunal is governed by the Statute annexed to United Nations Security Council Resolution 955 (the “Statute”) and by its Rules of Procedure and Evidence (the “Rules”).³

4. The Tribunal has authority to prosecute persons responsible for serious violations of international humanitarian law committed in the Republic of Rwanda, and Rwandan citizens responsible for such violations committed in the territory of neighbouring States.⁴ Articles 2, 3 and 4 of the Statute provide the Tribunal with subject-matter jurisdiction over acts of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Tribunal’s temporal jurisdiction is limited by Article 1 of the Statute to acts committed between 1 January 1994 and 31 December 1994.⁵

2. INDICTMENT

5. In the Indictment filed on 23 December 2003 (the “Indictment”), read together with the Schedule of Particulars filed on 28 February 2005, the Prosecution charged Tharcisse Muvunyi (the “Accused”) with five counts pursuant to Articles 2 and 3 of the Statute: genocide, or in the alternative complicity in genocide, direct and public incitement to commit genocide, rape, and other inhumane acts as crimes against humanity. The Prosecution charged the Accused with individual criminal responsibility pursuant to Article 6(1) and 6(3) of the Statute for genocide, complicity in genocide and rape. As for the charge of direct and public incitement to commit genocide, the criminal liability of the Accused is sought only in respect of Article 6(1), while Article 6(3) is referred to for the count of other inhumane acts.

¹ UNSG Report on Rwanda, 1994/924; Expert Report Pursuant UNSC Resolution 935, 1994/1125; Special Rapporteur Reports, 1994/1157, Annexes I and II.

² UN Doc. S/RES/955 (1994).

³ The Statute and the Rules are available at the Tribunal’s website: <<http://www.icttr.org>>.

⁴ Articles 1 and 5 of the Statute.

3. SUMMARY OF PROCEDURAL HISTORY

6. The Accused was arrested on 5 February 2000 in the United Kingdom, and was transferred on 30 October 2000 to the United Nations Detention Facility in Arusha, Tanzania.⁶ The Accused made his initial appearance on 8 November 2000 before Judge William Sekule and pleaded not guilty to all counts in the Indictment. In February 2005, the Chamber denied the Prosecution Motion for leave to amend the Indictment, but indicated that the Prosecution could, if it wished, file a Schedule of Particulars in order to arrange its pleading in a clearer manner provided that no new allegation was added. The Chamber added that if the Prosecution chose to do so, it should include the types of responsibility under Article 6(1) or 6(3) upon which it wished to rely.⁷ The trial commenced on 28 February 2005 and closed on 23 June 2006. The Prosecution called 24 witnesses in the course of 47 trial days, including an investigator, a socio-linguistic expert, and a handwriting expert. The Defence also called 24 witnesses over 33 trial days, including a handwriting expert and a socio-linguistic expert. In addition, the Chamber admitted the sworn statement of one Defence witness in lieu of her oral testimony.⁸ The Accused chose not to testify in his own defence.

4. OVERVIEW OF THE CASE

7. Immediately after the death of Rwandan President Juvénal Habyarimana on 6 April 1994, thousands of Tutsi civilians in many locations across the country were attacked and killed by Hutu militiamen and soldiers. By contrast, Butare *préfecture* remained relatively calm until 19 April 1994 when President Théodore Sindikubwabo visited the town to attend the investiture of a new *préfet*. It is alleged that during his speech, the President incited the public to join in the massacres. Thereafter, large numbers of Tutsi civilians residing in Butare, as well as refugees from other parts of Rwanda, were massacred by soldiers working in collaboration with members of the Hutu *Interahamwe* militia.

8. The Prosecution alleges in the Indictment that the Accused, by virtue of the fact that he became the Interim Commander of the *École des sous-officiers* (ESO) Camp and was the most senior military officer in Butare *préfecture* from 7 April 1994, was responsible for the activities of all the military personnel in the area. The Prosecution further alleges that instead of protecting the public, soldiers under the Accused's command committed various serious violations of international humanitarian law. These allegations form the basis of the charges preferred against the Accused in the Indictment.

9. The Defence, on its part, maintains that the Accused was never formally appointed to any position of authority over the military personnel either at the ESO or in Butare *préfecture* and therefore does not bear superior responsibility for the actions of the soldiers. The Defence also argues that there is no evidence that the Accused either directly participated in, or ordered the commission of, any of the crimes charged in the Indictment.

⁶ "ICTR Detainees – Status on 9 June 2005", online <http://www.icttr.org/ENGLISH/factsheets/detainee.htm>

⁷ *Prosecutor v. Muvunyi*, Decision on Prosecution's Motion for Leave to File an Amended Indictment, 23 February 2005.

⁸ Oral Decision of 23 June 2006.

5. ADMISSIBILITY AND ASSESSMENT OF EVIDENCE

10. The Rules give the Trial Chamber discretion to admit any relevant evidence which it deems to have probative value.⁹ According to the Appeals Chamber, in determining admissibility, the Trial Chamber need only consider that evidence is relevant and displays sufficient indicia of reliability. The question of probative value should be determined at the end of the trial.¹⁰ In admitting and assessing evidence, the Chamber is not bound to follow national rules of evidence, and shall apply rules of evidence which best favour a fair determination of the matter.

11. In general, the Chamber can make a finding of fact based on the evidence of a single witness if it finds such evidence relevant and credible.¹¹ It follows that the Chamber does not necessarily require evidence to be corroborated in order to make a finding of fact on it. Indeed, the Appeals Chamber has held that corroboration is not a rule of customary international law and as such shall ordinarily not be required by Trial Chambers.¹² With respect to sexual offences, Rule 96(i) specifically provides that the Trial Chamber shall not require corroboration of the evidence of a victim of sexual violence.

12. The Chamber's discretion to admit any relevant evidence which it deems to have probative value also implies that while direct evidence is to be preferred, hearsay evidence is not *per se* inadmissible before the Trial Chamber. However, in certain circumstances, there may be good reason for the Trial Chamber to consider whether hearsay evidence is supported by other credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt.

13. The evidence of accomplices or of detained witnesses is similarly not inadmissible before the Trial Chamber. However, the Trial Chamber will, when necessary, approach such evidence with caution in order to ensure a fair trial and avoid prejudice to the Accused.

14. In determining witness credibility, the Trial Chamber has discretion to assess inconsistencies between a witness's pre-trial statements and his evidence in court and to determine the appropriate weight to be attached to such inconsistencies. The mere fact that inconsistencies exist does not mean that the witness completely lacks credibility.¹³ Moreover, the Chamber notes that many of the witnesses who appeared before it had themselves suffered, or were witnesses to, untold physical and psychological suffering during the 1994 events in Rwanda. In many cases, giving evidence before the Tribunal entailed reliving these horrific experiences thereby provoking strong psychological and emotional reactions. This situation may impair the ability of such witnesses to clearly articulate their stories or to present them in a full and coherent manner. When the effect of trauma is considered alongside the lapse of time from 1994 to the present the Chamber believes that the mere fact that inconsistencies exist in a witness's story does not mean that the witness is not credible. Such inconsistencies go to the weight of the evidence rather than the credibility of the witness.

⁹ Rule 89(C) provides that "A Chamber may admit any relevant evidence it deems to have probative value."

¹⁰ *Nyiramasuhuko v. The Prosecutor*, "Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence", 4 October 2004, paras. 5, 7.

¹¹ *Musema*, Judgement (AC), para. 38; *Akayesu*, Judgement (TC), para. 135; *Kamuhanda*, Judgement (TC), paras 40, 41.

¹² *Tadic*, Judgement (AC), para. 539; *Kamuhanda*, Judgement (TC), para.38.

¹³ *Gacumbitsi*, Judgement (AC), paras. 74, 93.

Witness Protection Issues

15. The Chamber has issued witness protection orders in respect of several Prosecution and Defence witnesses, and heard the evidence of several witnesses in closed session. In analysing such evidence, the Chamber was mindful of the need to avoid revealing the identity of protected or otherwise vulnerable witnesses to the press or members of the public. Therefore, in presenting such evidence in this Judgement, the Chamber chose language which in its view, struck a balance between such witness protection concerns and the need to fully convey its reasoning.

Judicial Notice

16. The Appeals Chamber has held that the following are all facts of common knowledge, not subject to reasonable dispute and therefore qualify for judicial notice under Rule 94(A): genocide took place in Rwanda between 6 April and 17 July 1994; there were widespread or systematic attacks against a civilian population based on Tutsi ethnic identification during the said period; there was a non-international armed conflict in Rwanda; and the Tutsi, Hutu, and Twa existed as ethnic groups in Rwanda in 1994.¹⁴ The Chamber takes judicial notice of these facts and will therefore disregard any evidence the parties have led to prove or disprove such facts. However, this does not relieve the Prosecution of its burden to lead evidence to prove beyond reasonable doubt that the Accused's conduct and mental state rendered him individually responsible for genocide and crimes against humanity as charged in the Indictment.

CHAPTER II: FACTUAL FINDINGS

1. PRELIMINARY MATTERS

General Allegations

17. The Chamber notes that the allegations contained in Paragraphs 3.10, 3.10(i), 3.11, 3.11(i), 3.11(ii), 3.12, 3.12(i), 3.13, 3.14, and 3.16 do not attribute any specific criminal conduct to the Accused, and the Prosecution has not relied on them to prove any of the charges in the Indictment. The Chamber will therefore not make any factual findings on them.

Paragraphs of the Indictment not relied upon by the Prosecution

18. The Chamber also recalls that during its Closing Argument on 22 June 2006, the Prosecution indicated that it was not relying on the allegations contained in Paragraphs 3.37, 3.38, 3.39, 3.42, 3.43, 3.44, 3.49, 3.50, and 3.51 because it did not lead any evidence to support them.¹⁵ Accordingly, the Chamber will not make factual findings on the said paragraphs and they are hereby dismissed.

¹⁴ *Prosecutor v. Karemera et al.*, "Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice", 16 June 2006, paras. 22-37.

¹⁵ T. 22 June 2006, pp. 18-19.

Specificity of the Indictment

19. In its Closing Brief, the Defence argues that the Indictment alleges very few specific acts committed by the Accused and that based on the specific factual allegations in the Indictment, Muvunyi could not determine what acts he allegedly committed so as to mount an effective defence. It is argued that most references to Muvunyi contained in the Indictment are general in nature, and do not specify the particular criminal conduct he is accused of.¹⁶

20. The Defence further argues that the Indictment fails to allege any specific form of liability pursuant to Article 6(1) of the Statute. It submits that the Prosecution must plead a specific form of liability under Article 6(1) and the failure to do so results in ambiguity and a defective indictment. While conceding that such a defect can in certain circumstances be cured through the Pre-Trial Brief, whether the Prosecution has effected such a cure must be considered in light of the Accused's right to a fair trial, including his entitlement to adequate time and facilities for the preparation of his defence.¹⁷

21. Concerning genocide, the Defence argues that the Indictment does not charge the Accused with actual participation in the crime of genocide in a specific manner and urges the Chamber to limit its consideration to personal participation in genocide.¹⁸ The Defence also maintains that none of the allegations in the Indictment is made with sufficient specificity to support a conviction of the Accused for complicity in genocide.¹⁹ Furthermore, the Defence submits that the Indictment fails to plead Article 6(3) responsibility with sufficient specificity to support a conviction.²⁰

22. The Chamber notes that generally, the Defence must raise objections to the form of the Indictment at the pre-trial stage, and interpose a timely objection to a defective pleading when the evidence is introduced at trial.²¹ In any case, the Chamber will consider the Defence submission that the Prosecution failed to specifically plead the forms of participation under Article 6(1). In the Chamber's view, while it is desirable that forms of participation under Article 6(1) be specifically pleaded in the Indictment, there is no rule of law requiring such a form of pleading except where the Prosecution alleges joint criminal enterprise.²² In *Semanza*, the Appeals Chamber referred to the Prosecutor's long established practice of merely quoting the provisions of Article 6(1) and added that it would be "advisable" to plead the specific form of 6(1) responsibility in relation to each individual count of the indictment. However, the Appeals Chamber did not state that this was a mandatory requirement.²³ The majority in *Gacumbitsi* indicated that in determining whether the form of participation has been adequately pleaded so as to give the accused clear and

¹⁶ Defence Closing Brief, 19 June 2006, paras. 32-33.

¹⁷ Defence Closing Brief, 19 June 2006, paras. 37, 40. (The Closing-Brief does not contain Paragraphs 38, 39, 48, 49, 50, 51).

¹⁸ Defence Closing Brief, 19 June 2006, para. 53.

¹⁹ Defence Closing Brief, 19 June 2006, para. 71.

²⁰ Defence Closing Brief, 19 June 2006, para. 94.

²¹ *Niyitegeka*, Judgement (AC), paras. 199, 200.

²² *Gacumbitsi*, Judgement (AC), paras. 166, 167 and authorities cited therein.

²³ *Semanza*, Judgement (AC), para. 259. See also the Separate Opinion of Judge Shahabuddeen in *Gacumbitsi*, Judgement (AC) at para. 56, where he indicated that the Appeals Chamber's injunction in *Semanza* was not a universal procedural requirement and noted that "a practice of long standing is not terminated by an injunction as to what is 'advisable'".

timely notice, the indictment must be considered as a whole.²⁴ Having considered the totality of the allegations in the Indictment the Chamber is satisfied that the Accused was put on notice that the Prosecution intended to prove that he was individually responsible for either ordering or aiding and abetting the commission of genocide or crimes against humanity.

23. With respect to the form of pleading responsibility under Article 6(3), this Chamber is satisfied that the Indictment adequately sets out (a) that the Accused is the superior of sufficiently identified subordinates over whom he had effective control in the sense of the material ability to prevent or punish their criminal conduct; (b) that the said subordinates engaged in specific acts of criminal behaviour; (c) that the accused knew or had reason to know that the crimes were about to be committed or had been committed and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.²⁵

Notice

24. An accused has the right “[t]o be informed promptly and in detail ... of the nature and cause of the charges against him” according to Article 20(4)(a) of the Statute. According to the Appeals Chamber, when considered in light of Rule 47(C) of the Rules, this provision translates into a prosecutorial obligation “to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven.”²⁶ It also implies that the Prosecution must know its case before going to trial and to plead all the material facts in the Indictment with as much specificity as possible.²⁷

25. The Chamber notes the Prosecution submission made during closing arguments that even though it had not specifically pleaded the killing of Karegeya in the Indictment, its timely disclosure of Witness YAA’s unredacted statement, as well as the summary of this witness’s testimony contained in the Pre-Trial Brief, provided adequate notice to the Defence so as to justify the admission of testimony on this event. Relying on the Appeals Chamber judgement in *Ntakirutimana*, the Prosecution argues that the Defence has not suffered any prejudice from the admission of this evidence.²⁸ The Chamber has examined the Pre-Trial Brief and the statement of Witness YAA and is satisfied that the Defence was given timely, clear and consistent notice of the material fact relating to the killing of Karegeya.²⁹

26. The Chamber also notes that the attack on Tutsi refugees at Mukura forest is not specifically mentioned in the Indictment. However, the list of massacre sites provided in Paragraph 3.40 is not exhaustive, but merely a set of examples of such venues. Having considered the Indictment as a whole and subsequent communications made to the Defence by the Prosecution, the Chamber is satisfied that information regarding the attack and the Prosecutor’s intent to lead evidence on it were disclosed to the Defence in a timely, consistent and clear manner. The Chamber notes that in the summary of proposed evidence

²⁴ *Gacumbitsi*, Judgement (AC), paras. 123.

²⁵ *Blaškic*, Judgement (AC), para. 218.

²⁶ *Semanza*, Judgement (AC), para 85; *Ntakirutimana*, Judgement (AC), para 25; *Gacumbitsi*, Judgement (AC), para. 49; *Kupreškic*, Judgement (AC), para. 88.

²⁷ *Simba*, Judgement (TC), para. 14.

²⁸ T. 22 June 2006, p. 19.

²⁹ *Ntakirutimana*, Judgement (AC), para. 27.

of Witnesses XV and YAK contained in the Pre-Trial Brief, the Prosecution indicated that both witnesses would testify about the attack on refugees at Mukura forest by ESO soldiers and *Interahamwe*.³⁰ Similarly both witnesses referred to this attack in their pre-trial statements which, pursuant to the Chamber's order, were disclosed to the Defence at least 21 days prior to each witness testimony. Therefore, the Chamber concludes that the Accused's ability to defend himself will not be prejudiced if evidence relating to the Mukura forest attack is taken into account.³¹

27. In its Closing Brief, the Defence raised several objections, claiming it was not provided with proper notice on some of the evidence that the Prosecution was allowed to lead. The Defence requests that all such evidence be excluded in order to avoid prejudice to the Accused. The Chamber recalls that during the course of trial, the Defence objected to the evidence of several witnesses on the ground that it was not given adequate notice. These issues were considered and ruled upon by the Chamber either orally or in writing.³² Consequently, in the absence of a showing of exceptional circumstances, the Chamber will not reconsider those issues.

28. The Defence urges the Chamber not to take the evidence of Witness QX into account. It submits that the summary of Prosecution Witness QX's testimony contained in the Pre-Trial Brief was barely intelligible and there was no indication that this witness would say anything adverse to the Accused. In the end, the Defence submits that it was not given adequate notice of Witness QX's deposition testimony and therefore did not have adequate time to prepare a defence to this testimony.³³ The Chamber recalls that during trial, the Defence brought a motion to exclude the deposition testimony of Witness QX on the ground that it had insufficient opportunity to mount an effective defence and for lack of competent counsel at the deposition hearing. The Chamber views the current submission as an attempt to reargue a matter already decided by the Chamber. In any case, the Chamber considers that the Accused was represented at the deposition hearing by Duty Counsel and has had the benefit of counsel's assistance throughout the proceedings before the current Chamber. Since the deposition hearing was held in December 2003, the Defence has had adequate opportunity to consider Witness QX's testimony, to carry out further investigations and cross-examine Prosecution witnesses with a view to challenging his evidence, and indeed to call defence evidence to contradict, or impugn the credibility and reliability of Witness QX's testimony. It is the Chamber's view that since the Defence failed to take advantage of those opportunities, it cannot argue at this stage that Witness QX's testimony should not be taken into account.

29. The Defence also objected to the evidence of Prosecution Witnesses YAO and YAN on the ground that these witnesses were called to support the counts of genocide or complicity in genocide, and that the Accused never had notice of, and therefore could not prepare a defence to, the witnesses' evidence relating to the charge of other inhumane acts.³⁴ The Chamber has closely examined the evidential summary of both witnesses contained in the Prosecution Pre-Trial Brief as well as their pre-trial statements, and is

³⁰ Prosecutor's Pre-trial Brief, filed 24 January 2005.

³¹ Statement of Witness YAK dated 7 June 2000; and Statement of Witness XV dated 12 January 2001.

³² See *inter alia*, Oral Decision of 14 March 2005; "Decision on Accused Tharcisse Muvunyi's Motion to Exclude Testimony of Witnesses AFV, TM, QCS, QY and QBP and Motion to Strike QY's Testimony", 20 June 2005.

³³ Defence Closing Brief, 19 June 2006, para. 97.

³⁴ Defence Closing Brief, paras. 119, 368, 375.

satisfied that both of them clearly refer to acts of beating that could provide material in support of the charge of other inhumane acts. The Defence argument on lack of notice is therefore untenable.

2. THARCISSE MUVUNYI

30. Tharcisse Muvunyi, a Rwandan citizen, was born on 19 August 1953 in Mukarange *commune*, Byumba *préfecture*. He served in the Rwandan Army and as of 1 March 1994, and was Lieutenant-Colonel stationed at ESO.³⁵

3. THE ISSUE OF ESO COMMANDER

3.1. INDICTMENT

31. Paragraphs 2.2 and 2.3 read:

2.2 Throughout the events referred to in this Indictment until he left Rwanda, Tharcisse Muvunyi held the office of Commander of the *École [des] sous-officiers* (ESO). He was appointed to this position on the 7th of April 1994 after his superior officer, Colonel Marcel Gatsinzi, was appointed Acting Chief of Staff of the Rwandan army.

2.3 In his capacity as Commander of ESO, the Accused had under his command the officers and soldiers of the school. He exercised authority and control over the gendarmerie, Ngoma Camp, as well as all the military operations in Butare *préfecture*.

3.2. EVIDENCE

Prosecution Witness KAL

32. Prosecution Witness KAL, a Tutsi man, served in the Rwandan Army from 1991 to 1994.³⁶ When he joined the Army in 1991, he was sent for a six-month training course at the ESO in Butare. At that time, Colonel Marcel Gatsinzi was Commander of ESO.³⁷

33. On 6 April 1994, Witness KAL was still a student at MECATR, a school for army mechanics and transmission, and lived at the Kanombe Military Camp in Kigali. According to his evidence, that evening, he and his fellow students were sent to guard the MECATR school premises. When Witness KAL returned to ESO between 14 and 20 April 1994,³⁸ the Camp Commander was Colonel Tharcisse Muvunyi, who remained in that position until the time the witness left ESO for Gikongoro in June 1994.³⁹ During this period, the Accused gave orders which the witness had to carry out, and the witness saw Muvunyi address other people at two meetings held at the Accused's house. However, Witness KAL said he never spoke to the Accused directly because, as he put it, a mere soldier could not easily speak with a Commander.⁴⁰

³⁵ *Prosecutor v. Muvunyi*, "Accused's Response to the Prosecutor's Request to Admit" filed on 27 January 2005; See also Exhibit D.5, admitted on 24 May 2005.

³⁶ T.1 March 2005, p. 4 (I.C.S.); Exhibit P.1, Personal Information Sheet of Witness KAL (Under Seal), admitted on 1 March 2005.

³⁷ T. 5 March 2005, pp. 5, 7 (I.C.S.).

³⁸ T. 1 March 2005, p. 8; 3 March 2005, p. 23 (I.C.S.).

³⁹ T. 2 March 2005, p. 11; T. 7 March 2005, p. 2 (I.C.S.).

⁴⁰ T. 2 March 2005, p. 11; T. 7 March 2005, pp. 9, 14 (I.C.S.).

34. KAL testified that after his appointment as Chief of Staff, Colonel Gatsinzi came back to ESO on short visits “from time to time” between April and June 1994 during which the Colonel’s helicopter would land inside the ESO Camp and would then leave again. After Gatsinzi was replaced as Chief of Staff, he returned to Butare, but not as ESO Commander. The witness believed it was common knowledge that Gatsinzi was appointed to negotiate an end to the war between the Rwandan Government and the RPF.⁴¹

Prosecution Witness YAA

35. Prosecution Witness YAA, a soldier in the Rwandan Army, was based at ESO between April and June 1994 but was posted to various locations during that period. He testified that on 7 or 8 April 1994, Colonel Marcel Gatsinzi, then Commander of ESO, was appointed as interim Chief of Staff of the Rwandan Army and he moved to Kigali.⁴² According to YAA, Colonel Tharcisse Muvunyi took over command at ESO on 8 or 9 April even though the soldiers did not receive any information that Gatsinzi had been relieved of this position. YAA said that on 12 or 13 April 1994, he was deployed to the battlefield in Kigali but returned to ESO on 16 May and stayed there until 8 June 1994, when he left for Gikongoro and then Cyangugu.⁴³ During his stay at ESO, Witness YAA saw Muvunyi almost every day, knew the latter’s office within the ESO Camp and saw him giving orders to the soldiers. According to the witness, Muvunyi was ESO Commander between 16 May and 8 June 1994.⁴⁴

36. According to YAA’s testimony, everyone inside the ESO Camp was under Muvunyi’s orders.⁴⁵ He added, however, that Colonel Munyengango was also present at ESO during the events in question, but he did not assume command due to his health condition.⁴⁶

Prosecution Witness YAP

37. In 1994, Witness YAP said he worked at the Butare University Hospital and lived not far from ESO.⁴⁷ YAP testified that he never met Muvunyi, but knew Muvunyi was the Commander of ESO because this was a matter of public knowledge. He knew soldiers who worked under Muvunyi’s command such as Captain Nizeyimana and Second-Lieutenant Bizimana; these soldiers told him Muvunyi was their commander. Witness YAP thought that Muvunyi was Commander of ESO both before and after the death of President Habyarimana.⁴⁸ During cross-examination, he stated that he did not believe Marcel Gatsinzi was the Commander of ESO before the death of President Habyarimana, even though he had heard on the radio that Gatsinzi stated he was Commander of ESO during a *Gacaca* court session.⁴⁹

⁴¹ T. 2 March 2005, pp. 2, 3; T. 7 March 2005, pp. 6, 7 (I.C.S.).

⁴² T. 8 March 2005, p. 32. (I.C.S.)

⁴³ T. 8 March 2005, pp. 17, 34, 35, 41 (I.C.S.).

⁴⁴ T. 10 March 2005, pp. 34, 35 (I.C.S.).

⁴⁵ T. 9 March 2005, p. 11 (I.C.S.).

⁴⁶ T. 10 March 2005, p. 16 (I.C.S.) (Cross-examination).

⁴⁷ Exhibit P.17 (under seal), admitted on 6 June 2005.

⁴⁸ T. 6 June 2005, p. 36 (I.C.S.).

⁴⁹ T. 6 June 2005, pp. 19, 36, 37 (I.C.S.).

Prosecution Witness XV

38. Witness XV said that he worked at the Butare University Hospital in 1994.⁵⁰ He testified that around 15 or 16 April 1994, he received a letter signed by the Director of the Butare University Hospital and by “Commander Muvunyi” instructing him to return to work at the Hospital.⁵¹ Sometime in May 1994, Muvunyi visited the Hospital and a colleague of witness XV told him that “that person was Muvunyi, and that he was the commander of the soldiers who were both within the hospital and those who were outside ...”⁵²

Prosecution Witness CCQ

39. Witness CCQ was born in Butare and said that he knew the authorities there quite well. He testified that Marcel Gatsinzi was Commander of ESO until the war started in April 1994, but that the Accused was also present at that time. After the war started, he used to see Muvunyi and Munyengango who were living at ESO and recalled that Muvunyi replaced Gatsinzi as Commander of ESO following the death of President Habyarimana, and specifically, as of 20 April.⁵³

Prosecution Witness NN

40. Witness NN was a non-commissioned officer in the Rwandan Army from April to June 1994. He testified that Lieutenant-Colonel Muvunyi replaced Colonel Gatsinzi as Commander of ESO. He said he was present at ESO when the Accused arrived in March 1994 but could not remember whether Muvunyi or Munyengango was Colonel Gatsinzi’s deputy. NN further testified that even though Augustin Bizimungu replaced Colonel Gatsinzi as Chief of Staff, Gatsinzi did not resume his duties as Commander of ESO until late May 1994 and the Accused remained in charge of ESO until that time. He confirmed that Colonel Munyengango was present at ESO and was sick. He added that Colonel Mugemanyi was also present at ESO but only arrived after 16 April 1994.⁵⁴

Defence Witness Augustin Ndindiliyimana

41. Defence Witness General Augustin Ndindiliyimana was the Chief of Staff of the *Gendarmerie nationale* at the time of the events in 1994.⁵⁵ He testified that Colonel Marcel Gatsinzi was Commander of ESO on 6 April 1994.⁵⁶ On 7 April, Gatsinzi was appointed Interim Chief of Staff of the Rwandan Army and moved to Kigali to take up his new position. On 17 April 1994, Gatsinzi was replaced as Chief of Staff by Colonel (later General) Augustin Bizimungu. According to Augustin Ndindiliyimana, during the period when Gatsinzi served as Interim Chief of Staff, Lieutenant-Colonel Muvunyi acted as *de*

⁵⁰ T. 16 May 2005, p. 9.

⁵¹ T. 16 Mays 2005, p. 9.

⁵² T. 16 May 2005, p. 21.

⁵³ T. 26 May 2005, pp. 14, 15, 23-25.

⁵⁴ T. 18 July 2005, pp. 4-5 (I.C.S.), p. 23 (I.C.S.); T. 19 July 2005, p. 53 (I.C.S.); T. 20 July 2005, p. 12 (I.C.S.), p. 24 (I.C.S.).

⁵⁵ Augustin Ndindiliyimana is charged before the Tribunal for conspiracy to commit genocide, genocide, complicity in genocide, crimes against humanity, and war crimes.

⁵⁶ T. 6 December 2005, p. 31.

facto Commander of ESO.⁵⁷ But after 17 April, Gatsinzi returned to ESO and “took over his unit, his school again” and remained in that position until June 1994 when the witness left Rwanda.⁵⁸ Augustin Ndindiliyimana said he never saw any communiqué placing Muvunyi in command of ESO.⁵⁹

Defence Witness MO83

42. Defence Witness MO83 served in the Rwandan Army from 1985 to 1994 and was assigned to ESO at various times between 1989 and 1993. He testified that he was not at ESO in 1994 but understood that in April 1994, the Commander of ESO was Colonel Gatsinzi. MO83’s evidence was that Gatsinzi remained Commander until the time Butare town was taken over by the RPF even though he did not state the date this took place.⁶⁰ Gatsinzi remained Commander of ESO throughout this period even though he would leave ESO to go for negotiations with the RPF and all other commanders at ESO were there only in an acting capacity.⁶¹ The witness said he never saw a communiqué appointing Muvunyi as ESO Commander.⁶²

Defence Witness MO31

43. Witness MO31 served in the Rwandan Army from 1976 to 1994 and has known Muvunyi since 1982.⁶³ From mid-May to mid-June 1994, he held a senior military position in Butare *préfecture*.⁶⁴

44. According to the witness, there was no commander at ESO when he arrived in Butare in May 1994.⁶⁵ Later in his testimony, the witness stated that General Marcel Gatsinzi was the Commander of ESO from 17 April to 5 July 1994.⁶⁶ He indicated, however, that during the period he served in Butare, he was never required to report to the ESO Commander, and never carried out joint operations with the other military camps in the area.⁶⁷

45. Witness MO31 said that after serving in Butare for about one month, he received a telegram from the Ministry of Defence relieving him of his duties. On the same day, Muvunyi also received a telegram transferring him from his duties at ESO. Witness MO31 testified that sometime in June 1994, a helicopter landed at the ESO Camp for a short while and then left. He therefore went to Muvunyi and asked him who was on board the helicopter. Muvunyi responded that it was the Minister of Defence and that he had taken the opportunity to ask the Minister why he was being transferred.⁶⁸ Muvunyi added that according to the Minister, the reason for his transfer was that he and one Ndayambaje no

⁵⁷ T. 7 December 2005, p. 43.

⁵⁸ T. 6 December 2005, pp. 32, 34.

⁵⁹ T. 8 December 2005, p. 2.

⁶⁰ T. 12 December 2005, p. 14.

⁶¹ T. 12 December 2005, p. 8.

⁶² T. 12 December 2005, p. 14; T. 13 December 2005, p. 15.

⁶³ T. 14 December 2005, pp. 34, 36 (I.C.S.).

⁶⁴ T. 14 December 2005, p. 34, 36 (I.C.S.).

⁶⁵ T. 15 December 2005, p. 9 (I.C.S.).

⁶⁶ T. 15 December 2005, p. 11 (I.C.S.).

⁶⁷ T. 15 December 2005, p. 16 (I.C.S.).

⁶⁸ T. 15 December 2005, p. 6 (I.C.S.).

longer enjoyed the confidence of the government and that they were suspected of being accomplices of the RPF. Further, Muvunyi told him it was the government's view that if the RPF were to enter Butare, Muvunyi and Ndayambaje would not be able to defend the town.⁶⁹

Defence Witness MO30

46. Witness MO30 testified that he and his family relocated from Kigali to Butare in 1992, and remained there until about 30 June 1994 when he left for Gikongoro.⁷⁰ During his stay in Butare, he became familiar with people in key positions in government, society, and business in the city. On 28 April 1994, Witness MO30 and one of his colleagues at work went to see Muvunyi at ESO to request fuel for their factory because it was said that the Ministry of Defence was managing the distribution of fuel supplies. Upon arrival, his colleague spoke to Muvunyi who responded that "the boss, Marcel Gatsinzi" was not there, that he had gone to Kigali, and that therefore he could not meet their needs.⁷¹

Defence Witness MO46

47. Defence Witness MO46 served in the Rwandan Army from 1971 to 1994 and has known Muvunyi for a very long time.⁷² In April 1994, MO46 worked at the Ministry of Defence. On or about 20 April 1994, he was sent on an official mission to find out what was happening in Butare. Upon his arrival at ESO, he expected to meet with Colonel Marcel Gatsinzi who, according to the witness, was the Commander of the ESO Camp. However, because Gatsinzi was not available, he met with Lieutenant-Colonel Muvunyi who was an S-4 officer in charge of logistics. Witness MO46 told Muvunyi he was sent from the Ministry of Defence "because it was felt that the killings had already reached Butare", and there was a need to do something about the massacres. Muvunyi replied that he was not in a position to do anything about the killings because it was being said that Nizeyimana was the commander, and advised that MO46 should speak to Nizeyimana and Hategekimana if he wanted to put an end to the massacres.⁷³ Witness MO46 told the Chamber that when he spoke with Muvunyi, he knew quite well that Marcel Gatsinzi, and not Muvunyi, was the Commander of ESO Camp.⁷⁴ He explained further that following Gatsinzi's appointment as Interim Chief of Staff on 7 April, no one was appointed to the position of Commander or Interim Commander of ESO Camp.⁷⁵ He said Gatsinzi continued to direct the affairs of ESO at the same time that he served as Army Chief of Staff *ad interim* and that this situation remained until the time when the witness left his position at

⁶⁹ T. 15 December 2005, p. 28 (I.C.S.).

⁷⁰ T. 14 March 2006, pp. 5, 15 (I.C.S.).

⁷¹ T. 14 March 2006, p. 15 (I.C.S.).

⁷² T. 10 March 2006, pp. 57, 58 (I.C.S.).

⁷³ T. 13 March 2006, p. 39 (I.C.S.): "And he told me that it was the minister that has sent me and that was good, but the population was saying that Nizeyimana is a commander, and the commander of the camp maybe involved in the killings. "If you want us to stop the massacres, I don't have the power to do so. The person you should be talking to is Nizeyimana and Hategekimana. They are the ones who are in a position to stop the massacres."

⁷⁴ T. 13 March 2006, p. 38 (I.C.S.).

⁷⁵ T. 13 March 2006, p. 13 (I.C.S.). But see Article 8 of Law No. 23/1986, "Création et organisation de l'École des sous-officiers", admitted as Exhibit D49 on 13 March 2006, which provides that where the Commander of ESO is absent or unable to perform his duties, his duties shall be assumed by the Deputy Comander of ESO.

the Defence Ministry on 13 May 1994.⁷⁶ Witness MO46 explained that where a commander was appointed to another acting position, he continued to exercise the duties of his command until he was dismissed or replaced by someone else. He told the Chamber that due to his position at the Ministry of Defence he would have known if a commander or an interim commander had been appointed to replace Gatsinzi at ESO.⁷⁷

Defence Witness MO15

48. Witness MO15 worked as an instructor at ESO at the time of the 1994 events.⁷⁸ He said that when he arrived in 1992, Colonel Marcel Gatsinzi commanded ESO and remained in that position until 7 April 1994 when he was appointed Interim Chief of Staff of the Rwandan Army. Witness MO15 added that Gatsinzi was not replaced as ESO Commander.⁷⁹ When asked if ESO had a Deputy Commander, he initially said ESO did not have a Deputy Commander, but later indicated that one Lieutenant-Colonel Baramyeretse “replaced Gatsinzi in his absence”.⁸⁰ Muvunyi arrived at ESO in March 1994 and was designated the S-1/S-4 officer. Captain Idelphonse Nizeyimana was the S-2/S-3 officer responsible for training and operations.⁸¹

Defence Witness MO23

49. Witness MO23, who was a student at the ESO in 1994, testified that when General Bizimungu was appointed Chief of Staff, Colonel Gatsinzi came to ESO after three or four days and continued to function as the Commander. The witness stated that whenever he was on guard at the ESO entrance, he saw Gatsinzi coming almost every day and going into his office.⁸²

3.3. DELIBERATIONS

50. The Indictment asserts that from 7 April 1994, up to the time he left Rwanda, Tharcisse Muvunyi held the Office of Commander of ESO, a position he was appointed to after his superior officer, Marcel Gatsinzi, was appointed Acting Chief of Staff of the Rwandan Army. The Indictment further alleges that as ESO Commander, Muvunyi was the most senior among the officers and men at ESO and exercised authority over the Ngoma Camp and military operations in Butare. In support of the allegations contained in the Indictment that Muvunyi was the Acting Commander of ESO camp from 7 April 1994, the Prosecution has relied on the evidence of Witnesses KAL, YAA and NN, all of whom were soldiers attached to ESO at various times between April and June 1994. All three witnesses testified that Muvunyi assumed command of ESO after Marcel Gatsinzi’s appointment as Interim Chief of Staff sometime between 7 and 9 April 1994. Although no evidence was led pointing to a formal instrument appointing the Accused to this position, his assumption of the position of ESO Commander was based on the provisions of Law No. 23/1986 on the Establishment and the Organisation of ESO, which provides that in the absence of the

⁷⁶ T. 13 March 2006, p. 13 (I.C.S.).

⁷⁷ T. 13 March 2006, p. 13 (I.C.S.).

⁷⁸ T. 9 March 2006, p. 22 (I.C.S.).

⁷⁹ T. 8 March 2006, pp. 28, 32 (I.C.S.).

⁸⁰ T. 8 March 2006, pp. 25, 28, 32 (I.C.S.).

⁸¹ T. 8 March 2006, p. 28. (I.C.S.).

⁸² T. 16 March 2006, pp. 19-20 (I.C.S.).

Commander, the Deputy Commander shall assume the former's responsibilities.⁸³ Witnesses KAL, YAA, and NN, corroborated one another's testimony that Muvunyi, throughout the period in question, was giving orders to ESO soldiers. Although Colonel Munyengango was also present at ESO, the Chamber believes he was only there for medical reasons. The testimony of Witnesses KAL, YAA and NN that Muvunyi became ESO Commander after Gatsinzi's appointment as Interim Chief of Staff is supported by Witnesses YAP and XV, both of whom were civilians living in Butare during April 1994. The evidence of Witness XV that Muvunyi co-signed a letter instructing him to return to work lends further support to the allegation that Muvunyi was ESO Commander in April and May 1994.

51. The Defence witnesses gave various accounts as to who was in command of ESO after Gatsinzi was appointed Interim Chief of Staff of the Rwandan Army. In assessing their evidence the Chamber will give more weight to the testimony of witnesses who were present at ESO in the crucial months of April to June 1994. In this respect, the Chamber notes that Witness MO83 left ESO in 1993. Defence Witness MO31 contradicted himself when he testified that Gatsinzi was ESO Commander from 17 April to 5 July, but at the same time, said that when he arrived in Butare in May 1994, there was no ESO Commander; subsequently he explained that Muvunyi received a telegram sometime around the middle of June 1994 relieving him of his post at ESO. Indeed the overall tenor of MO31's testimony is consistent with an inference that Muvunyi was the most senior military officer at ESO. It is the Chamber's view that MO31's account that Muvunyi was at ESO until the middle of June 1994, is more consistent with the evidence of Prosecution Witnesses KAL and YAA who worked at ESO, and therefore had direct knowledge of day-to-day events at that Camp. Furthermore, the evidence of Witness MO46 that on 20 April 1994 he visited the ESO Camp as a delegate of the Ministry of Defence and met with Muvunyi instead of Gatsinzi, provides additional reason to believe that Muvunyi acted as ESO Commander in the absence of Gatsinzi. Defence Witnesses MO36 and MO30 testified that they attended several security committee meetings at the Office of the *préfet*, and that Muvunyi represented ESO at these meetings.⁸⁴ Taken in its totality, this evidence supports the conclusion that Muvunyi exercised the powers of the office of ESO Commander on the basis of law, and had effective control over the actions of ESO soldiers even though he might not have been formally appointed as such. As stated by the Appeals Chamber in the *Celebici* Judgement, the absence of a formal appointment is not fatal to a finding of criminal responsibility, provided it can be shown that the superior exercised effective control over the actions of his subordinates.⁸⁵ For this purpose, effective control reflects the superior's material ability to prevent or punish the commission of offences by his subordinates and it could arise from both a *de jure* and a *de facto* position of authority. Where *de jure* authority is proved, a court may presume the existence of effective control on a *prima facie* basis. Such a presumption can, however, be rebutted by showing that the superior had ceased to possess the necessary powers of control over subordinates who actually committed the crimes.⁸⁶

⁸³ Law No. 23/1986, admitted as Exhibit D.49 on 13 March 2006. Article 8 provides: "[Le Commandant en second] est chargé de la coordination et de l'enseignement et remplace le Commandant de l'École en cas d'absence ou d'empêchement",

⁸⁴ T. 7 March 2006, p. 23 (I.C.S.); T. 14 March 2006, p. 23 (I.C.S.).

⁸⁵ *Delalic et al. (Celebici)*, Judgement (AC), "Celebici case", para. 196.

⁸⁶ *Delalic et al. (Celebici)*, Judgement (AC), para. 197.

52. The Chamber must also determine the period for which Muvunyi served as ESO Commander. Witnesses KAL and YAA testified that Muvunyi acted as ESO Commander from 7 April to June 1994. Prosecution Witness NN's testimony differs slightly on the temporal duration of Muvunyi's command. He told the Chamber that in late May 1994, Gatsinzi returned to ESO as Commander. Defence Witness Augustin Ndindiliyimana testified that on 4 May 1994, in his capacity as Chief of Staff of the *Gendarmerie nationale*, he visited Butare and held a meeting with military commanders in the area. He told the Chamber that Muvunyi attended the said meeting as the representative of ESO.⁸⁷

53. The Defence has challenged the credibility of Prosecution Witnesses KAL, YAA, and NN.⁸⁸ With respect to Witnesses KAL and YAA, the Defence suggests that both of them were military deserters who, in April 1994, had been posted to the war front in Kigali, but had returned to the ESO Camp in Butare without instruction or approval. The Defence further disputes that Witness YAA returned to ESO on 16 May 1994, and indicated that he signed at least three statements in which he said he returned to ESO in late May. For these reasons, the Defence argues that the evidence of KAL and YAA should not be believed. The Chamber disagrees.

54. In the Chamber's view, the mere fact that Witnesses KAL and YAA left their positions at the battlefield in Kigali to return to Butare is not sufficient to dispute the veracity of their testimony relating to events that they witnessed during the course of their stay at ESO. The Chamber has carefully considered the specific circumstances surrounding the departure of Witnesses KAL and YAA from Kigali to ESO in Butare, alongside the general context of the ethnic-based killings that were then being perpetrated in Rwanda. In the Chamber's view, the fact of their desertion, does not *per se* affect the credibility and reliability of the evidence they gave about the issue of ESO Commander during the months of April and May 1994.

55. On the issue of the discrepancy in the date that Witness YAA might have returned to ESO from Kigali, the Chamber notes that in his statement dated 18 and 22 September 2000, Witness YAA indicated on three separate occasions that he returned to Butare in late May.⁸⁹ In his evidence before the Chamber, he stated that he returned to ESO on 16 May 1994.⁹⁰ The Chamber is of the view that this is a minor discrepancy that does not affect YAA's credibility. Moreover, the Chamber notes that when Witness YAA was confronted with this discrepancy during cross-examination, he explained that when he noticed it back in 2000, he brought it to the attention of one of the Prosecution investigators who promised to change it. He maintained that he told the investigators he returned to Butare at the middle of May 1994, not in late May. The Chamber accepts this as a sufficient explanation of the discrepancy between Witness YAA's evidence and his pre-trial Statement.

56. With respect to Witness NN, the Defence submits that his evidence should not be relied upon because he was paid US\$ 5,000.00 before he agreed to testify for the Prosecution, and his evidence is therefore tainted. The Chamber has carefully considered the Defence submission, the evidence of Witness NN and the circumstances surrounding the payment of US\$ 5,000.00 to him by the Office of the Prosecutor. The Chamber is

⁸⁷ T. 6 December 2005, p. 34; T. 7 December 2005, p. 43.

⁸⁸ Tharcisse Muvunyi's Final Trial Brief, pp. 44, 46, 59.

⁸⁹ Statement of Witness YAA, 18 and 22 September 2000. YAA explained that he met with the investigators on the two dates indicated.

⁹⁰ T. 9 March 2005, p. 8 (I.C.S.); T. 10 March 2005, pp. 17, 18 (I.C.S.) (Cross-examination).

satisfied that the sum was paid to the witness as compensation for material and financial loss he suffered as a result of his quick relocation from Rwanda to another State, leaving behind his house and business. The Chamber believes that Witness NN was compelled to flee Rwanda because of threats he and his family received from people who did not like the fact that he was in contact with investigators of the Office of the Prosecutor and that he might be called to testify before the Tribunal. The Chamber is further satisfied that this payment, made on 7 May 2005,⁹¹ did not colour or change Witness NN's testimony given on 18, 19 and 20 July 2005. The Chamber's finding in this respect is supported by the fact that the witness's testimony before the Chamber with respect to Muvunyi's position as ESO Commander, is generally consistent with his pre-trial statement given to Prosecution investigators on 16 July 1998, seven years before he took the witness stand or received the said compensation.⁹²

57. In the Chamber's opinion, even if Muvunyi was never formally appointed ESO Commander, this does not detract from the fact that he effectively remained the most senior officer and commander on the ground with power and authority to make day-to-day operational decisions at ESO. Therefore, having considered the totality of the evidence adduced by the Prosecution and the Defence, the Chamber makes the following findings of fact:

- On 6 April 1994, Colonel Marcel Gatsinzi was the Commander of ESO and Tharcisse Muvunyi was the second most senior officer;
- On 7 April 1994, Gatsinzi was appointed Interim Chief of Staff of the Rwandan Army, a position he held until 17 April 1994;
- While he might have returned to Butare on a few occasions, Gatsinzi did not return to the position of ESO Commander;
- Colonel Tharcisse Muvunyi, as the second most senior officer at ESO, assumed the position of ESO Commander after his superior officer, Marcel Gatsinzi, was appointed Interim Chief of Staff on 7 April 1994; although there was no formal instrument or other official communication appointing him as such, his assumption of the post of ESO Commander was based, *inter alia*, on the provisions of Law No. 23/1986 on the Establishment and Organization of ESO, which provides that in the absence of the Commander, the Deputy Commander shall assume his responsibilities.
- Muvunyi held this position until mid-June 1994, and during this period he had effective control over the actions of ESO soldiers.

⁹¹ "Prosecutor's Ex-parte Response to the Trial Chamber's Order on the Prosecutor's Application [pursuant] to Rule 66(C) of the Rules of Procedure and Evidence to be Relieved of His Obligation to Disclose Additional Information Concerning Prosecution Witness NN and for Special Protective Measures Pursuant to Rule 69(A) of the Rules of Procedure and Evidence", 13 July 2005. Attachment 'C' to the Motion is a receipt signed by Witness NN on 7 May 2005, confirming receipt of the sum of US\$ 5,000.00 from two investigators of the Office of the Prosecutor. Attachment 'A' is an affidavit signed by the Prosecutor's Chief Investigator detailing his Office's dealings with Witness NN and the circumstances surrounding the payment of the above sum.

⁹² Statement of Witness NN dated 16 July 1998.

4. MUVUNYI'S RESPONSIBILITY FOR SECURITY IN BUTARE AND GIKONGORO PRÉFECTURES

4.1. INDICTMENT

58. Paragraphs 3.21 and 3.22 of the Indictment read:

3.21 In Butare *préfecture*, the Commander of the ESO was the most senior military officer responsible for security operations in Butare and Gikongoro *préfectures*. He carries out the orders of the military high command as directed from the Army Chief of Staff. In instances where there was a breach of security, the *préfet* could summon the assistance of both the gendarmerie and the army to restore order.

3.22 In his capacity as the highest military authority in the *Préfecture* Tharcisse Muvunyi was part of the military presence to ensure security of the civilians in the *Préfecture* and part of his duties entailed: liaising with the *préfet* on matters of security; being part of the security council of the *préfet*; ensuring that the *préfet* enjoys the enabling environment to carry out his functions as the most senior civilian government representative; assisting the population in times of danger and carrying out all other functions necessary for the smooth running of the training school for soldiers.

4.2. EVIDENCE

Prosecution Witness KAL

59. Witness KAL explained that, in addition to the ESO, there were two other military camps in Butare during the course of the events between April and July 1994, namely the Ngoma Military Camp, and the Tumba *gendarmerie* Camp.⁹³ The Ngoma Camp was under the command of Lieutenant Hategekimana, while one Captain Rusigariye commanded the Tumba *gendarmerie* Camp. These individual camp commanders were under the overall command of the Sector Commander, who was the Commander of ESO. According to Witness KAL, as ESO Commander, Tharcisse Muvunyi was the hierarchical superior of the commanders of the other two military camps in Butare and had authority over the entire Butare and Gikongoro *préfectures*.⁹⁴ Colonel Muvunyi was not replaced as Camp Commander during the war.⁹⁵

60. During examination-in-chief, KAL repeatedly identified the Accused as the "Sector Commander", a position which corresponded with ESO Commander and was hierarchically superior to the other commanders in Butare and Gikongoro; the Ngoma Camp and Tumba Camp commanders both reported to this Sector Commander.⁹⁶ When asked whether the term "*commandant de place*" was the same as "Area Commander", Witness KAL replied: "We used to say *commandant de place* instead of Area Commander."⁹⁷ During cross-examination, Defence Counsel asked Witness KAL to explain the distinction between

⁹³ T. 1 March 2005, p. 9 (I.C.S.).

⁹⁴ T. 1 March 2005, pp. 12-15 (I.C.S.). The Witness testified: "... the ESO military camp was commanded by Colonel Muvunyi at the time. Ngoma Military Camp was commanded by Lieutenant Hategekimana, and I also said that the Tumba Camp was commanded by Captain Rusigariye, but the last two commanders, that is, the Commander of Tumba Camp and the commander of Ngoma Military Camp, were under the command of the ESO Commander. That was the structure."

⁹⁵ T. 7 March 2005, p. 11 (I.C.S.).

⁹⁶ T. 1 March 2005, pp. 12, 16 (I.C.S.).

⁹⁷ T. 8 March 2005, pp. 2-3 (I.C.S.).

“sector commanding officer” and “area commanding officer”. In response the witness stated that: “Until July 1994, the Sector Commander was also called the *Commandant ops*, the ops Commander. Ops is short for operations. So this was the places where there was fighting. ... The ops commander was the Sector Commander, and I told you that the ops commander was the superior of the Area Commander.”⁹⁸

Prosecution Witness YAA

61. Witness YAA testified that ESO was under the authority of a Commander who was assisted by four immediate officers. These officers were in charge of administration and personnel (S-1), intelligence (S-2), training and operations (S-3), and logistics (S-4).⁹⁹ Apart from ESO, there were two other military camps in Butare, namely, Ngoma Camp, and the *gendarmerie* unit known as the *Groupement de Butare* located on Tumba Hill. He explained that both of these camps had their respective commanders, but they were also answerable to the ESO Commander who was *commandant de place*. Witness YAA recalled that in April 1994, the Commander of the Ngoma Camp was Lieutenant Hategekimana, and the Commander of the *gendarmerie* Camp in Tumba was Major Cyriaque Habyarabatuma.¹⁰⁰ Witness YAA testified that Muvunyi was the Area Commander or *commandant de place*.¹⁰¹

62. He further explained that when reference was made to an “area”, it meant the various camps located within one *préfecture*. The highest-ranking officer of all the camps located within the area automatically became “Area Commander” or *commandant de place*, and he assumed overall responsibility for coordinating military operations and security in the area including activities of both the Army and the *gendarmerie*. According to Witness YAA, the Area Commander was appointed by the Chief of Staff and had to approve all reports sent from the area to the Office of the Chief of Staff.¹⁰²

63. With respect to the other functions of the Area Commander, YAA explained that because of his primary responsibility for security in the area, the Area Commander could, for operational reasons, request the intervention of soldiers from other units within his area of authority. The Area Commander’s responsibility also extended to the then *préfecture* of Gikongoro which had one *gendarmerie* camp. As a result, YAA stated, in his capacity as Area Commander, the ESO Commander had responsibility for military operations not only by soldiers of ESO Camp, but also the Ngoma Military Camp and the *gendarmerie* Camps on Tumba Hill and at Gikongoro.¹⁰³

64. YAA drew a distinction between “Area Commander” and “Sector Commander”. He explained that the concept of Sector Commander was introduced during the war and applied to areas where there were active hostilities. On the other hand, “Area Commanders” existed prior to the war. He said the term “Sector Commander” existed alongside “Area

⁹⁸ T. 8 March 2005, pp. 2-3 (I.C.S.).

⁹⁹ T. 8 March 2005, pp. 27, 28 (I.C.S.).

¹⁰⁰ T. 8 March 2005, pp. 34, 35 (I.C.S.).

¹⁰¹ T. 8 March 2005, p. 34 (I.C.S.).

¹⁰² T. 10 March 2005, p. 9 (I.C.S.).

¹⁰³ T. 8 March 2005, p. 36 (I.C.S.). The witness explained as follows: “[the Area Commander] was responsible for security in the province in collaboration with his camp commanders in Butare, and it is he who coordinated all the activities, so much so that the Area Commander could request the intervention of the other soldiers for operations. Thus, his prerogatives extended even to Gikongoro province.”

Commander”, although he did not know of the existence of a Sector Commander in Butare.¹⁰⁴

Prosecution Witness NN

65. Prosecution Witness NN testified that Colonel Marcel Gatsinzi was Commander of ESO in 1994, and, as such, he “was commander of the Butare, Gikongoro military region,” which included the Ngoma Company and the Tumba *gendarmerie* in Butare and the *gendarmerie* Camp in Gikongoro. He explained that this meant the ESO Commander had higher authority than the commanders of each of these other camps.¹⁰⁵

66. The witness drew a distinction between the positions of “Area Commander” or “*commandant de place*” on the one hand, and “Ops, or Operations Commander” on the other. He explained that whereas the position of Ops commander was created when the war broke out in 1990, that of Area Commander existed well before the war. Before the war, the Area Commander dealt with administrative matters but also had military camps under his command and control. However, after the war began, the Area Commander was also given authority to deal with military operations in his area. The witness explained that when the French term “*place*” was used, it denoted a given space or region where there were military camps controlled or commanded by the Area Commander. These military camps had individual commanders, but those commanders had the Area Commander as their hierarchical superior. Witness NN said that he had never heard of a situation in which the Area Commander was not the highest-ranking officer in the area.¹⁰⁶

67. Witness NN told the Chamber that the title “Ops Commander” related to activities and command of troops at the battlefield. The Ops Commander had authority over units or battalions that operated in a military region. The battalion commanders came under the authority of the Ops Commander.¹⁰⁷

Prosecution Witness YAN

68. Prosecution Witness YAN testified that in mid-May 1994, he was abducted from *l'Économat général* in Butare town by a group of ESO soldiers under the command of Lieutenant Gakwerere. Thereafter, he was beaten and taken to ESO Camp where he observed *Interahamwe* and military men, the former armed with clubs, spears and rifles and dressed in *kitenge*. The witness did not know whether soldiers or *Interahamwe* had beaten him.¹⁰⁸

69. YAN also testified that he was later taken to a Brigade, about 400 meters from ESO located just past the *Quartier arabe* in Butare. At the Brigade, he was held in a room with about fifteen Tutsi from Tumba and elsewhere. YAN saw both soldiers and *gendarmes* at the Brigade although he did not know who was in charge. The *gendarmes* wore red berets whereas the soldiers wore black or camouflage berets. During his detention, people were periodically taken away: “the *gendarmes* would open the rooms and then hand over the victims to the soldiers”. Witness YAN also described repeatedly overhearing his guard, a

¹⁰⁴ T. 10 March 2006, pp. 9, 10 (I.C.S.).

¹⁰⁵ T. 18 July 2005, p. 12 (I.C.S.).

¹⁰⁶ T. 19 July 2005, pp. 40, 43, 48 (I.C.S.).

¹⁰⁷ T. 19 July 2005, pp. 41, 42 (I.C.S.).

¹⁰⁸ T. 30 May 2005, pp. 4-7.

gendarme, answer the phone. He said, “Each time that people were taken out, the *gendarmes* would say that it was Muvunyi who had given that order to take them away.”¹⁰⁹

70. Finally, Prosecution Witness YAN testified that he was released from the Brigade after someone pleaded with Muvunyi to have him released. This occurred to the disappointment of the *gendarmes*. He said: “the *gendarmes* were upset by the fact that I was not taken away as the others. They were wondering why Muvunyi was not giving the order to take me away. So I was subsequently released.”

Prosecution Witness YAO

71. Prosecution Witness YAO testified that she was abducted from the Butare Cathedral by soldiers under the leadership of Lieutenant Gakwerere. She was taken to ESO where she saw Muvunyi, who ordered the soldiers to take her to the Brigade, where she was held for several weeks and beaten by soldiers and *gendarmes*. Soldiers and *gendarmes*, YAO explained, could be distinguished on the basis of their uniforms: some had red berets and some had black berets and some had camouflage and others had green uniforms.¹¹⁰

Defence Witness Augustin Ndindiliyimana

72. Witness Augustin Ndindiliyimana testified that a *commandant de place* in the Army was a commander on the spot, an officer appointed by the Army Chief of Staff and given responsibility over a military area. The *commandant de place* was responsible, among other things, for recruitment, managing the reserve elements, coordinating activities involving the participation of military corps and elements from the various camps in the area, organizing ceremonies during peacetime, and participating in the activities of the *préfecture*.¹¹¹

73. Ndindiliyimana explained that an Operational Sector Commander was different from the *commandant de place* because the former was the military commander in a given sector, and was responsible for the defence of the region. According to the witness, the term “Operational Sector” was used to identify combat areas or combat zones. In April 1994, he knew there were military operational sectors in the areas of Gisenyi, Ruhengeri, Rulindo, Mutara, Kigali and possibly Kibungu. He noted that the Butare sector “was not operational, so to speak” and confirmed during cross-examination that he never saw a message indicating that Butare had become an operational military sector.¹¹² According to Ndindiliyimana, a document presented by the Prosecution indicating that Muvunyi was “Ops Commander” was surely a mistake because, in principle, “one cannot designate oneself operational commander if one is not designated by the Minister responsible.”¹¹³

74. Ndindiliyimana testified that Butare *préfecture* was divided into three sectors for security purposes, namely: the central area, which was occupied by ESO; the northern sector occupied by the Ngoma Company; and the southern sector controlled by the *gendarmerie* units from Tumba. The Commander of each sector was responsible for recording and reporting crimes and misconduct within his sector and for taking all necessary action. A member of the armed forces involved in misconduct could be subjected

¹⁰⁹ T. 30 May 2005, pp. 7-9.

¹¹⁰ T. 21 March 2005, p. 14.

¹¹¹ T. 6 December 2005, p. 30.

¹¹² T. 6 December 2005, pp. 22, 23.

¹¹³ T. 7 December 2005, p. 47.

to the penal process by the office of the Public Prosecutor, or be dealt with under military disciplinary procedures. However, these two processes were not mutually exclusive.¹¹⁴

75. With respect to the relationship between the different military units in Butare, Augustin Ndindiliyimana told the Chamber that the ESO Commander had two hierarchical superiors as head of a military training school: in terms of courses and academics, he was answerable to the Ministry of Defence; in terms of administration, he was under the General Staff of the Army. The Commander of the Ngoma Camp answered to the Army General Staff headed by the Chief of Staff, and the Commander of the Tumba *gendarmérie* reported to the Chief of Staff of the *Gendarmerie nationale* on *gendarmérie* matters.¹¹⁵

Defence Witness MO83

76. Witness MO83 testified that a *commandant de place* or Area Commander is usually appointed by the Army High Command on the basis of an order from the Ministry of Defence. The high command would issue a telegram announcing the name of the *commandant de place*, his rank, his subordinates, the area he would command, and the scope of his authority. It was not automatic for a *commandant de place* to be the Operations Commander of a given region. He explained that no one could arrogate to himself the functions of an Area Commander, and if this happened, the Army High Command would take disciplinary action. The witness never saw a communiqué appointing Muvunyi as *commandant de place* for Butare.¹¹⁶

Defence Witness MO31

77. Defence Witness MO31 told the Chamber that the *commandant de place* or Area Commander was the representative of the Ministry of Defence within the *préfecture* and that he was responsible for the coordination of activities concerning administration. He played an administrative role and liaised with the *préfet*. The witness stated that during the period of his stay in Butare from mid-May to mid-June 1994, the *commandant de place* in Butare was Marcel Gatsinzi.¹¹⁷

78. MO31 testified that during the 1994 war there were seven military “operational sectors” in Rwanda, namely: Gisenyi, Ruhengeri, Byumba, Kibungo, Mutara (later replaced by Nyanza), Rulindo, and Kigali city.¹¹⁸ These sectors were designated by the Army Chief of Staff, and each operational sector was under the command of a Sector Commander, who in turn reported to the Army Chief of Staff. Witness MO31 told the Chamber that during the time he served in another military facility in Butare, he was not aware of any decision or communication designating a military operational sector in that *préfecture*. He said if such a decision were ever made, the Chief of Staff would have informed him by telegram.¹¹⁹ Moreover, he indicated that during that period, he was never required to report

¹¹⁴ T. 6 December 2005, p. 9.

¹¹⁵ T. 6 December 2005, pp. 24, 31.

¹¹⁶ T. 13 December 2005, pp. 13, 14.

¹¹⁷ T. 15 December 2005, p. 4 (I.C.S.).

¹¹⁸ T. 15 December 2005, p. 16 (I.C.S.).

¹¹⁹ T. 15 December 2005, pp. 23, 24 (I.C.S.).

to the ESO Commander, and never carried out joint operations with the other military camps in the area.¹²⁰

Defence Witness MO46

79. Defence Witness MO46 testified that the post of *commandant de place* existed during the time of the National Guard, which preceded the establishment of the *gendarmerie* and the Rwandan National Army.¹²¹ The witness explained that the National Guard was responsible for the maintenance of law and order and fighting the enemy from outside.¹²² He explained that *commandant de place* was a title later used within the Army and was not known outside the Army.¹²³ He added that the *commandant de place* was someone who was very important from the time of the coup d'état in 1973 because it was said that at that time the *commandant de place* was going to replace the *préfet*.¹²⁴

80. MO46 testified that the *commandant de place* existed in the By-Law No. 13.¹²⁵ When the Rwandan Army separated from the *gendarmerie*, the term *commandant de place* disappeared with the by-law because after the establishment of the *gendarmerie* as an entity distinct from the Rwandan Army, there was another article which said that anything different should be abrogated.¹²⁶ He explained that the *commandant de place* would have been a commander of a military camp and would determine who would be on the watch.¹²⁷ He explained that had the term *commandant de place* remained, it would be replaced by "Commandant de camp".¹²⁸

Defence Witness MO23

81. Defence Witness MO23 testified that after 6 April 1994, there were three companies of soldiers at ESO: a reserve company, which remained in the camp; a company charged with protecting the camp; and the intervention company which handled security in Butare town.¹²⁹ MO23 noted that there was some collaboration between the ESO soldiers and the *gendarmes*. For example, MO23, who was himself a soldier in the intervention company which manned the roadblocks in Butare town, explained that *Inkotanyi* identified as such at the roadblocks would be handed over to the judicial department of the *gendarmerie*.¹³⁰ Additionally, the witness stated that there was at least one Military Police unit composed of both soldiers and *gendarmes* that was created at ESO with the aim of tracking down soldiers who deserted the army.¹³¹

¹²⁰ T. 15 December 2005, p.16 (I.C.S.).

¹²¹ T. 13 March 2006, p. 12 (I.C.S.).

¹²² T. 13 March 2006, p. 12 (I.C.S.).

¹²³ T. 13 March 2006, p. 12 (I.C.S.).

¹²⁴ T. 13 March 2006, p. 12 (I.C.S.).

¹²⁵ T. 13 March 2006, p. 13 (I.C.S.).

¹²⁶ T. 13 March 2006, p. 13 (I.C.S.).

¹²⁷ T. 13 March 2006, p. 13 (I.C.S.).

¹²⁸ T. 13 March 2006, p. 13 (I.C.S.).

¹²⁹ T 16 March 2006, pp. 15-16 (I.C.S.).

¹³⁰ T 16 March 2006, pp. 16-17, 29 (I.C.S.).

¹³¹ T 16 March 2006, p. 17 (I.C.S.).

4.3. DELIBERATIONS

82. The Indictment alleges that as Commander of ESO, Muvunyi was the most senior military officer in Butare and was responsible for security operations in Butare and Gikongoro *préfectures*. The Prosecution further alleges that in carrying out his responsibilities for maintaining security of the civilian population in the two *préfectures*, the Accused acted in collaboration with the *préfet*, who was the most senior civilian administrator, as well as other local civil and military authorities. It is the Prosecution's case that Muvunyi became *commandant de place* and thereby assumed administrative and operational authority over military camps in the entire Butare and Gikongoro *préfectures* including the Ngoma Military Camp, and the *gendarmerie* Camp on Tumba Hill. The Prosecution argues that even though the Accused might not have enjoyed *de jure* authority over Ngoma Military and Tumba *gendarmerie* Camps, he had effective control over their operations.¹³² In its Closing Brief, the Prosecution further argues that in view of his seniority among the officers at ESO on 7 April 1994, Muvunyi "automatically assumed" the position of ESO Commander after his superior officer, Marcel Gatsinzi, was appointed to a new position in Kigali.

83. To support these allegations, the Prosecution relies on the evidence of Witnesses KAL, YAA, and NN. The Prosecution also relies on the evidence of Defence Witnesses Ndindiliyimana, MO83, and MO31 to prove that the position of *commandant de place* existed in Rwandan military hierarchy during the events of 1994, that it was usually held by the most senior military officer in each *préfecture*, and that the duties of the position included overall administrative and operational command of the various Army and *gendarmerie* camps in the *préfecture*.

84. The Chamber has considered the evidence of Witness KAL that as "Sector Commander" Muvunyi was the hierarchical superior of all other commanders in Butare *préfecture*. Similarly, the Chamber recalls the evidence of Prosecution Witness YAA that Muvunyi was responsible for overall coordination of military operations in Butare and Gikongoro *préfectures*. With respect to Prosecution Witness NN, the Chamber recalls that he did not testify that Muvunyi became "Area Commander" but stated that Muvunyi succeeded Gatsinzi as ESO Commander.

85. The Chamber has also considered the evidence of the various Defence Witnesses on the issue of *commandant de place*. Augustin Ndindiliyimana distinguished between "*commandant de place*" and "Operational Sector Commander" noting that while the former was primarily an administrative position, the latter had operational responsibilities. The Chamber further notes from Ndindiliyimana's testimony that Butare was not one of the six military operational sectors in existence in Rwanda in 1994 and therefore did not have an "Operational Sector Commander". Particularly worthy of note is his evidence that the Ngoma Camp Commander was answerable directly to the Chief of Staff of the Rwandan Army, and that the Commander of the Tumba *gendarmerie* Camp answered directly to the Chief of Staff of the *Gendarmerie nationale*, a position which was held by Ndindiliyimana himself. The ESO Commander had two hierarchical superiors depending upon the issue at hand; for academic matters relating to the training activities of the school, the Commander was answerable to the Ministry of Defence. For operational matters, he answered to the Chief of Staff. It is the Chamber's view that Defence Witness Augustin Ndindiliyimana gave a coherent and cogent account of the distinction between Area Commander and

¹³² The Prosecutor's Closing Brief, Chapter III, especially paras. 129-132; 160, 161, 189, 190, 193.

Operational Sector Commander, and a very clear picture of the chain of command that governed the operations of the various military camps in Butare in 1994.

86. Notwithstanding the caution with which the Chamber must treat the testimony of Witness MO31, who asserted that Gatsinzi maintained his position as ESO Commander after 6 April, the Chamber cannot fail to consider the fact that he corroborates the evidence of Witness Ndingiyimana with respect to the military structure in Rwanda and the existence of military operational sectors in 1994. In particular, both witnesses agree that Butare was not a military operational sector and therefore did not have a Sector Commander. MO31 also supports the view that the Area Commander fulfilled an administrative, rather than an operational role and reported to the Ministry of Defence. The evidence of Witness MO31 that during the time he served in Butare he never reported to the ESO Commander and was instead answerable to the Chief of Staff of the National Army, is particularly significant in this respect. This evidence supports the account of Witness Ndingiyimana.

87. The Chamber is satisfied that the evidence of Defence Witnesses MO83 and MO46 on of the position of *commandant de place* generally corroborates that given by Defence Witnesses Ndingiyimana and MO31. The Chamber has considered By-Law No. 13, and notes that while it provided for the position of *commandant de place*, it governed the operations of the Rwandan National Guard, which was later disbanded.¹³³ However, it remains unclear to the Chamber whether the By-Law or any of its provisions remained in force in 1994.

88. The Chamber recalls that during the cross-examination of Defence Witness Ndingiyimana, the Prosecution attempted to tender a set of documents that were said to bear the signature of the Accused in the capacity of “*commandant de place, Butare-Gikongoro.*” The Chamber declined to admit the documents as exhibits and marked them for identification purposes (“PID1”) subject to the Prosecution’s right to call evidence later to prove their authenticity or reliability.¹³⁴ The Chamber subsequently granted a Prosecution motion to call a handwriting expert, who examined the documents contained in PID1, compared them to some undisputed signatures of the Accused, and concluded that the signatures on the disputed documents were made by the Accused.¹³⁵ The Chamber also granted a Defence motion to call a handwriting witness in rejoinder, who examined the same set of documents against known samples of the signature of the Accused, and testified that she could not tell as a matter of certainty that the signatures on the PID1 documents were made by the Accused. She told the Chamber that there were too few samples of the known signature of the Accused to make an effective comparison, that the quality of the photocopies supplied for analysis was poor, and that there was a distinct possibility that the signatures could have been manipulated. In light of this clearly conflicting expert opinion, the Chamber remains in doubt about whether the signatures on the PID1 documents were those of the Accused and therefore declines to admit the PID1 documents.

89. The Chamber notes the evidence of Witness QX that Lieutenant Hategekimana, then Commander of Ngoma Camp, collaborated with ESO soldiers to attack refugees at Ngoma Parish on or about the 30 April 1994. Prosecution Witness TQ also testified that Hategekimana together with Lieutenant Modeste Gatsinzi and Captain Nizeyimana, both

¹³³ By-Law No. 13 was admitted into evidence as Exhibit “P.29” on 7 December 2005.

¹³⁴ T. 7 December 2005, p. 34.

¹³⁵ Exhibit P.37, admitted on 8 May 2006.

from ESO, led a large-scale attack on Tutsi refugees at the *Groupe scolaire* on 29 April 1994. The Chamber has also considered the evidence of Defence Witness MO23 that on 8 April 1994, under Muvunyi's auspices, a Military Police unit composed of soldiers and *gendarmes* was created at ESO with the aim of tracking down army deserters. Finally Witnesses YAO and YAN both narrated that after their arrest from the Convent of the Little Sisters and the *Économat général* respectively, they were taken to ESO where they saw Muvunyi and pursuant to his instructions, were later transported and detained at the *gendarmerie* Brigade. The Chamber also recalls YAN's testimony that he survived the genocide because someone interceded with Muvunyi on his behalf, and even though many of his co-detainees at the *gendarmerie* Brigade were taken away and killed, his life was spared because the Accused did not authorise that he be taken away.

90. The question before the Chamber is whether in light of all the evidence presented, the Prosecution has proved that the Accused, Tharcisse Muvunyi, exercised the functions of *commandant de place* with responsibility for security in Butare and Gikongoro *préfectures* from April to June 1994. In the Chamber's view this allegation has not been established beyond reasonable doubt. Indeed it is still unclear whether the office of *commandant de place* existed in Rwandan military hierarchy in 1994, whether it was merely an administrative position, or if it entailed both administrative and operational duties. The Chamber notes that the Prosecution listed a military expert in his Pre-Trial Brief but fail to call him to testify. Such expert testimony could have been of assistance to the Chamber. However, the Chamber is satisfied that as Interim Commander of ESO, the Accused had authority over ESO Camp with responsibility for the security of the civilian population within the central sector of Butare *préfecture* and had responsibility for the actions of ESO soldiers within this area.

91. Notwithstanding its finding that the Prosecution has not proved beyond reasonable doubt that the Accused exercised the functions of *commandant de place*, in assessing the Accused's individual responsibility as a superior, the Chamber shall take the following factors into consideration: whether the Accused had effective control over the actions of those subordinates in the sense of the material ability to prevent or punish their actions; whether he knew or had reason to know that his subordinates had committed or were about to commit specific crimes; and finally, whether the Accused failed to take necessary and reasonable measures to prevent or punish their unlawful conduct. Furthermore the individual responsibility of the Accused for specific events where his subordinates at ESO collaborated with units from Ngoma Camp or the *gendarmerie*, has to be assessed on a case-by-case basis. As stated in the *Celebici* judgement, in considering the question of superior responsibility, the Chamber must at all times be alive to the realities of any given situation, and do away with "veils of formalism" that may shield individuals from responsibility for committing the most serious crimes known to humanity.¹³⁶

¹³⁶ *Delalic et al. (Celebici)*, Judgement (TC), para. 377.

5. SPECIFIC ALLEGATIONS AGAINST THARCISSE MUVUNYI

5.1. SWEARING-IN CEREMONY OF NEW *PRÉFET* OF BUTARE ON 19 APRIL 1994

5.1.1. Indictment

92. Paragraphs 3.19 and 3.20 read:

3.19 On the 19th of April 1994, the swearing-in ceremony in Butare for the new *préfet*, Sylvain Nsabimana, was the occasion of a large gathering. The meeting, which had been announced and organized by the Interim Government, was held at the MRND headquarters in Butare. On that occasion, President Théodore Sindikubwabo made an inflammatory speech, openly and explicitly calling on the people of Butare to follow the example of the other *préfectures* and begin the massacres. He violently denounced the “*banyira ntibindeba*”, meaning those who did not feel concerned. He asked them to “get out of the way” and “let us work”. Prime Minister Jean Kambanda, who subsequently took the floor, did not contradict the President of the Republic.

3.20 Lieutenant-Colonel Tharcisse Muvunyi attended in his capacity as Commander of Military Operations in Butare. Because he was present at the ceremony and did not dissociate himself from the statements made by the President of the Republic, Lieutenant-Colonel Tharcisse Muvunyi gave a clear signal to the people that the massacres were condoned by the Military.

5.1.2. Evidence

Prosecution Witness YAA

93. Prosecution Witness YAA testified that the situation in Butare changed following the speech given by Interim President Théodore Sindikubwabo in Butare on the occasion of the swearing-in of the new *préfet*, Sylvain Nsabimana.¹³⁷ The witness heard this speech over Radio Rwanda in Kigali, on 19 April 1994, the day it was delivered and a week before he left Kigali.¹³⁸ In the speech, Sindikubwabo called on the population to “do something”, and said that those who “did not feel concerned” should “get up and work”. YAA said that the killings by the *Interahamwe* were referred to as “work”. The witness testified that this speech incited people in Butare to kill, because prior to its broadcast killings had not started in that city.¹³⁹

Prosecution Witness NN

94. Witness NN testified that before President Sindikubwabo came to Butare, there had been no disturbances or killings there. On 19 April 1994, Sindikubwabo gave a speech at a meeting during his visit to Butare, which Witness NN heard over the radio. During that meeting, Sindikubwabo stressed the fact that members of the Butare population were behaving as if they were not concerned about what was happening. The day after the President’s visit, there was disorder in Butare and the killings started. Taking into account the speech and its consequences, Witness NN stated that Sindikubwabo wanted to convey

¹³⁷ T. 9 March 2005, pp. 14 and 15 (I.C.S.).

¹³⁸ T. 9 March 2005, p. 17 (I.C.S.).

¹³⁹ T. 9 March 2005, pp. 14, 15, 16 (I.C.S.).

to members of the Butare population that they must do the same thing as people in other *préfectures*.¹⁴⁰

95. Although Witness NN was not present at the meeting, he testified that he knew those who attended because whenever the President came to Butare, he was welcomed by the same people. According to Witness NN, the following authorities attended the meeting: the *préfet*, the Area Commander, the *bourgmestre*, and *préfecture* officials. In short, Sindikubwabo was welcomed by members of the local administration, as well as military authorities.¹⁴¹

Defence Witness MO01

96. On 6 April 1994, Defence Witness MO01 was working at the Nyakibanda Major Seminary located about nine kilometres from Butare.¹⁴² He remained at the seminary until the beginning of July 1994 when he went into exile.¹⁴³ Witness MO01 stated that between 1 May and 1 July 1994, he visited the Bishopric in Butare on at least five occasions. Defence Witness MO01 told the Chamber that even though he heard on the radio that President Sindikubwabo visited Butare, he never heard that the President addressed a meeting on 19 or 20 April 1994. On 20 April, he travelled to Karubanda and returned to Naykibanda Major Seminary a week later. However, Witness MO01 recalled having heard that the President came to Butare on a pacification mission.¹⁴⁴

Defence Witness MO37

97. Witness MO37 lived in Nyamirambo, in Kigali *préfecture*, when the President of Rwanda died on 6 April 1994.¹⁴⁵ As a result of the deteriorating security situation in Kigali, he and his fiancée decided to leave for Butare about one week after the President's death. Upon their arrival in Butare, the situation was initially calm and they could even walk to attend mass at Bishopric.¹⁴⁶ However, on or about 19 April 1994, the Bishop of Butare told them it was no longer necessary for them to come to mass, and advised that they should stay at home. According to Witness MO37, when they arrived in Butare, the *préfet* was Jean-Baptiste Habyalimana. However, by 20 April, Mr. Habyalimana was no longer *préfet*; he had been removed from that position on 19 April by President Sindikubwabo during a speech the President made at the swearing-in ceremony of the new *préfet*, Nsabimana. Witness MO37 further explained to the Chamber that after the President's speech, the

¹⁴⁰ T. 18 July 2005, pp. 31-32 (I.C.S.).

¹⁴¹ T. 18 July 2005, pp. 33-34 (I.C.S.): Witness NN testified: "I would therefore, like to point out that before the president came to Butare during that crisis period, and even when President Habyarimana was still president, wherever he went, he was welcomed by the *préfet* of the *préfecture* in question, by the Area Commander, the military authorities in the area and *bourgmestres*. Even if the Defence states that I did not attend that meeting, I can say that I never went where President Habyarimana went. Whenever he came to Butare, I was among the personalities who welcomed him. For instance, when he held a meeting in the stadium, it was the same personalities who came to welcome him. Those same personalities, therefore, came to the meeting held by Sindikubwabo."

¹⁴² T. 22 March 2006, pp. 4-5 (I.C.S.).

¹⁴³ T. 22 March 2006, pp. 4-5 (I.C.S.).

¹⁴⁴ T. 22 March 2006, p. 18 (cross-examination).

¹⁴⁵ T. 9 February 2006, p. 11 (I.C.S.).

¹⁴⁶ T. 9 February 2006, p. 14 (I.C.S.).

security situation in Butare town changed a great deal because killings started after the dismissal of *préfet* Habyalimana.¹⁴⁷

5.1.3. Deliberations

98. In the Chamber's view, the evidence of both Prosecution and Defence witnesses demonstrates that on 19 April 1994, President Sindikubwabo addressed a crowd in Butare at the swearing-in ceremony of the new *préfet* of Butare, Sylvain Nsabimana. The Chamber notes that even though Prosecution Witnesses NN and YAA only heard the speech on the radio, their accounts of its contents are sufficiently similar to render them credible. The evidence shows that widespread killing of Tutsi civilians started in Butare after that speech. Further, the Chamber accepts YAA's interpretation of the President's speech, that when the President said "get up and work" and "do something", he was in fact calling the people to resort to violence. The Chamber has also examined the reports of the socio-linguistic experts called by both the Prosecution and the Defence and finds that in the context of the war in Rwanda in 1994 these words were understood as a call to eliminate members of the Tutsi ethnic group.¹⁴⁸

99. However, the Chamber has not heard any reliable evidence that Muvunyi attended this meeting. Taking the totality of the evidence and the circumstances into account, the Chamber finds that the Prosecution has not proved beyond reasonable doubt that Muvunyi attended the meeting of 19 April 1994 at which President Sindikubwabo called on members of the Hutu ethnic group to "get up and work", which was understood as a call to kill Tutsis.

5.2. MEETING OF ESO OFFICER CORPS AFTER PRESIDENT SINDIKUBWABO'S SPEECH AT THE SWEARING-IN CEREMONY

5.2.1. Indictment

100. Paragraph 3.23 reads:

3.23 Subsequent to the visit of President Sindikubwabo and in exercising his *de jure* and *de facto* authority over the officers and men of the ESO, Lieutenant-Colonel Tharcisse Muvunyi called for a meeting of all the ESO commissioned and non-commissioned officer corps and informed them that the President's wishes should be considered as orders to be carried out.

5.2.2. Evidence

Prosecution Witness NN

101. Witness NN testified that Lieutenant-Colonel Muvunyi convened a meeting at the ESO Camp on 20 April 1994 which was attended by 10 to 15 officers and non-commissioned officers, including Captain Nizeyimana.¹⁴⁹ The meeting was convened by means of a message written on a blackboard in French, indicating that the meeting was for officers and high-ranking non-commissioned officers ("NCOs") of the ESO.¹⁵⁰

102. Witness NN testified that during the meeting which lasted for one hour, Muvunyi repeated what President Sindikubwabo had said, that the people of Butare were indifferent

¹⁴⁷ T. 9 February 2006, p. 15 (I.C.S.).

¹⁴⁸ T. 6 July 2005, pp. 15-22.

¹⁴⁹ T. 18 July 2005, pp. 36, 37-38 (I.C.S.), T. 20 July 2005, p. 28, 30-32 (I.C.S.) (Cross-examination).

¹⁵⁰ T. 20 July 2005, p. 28 (I.C.S.) (Cross-examination).

and did not feel concerned.¹⁵¹ Muvunyi then told officers at the meeting that they needed to consider what the President had said as an order that had to be executed.¹⁵² After the meeting, the killings started.¹⁵³

103. Witness NN also testified that Muvunyi reproached people for carrying out unauthorized missions. NN understood this to be a reference to his trip to the Rwanda-Burundi border to help Tutsis escape the fightings, because both Captain Nizeyimana and Muvunyi had asked him about the trip on 19 April 1994.¹⁵⁴

Defence Witness MO15

104. Witness MO15 testified that on 20 April, Muvunyi convened a meeting of the service heads of ESO. MO15 did not attend, but his commander told him that Muvunyi chaired the meeting and stated that because the security situation had deteriorated in Butare, the defence system within ESO had to be strengthened.¹⁵⁵ On the morning of 20 April, Muvunyi conducted a roll call and told the soldiers that they needed to strengthen the defences and be vigilant in order to arrest looters irrespective of whether they were soldiers or civilians. MO15 added that Muvunyi left after making those remarks and Captain Nizeyimana took over from him. MO15 later overheard Nizeyimana telling some non-commissioned officers that Muvunyi's remarks about the security situation were not true, that the words of President Sindikubwabo had to be considered an order, and that Muvunyi was an accomplice of the RPF.¹⁵⁶

5.2.3. Deliberations

105. The Chamber accepts the testimony of Prosecution Witness NN that on 20 April 1994 Muvunyi convened a meeting of ESO officers at which he repeated the contents of President Sindikubwabo's speech. The Chamber also finds that Muvunyi told those at the meeting they needed to understand what the President of the Republic meant to say, and consider the President's remarks as an order that had to be executed. The Chamber also accepts that shortly after this meeting, killings began in Butare.

106. The Chamber has considered the testimony of Defence Witness MO15 that on 20 April his superior officer told him Muvunyi convened a meeting of the service heads of ESO in which he discussed the deteriorating security situation in Butare and advocated for the ESO defence structure to be bolstered. In respect of the issue of whether it was

¹⁵¹ T. 18 July 2005, p. 38 (I.C.S.).

¹⁵² T.18 July 2005, p. 37 (I.C.S.).

¹⁵³ T. 18 July 2005, p. 37 (I.C.S.).

¹⁵⁴ T. 18 July 2005, p. 37 (I.C.S.).

¹⁵⁵ T. 9 March 2006, pp. 11, 12 (I.C.S.). According to Witness MO15, "Following the speech that was made by President Sindikubwabo, the highest ranking officer that was in Butare at the time was Lieutenant-Colonel Tharcisse Muvunyi, held a meeting attended by the service heads of ESO and this was on the 20th, in the afternoon. Those in attendance at the meeting of service heads were the three commanders of the -- the three company commanders that were in Butare."

When asked by Defence Counsel about what transpired at the meeting, MO15 answered as follows: "As I said earlier on, I did not attend that meeting. I wasn't a service head nor was I a company commander. It is my company commander who told me what had transpired in the course of the meeting. He told me that that meeting had been chaired by Lieutenant-Colonel Muvunyi. He also said that the security situation had deteriorated in Butare town and the defence system, therefore, had to be strengthened within ESO, and that, furthermore, the company responsible for security in town had to display or show proof of more vigilance."

¹⁵⁶ T. 9 March 2006, p. 16 (I.C.S.).

Muvunyi or Nizeyimana who stated that President Sindikubwabo's words should be considered as an order, the Chamber attaches more weight to the testimony of Witness NN who was present at the meeting than to that of Witness MO15 who only gave hearsay evidence.

107. The Chamber therefore finds that at a meeting of ESO officers on 20 April 1994, Muvunyi told the officers to consider the content of President Sindikubwabo's speech as an order to be carried out.

5.3. ESTABLISHMENT AND USE OF ROADBLOCKS IN BUTARE PRÉFECTURE

5.3.1. Indictment

108. Paragraphs 3.33 and 3.34 read:

3.33 On 27th April 1994, the Interim Government ordered roadblocks to be set up, knowing that the roadblocks were being used to identify the Tutsi and their "accomplices" for the purpose of eliminating them. These orders were followed and had already been put in place in Butare.

3.34 These checkpoints were ostensibly to check for weapons and to prevent any infiltration by the enemy. The roadblocks were located at Rwasave, Rwabuye, the front of Hotel Faucon, in front of Ngoma Camp, in front of the Ibis Hotel, at the junction leading to the University hospital, beside *Chez Bihira* and in front of the ESO. These checkpoints served as points where searches were conducted on civilians for the purposes of identity control and to check against infiltration of the enemy.

5.3.2. Evidence

Prosecution Witness QX

109. Prosecution Witness QX, a Tutsi priest, gave testimony by deposition from Kigali on 4 and 5 December 2003.¹⁵⁷ On 7 April 1994, he received the news of the death of President Habyarimana by telephone. Thereafter, he confirmed the news from a broadcast on Radio Rwanda which further announced that the entire population should stay at home. When he switched to Radio France International, he heard that "in Kigali they had started killing people."¹⁵⁸

110. He also heard people saying that in Butare, members of the MRND had started putting up roadblocks on various roads and paths. He added that there were times when "people were allowed to go out and purchase some goods." On one such occasion, the witness went out and when he got close to the Ngoma Camp, he found that armed soldiers had erected and were manning a roadblock. Witness QX testified that "everybody passing through had to show his or her identity card."¹⁵⁹

111. On another occasion, he was going to administer the sacrament to some sick people when he encountered a roadblock close to Ngoma Parish. This roadblock was manned by

¹⁵⁷ "Decision on the Prosecutor's Extremely Urgent Motion for the Deposition of Witness QX, Rule 71 of the Rules of Procedure and Evidence", dated 11 November 2003. The Chamber reasoned that the witness's advanced age and poor health constituted exceptional circumstances under rule 71. The Chamber also took into account the fact that the witness was going to give an eyewitness account of the alleged massacres that took place at the Ngoma Parish on 30 April 1994.

¹⁵⁸ T. 4 December 2003, p. 3 (I.C.S.).

¹⁵⁹ T. 4 December 2003, p. 14 (I.C.S.). The witness stated that the roadblock was "close to the camp ... was manned by soldiers and they were carrying weapons."

civilians carrying clubs and knives. He explained that all persons going through the roadblocks had to show their identity cards and that when it was determined that they were Tutsi, they were killed. He was not asked for his identity card at this roadblock but on his way back, those manning the roadblock demanded to see it. Witness QX told them that he had left it at home. They sent someone to accompany him to his home so he could produce the card. Upon arrival at Witness QX's home, he showed his identity card to the person who had accompanied him, and the latter said, "come with me, you have to explain this to those manning the roadblock." When he got there, he met a Hutu person who told him "to go back home" and promised to explain to those manning the roadblock what was happening.¹⁶⁰

Prosecution Witness KAL

112. Prosecution Witness KAL, a soldier posted at ESO in 1994, testified that on one occasion between April and June 1994, he left the ESO Camp to buy milk from the Arab neighbourhood. As he approached the second entrance of the ESO Camp at a place called Charabu, he found a roadblock made out of tree trunks placed across the road. Most of the people manning the roadblock were soldiers from ESO. He specifically named Corporals Mazimpaka and Niyibizi from ESO *nouvelle formule* as being among them. Witness KAL testified that people were stopped at the roadblock to determine whether they were Tutsi or accomplices of the *Inkotanyi*. The word *Inkotanyi*, he explained, referred to opponents of the government in power at the time, people who were at the war front, or who had infiltrated Butare. Tutsis were considered *Inkotanyi*.¹⁶¹

113. Witness KAL said that people who were identified as Tutsi or *Inkotanyi* at the roadblock were taken inside the ESO Camp. Subsequently, they were taken away from the Camp by ESO soldiers, including Lieutenants Bizimana and Gatsinzi, as well as trainees of ESO *Nouvelle Formule*. The soldiers who took the arrested civilians away seemed to be following orders, they seemed to have been authorised to carry out killings and were proud of themselves for doing so.¹⁶² Witness KAL admitted that he was not an eyewitness to the killing of any of the people taken away from the ESO Camp. He added, however, that the killings were a matter of public knowledge because the soldiers who carried them out returned to the camp and spoke openly about their actions.¹⁶³

Prosecution Witness YAA

114. Witness YAA, a soldier who worked at ESO in 1994, testified that on 7 or 8 April 1994, he noticed that a roadblock had been created at a distance of 100 to 200 metres from ESO, in the Arab neighbourhood. The roadblock was manned by a group of about 12 armed soldiers from ESO. Each of the soldiers carried a personal weapon such as an FAL gun, an

¹⁶⁰ T. 4 December 2003, pp. 13-14 (I.C.S.).

¹⁶¹ T. 2 March 2005, pp. 7, 8, 12 (I.C.S.).

¹⁶² T. 7 March 2005, p. 35 (I.C.S.).

¹⁶³ T. 7 March 2005, pp. 35-36. KAL testified as follows: "Soldiers crossed that roadblock to return to the camp, and they prided themselves on having arrested people. It was not difficult to know what was happening. In any case, as people passed, we could see new faces, and it was not possible not to be aware of that. Everybody spoke about it... I personally did not witness any murder outside of ESO, but those who committed those murders prided themselves on having done so. Some of those people are still in Rwanda. You can find them in various *préfectures*."

R-4 gun, or a J-3 gun. These were the same types of guns used at ESO. The guns were loaded with ammunition.¹⁶⁴

115. Witness YAA testified that people were intercepted at the roadblock and asked to present their identity cards. Some of the people were struck with weapons. Those who were identified as Tutsi were beaten at the roadblock, while Hutu were allowed to pass through. He recalled that at an assembly of ESO soldiers on 7 April 1994, Captain Nizeyimana confirmed that President Habyarimana's plane was shot down by the RPF. Witness YAA further explained that since the Tutsi inside the country were generally regarded as accomplices of the RPF, they were also held responsible for the death of the President.¹⁶⁵

116. On 12 or 13 April 1994, YAA and a detachment of ESO soldiers were deployed to Kigali. On their way, he saw a second roadblock at the Hotel Faucon. He noticed that a group of 10 to 12 armed trainee-soldiers from ESO were manning the roadblock. They were armed with FAL, R4 and J-3 rifles. Some carried grenades. Although YAA did not stay long at the roadblock, he noticed that the soldiers were checking the identification papers of people passing through the roadblock.¹⁶⁶

117. Witness YAA saw two other roadblocks in the city of Butare. One was at a crossroads leading to Gikongoro; the other was at Rwabuye. Both were manned by *Interahamwe* militia armed with firearms, including grenades, as well as traditional weapons such as machetes and spears. As they proceeded to Kigali, YAA saw other roadblocks on the road from Butare to Kigali and at each of these, people were being asked to present their identification papers.¹⁶⁷

Prosecution Witness XV

118. Witness XV was an employee of the Butare University Hospital at the time of the events in question. On 7 April, he received news of the death of President Habyarimana through a broadcast on Radio Rwanda. The next day, "all the population was on the hills and roadblocks were ordered to be set up, especially in Butare." According to the witness, the roadblocks in the city were set up by soldiers from ESO and Ngoma Camps, and there was very frantic activity. He recalled the names "Rapide" and "Kazungu" as two ESO soldiers whom he saw at the roadblock. The latter bore this nickname because of his light complexion. At these roadblocks, those suspected of being Tutsi had to show their identity card and they could be mistreated just because of their physical appearance.¹⁶⁸

¹⁶⁴ T. 8 March 2005, p. 42 (I.C.S.): YAA said: "Customarily, except for assemblies that were held when the flag was hoisted, each soldier had his or her arm, otherwise there was an ammunitions depot and each trainee, when going for lessons, put his gun in that armoury. But from April 1994 every trainee, every soldier had a gun loaded with ammunition."

¹⁶⁵ T. 8 March 2005, p. 43 (I.C.S.): YAA stated that: "... if I go by what was said in general, whenever people made mention of the RPF people understood that Tutsis inside the country were accomplices of the RPF. At the assembly held on the 7th in the morning, Captain Nizeyimana confirmed that President Habyarimana's plane had been shot down by the RPF, which meant that the Tutsis who were described as accomplices of the RPF were also responsible."

¹⁶⁶ T. 8 March 2005, pp. 42-43 (I.C.S.).

¹⁶⁷ T. 8 March 2005, p. 43; 9 March 2005, p. 7 (I.C.S.).

¹⁶⁸ T. 16 May 2005, pp. 7-8.

Prosecution Witness CCQ

119. On 20 April 1994, Witness CCQ was taking his wife to the medical centre at the Butare *Groupe scolaire* with the help of a priest from Ngoma Parish. His wife had just suffered a heart attack. On the way, they came across a roadblock located at Hotel Faucon manned by about six to ten soldiers and *Interahamwe*. One of the soldiers stopped them and demanded to see their identity cards. CCQ knew some of the soldiers at the roadblock because they were natives of his *secteur*; he knew that they worked at the ESO.¹⁶⁹

120. Witness CCQ and his wife produced their identity cards which showed that they were Hutu.¹⁷⁰ The priest accompanying them did not have an identity card, but carried another document which showed that he was a priest and a Tutsi. The Tutsi priest was questioned at the roadblock for about one-and-a-half hours before they were let through. The priest was questioned because the soldiers had orders to arrest all Tutsis. They were only allowed to proceed from the roadblock after CCQ begged the soldiers and told them that his wife would die if they did not let them through. The soldiers insisted, however, that the Tutsi priest must return to them within 15 minutes using the same road.¹⁷¹

121. Witness CCQ further explained that while Hutu were allowed to pass through the roadblocks without any trouble, Tutsi were being chased away, their houses were being burnt down, and they were being attacked with firearms and traditional weapons. He stated that the roadblocks were established for the purpose of the attacks on the Tutsis.¹⁷²

122. Witness CCQ testified that after leaving the roadblock at Hotel Faucon, they came across another roadblock in front of *Chez Bihira*. Even though there was no physical barrier at this place, there was a group of armed soldiers who stopped them and demanded to know their destination. They responded that they were taking a sick person to the hospital. CCQ added that they stopped only briefly at this roadblock because the soldiers noticed that they had already been checked at the previous roadblock.¹⁷³

123. While at this second roadblock, Witness CCQ saw three slender-looking young persons, who appeared to be of Tutsi ethnicity. The soldiers were asking them to show their identity cards. He also saw one of the soldiers holding a bloodstained sword, which he

¹⁶⁹ T. 26 May 2005, pp. 14, 23.

¹⁷⁰ T. 26 May 2005, p. 15. The witness explained further: "My identity card indicated that I was Hutu. ... I did not belong to the Hutu ethnic group. I am Tutsi, but my wife was Hutu. ... The reason for that is that in 1959, my father changed his ethnicity in his identity card with the birth of the MDR party. So when my father was asked for his card he stated that he was Hutu, and that flowed on to us, his children. ... It was in a bid to protect ourselves. War was raging at the time, a war that was similar to the war of 1994. However, at the time the killings were not at the scope of those that occurred in 1994."

¹⁷¹ T. 26 May 2005, p. 15. At p. 31 of the transcript, witness explained that the priest had earlier given him 1000-2000 Rwandan francs to pay to the soldiers, but that this offer was turned down.

¹⁷² T. 26 May 2005, p. 16:

"Q: Why do you say that the soldiers had been instructed to arrest Tutsis?"

"A: That was the prevailing situation in Rwanda at the time, and everybody knew that, and we all knew what was going on. We were already being chased away; our houses were already being burnt down. We were already being attacked by firearms and clubs and what have you. So you understand that these roadblocks were set up for a purpose. You see, they didn't ask us to show the documents for the vehicle. We were simply asked to show our identification cards."

¹⁷³ T. 26 May 2005, p. 16.

brandished, saying that they had finished killing the *Inyenzi*. Witness CCQ understood this to mean the soldiers had finished killing Tutsi.¹⁷⁴

124. After they arrived at the hospital, CCQ left his wife and went to buy some food. He took the same route as when they came to the medical centre, and therefore had to go through the roadblock at *Chez Bihira*. As he went by, he saw the bodies of the three young people whom he had left at the roadblock earlier, thrown in the gutter. They had been shot dead. CCQ could identify them from their attire and could tell that they were the same three people he had previously seen. He continued on his way to buy food in town and returned to the medical centre to join his wife.¹⁷⁵

125. Witness CCQ also told the Chamber that on 21 April 1994, while on his way to visit his family at Matyazo, he saw Muvunyi together with Robert Kajuga¹⁷⁶ and soldiers at the roadblock in front of Hotel Faucon. He was on the other side of the road from where Muvunyi and his colleagues stood, but he could see them talking. He believed that Muvunyi was giving orders to the soldiers. CCQ was asked to show his identity card which he did and continued on his way.¹⁷⁷

126. Witness CCQ also testified that there were several roadblocks located in Butare. He said, “[f]rom Matyazo to the *School complex* and from the *School complex* to Tumba, there were roadblocks. I went through all those roadblocks. There was one in Matyazo; I went through that roadblock. There were roadblocks at the level of the Ngoma Camp. There was a roadblock in front of the university extension. There was a roadblock in front of Hotel Faucon. There was a roadblock in front of Bihira’s home which was manned only by soldiers, and there was another roadblock at Pauline Nyiramasuhuko’s. There was the Mukoni roadblock, as well as a roadblock which was at Tumba. I went through all that distance.”¹⁷⁸

Prosecution Witness YAN

127. Witness YAN lived in Gikongoro *préfecture* when President Habyarimana’s plane was shot down. Sometime during the war, he moved from Gikongoro to Butare and went to live at a place called the *Procure*, otherwise known as *Économat général*, located close to the *Groupe scolaire*. He was arrested by ESO soldiers under the leadership of Lieutenant Gakwerere in mid-May and taken to ESO in the back of a white single-cabin pick-up truck. He was subsequently detained at the *Brigade* for two or three weeks. Upon release, he saw several roadblocks including at *Chez Bihira*, close to the University, next to Nyiramasuhuko’s house, and opposite Hotel Faucon. All these roadblocks were manned by soldiers and *Interahamwe* militia. YAN believed that the soldiers collaborated with the *Interahamwe* and were manning the roadblocks together. Witness YAN described the *Interahamwe* as “killers” who had received military training. They wore *kitenge* fabric and carried guns and traditional weapons such as machetes.¹⁷⁹

¹⁷⁴ T. 26 May 2005, p. 16.

¹⁷⁵ T. 26 May 2005, p. 17.

¹⁷⁶ Kajuga was the alleged leader of the *Interahamwe* militia in Rwanda in 1994.

¹⁷⁷ T. 26 May 2005, pp. 17, 18.

¹⁷⁸ T. 26 May 2005, p. 19. Note that the “School Complex” refers to the “*Groupe scolaire*” of Butare (see French Transcripts).

¹⁷⁹ T. 30 May 2005, p. 10. “The roadblocks were manned by soldiers and *Interahamwes*. The *Interahamwes* collaborated with the soldiers. If they wanted to kill someone they would do so. It seems they were manning

128. When asked by the Prosecution how he was able to go through all these roadblocks without being killed, YAN responded he could see the roadblocks, but avoided going through them.¹⁸⁰

Prosecution Witness AFV

129. Witness AFV was an employee of the Butare University Hospital on 6 April 1994 when the President's plane was shot down. She testified that on 20 April 1994, she was stopped at a roadblock on her way home from the hospital. It was manned by a group of "more than four" armed soldiers who carried firearms, cartridge belts, and grenades. The roadblock was located at the intersection of the roads leading to the University Laboratory and the University Hospital. Witness AFV believed that the soldiers were from ESO because they carried weapons and wore the military uniforms with spotted colours that she knew soldiers from ESO wore. However, she did not notice the headgear that the soldiers might have been wearing, or even whether they wore any, because she was scared. In addition, she believed the soldiers were from ESO because the roadblock was only ten minutes away from the ESO Camp and the soldiers took turns at the roadblock.¹⁸¹

130. Witness AFV testified that the soldiers demanded that passers-by show their identity cards and separated the Hutu from the Tutsi. Those whose identity cards showed that they were Hutu were allowed to pass, but the Tutsi were detained at the roadblock and searched. Recounting her personal experience at the roadblock, AFV said she was searched, beaten and asked by the soldiers if she thought she was extraordinary. They also asked how she could dare go to work. Witness AFV added that a girl who had accompanied her to the roadblock was killed by the soldiers in her presence when they realised that she was Tutsi, but that she had torn up her identity card. Her body was thrown in a gutter.¹⁸²

131. Furthermore, AFV testified that one of the soldiers said to his colleagues, "Let us look at this Tutsi's sexual organs. How come you are working when others aren't?" He then told his colleagues that they should go along with her, and that she should come back and report to them the next day. The witness stated that she interpreted the soldier's statement to mean they would kill her after looking at her private parts. Witness AFV testified that two armed soldiers escorted her from the roadblock, and said they were going to take her home. Instead, they beat her and took her to the woods. Along the way, they hit her and said they were going to look at her sexual organ to see to what extent she was extraordinary. They called her names. She said, "I understood that they were going to hurt me, taking into account the fact that they were beating me and the fact that they had killed

these roadblocks together." When asked by the Prosecutor to explain who the Interahamwe were, YAN stated: "Interahamwes were killers who had received military training. They had their kitenge fabric that they were wearing. And these were people who had been trained. They were people not like others; they had been trained."

¹⁸⁰ T. 30 May 2005, p. 11.

¹⁸¹ T. 21 June 2005, p. 5.

¹⁸² T. 21 June 2005, p. 13. Witness narrated her experience at the roadblock in the following words: "They asked passers by to present their identity cards and separated the Hutu from the Tutsi. And when the name Hutu was on your identity, you were allowed to pass, and the Tutsis were asked to stay, and they searched us. ... They searched me; they asked me to show my identity card. And they were severe in their language to me. They asked me if I were an extraordinary person and asked how I could dare go to work. ... I understood that they were going to hurt me because there was a girl who was in my company and who had just been killed and thrown into the gutter. ... I had come down with that girl. She had torn her identity and therefore had none. And once soldiers realised that she was Tutsi, she was killed and thrown into the gutter in front of us."

the girl who was in my company. I understood that they were going to kill me.” The witness therefore asked the soldiers to kill her on the spot instead of taking her away to torture her.¹⁸³

132. Despite her plea to be killed on the spot, the soldiers took her into the bush to a spot “very close to Mukoni as you go down towards the university.” She estimated that the distance between this place and the roadblock was about two metres, but added that it was the equivalent of the distance between the witness stand and the main entrance to the courtroom. She added that “you could see the bush from the roadblock.” According to the witness, she was taken into the bush sometime between 4.30 and 5.00 p.m. although she emphasized that this was only an estimate, as she was afraid and did not look at her watch. She was subsequently raped by the soldiers.¹⁸⁴

Prosecution Witness YAQ

133. Witness YAQ testified that on 24 April 1994, he saw Muvunyi, in the company of local government officials including Nteziryayo, and Kalimanzira at a roadblock in Rumba *cellule*, Kibilizi *secteur*. The witness was one of those manning the roadblock. He said that Muvunyi and about 10 other people, including soldiers, arrived in a white Toyota vehicle, not a military vehicle. This was the first time the witness saw Muvunyi, and he did not know the names of the other officials who accompanied him until they were introduced at a “security meeting” held later that day near the roadblock. Witness YAQ testified that Gasana, Chairman of the Power Wing of the MDR Party, introduced Muvunyi at the meeting. The meeting was chaired by Muvunyi and Alphonse Nteziryayo. During cross-examination, YAQ denied mentioning in his statement of 4 February 2000 that Muvunyi was accompanied at the roadblock by Nteziryayo and Kalimanzira, instead of Nteziryayo and Nsabimana as he said before the Chamber.¹⁸⁵

134. The Accused and the other military officers addressed the crowd. The Accused said, “Tomorrow, very early in the morning, if I do not find bodies, any dead bodies at this roadblock, I will conclude that you are all Tutsis. I myself will bring soldiers, and we will allow people from Shyanda - - assailants from Shyanda, to come here, and they will even kill you.”¹⁸⁶ The next day, that is 25 April 1994, the Accused returned to the roadblock to see if the killings had started. The witness testified that upon arrival of the Accused, there were dead bodies at the roadblock – “The first person to be killed and who was a Tutsi was Rwabigwi. There was also Rubanda, Isador Mutiganda, [and] Kayiranga. These are the names that I remember, but I believe there were about seven bodies.”¹⁸⁷

¹⁸³ T. 21 June 2005, pp. 14, 15.

¹⁸⁴ T. 21 June 2005, p. 15.

¹⁸⁵ T. 31 May 2005, pp. 4, 5, 8, 16, 19.

¹⁸⁶ T. 31 May 2005, p. 6.

¹⁸⁷ T. 31 May 2005, p. 7.

Defence Witness MO01

135. Defence Witness MO01 testified that on or around 14 April 1994, he went into Butare town from the Nyakibanda Major Seminary using the road that passed through the University of Butare to the *Chez Bihira* junction.¹⁸⁸ On his outward and return trips he did not see any soldiers on the road, nor did he see a roadblock at the *Chez Bihira* junction.¹⁸⁹ On 20 April, Witness MO01 left the Nyakibanda Major Seminary and travelled to the Karubanda Minor Seminary where he stayed for a week. He took the same road that he travelled on 14 April, and again there were no soldiers on the road, and he did not see a roadblock at *Chez Bihira*.¹⁹⁰

136. Witness MO01 testified that sometime in June 1994, while on his way to the Butare Bishopric, he saw a roadblock at the *Chez Bihira* junction.¹⁹¹ He believed that those manning the roadblock were civilians because the person who asked the witness to show his identity papers was not wearing a military uniform or military beret.¹⁹²

Defence Witness MO23

137. In April 1994, Witness MO23 was a student soldier at ESO *Nouvelle Formule*. He was assigned to the “Intervention Company” which was in charge of security in Butare town under the command of Lieutenant Gakwerere.¹⁹³ The Intervention Company was one of the units created on 8 April 1994 by Captain Nizeyimana during a roll-call which was also attended by Muvunyi. He said Muvunyi addressed the soldiers and advised them to be law abiding. According to the witness, a company in charge of protecting the ESO Camp was also created and placed under the command of Lieutenant Bizimana; and a Reserve Company under the command of Lieutenant Gatsinzi remained in the camp.¹⁹⁴

138. Witness MO23 stated that the Intervention Company was in charge of creating roadblocks in Butare town. He said a roadblock was put up at the second entrance of ESO, in the Arab neighbourhood, and others were located at Hotel Faucon, Hotel Ibis, and at the *Chez Bihira* junction.¹⁹⁵ Witness MO23 said he was assigned to the *Chez Bihira* roadblock which was created on 9 April, but remained for only two days. According to Witness MO23, the Butare prefectural committee decided that the roadblock was no longer necessary and it was therefore dismantled. During the period Witness MO23 stayed at the roadblock, he never arrested anybody.¹⁹⁶

Defence Witness MO30

139. Defence Witness MO30 said that to his knowledge, there were no roadblocks in Butare from 7 to 8 April 1994. However, sometime between 8 and 10 April, he saw a single

¹⁸⁸ T. 22 March 2006, p. 12. Throughout this witness’s testimony, the name of this junction is spelt “Sebihira”, which is a misspelling for “*Chez Bihira*”.

¹⁸⁹ T. 22 March 2006, p. 12.

¹⁹⁰ T. 22 March 2006, p. 10.

¹⁹¹ T. 22 March 2006, p. 12.

¹⁹² T. 22 March 2006, p. 19.

¹⁹³ T. 13 March 2006, pp. 14, 15 (I.C.S.).

¹⁹⁴ T. 16 March 2006, p. 14 (I.C.S.).

¹⁹⁵ T. 16 March 2006, p. 15 (I.C.S.).

¹⁹⁶ T. 16 March 2006, pp. 16, 17, 29, 31 (I.C.S.).

roadblock “towards the Bihira Shop”, which was a small roundabout on the road leading to the Butare Cathedral. This roadblock was up for only a day or two and was removed by 11 April.¹⁹⁷ Between 7 and 21 April, MO30 did not go to the Arab neighbourhood or ESO and did not see any roadblocks manned by military personnel during this period.¹⁹⁸

140. Witness MO30 testified that there were a lot of roadblocks in Butare after 20 or 21 April 1994.¹⁹⁹ He recalled that there was a roadblock in front of Hotel Faucon, another one between the residence of Minister Nyiramasuhuko and the Protestant College, and a third one next to the University Hospital Laboratory. The University Laboratory roadblock was manned by young civilians whom he believed were students who had remained on campus. MO30 stated that he did not see a roadblock at *Chez Bihira* in May 1994.²⁰⁰

Defence Witness MO48

141. In April 1994, Witness MO48 lived in Mugusa *commune*, in Butare *préfecture*.²⁰¹ He heard the news of President Habyarimana’s death on 7 April and noted that people in his *commune* were shocked. He estimated that about two weeks after the President’s death, around 20 April 1994, the *conseiller* of his *secteur*, Tharcisse Singisabana, asked the members of the population to commence night patrols because “the situation was becoming serious.”²⁰² Members of the population, both Hutu and Tutsi, had started killing each other.²⁰³

142. Defence Witness MO48 testified that roadblocks were set up with the intention of bringing people who did not have identity papers to the Communal Office. Those manning the roadblocks also searched bags to ensure that people were not carrying weapons. He explained that it was the people coming from Uganda who were *Inkotanyi* because they were working with the RPF.²⁰⁴

143. Witness MO48 said that he was posted to a roadblock at Cyamugasa, seven to eight kilometres from the Mugusa Communal Office on the road towards Cyiri-Gikonko. All the *cellules* were required to provide civilians armed with traditional weapons to man the roadblocks.²⁰⁵ He worked at the roadblock for only four days after it was set up, because he fell ill with malaria and requested permission from the *responsable de cellule* to stop working. During the period he was at the roadblock, he never saw any soldiers, nor did he see anyone being killed; moreover, those who manned the roadblock during his absence never said anyone was killed at the roadblock. In fact, he added, those who manned the roadblock did not have authority to kill, they were prohibited from threatening anyone, and they did not carry guns.²⁰⁶

¹⁹⁷ T. 14 March 2006, pp. 10, 28, 29. (I.C.S.).

¹⁹⁸ T. 14 March 2006, p. 11 (I.C.S.).

¹⁹⁹ T. 14 March 2006, p. 29 (I.C.S.).

²⁰⁰ T. 14 March 2006, pp. 12, 13 (I.C.S.).

²⁰¹ T. 14 March 2006, p. 34; Exhibit D.53, admitted on 14 March 2006.

²⁰² T. 14 March 2006, pp. 37, 44 (I.C.S.).

²⁰³ T. 14 March 2006, p. 44 (I.C.S.); T. 16 March 2006, p. 4 (cross-examination).

²⁰⁴ T. 14 March 2006, pp. 46-47 (I.C.S.).

²⁰⁵ T. 14 March 2006, pp. 37, 38 (I.C.S.).

²⁰⁶ T. 14 March 2006, pp. 47, 48 (I.C.S.).

Defence Witness MO69

144. On 6 April 1994, Witness MO69 lived in Kigali with her family. Due to security concerns, she moved to Butare sometime in May. In Butare, Witness MO69 saw roadblocks at many places including at a junction leading to Gikongoro, and at Hotel Faucon. Initially, she said that the Hotel Faucon roadblock was manned by “young persons”.²⁰⁷ Later, however, she said the Hotel Faucon roadblock was manned by soldiers “dressed in the usual uniform of the national army and berets” but added “there were other people around”.²⁰⁸

Defence Witness MO73

145. Witness MO73 and his family left their house in Rubungo *commune*, Kigali on or about 16 April 1994. They had received information that the *Interahamwe* were preparing to attack their family house. They travelled by car for about five hours and eventually arrived in Butare and secured accommodation at the Hotel Faucon. According to the witness, throughout their journey from Rubungo to Butare, and up to their arrival at Hotel Faucon, they did not come across any roadblocks.²⁰⁹

146. MO73 said that they left Hotel Faucon and moved to ESO on or about 20 April because the security situation in Butare had deteriorated as of 19 April 1994.²¹⁰ At ESO, Colonel Muvunyi gave accommodation to Witness MO73 and his family at one of the officers’ quarters located about 50 metres from Muvunyi’s own official residence. They stayed at ESO until about 21 May 1994, when Muvunyi provided a military escort composed of six soldiers in a pick-up truck and they crossed the border into Burundi.²¹¹

147. MO73 testified that during his stay at ESO in April and May 1994, there was a roadblock in front of the Camp.²¹² He also said that on 23 or 24 April, he went from ESO to the Butare University campus to collect his belongings. He walked the distance, and passed through the University Hospital. He did not see any roadblocks manned by soldiers and did not see a roadblock at the University Laboratory. However, there was a roadblock on the small road leading to the Kigali/Butare main road at Kagaro. This roadblock was close to the University and the witness believed it was manned by students from the Law Faculty.²¹³ In addition, during his stay at ESO, he made about four or five trips to Butare town during which he passed Hotel Faucon. On each occasion, he noticed that there was a roadblock opposite the hotel manned by soldiers. He did not see or hear about anyone being abused at the roadblock “because the people were saying that the soldiers manning the roadblock were disciplined.”²¹⁴

²⁰⁷ T. 9 February 2006, p. 50 (I.C.S.).

²⁰⁸ T. 9 February 2006, p. 59 (I.C.S.).

²⁰⁹ T. 6 March 2006, pp. 17, 19 (I.C.S.).

²¹⁰ T. 6 March 2006, p. 23 (I.C.S.).

²¹¹ T. 6 March 2006, p. 31 (I.C.S.).

²¹² T. 6 March 2006, p. 10 (I.C.S.).

²¹³ T. 6 March 2006, p. 26 (I.C.S.).

²¹⁴ T. 6 March 2006, p. 27 (I.C.S.).

Defence Witness MO15

148. Defence Witness MO15 testified that in order to ensure security in Butare, roadblocks were set up at various locations between 8 and 10 April 1994 including one near the ESO Camp within in the Arab neighbourhood, and others at Hotel Faucon, the Kigali-Gikongoro crossroad, and at *Chez Bihira*.²¹⁵ All the roadblocks were manned by military personnel from the Intervention Company under the leadership of Lieutenant Gakwerere. He explicitly denied that civilians manned the roadblocks.²¹⁶ The soldiers asked people passing through the roadblocks to show their identity cards, so as to prevent infiltration into their area by RPF forces.²¹⁷

149. Witness MO15 initially testified that the roadblock at *Chez Bihira* was dismantled nine days after it was set up,²¹⁸ but later said that the roadblocks at Hotel Faucon and the Kigali-Gikongoro crossroad, as well as the one at *Chez Bihira*, were still in place when he left Butare on 3 May 1994.²¹⁹

5.3.3. Deliberations

150. The Chamber finds that roadblocks were set up in Butare in the days following the death of President Habyarimana. This conclusion is supported by Prosecution Witnesses XV, QX, KAL, and YAA, as well as Defence Witnesses MO15 and MO23.

151. The Chamber also finds that many of these roadblocks were created and operated by soldiers, specifically ESO soldiers. The Intervention Company was a unit created at ESO on 8 April 1994 and specifically tasked with creating and manning roadblocks in Butare town. As Defence Witness MO23 noted, the Company established such roadblocks near Hotel Faucon, Hotel Ibis, *Chez Bihira*, and in the Arab neighbourhood near ESO. Witnesses KAL, YAA, XV, CCQ, YAN, AFV, MO15 and MO23 all gave evidence that ESO soldiers were involved in creating and manning the roadblocks. Specifically, the Chamber notes the testimony of Prosecution Witnesses KAL and YAA, both of whom worked at ESO in 1994 and specifically identified ESO soldiers whom they knew at various roadblocks in Butare.

152. The Chamber finds that the Prosecution evidence was largely corroborated by the Defence. Witness Ndindiliyimana, MO01, MO23, MO30, MO48, MO69, MO73, and MO15 all acknowledged the existence of several roadblocks in Butare town, and testified that the roadblocks were intended for stopping persons to check their identification cards in hopes of weeding out RPF infiltrators. Defence Witnesses with a military background such as Ndindiliyimana, MO23, and MO15 all testified that the roadblocks in Butare were manned by soldiers coming from the ESO Camp.

153. The Chamber finds that at various times from 7 April to mid-June 1994, roadblocks existed at the following locations: at a distance of 100 or 200 metres from ESO Camp, as per the testimony of KAL, YAA, MO23, MO73, and MO15; Ngoma Camp, as established by QX and CCQ; Hotel Faucon, at the very least by April 20 or 21, in accordance with the testimony of YAA, CCQ, YAN, MO69, MO30, MO23, MO73 and MO15; Hotel Ibis, as per MO23's testimony; at least one in the vicinity of the University of Butare, pursuant to

²¹⁵ T. 9 March 2006, p. 6 (I.C.S.).

²¹⁶ T. 9 March 2006, p. 6 (I.C.S.).

²¹⁷ T. 9 March 2006, p. 6 (I.C.S.); T. 10 March 2006, p. 4 (I.C.S.).

²¹⁸ T. 9 March 2006, p 4 (I. C.S).

²¹⁹ T. 9 March 2006, p. 4 (I.C.S.).

the testimony of CCQ, YAN, AFV, MO01, MO30, and MO73; *Chez Bihira*, as stated by CCQ, MO15, and MO23; Matyazo, as per the testimony of QX and CCQ; Rwabuye, in accordance with YAA's testimony; the Kigali-Gikongoro crossroads, as established by YAA and MO15; Cyamugasa, where MO48 worked; Rumba *cellule*, where YAQ testified that he worked; and several others, noted by Witness YAA.

154. Of these, there is no evidence suggesting that the Matyazo, Rwabuye, or Cyamugasa roadblocks were manned by soldiers. The Chamber finds that the Rwabuye roadblock was operated by armed civilian *Interahamwe*. Furthermore, the Ngoma Camp checkpoint was most likely manned by soldiers from that camp, and the Prosecution has not shown that ESO soldiers were at any time present at that location. Finally, the Chamber observes that the military forces and armed civilians were in many instances working together. For example, on 20 April, Witness CCQ saw six to ten soldiers at the Hotel Faucon roadblock along with several members of the civilian *Interahamwe*, who were armed with traditional weapons. CCQ also personally spotted the Accused in front of the Hotel Faucon talking with Robert Kajuga, the alleged leader of the *Interahamwe*, along with several soldiers and other *Interahamwe*. This identification evidence is, however, not corroborated by any other witness, and the Chamber concludes that it would be unsafe to rely on it, or to draw any inference therefrom that Muvunyi acted in concert with, or otherwise ordered, instructed or permitted his subordinates to jointly operate with the *Interahamwe* at this roadblock.²²⁰

155. The Chamber finds that the roadblocks served as points where searches were systematically conducted on civilians for the purposes of identity control. The Chamber further finds that while the official rhetoric was that the roadblocks were to prevent infiltration by enemy forces, they were in fact used to identify Tutsi civilians for the purpose of eliminating them. Prosecution Witnesses YAA, CCQ, AFV, KAL, QX, XV, and YAN all offered evidence demonstrating the existence of identity checks at roadblocks in Butare.

156. The Chamber has considered Witness YAQ's testimony placing Muvunyi at the Rumba *cellule* roadblock on 24 April 1994 and finds it unreliable. YAQ was an *Interahamwe* militiaman and had reason to enhance Muvunyi's participation in the genocidal campaign and in that way attempt to diminish his own role therein. Moreover, his evidence on this issue is not supported by that of any other witness.

157. Taking all the Prosecution and Defence evidence into account, the Chamber is satisfied beyond reasonable doubt that between 7 April and 15 June 1994, roadblocks were set up in various parts of Butare town and manned by soldiers from ESO Camp. While these roadblocks were ostensibly set up to prevent infiltration by enemy soldiers, they were in fact systematically used to identify Tutsi civilians for elimination. Due to the large number of roadblocks set up in Butare, the widespread nature of killings at these roadblocks, the proximity of some of the roadblocks to the ESO Camp, and the fact that ESO soldiers were routinely deployed to man the roadblocks, the Chamber concludes that Muvunyi knew or had reason to know about them. The Chamber finds that Muvunyi failed to take necessary and reasonable measures to stop the unlawful killing of Tutsi civilians at these roadblocks by ESO soldiers.

²²⁰ *Bagilishema*, Judgement (AC), para. 75; *Kupreškic*, Judgement (AC), para. 39. In both cases, the Appeals Chamber urged "extreme caution" before relying upon identification evidence made under difficult circumstances.

5.4. SENSITISATION MEETINGS

5.4.1. Indictment

158. Paragraphs 3.24 and 3.25 read:

3.24 During the events referred to in this Indictment, Lieutenant-Colonel Muvunyi, in the company of the Chairman of the civil defense program for Butare who later became the *préfet* of Butare *préfecture*, and other local authority figures, went to various *communes* all over Butare *préfecture* purportedly to sensitize the local population to defend the country, but actually to incite them to perpetrate massacres against the Tutsis. These sensitization meetings took place in diverse locations throughout Butare *préfecture* such as:

- in Mugusa *commune* sometime in late April 1994;
- at the Gikore Centre sometime in early May 1994;
- in Muyaga *bureau communal* between the 3rd and 5th of June 1994;
- in Nyabitare *secteur*, Muganza *commune* sometime in early June 1994.

3.25 At the meetings referred to in Paragraph 3.24 above, which were attended almost exclusively by Hutus, Lieutenant-Colonel Muvunyi, in conjunction with these local authority figures, publicly expressed virulent anti-Tutsi sentiments, which they communicated to the local population and militiamen in traditional proverbs. The people understood these proverbs to mean exterminating the Tutsis and the meetings nearly always resulted in the massacre of Tutsis who were living in the *commune* or who had taken refuge in the *commune*.

5.4.2. Meetings at Nyantanga Trade Centre and at Nyakizu Communal Office

5.4.2.1 Evidence

Prosecution Witness CCR

159. Prosecution Witness CCR testified that on 6 April 1994 when President Habyarimana's plane was shot down, he lived in Nyakizu *commune*, Butare *préfecture*.

160. On 20 April, at about 10.00 a.m., CCR heard from an announcement by megaphone mounted on a vehicle that the population were invited to a "security meeting" at the Nyantanga Trade Centre. The meeting took place between 2.00 p.m. and 3.00 p.m. He attended the meeting, and so did members of all ethnic groups from the three *secteurs* that made up his *commune*. The meeting was also attended by Colonel Tharcisse Muvunyi, Captain Niyomugabo, Lieutenant Emmanuel, at least one military chaplain, the *préfet* of Butare and several other *commune* and *préfectoral* officials.²²¹

161. Several officials spoke at the meeting. In his speech, the *bourgmestre* said the meeting was convened because the military commander of the area, Colonel Tharcisse Muvunyi, wished to come to the area to "get an assessment of the situation", and to tell the people "what needed to be done". Colonel Muvunyi then took the floor and stated as follows: "You are all aware that we are in a state of war. We are fighting the enemy just as we have fought the enemy in the past and that is the *Inyenzi*. Today they have taken on a new name - the RPF. This is a difficult war and that is why we seek your assistance. You, members of the population, you are expected to help us within the framework of our civilian defence."²²² Muvunyi added that there would be another meeting the next day where he would distribute weapons to the population of Nyakizu *commune*.²²³

²²¹ T. 20 May 2005, p. 3.

²²² T. 20 May 2005, p. 4.

²²³ T. 20 May 2005, p. 4.

162. The following day, 21 April, a second meeting was indeed held at the Nyakizu Communal Office. Tharcisse Muvunyi and the other officials addressed the population. The *bourgmestre* informed those gathered that “the government had decided to set up the civilian defence” and invited the Accused to explain the nature of the war and the measures that needed to be taken. In his turn, Muvunyi reminded the population of the previous day’s meeting and stated: “The matter before us now is that our country is at war. We are fighting this war against the enemy, who has taken the name RPF, whereas it is the same enemy we fought in the past under the name *Inyenzi*.” The Accused went on to say “the current war is a difficult war because the enemy before us is fighting us from a military front and is also using accomplices. As your soldiers, we are at the battle front and we have come here to make you aware so that you may fight the accomplices who are amongst you. [...] The RPF *Inyenzi* has distributed weapons to its accomplices, and that was the reason why we, too, have brought weapons to you so that you may face the accomplices.” Muvunyi added “Let this be clearly understood, and it is common knowledge, all Rwandans know it, these accomplices I am referring to are Tutsis and Hutus who are cowards. All these persons must be exterminated. We must get rid of this dirt.”²²⁴ Witness CCR stated that the population understood the word “*Inyenzi*” used by Muvunyi as an indirect reference to the Tutsi. With respect to the term “accomplices”, Muvunyi had explained that this referred to the Tutsi members of the population.²²⁵

163. CCR testified that weapons were distributed at the meeting and that later that evening some people were killed at the Nyakizu Communal office. The next day CCR witnessed the killing of eight people at the Nyantanga Trade Centre.

Defence Witness MO81

164. Defence Witness MO81, a Tutsi, testified that the Nyantanga Health Centre was located at virtually the same place as the Nyantanga Trade Centre.²²⁶ Even though the two were separated by trees, MO81 explained that a person standing at the Health facility could clearly see the Trade Centre and vice-versa.²²⁷

165. According to MO81, the situation in Nyantanga remained calm until about 15 April, when people started killing each other, destroying houses and looting property.²²⁸ He therefore went into hiding with his family until late June or early July when he went into exile in Burundi.²²⁹ He said that he was not aware of any public meeting held at the Nyantanga Trade Centre before 15 April which was presided over by high officials of Butare *préfecture*. He added if any such meeting had taken place, he would have known because the Trade Centre was close to his home. Witness MO81 said he never saw any soldiers in the Nyantanga Health or Trade Centre before 15 April.

²²⁴ T. 20 May 2005, p. 12.

²²⁵ T. 20 May 2005, p. 5.

²²⁶ T. 7 February 2006, pp. 28-29 (I.C.S.).

²²⁷ T. 7 February 2006, p. 32 (I.C.S.).

²²⁸ T. 7 February 2006, p. 33 (I.C.S.).

²²⁹ T. 7 February 2006, pp. 34, 35 (I.C.S.).

Defence Witness MO67

166. Defence Witness MO67 also testified that where the Nyantanga Trade Centre was located.²³⁰ At approximately 11.00 a.m. one day, about one week after the President's death, while at work, she heard people shouting that the *Inkotanyi* were coming, and members of the population started fleeing. As a result, the witness also fled to Kibangu *secteur*, where she remained for about two hours before returning to Nyantanga.²³¹

167. She explained that before that morning's incident, she never heard of a public meeting being held at the Nyantanga Trade Centre, and never saw any military vehicles in the area. According to MO67, she continued working near the Trade Centre up to the time she fled from Rwanda in July 1994.²³²

Defence Witness MO68

168. Defence Witness MO68 also confirmed the proximity of Nyantanga Health Centre to Nyantanga Trade Centre and stated that if there was a meeting at the Trade Centre, someone at the Health Centre could hear what was being said.²³³

169. Around 15 or 16 April, MO68 heard people running and shouting. She knew that people were dying, but did not know who was being killed and by whom. Before the violence broke out on 15 April, she never saw or heard of a public meeting convened at the Nyantanga Trade Centre by senior government officials from the Butare *préfecture*.²³⁴

Defence Witness MO39

170. Defence Witness MO39 testified that between April and July 1994, he lived in Nyakizu *commune*.²³⁵ About a week-and-a-half after the death of President Habyarimana, he accompanied *bourgmestre* Ntagazwa to Nyantanga and noticed that the security situation had deteriorated. However, according to the witness, *bourgmestre* Ntagazwa neither made a speech nor called or attended a meeting in Nyantanga during this trip. Furthermore, he did not see Tharcisse Muvunyi or any other military personnel during the visit.²³⁶

5.4.2.2. *Deliberations*

171. The Chamber has considered the totality of the evidence heard on the alleged meetings held at Nyantanga Trade Centre and at Nyakizu Communal Bureau on 20 and 21 April 1994. The Prosecutor relied exclusively on the evidence of witness CCR to prove these allegations. The Chamber notes that the Defence strongly objected to the evidence of this witness on the ground that he is not credible. The Defence argued that Witness CCR's pre-trial statements are materially distinct from his evidence before the Chamber. In particular, the Defence submitted that in three statements CCR made in 2001, he referred to

²³⁰ T. 7 February 2006, pp. 4, 5 (I.C.S.).

²³¹ T. 7 February 2006, pp. 9, 10, 11 (I.C.S.).

²³² T. 7 February 2006, pp. 11, 12 (I.C.S.).

²³³ T. 6 February 2006, pp. 23, 24, 27, 32, 33 (I.C.S.).

²³⁴ T. 6 February 2006, p. 28 (I.C.S.).

²³⁵ T. 10 February 2006, p. 8 (I.C.S.).

²³⁶ T. 10 February 2006, pp. 10, 11 (I.C.S.).

only one meeting held at the Nyantanga Trade Centre on 10 April 1994;²³⁷ in none of the statements did he mention a meeting held at Nyakizu Communal Office, although in his statement of 22 February 2001, he indicated that he heard from someone that weapons were distributed at the Communal Office on 11 April 1994. Witness CCR testified that there were in fact two meetings which took place on 20 and 21 April 1994 at Nyantanga Trade Centre and Nyakizu Communal Office respectively. The Chamber observes that on 18 May 2005, barely two days before CCR took the witness stand, the Prosecutor filed a will-say statement indicating that the witness intended to correct the date “10 April 1994” in his statement of 22 February 2001, to read “20 April 1994”, and the date “11 April 1994” to read “21 April 1994”.

172. The Chamber considers that significant inconsistencies exist between Witness CCR’s testimony and his pre-trial statements with respect to the dates and number of meetings at which the Accused is alleged to have made anti-Tutsi statements. The introduction of a will-say statement two days before the witness’s testimony, seeking to align the proposed testimony with the Prosecution’s theory of the case, is in the Chamber’s opinion, at best suspect.

173. In addition to the inconsistencies between his testimony and his pre-trial statements, the Chamber notes that CCR was detained in Rwanda for six years from 1996 to 2002 on allegations that in 1994, he killed people including his mother and/or wife, and son.²³⁸ In his testimony, the witness denied having killed anyone and said he was acquitted by a Gacaca court. He added that the person who killed his wife had confessed. He also maintained that his mother died while he was in prison. The Defence maintains that the witness was provisionally released and not acquitted. The Chamber notes that on 27 April 2006, the Prosecution filed an order of provisional release issued by the Court of First Instance in Butare on 11 November 2002, which requires Witness CCR to periodically report to the authorities in Butare. It also provides that the terms of the provisional release shall cease to apply once the witness is acquitted or convicted of the charges laid against him.²³⁹ In the Chamber’s view, the Defence has not shown that because of his prior detention in Rwanda in connection with the genocide, Witness CCR had a motive to lie and that he in fact lied on the witness stand so as to curry favour with the Rwandan authorities.²⁴⁰ Nonetheless, it is the Chamber’s view that Witness CCR is an alleged participant in the genocide, and the Chamber therefore views his evidence with caution.

174. CCR’s testimony must be considered in light of the evidence of Defence Witnesses MO67, MO68, MO81, and MO39. The Chamber concludes that MO39 is not credible; he was evasive during his testimony and denied the obvious, including ever seeing any soldiers or hearing about killings in Nyakizu *commune* between April and July 1994. However, the Chamber believes that Defence Witnesses MO67, MO68, and MO81 gave coherent and convincing testimony about events in Nyantanga in April 1994. They gave similar accounts of the physical location of the Nyantanga Trade Centre; each of them said

²³⁷ The Prosecution investigators recorded three statements from Witness CCR dated 22 February 2001; 24 May 2001; and 28 August 2001. The statements were not tendered as Exhibits, but pursuant to the Chamber’s Order, were disclosed at least 21 days prior to the date of Witness CCR testimony.

²³⁸ Defence Exhibits D.2, D.3, D.4 (all under seal), admitted on 23 May 2005.

²³⁹ Prosecutor’s Report filed Pursuant to Trial Chamber’s Directive of 24 May 2005, filed on 27 April 2006.

²⁴⁰ *Ntakirutimana* Judgement (AC), para. 181 where it was stated that that the mere fact that a detained witness might have a motive to lie so as to gain favour with the authorities detaining him, is by itself insufficient to prove that the witness in fact told a lie on the stand..

there were no killings before 15 April 1994; however, on that day, members of the population were scared and had to go into hiding because some people were shouting that the *Inkotanyi* had come; finally, each of them denied that there was a meeting held by civil and military figures at the Nyantanga Trade Centre in April 1994. The Chamber notes that the Defence witnesses each testified that there was no meeting at the Nyantanga Trade Centre before 15 April 1994 or anytime thereafter. On the other hand, Witness CCR's evidence is to the effect that a meeting was held at that location on 20 April 1994. The Chamber accepts the evidence of the Defence witnesses.

175. In light of the inconsistencies between Prosecution Witness CCR's pre-trial statements and his testimony before the Chamber, as well as the uncorroborated nature of that testimony, and the fact that three Defence witnesses who were in a position to know, testified that to their knowledge no meeting was held at the Nyantanga Trade Centre, the Chamber concludes that the Prosecution has not proved beyond reasonable doubt that a meeting took place at Nyantanga Trade Centre on 20 April 1994 at which the Accused addressed the population. The Chamber further disbelieves CCR's testimony that another meeting was held on 21 April 1994 at Nyakizu Communal Office during which the Accused distributed weapons to the population. The Prosecution has equally failed to prove this alleged meeting took place.

5.4.3. Meeting at a Roadblock in Rumba *cellule*, Kibilizi *secteur*

5.4.3.1. Evidence

Prosecution Witness YAQ

176. Prosecution Witness YAQ testified that in April 1994, he lived in Nyabiduha, Kibilizi *secteur*, Mugusa *commune*, in Butare *préfecture*. He admitted before the Chamber, as he did in his confession before the Rwandan authorities, that he participated in the genocide. He manned roadblocks, looted and burned down Tutsi property, and killed Tutsi people. On 24 April 1994, at about 1.00 p.m., while YAQ was on duty at a roadblock located at Rumba *cellule*, Kibilizi *secteur*, the Accused arrived in a white Toyota vehicle together with Colonel Alphonse Nteziryayo, one Nsabimana who later appointed *préfet*, Kalimanzira who was a senior civilian officer in Butare, and other people. The Accused wore a camouflage military uniform with a black beret which had a sign or badge on it. There was a large crowd of people present at the roadblock which was located at the intersection of the roads leading to Butare, Rubona and Gikongoro, in front of one Sakindi's house.²⁴¹

177. The Accused and the other military officers addressed the crowd. During his speech, the Accused told the population that "[t]omorrow, very early in the morning, if I do not find bodies, any dead bodies at this roadblock, I will conclude that you are all Tutsis. I myself will bring soldiers, and we will allow people from Shyanda – assailants from Shyanda, to come here, and they will even kill you."²⁴² The next day, that is 25 April 1994, the Accused returned to the roadblock to see if the killings had started. The witness testified that upon arrival of the Accused, there were dead bodies at the roadblock – "The first person to be killed and who was a Tutsi was Rwabigwi. There was also Rubanda, Isador Mutiganda,

²⁴¹ T. 31 May 2005, pp. 4-5.

²⁴² T. 31 May 2005, p. 6.

Kayiranga. These are the names that I remember, but I believe there were about seven bodies.”²⁴³

178. Witness YAQ said that before Muvunyi’s speech, a soldier who had come along with the Accused posed the following rhetorical question: “You Hutus of this area, do you know how to cut the throats? ... You Hutus of this area, do you know how to cut people’s neck?” This soldier then put his hands around his own neck and demonstrated to the population how they could cut other people’s necks. After the soldier’s speech, Nteziryayo also took the floor and said: “As from today, you should be aware that all the *communes* have finished, and I believe that you are aware that you should start eating the cattle of the Tutsis who are in this area, and you should burn down their houses.”²⁴⁴

179. YAQ gave evidence that after hearing these speeches, members of the population were given matches by the leaders of the MRND and they proceeded to burn down houses belonging to the Tutsis and to eat their cattle. He added that the next day, 25 April 1994, the killings began.²⁴⁵

5.4.3.2. *Deliberations*

180. By his own admission, Witness YAQ was an accomplice to the 1994 genocidal killings in Rwanda and the Chamber therefore views his evidence with caution. The Chamber has considered Witness YAQ’s testimony that while working at a roadblock in Rumba *cellule* on 24 April 1994, the Accused arrived with other military and civilian officials and threatened those manning the roadblock that if by the next day he does not find any dead bodies at that spot, he will consider all of them as Tutsis, and would bring assailants from another *commune* to attack and kill them. As a result of this threat, a number of Tutsis were killed the following day.

181. The Chamber recalls that the Tribunal can make a finding of fact on the basis of the evidence of a single witness if it finds such evidence relevant, reliable and probative of the material facts alleged in the Indictment.²⁴⁶ However, the Chamber concludes that in the circumstances of the present case, the evidence of Witness YAQ is not sufficiently reliable or credible to ground a finding of fact beyond reasonable doubt that a meeting took place at a roadblock in Rumba *cellule* on 24 April 1994 at which the Accused incited the population to kill Tutsis. The Chamber will therefore not rely on this evidence and holds that the Prosecution has not proved beyond reasonable doubt that Muvunyi visited the roadblock at Rumba *cellule* on 24 April 1994 or that he threatened those manning the roadblock to kill Tutsis or otherwise get killed by assailants from another *commune*.

²⁴³ T. 31 May 2005, p. 7.

²⁴⁴ T. 31 May 2005, p. 6.

²⁴⁵ T. 31 May 2005, pp. 6-7: YAO said: “So after the authorities left, the leaders of the MRND parties, Léonidas, gave matchboxes to Muvoza ... and we then started burning the houses of that very evening, and we started eating the cattle. ... The next day, on the 25th, the killings began. Given that he had said that he would return to see whether the members of the population had, indeed, started killing people, he came back and there were dead bodies at the roadblock.”

²⁴⁶ *Tadic*, Judgement (AC), para. 65; *Kamuhanda*, Judgement (TC) para. 38; *Aleksovski*, Judgement (AC), para. 62; *Musema*, Judgement (AC), para. 31.

5.4.4. Meeting at Gikonko, Mugusa commune

5.4.4.1. Evidence

Prosecution Witness YAQ

182. Witness YAQ recalled that he attended another meeting held in Gikonko, in Mugusa commune, sometime in April or May 1994. The meeting was called by the *bourgmestre* of Mugusa, Mr. André Kabayiza.²⁴⁷

183. Most people who attended the meeting were armed Hutu men, but YAQ explained that a few Tutsi who carried Hutu identity cards might also have been present. Upon their arrival at the communal Office, YAQ and the other people found Muvunyi, Nteziryayo and Kalimanzira already there sitting in a red Toyota vehicle. Some people had surrounded the vehicle. There was a soldier at the back of the vehicle with a big gun mounted above the cabin. Muvunyi wore a military uniform and carried a pistol.²⁴⁸

184. The first speaker, Nteziryayo, said: “We can see that the *Inkotanyis* have already taken over the entire country because they are also in Butare. So you, the members of the population, you have not fought against the *Inkotanyis* as we instructed you to do, so return to the *communes* and do the mopping up. The Tutsis who are still alive, whether they are young girls, men, or women who had been forced into marriage, and all those who look like them should be killed. The *Inkotanyis* have already taken over the country, and if you do not kill them, they are going to tell the *Inkotanyis* what you have done.”²⁴⁹

185. *Conseiller* Gasana then told the crowd that while Nteziryayo was asking the population to go and mop up the Tutsi, he, Gasana, was aware that the *bourgmestre* was hiding a Tutsi. He said there was no reason for them to go and look for the snakes in the bushes when there were serpents or snakes right in front of their doors. YAQ testified that the reference to “serpents” or “snakes” in Gasana’s speech was in fact an oblique reference to Tutsis. He said Gasana was referring to the Tutsis that the *bourgmestre* was hiding at the communal office, in particular, one Vincent Nkurikiyinka who was a friend of the *bourgmestre*.²⁵⁰

186. After Gasana made these remarks, the Accused then turned to the *bourgmestre* and said: “How could you be hiding a Tutsi when you are a *bourgmestre*? You have to hand him over so that he should be killed.” The Accused added that “when a snake is near a calabash, it is necessary to break that calabash in order to get the snake.”²⁵¹ YAQ informed the Chamber that as a result of what Muvunyi said, the *bourgmestre* ordered people to go below the communal office and bring out Vincent, the Tutsi man who was in hiding. A group of attackers went from the meeting to the communal offices where they captured Vincent, took him to his own house and killed him. Members of the population thereafter returned to their respective *communes* to mop up the surviving Tutsis as they had been told.²⁵²

²⁴⁷ T. 31 May 2005, p. 8.

²⁴⁸ T. 31 May 2005, pp. 9-10.

²⁴⁹ T. 31 May 2005, pp. 9-10.

²⁵⁰ T. 31 May 2005, pp. 9-10.

²⁵¹ T. 31 May 2005, p. 10.

²⁵² T. 31 May 2005, pp. 10-11.

Defence Witness MO80

187. Defence Witness MO80, a Hutu, lived in Mugusa *commune*, Kibilizi *secteur*, in April 1994. He said that one or two weeks after President Habyarimana's death, *conseiller* Gasana directed that roadblocks should be set up in Mugusa *commune*. The witness was assigned to a roadblock located on the "junction of the main road from Butare and the one going to ISAE Rubona or the one going into Mugusa *commune*" near Sakindi's house where he worked for about two weeks.²⁵³ During this period, he never took part in or heard of a public meeting involving the populations of Mugusa, Ndora, Uyaga and Muganza.²⁵⁴ If such a meeting had taken place in his *secteur*, he would have known about it, although it would be difficult to know about meetings in the *commune* in general.²⁵⁵

188. MO80 also confirmed that a Tutsi civilian called Vincent Nkurikiyinka was abducted from his hiding place at the Communal Office and taken to his house where he was killed. The armed Hutu attackers were led by *conseiller* Gasana. This event took place in mid-May 1994.²⁵⁶

5.4.4.2. *Deliberations*

189. The Chamber has considered Witness YAQ's evidence on the meeting held at Gikonko sometime in April or May 1994. The Chamber believes YAQ's account and notes that certain aspects of his testimony are supported by that of Defence Witness MO80. While the latter denied that there were any public meetings in his *secteur* in April or May 1994, he admitted he could not tell as a matter of certainty that meetings were not held in other parts of the *commune*. In the Chamber's view, the fact that Witness MO80 was not aware of the meeting at Gikonko does not mean that the meeting did not take place. The Chamber notes that both witnesses stated that *conseiller* Gasana was the leader of the armed attackers, that Vincent was abducted from the Mugusa Communal Office and that he was killed sometime in April or May 1994.

190. Having considered all the evidence, the Chamber finds beyond reasonable doubt that Muvunyi addressed Hutu members of the population in April or May 1994 in Gikonko. The Chamber also finds the Prosecution has proved beyond reasonable doubt that Muvunyi blamed the *bourgmestre* of Gikonko for hiding a Tutsi man and asked him to deliver the said man to the killers. The Chamber believes this aspect of Witness YAQ's evidence and finds that Muvunyi used the Rwandan proverb, "when a snake is near a calabash, it is necessary to break that calabash in order to get the snake", and that the population understood his remarks as a call to kill Tutsis.²⁵⁷ The Chamber is also satisfied that Muvunyi knew that his audience would understand his words as a call to kill the Tutsi man Vincent. The Prosecution has proved beyond reasonable doubt, and the Chamber therefore finds that as a result of Muvunyi's remarks, Vincent, a Tutsi man, was arrested from his hiding place and killed by a group of armed attackers under the leadership of *conseiller* Gasana.

²⁵³ T. 13 February 2006, p. 26 (I.C.S.); T. 14 February 2006, p. 4 (I.C.S.).

²⁵⁴ T. 14 February 2006, p. 10 (I.C.S.).

²⁵⁵ T. 14 February 2006, p. 22 (I.C.S.).

²⁵⁶ T. 14 February 2006, p. 9 (I.C.S.); T. 15 February 2006, p. 5 (I.C.S.).

²⁵⁷ Report of Prosecution Expert Witness Evariste Ntakirutimana presented to the Chamber on 6 July 2005.

5.4.5. Meeting at Gikore Trade Centre

5.4.5.1. Evidence

Prosecution Witness YAI

191. Witness YAI testified that he attended a “security” meeting at the market square of the Gikore Trade Centre towards the end of May 1994. The meeting started at about 1.00 p.m. Colonel Muvunyi attended the meeting accompanied by Jean-Baptiste Ruzindana, the *sous-préfet* of Butare called Laurent, the *sous-préfet* of Gisagara called Dominic Ntawukulyirayo and the *bourgmestre* of Nyaruhengeri *commune*.²⁵⁸ Also in attendance were about one thousand local people, mainly Hutu from the Nyaruhengeri, Kegembe and Muganza *communes*.²⁵⁹

192. During his speech, Muvunyi reminded the population that the country was at war, and that they were fighting against the *Inkotanyi*. He informed the attendees that the *Inkotanyi* start by infiltrating areas they wish to attack, and that “[e]ven in our own area, the *Inkotanyi* were already present.” He warned the population that if they were not vigilant, the *Inkotanyi* “will make it to [their] own homes.” He further called on members of the population to “beef up the roadblocks; to conduct night patrols, and to take full control of their security.”²⁶⁰ On the issue of Hutu men who had forcefully taken Tutsi women as wives, the Accused told the population “to send these women back to their homes”. In YAI’s view, because the homes of the Tutsis had been destroyed and their property plundered, Muvunyi’s reference to sending the women home “simply meant to deliver those persons to the killers.”²⁶¹

193. Next, YAI stated that Muvunyi pointed to a partially demolished house in front of him and said: “Look at that house that has been destroyed. You will be blamed for that. So level the houses; bring them down completely -- those houses that are still standing -- these Tutsi houses that are still standing. And in the place of those houses, cultivate and plant banana plantations and you will see what will happen.”²⁶² Witness YAI testified that by these words, Muvunyi wanted to make sure that no one could in future give an account of what had transpired and “in so doing, make any Prosecution difficult.”²⁶³ He added that Muvunyi spoke in a “firm” tone during the meeting.

²⁵⁸ T. 25 May 2005, p. 6: The witness could not recall the names of the other persons who came with the Accused.

²⁵⁹ T. 25 May 2005, p. 6: He added that there were also a few members of the Twa ethnic group “because at the time, they had no problem.”

²⁶⁰ T. 25 May 2005, pp. 7-8.

²⁶¹ T. 25 May 2005, p. 8. “Q: Can you explain, in terms of the situation, the homes of these people? Where were there homes located?”

A: He was referring to the roots or the origin of these people. The places from which they came as they escaped. This was in Gikore in the south. The southern border with Burundi and these people came from all over -- attempting to cross over into Burundi in order to escape and find freedom.

Q: Mr. Witness, to the best of your knowledge, at the time of the meeting, what had happened to the homes of Tutsi people?

A: The houses of Tutsis had been demolished and their property plundered. So when one said that these people were to be sent back to their home, that was not correct. It simply meant to deliver those persons to their killers.”

²⁶² T. 25 May 2005, p. 9.

²⁶³ T. 25 May 2005, p. 9.

194. After Muvunyi, Jean-Baptiste Ruzindaza took the floor and invoked Biblical scripture from the Prophet Jeremiah about an enemy who came from the North and killed and destroyed everything in its path. According to YAI, Ruzindaza's speech was not a prayer for peace, but a "satanic prayer", because it was used to "call on people to kill." He recalled that Ruzindaza urged the population to be vigilant so as to avoid infiltration into their areas by the *Inkotanyi*. Ruzindaza also stated that it was unfortunate that the Hutu had not been trained to kill, and that parents should encourage their Hutu children to "have a mastery of the art of killing."²⁶⁴ Finally, the witness recalled that Ruzindaza employed the Rwandan proverb that "those who did not wish to spill their blood for their country would have dogs drink it", meaning that people should not be afraid to spill their blood for their country.²⁶⁵

Prosecution Witness CCP

195. Witness CCP testified that he first met the Accused at a meeting held in Gikore in May or June 1994. The meeting was held at a location opposite *Chez Vénuste Nkulikiyukuri* and was attended by members of the population from all ethnic groups. A number of officials were in attendance, including Muvunyi, the then *préfet* of Butare called Alphonse Nteziryayo, one Ruzindaza, the *bourgmestre* called Charles Kabeza, *conseillers*, and *Responsables de cellule*.²⁶⁶ Nteziryayo, Muvunyi and Ruzindaza addressed the meeting.

196. During their respective speeches, Witness CCP stood at a distance of approximately 4 to 5 metres away from the speakers and so could see and hear them clearly. He testified that the *préfet*, Mr. Nteziryayo, told the population that the country had been attacked by the *Inyenzi/Inkotanyi*. He called on the young people to go and fight against the *Inkotanyi*, chase them away and take over their property. CCP recalled that Nteziryayo referred to Tutsi as "serpents" and said that their eggs should be destroyed. He concluded by warning the people gathered in the following terms: "When you refuse to pour or to shed your blood for the country, dogs will drink it for free." Witness CCP testified that he was frightened by the *préfet*'s words because he understood them to imply a call to members of the population to kill those who were being referred to as "serpents", and that the reference to "eggs" implied that little children, including newly-born babies, had to be killed.²⁶⁷

197. In his speech, Muvunyi told young Hutu men who had married Tutsi girls that they should either kill those girls or send them away. The Accused invoked a Rwandan proverb and said the Tutsi girls "should die elsewhere because they could poison" their Hutu husbands. Furthermore, the Accused told his audience that Tutsi were serpents that should be killed and their eggs crushed. The Accused added: "I know that very well [...] I know that you have hidden girls and children. Go and seek them out and kill them." Witness CCP said he understood Muvunyi's words to be a call on young Hutu to kill Tutsi girls and that

²⁶⁴ T. 25 May 2005, p. 10.

²⁶⁵ T. 25 May 2005, pp. 41-42.

²⁶⁶ T. 9 June 2005, p. 4.

²⁶⁷ T. 9 June 2005, pp. 5-6. "When I heard that message I was afraid because people were being referred to as serpents. People were being asked to kill them. When it is said that somebody is a serpent and that the person has to be killed, they were talking about people, and they were talking about eggs referring to little children and even babies who had just been born. So you would understand that those words were very intimidating."

the reference to “serpents” was a way of saying that Tutsi and their children should be killed.²⁶⁸

198. CCP also testified that Muvunyi pointed to a partially demolished house opposite the meeting venue and called on the population to pull it down completely and grow plants in its place. During cross-examination, CCP reaffirmed this testimony, and clarified that the house in question belonged to a priest and that the Accused told the population to destroy it completely and plant pumpkins in its place. According to CCP, by asking the population to destroy the house and plant pumpkins in its place, Muvunyi wanted to “destroy all traces of genocide in Rwanda.”²⁶⁹

199. The third official to speak, according to CCP, was Ruzindaza. The witness said that Ruzindana held a Bible during his speech and prayed to God to teach Hutu to kill, “as Tutsis grow up to kill.”²⁷⁰

200. The meeting lasted for about an hour and ended in the afternoon. According to CCP, the following morning, “there was a disaster because as was prescribed, people were killed, and the instructions which were given were followed.” He explained that those killed were Tutsi and those who did the killing were Hutu, but not all Hutu were involved in the killing.²⁷¹

201. Witness CCP denied any personal involvement in the killings.²⁷² However, Defence Counsel referred to the witness’s pre-trial statement of 19 October 1999, in which the witness is alleged to have admitted taking part in the hunt for and killing of Tutsis.²⁷³ The witness admitted to making part of this statement, but denied that he participated in killing Tutsi.²⁷⁴

²⁶⁸ T. 9 June 2005, pp. 6-7. At p. 26, during cross-examination, Witness CCP stated as follows: “People who had detained these women for sexual purposes had to kill them or drive them away. ... He [Muvunyi] said that the people who had subjected those girls to sexual slavery had to kill them, and those who could not kill them had to drive them away. He was worried, he was concerned that these women were going to exterminate Hutus by poisoning them. So he said he had no pity for those women.”

²⁶⁹ T. 9 June 2005, pp. 6, 41. “What I believe I said is that this person, Tharcisse Muvunyi, pointed to the house of a priest which had been partially destroyed and said that this house should be completely destroyed and pumpkins planted. And this is a plant that covers the entire ground when it is planted, and therefore you will not be able to see the ground or the soil that it covers.”

²⁷⁰ T. 9 June 2005, p. 7.

²⁷¹ T. 9 June 2005, p. 8.

²⁷² T. 9 June 2005, p. 16. Witness CCP explained that he was detained in 1996 upon his return from exile in Burundi on suspicion that he committed rape in 1994. He added that he was released after an investigation found him innocent of the rape allegation. However, CCP admitted that on one occasion during the events of 1994, a group of killers asked him to keep watch over three people – a girl and two of her brothers – while they embarked on their killing spree. He kept watch over the three people and delivered them back to the killers upon their return. The witness stated that he released the people back to the killers because it was said that they were going to be taken to one Buchumi, who would confirm that they were Hutus.

²⁷³ T. 9 June 2005, p. 16; CCP testified: “These deaths signalled the killings in our area because the same morning a certain Rowansnashyroka, alias Zona, a Hutu, accompanied by about ten other Hutus, whose identity I cannot remember, came to look for me at my home and asked me to go with them to participate in the hunt for Tutsis, which they had organized. ... They even threatened to kill me if I refused to follow them. ... We had to look for the Tutsis in our secteur, assemble them together, kill them and throw their bodies into the lake.”

²⁷⁴ T. 9 June 2005, p. 16.

Defence Witness MO78

202. Defence Witness MO78 testified that on the 23 or 24 May 1994, he attended a public meeting at Gikore *secteur*, Nyaruhengeri *commune*.²⁷⁵ The meeting was organized by the *bourgmestre* of Nyaruhengeri, Charles Kabeza. According to Witness MO78, the purpose of the meeting was to promote peace in Nyaruhengeri, and to foster unity among members of the population.²⁷⁶ He added that several officials attended the meeting including Tharcisse Muvunyi, Alphonse Nteziryayo, Sylvain Nsabimana (the *préfet* of Butare), Mr. Rosendarusa, and Dominic Ntawukuriryayo.²⁷⁷

203. Muvunyi spoke at the meeting and said that the purpose of the meeting was to restore security to the area and urged members of the population to remain united. He told them that the war was between the RPF and the Rwandan Army and that it did not concern the public. Muvunyi further told the population to fight against Army deserters, and also called on those with military equipment to return such materials in order not to frighten members of the population.²⁷⁸

204. Witness MO78 added that he did not recall that Muvunyi or any other speaker called on the population to get rid of their Tutsi wives, or to pull down structures belonging to Tutsis, or to plant anything in place of destroyed Tutsi houses. He further said he did not remember that any of the speakers invoked a Rwandan proverb or that someone said a prayer at the meeting.²⁷⁹ Witness MO78 confirmed that he knew Prosecution Witness YAI, but could not recall if the latter attended the meeting held at Gikore on 23 or 24 May 1994. He said he did not know Prosecution Witness CCP.²⁸⁰

Defence Witness MO30

205. Defence Witness MO30 testified that during the events of 1994, he saw Muvunyi at public meetings at the *commune* Office or at Amohoro stadium. The meetings were convened by the *préfet* to mobilise the population and to restore security to the area.²⁸¹ He explained that Muvunyi attended these meetings as the envoy or representative of the powers who were in command. According to Witness M030, in May 1994, there was a meeting in the urban *commune* attended by communal and préfectoral authorities, as well as private sector persons such as himself. Sometime in mid-June, Muvunyi and General Gatsinzi were both present at a public meeting chaired by the *préfet*. At this meeting, the authorities gave information to the population about their attitude towards work, on the road and in their homes.²⁸²

²⁷⁵ T. 16 February 2006, pp. 13, 15.

²⁷⁶ T. 16 February 2006, p. 16:

“Q. And what was the purpose-- or the announced purpose?

A. People were told that the purpose of the meeting was pacification in the entire Nyaruhengeri *commune*, and people were told that the officials who were to preside over the meeting were to inform the public that they were to bring about peace.”

²⁷⁷ T. 16 February 2006, p. 15.

²⁷⁸ T. 16 February 2006, pp. 16, 17.

²⁷⁹ T. 16 February 2006, p. 19.

²⁸⁰ T. 16 February 2006, pp. 20, 21.

²⁸¹ T. 14 March 2006, pp. 21, 23 (I.C.S.).

²⁸² T. 14 March 2006, p. 23 (I.C.S.).

5.4.5.2. *Deliberations*

206. The Chamber has considered the Defence objections that Prosecution Witnesses YAI and CCP should not be believed because they were both, at various times, arrested and detained in connection with the genocide. CCP admitted that in 1996 he was arrested on suspicion of having committed rape in 1994, but was subsequently found innocent and released. He also admitted that during the 1994 events, members of a Hutu militia had asked him to join them in hunting down and killing Tutsis and that they threatened to kill him if he refused. However, he states that he did not join the killing campaign because the killers had asked him to watch over a Tutsi girl and two of her brothers whom they later picked up from him. He explained that he handed the detainees over because it was said that they would be taken to one Buchumi to confirm that they were Hutu. It is not clear what happened to these three persons. The Chamber considers, in light of the above evidence, that Witness CCP is an accomplice to the genocidal killings that took place in Rwanda in 1994 and views his evidence with caution.

207. The Defence also argues that CCP should not be believed because he testified that Colonel Nteziryayo attended the Gikore meeting as *préfet* of Butare, and this could not have been the case since Nteziryayo was appointed *préfet* on 17 June 1994. The Defence produced Exhibit D13, a letter ostensibly emanating from the Rwandan Council of Ministers, appointing Nteziryayo to that position with effect from 17 June 1994.²⁸³ The Chamber holds that this misstatement of the capacity in which Nteziryayo might have attended the Gikore meeting is immaterial to the issue to be determined and does not affect the overall credibility of Witness CCP. The Chamber has heard evidence from other witnesses that Nteziryayo was the Chairman of the civil defence program in Butare in 1994 before his appointment as *préfet*.²⁸⁴ Considering the context of events in Rwanda in 1994, his attendance at a “security” or “sensitization” meeting is not inconsistent with the duties that the holder of such an office might be expected to carry out.

208. With respect to YAI, the Chamber notes that up to the time he testified, he was being held in Rwanda in connection with the killing of a Tutsi man named Mukunzi, together with his wife and children. The witness denies that he was involved in the killing of the Mukunzi family; on the contrary, he testified that he hid the Mukunzi family in his house in order to protect them from the killers, but that they were subsequently discovered and killed. The witness has not yet been tried in connection with the killings of the Mukunzi family. The Chamber recalls the Appeals Chamber’s reasoning to the effect that merely because a detained witness might have a motive to lie so as to gain favour with the authorities detaining him, is, by itself, insufficient to prove that the witness in fact told a lie on the stand.²⁸⁵ Nonetheless, the Chamber will assess Witness YAI’s evidence with caution.

209. The Chamber has closely examined the evidence of YAI and CCP. Both witnesses testified that a meeting took place in Gikore sometime towards the end of May or early June 1994 and that Tharcisse Muvunyi attended the meeting and addressed the population as did a number of other military and civilian authorities. The Chamber is satisfied that during the meeting, Muvunyi called on young Hutu men to send their Tutsi wives away; he said Tutsi women could poison their husbands; he referred to Tutsis as “serpents” or “snakes” to be killed and their eggs crushed; and asked the population to pull down a

²⁸³ Exhibit D.13, admitted on 9 June 2005.

²⁸⁴ See Prosecution Witness TQ’s testimony, 30 June 2005, pp. 30-31.

²⁸⁵ *Ntakirutimana*, Judgement (AC), para. 181.

partially demolished house that belonged to a Tutsi priest and plant crops in its place. The account that the two Prosecution witnesses gave of Muvunyi's speech at Gikore is strikingly similar. The Chamber has not received any evidence to suggest that they fabricated or otherwise colluded to harmonize their testimonies. The Chamber therefore concludes that they both gave reliable evidence of the Gikore meeting and the speech the Accused made there.

210. The Chamber adds that the evidence of Prosecution Witnesses YAI and CCP is corroborated by that of Defence Witness MO78 who confirmed that he saw Muvunyi at a public meeting in Gikore on 23 or 24 May 1994, and that Nteziryayo and Nsabimana were also in attendance. The Chamber, however, disbelieves Witness MO78's evidence to the extent he said that in their speeches, Muvunyi and the other officials promoted peace, security and friendly relations among members of the population. This evidence is rejected in light of the clear and coherent evidence to the contrary given by Witnesses YAI and CCP.

211. The Chamber therefore concludes that the Prosecution has proved beyond reasonable doubt that at a meeting held in Gikore in May 1994, Muvunyi made a speech in which he called for the killing of Tutsis, the destruction of Tutsi property, associated Tutsis with the enemy, and denigrated Tutsi people by associating them with snakes, serpents, and poisonous agents. The Chamber is also satisfied that his audience understood Muvunyi's words as a call to kill Tutsis, and that the Accused knew that this would be the effect of his words on the audience.

5.5. PROVISION OF WEAPONS TO MILITIAMEN

5.5.1. Indictment

212. Paragraph 3.26 reads:

3.26 During the events referred to in this Indictment, Lieutenant-Colonel Muvunyi participated in the provision of weapons such as grenades to these militiamen to perpetrate attacks against the Tutsis.

5.5.2. Evidence

Prosecution Witness KAL

213. Witness KAL testified that he attended a secret meeting held at Lieutenant-Colonel Muvunyi's house located at *Joli Bois* inside the ESO Camp. Also present were Lieutenant Bizimana, and the *bourgmestres* of Ngoma and Huye *communes*. He said generally when *bourgmestres* met, they did so to request guns for themselves or for civilians trained at ESO. He added that the *bourgmestres* had enlisted civilians who had to learn to handle firearms. After the meeting, "people indeed came to the Camp to receive a weeklong training on how to operate firearms."²⁸⁶ He said that the training was conducted by soldiers of the ESO Camp. Captain Nizeyimana, who was officer in charge of operations and training at ESO, came from time to time to check on the progress of the training programme. KAL testified that upon completion of their training, these civilians were sent to the *communes* to "look for the enemy." He added that the trainees were issued various

²⁸⁶ T. 1 March 2005, p. 28 (I.C.S.).

types of weapons before leaving the Camp, including Kalashnikov rifles, R-4 rifles, FAR rifles, G-3 rifles and grenades.²⁸⁷

Prosecution Witness YAA

214. Witness YAA testified that when he returned to ESO from Kigali in May 1994, he found out that Captain Nizeyimana and 2nd Lieutenant Modeste Gatsinzi were based in Mata, in Gikongoro *préfecture*, where they trained *Interahamwe* and Burundians on how to handle guns. Witness YAA explained that Nizeyimana returned to ESO a few times in order to obtain training equipment and ammunition as well as other supplies such as petrol and food for the trainees. He knew that Nizeyimana and Gatsinzi were based in Mata because when they came to ESO, he spoke to them. YAA added that when he fled from ESO on 8 June 1994, he met 2nd Lieutenant Gatsinzi at Gikongoro town. The latter was on board a van with trainees from ESO *Nouvelle Formule*. YAA spoke to Gatsinzi, who told him that he was based in Mata, where he was training *Interahamwe*.²⁸⁸

Prosecution Witness CCR

215. Witness CCR testified that at a meeting in Nyakizu *commune* on the 21st April 1994, Muvunyi told the population that weapons would be distributed after the meeting. He explained that priority would be given to those who already knew how to use weapons, and to reserve soldiers and policemen who were no longer in active service.²⁸⁹

216. CCR testified that during the meeting, he saw a deep-green CTA military truck that had weapons loaded on it. It was covered with tarpaulin. He does not state how he knew the truck was loaded with weapons. The witness was not present when the weapons were distributed, but later met at least three people with weapons, who confirmed to him that they received them at the meeting, and that they were part of weapons distributed by the Accused.²⁹⁰

Defence Witness MO67

217. Defence Witness MO67 testified that the Nyantanga Trade Centre was located in Nyakizu *commune*, Butare *préfecture*.²⁹¹ According to Witness MO67, from the time of the President's death until when she left for Gikongoro in July, she never heard or saw weapons being distributed at the Nyantanga Trading Centre.²⁹²

²⁸⁷ T. 2 March 2005, pp. 4, 5 (I.C.S.).

²⁸⁸ T. 9 March 2005, pp. 27, 28 (I.C.S.).

²⁸⁹ T. 20 May 2005, p. 5.

²⁹⁰ T. 20 May 2005, p. 12. In answer to the Prosecutor's question about how witness knew that weapons were distributed if he did not personally witness such distribution, CCR answered: "I found out in two ways: one, the vehicle in which the weapons were loaded was parked on the premises, and it was a CTA truck. Following the distribution of weapons, I saw three persons who were in possession of the weapons. ... Now, Augustin Kabayiza came to my place of work with a brand new gun, a G-3 gun, which he had never owned before. So he showed us the gun, proudly displaying it. So I took it in my hand, and he said he had received the gun because he was a reserve officer or reserve soldier. ... One Jean-Baptiste Bazaramba also had a gun. He had a Kalashnikov, a brand new Kalashnikov. The former communal police Kaganwa also had a gun, and it was a machine-gun, an old machine-gun."

²⁹¹ T. 6 February 2006, pp. 4, 22 (I.C.S.).

²⁹² T. 7 February 2006, p. 12 (I.C.S.).

Defence Witness MO68

218. Witness MO68 testified that there was no distribution of weapons at the Nyantanga Trade Centre and that throughout the 1994 events while she was in Nyantanga, she never saw any military vehicle or firearm.²⁹³

Defence Witness MO81

219. Witness MO81 testified that before 15 April he did not see any military personnel in the Nyantanga Trade Centre area and that he did not see any soldiers distributing weapons at the Centre or any other place. He said that he fled Rwanda for Burundi where he stayed for about one-and-half months and returned in late June or early July.²⁹⁴

5.5.3. Deliberations

220. The Chamber notes that the Prosecution Closing Brief does not address Paragraph 3.26 of the Indictment. It is therefore unclear which witnesses the Prosecution wishes to rely on to prove this allegation, or if indeed it intends to support or abandon the paragraph. However, in the absence of express notice of withdrawal, the Chamber must consider whether the allegation is supported by any of the evidence brought before it.

221. Witness KAL is the only witness who testified that Muvunyi met with the *bourgmestres* of Ngoma and Huye *communes* and that after the meeting, civilians came to ESO for training and were given weapons and asked to go and “look for the enemy”, understood as Tutsi civilians. The Chamber has serious doubts about KAL’s testimony in this respect. He does not state when this meeting took place, and he speculates that “[g]enerally, when *bourgmestres* met, they were meeting to request guns for the civilians being trained at ESO Camp. These were civilians. Or they came to request guns for themselves. They came, in particular, to submit reports to the ESO Camp.”²⁹⁵ His testimony is not supported by that of any other witness.

222. The Chamber believes that if civilians were trained and issued weapons at ESO in 1994, this circumstance would have been known by more than one person. The fact that none of the other Prosecution witnesses spoke about this issue, including YAA and NN, who worked at ESO, reinforces the Chamber’s doubts about the accuracy of Witness KAL’s account. Consequently, the Chamber finds that the Prosecution has not proved beyond reasonable doubt that Muvunyi trained or distributed weapons to civilian militia at ESO in 1994.

223. Similarly, the Chamber has doubts about YAA’s testimony that in May 1994, *Interahamwe* militiamen were trained by ESO soldiers Nizeyimana and Modeste Gatsinzi in Mata. At first, the witness said he heard that these two ESO officers were training *Interahamwe* and Burundians; then he said he met Gatsinzi in Gikongoro and the latter was accompanied by a truck-load of ESO *nouvelle formule* trainees; finally he said during their conversation, Gatsinzi told him he was training *Interahamwe* at Mata. The Chamber concludes that this inconsistent testimony leaves a reasonable doubt about whether Muvunyi provided weapons for the training of civilian militia to perpetrate attacks against Tutsis as alleged in the Indictment. The Chamber has already concluded (with respect to the

²⁹³ T. 6 February 2006, pp. 22, 30, 32, 33 (I.C.S.).

²⁹⁴ T. 7 February 2006, pp. 32, 34, 35 (I.C.S.).

²⁹⁵ T. 1 March 2005, p. 28 (I.C.S.).

“sensitization meetings”) that CCR’s testimony about the alleged meeting at Nyakizu Communal office on 21 April 1994 is not credible and therefore will not consider here the allegation that Muvunyi distributed weapons at that meeting.

5.6.5.6. ATTACK ON WOUNDED REFUGEES AT THE BUTARE UNIVERSITY HOSPITAL

5.6.1. Indictment

224. Paragraph 3.29 reads:

3.29 On or about the 15th of April, Lieutenant-Colonel Muvunyi in the company of a section of soldiers participated in the attack on wounded refugees at the University Hospital in Butare separating the Tutsis from the Hutus and killing the Tutsi refugees.

5.6.2. Evidence

Prosecution Witness XV

225. Witness XV was an employee at the Butare University Hospital in 1994.²⁹⁶ He testified that as a result of the deteriorating security situation following the death of the Rwandan President on 6 April 1994, he stayed at home with his Hutu wife and four children together with their two domestic servants until around the 15 or 16 April 1994.²⁹⁷ On one of those dates, Witness XV received a letter signed by the Director of “the University Establishment” and “by Commander Muvunyi” instructing him to return to work. XV said he obeyed the instruction and returned to work at the University Hospital. At that point he added: “[t]hey hadn’t started killing people”. However, around the 18 or 19 April, his boss asked him to stop coming to work because “houses were being burnt and people had started running away” in the hills around Nyarutovu. He therefore stayed at home from that date until around 21 April, 1994. Meanwhile, his wife had taken the children to the University Hospital “because she used to work there and she thought that the children would be safer there.” At this time, his neighbours houses were being burnt down, and people were being asked to ensure their own security.²⁹⁸ XV said his family left the hospital only because the Head of Service at the hospital said “he didn’t want to hold any refugees at the hospital and referred to them as *Inyenzi*.”²⁹⁹

226. Witness XV returned to the hospital on or around the 21 April, after surviving an attack by ESO and Ngoma Camp soldiers and *Interahamwe* on refugees at Mukura forest.³⁰⁰ Upon his arrival at the hospital, Witness XV saw some refugees and uniformed soldiers who were armed with guns. Shortly thereafter, the *Interahamwe* arrived and in collaboration with the soldiers, asked people to show their identity cards. XV recalled that anyone who did not have an identity card “was taken for a Tutsi, or was referred to as a Tutsi *Inyenzi*.” Witness XV was not asked to show his identity card because a soldier whom he had helped in the past, assisted him to evade being asked to show his identity papers.³⁰¹

²⁹⁶ T. 16 May 2005, p. 9; T. 18 May 2005, p. 26.

²⁹⁷ T. 16 May 2005, pp. 8-9.

²⁹⁸ T. 16 May 2005, p. 9.

²⁹⁹ T. 17 May 2005, p. 1.

³⁰⁰ T. 16 May 2005, p. 13.

³⁰¹ T. 16 May 2005, p. 16. Witness VX stated to the Chamber as follows: “What they did is that - - a soldier whom I had helped and I - - the doctors were aware of this, the nurses had asked me to assist that soldier. And

227. Witness XV testified that sometime in May 1994, Muvunyi visited the hospital accompanied by other military officials and a lady called Nyiramasuhuko. Although Witness XV stated that he had seen Muvunyi before that date, specifically “in Butare Town” and “when he came from Taba”, the witness also stated that it was one of his colleagues who told him that the person who was visiting the hospital that day was Muvunyi, and that “he was the commander of the soldiers who were both within the hospital and who were outside, and they had come to determine whether the work had been done properly.”³⁰² Witness XV estimated that Muvunyi stayed at the hospital for about 20 minutes on that occasion, and even though he could not hear what Muvunyi was saying, he stood about “12 steps away from him”, and could see him talking to the soldiers and civilians.³⁰³

228. After Muvunyi’s departure, the soldiers continued to check the identity papers of the refugees during the day, and took people away at night “to be killed.” Witness XV said he personally witnessed a soldier called Phillip Jeans, a native of Kibuye, shoot and kill a male refugee who had come from Ngoma. XV added that his own sister was taken away by soldiers on one Sunday and that she never returned after that.³⁰⁴ He said during his stay at the hospital, he also saw other people being killed including a man called Claude Dogo, and a child who was suffering from diabetes.³⁰⁵

229. XV further testified that most of the refugees were wounded and hungry. Nonetheless, soldiers and *Interahamwe* took them away, and it was clear that “they were taking them to kill them in mass graves.” The witness explained that he knew this because one of the refugees, whom the soldiers had taken away and tried to kill with a hoe, escaped and told the witness that the other refugees had been killed.³⁰⁶ Witness XV explained that he survived the attacks because he wore a service robe and some nurses gave him their keys which enabled him to move from room to room. XV stated that on the day after his sister was taken away, he escaped from the hospital with the help of a staff member who put him on the hospital ambulance.³⁰⁷

Prosecution Witness YAP

230. Witness YAP was an employee of the Butare University Hospital between April and July 1994.³⁰⁸ He testified that he did not know Tharcisse Muvunyi personally, but knew that Muvunyi was the Commander of ESO, “because everybody talked about it.”³⁰⁹ YAP also stated that he was friends with several soldiers from ESO and many of them talked about Muvunyi, their Commander. He mentioned Corporal Rwagihangi, Corporal Bicamumpaka, a certain Adele, and Corporal Mamishi.³¹⁰

this soldier told me that, “This Tutsi has treated me poorly, and I’ll take him down the slopes to give him his reward.”

³⁰² T. 16 May 2005, pp. 18, 21.

³⁰³ T. 16 May 2005, pp. 21, 23.

³⁰⁴ T. 16 May 2005, pp. 23, 24.

³⁰⁵ T. 18 May 2005, p. 41 (I.C.S.).

³⁰⁶ T. 16 May 2006, p. 17.

³⁰⁷ 16 May 2005, p. 24.

³⁰⁸ T. 6 June 2005, p. 2.

³⁰⁹ T. 6 June 2005, pp. 19; 36. Under cross-examination, Witness YAP stated that he believed Muvunyi was ESO Commander both before and after the death of President Habyarimana.

³¹⁰ T. 6 June 2005, p. 39 (I.C.S.).

231. According to YAP's testimony, after he learnt of the death of President Habyarimana on 7 April, he went to the hospital and noticed that several things had changed. There were very few workers, the number of Tutsi refugees had increased, and soldiers had entered the hospital premises. Some of the refugees came from Gikongoro, and others from Nyaruteza, Mpare, Vumbi, and Runyinya *communes*. The refugees from Gikongoro and Nyaruteza were wounded. Those from the other *communes* were not wounded, but they were fleeing from areas that were under attack.³¹¹ YAP testified that there was one refugee who had come from Kigali. This refugee informed Witness YAP that initially, nine of them had started the journey from Kigali to Butare. However, upon their arrival at Ngoma Camp, eight of the refugees were beaten to death by soldiers belonging to that camp. Their bodies were dumped at Mubumbano in Gishamvu *commune*. The *bourgmestre* of Gishambvu, Pascal Kambanda, took the bodies for an autopsy, and the surviving refugee came to the Butare University Hospital for an X-ray. That was how the said refugee met with Witness YAP. YAP testified that this refugee also died later.³¹²

232. Witness YAP testified that during the period he stayed at the Hospital, an ESO soldier called Bizimana (alias Rwatsi, or Ruhati) was training Burundian refugees at the hospital on how to handle and dismantle weapons.³¹³ YAP said the young Burundians lived under tents next to the paediatric service. When Witness YAP observed this activity, he reported it to the medical officer of the hospital, Jotham Hakizumukika. The latter in turn promised to inform the ESO Commander, and told YAP that the ESO Commander was Muvunyi. Three days later, YAP said he inquired from Jotham about the outcome of his contact with the ESO Commander. Jotham responded that when he informed the ESO Commander about YAP's report, the Commander told him that it was impossible to punish a soldier during wartime.³¹⁴

233. Witness YAP also stated that sometime after 20 April 1994, he learnt about the existence of a Crisis Committee at the Hospital. The members of the Committee were Dr. Karemera, who was Dean of the Faculty of Medicine, Dr. Gatera, the Head of the Surgery Unit, and other civilians such as Twahirwa and Nshimyumukiza. The Committee also included 18 ESO soldiers including one Nizeyimana, Mberabagabo, Sekimonyo, Second-Lieutenant Rwanyonga who was a student at the Faculty of Medicine, Muzungu, and Nzema. He added that while the Crisis Committee was supposed to provide security at the hospital, it in fact sought out people and killed them.³¹⁵

234. Prosecution Witness YAP testified that as a result of the deteriorating security situation, he stopped going to work on 18 April 1994. From that day until 3 July, he mostly remained in hiding at home, except for four occasions on which he visited the University hospital.³¹⁶ During his first visit on 20 April 1994 he saw a Corporal called Kayitana, who came from ESO with instructions that a search should be conducted within the hospital. YAP explained that this "search" actually involved "seek[ing] out the Tutsis who were

³¹¹ T. 6 June 2005, pp. 2-4.

³¹² T. 6 June 2005, p. 4.

³¹³ T. 6 June 2005, p. 3.

³¹⁴ T. 6 June 2005, pp. 3-4.

³¹⁵ T. 6 June 2005, p. 15.

³¹⁶ T. 6 June 2005, pp. 24-25 (I.C.S.).

within the hospital complex.³¹⁷ The witness admitted he did not speak to Kayitana directly, but said he was present when the latter spoke to the “officer in charge.”³¹⁸

235. In his further testimony before the Chamber, YAP said that even though he left the hospital premises as the people who were going to conduct the search arrived, he saw everything that happened. He explained to the Chamber that he withdrew to a location not far from both the ESO Camp and the University Hospital, and clearly saw all that transpired.³¹⁹ The search party included one Nyimyumukiza, Dr. Gatera, Dr. Karemera, the Vice-Rector of the University, soldiers and *Interhamwe* and they asked the Tutsi refugees to board a red pick-up vehicle that belonged to the hospital. The pick-up made several trips.

236. YAP testified that soldiers and some surviving refugees later told him that the pick-up truck took the refugees to the EER primary school. In particular, a female survivor told YAP that the refugees were taken from the University Hospital to EER.³²⁰ This woman also told Witness YAP that those refugees who survived the journey from the University Hospital to EER were taken from EER to the *préfecture* Office. Some were then forced to flee to Kabilizi, while others were taken to Cyarwa and killed. The witness further testified that other refugees were taken and killed near an Electrogaz transformer located “quite close” to the University Hospital. Finally, YAP testified that the last remaining refugees arrived at Rango forest and were subsequently rescued by the RPF *Inkotanyi*.³²¹

237. On his second visit to the hospital sometime in May, Witness YAP went to accompany one of his neighbours who had asked him for help because Witness YAP worked at the hospital. He stayed for about “30 minutes ... in any case, not up to an hour.”³²² Upon their arrival, he noticed that there were many soldiers both in the parking lot and in the corridors. He observed that because the hospital was so close to ESO, the health facility had almost become a military camp. YAP said that with a few exceptions, all the other soldiers he saw were from ESO and they were armed.³²³

238. Witness YAP’s third visit to the hospital after 18 April took place on a Sunday in late May or early June 1994. On this occasion, he noticed that the beds in the paediatric unit and the dermatology service were occupied by soldiers. He spoke briefly to the hospital director and returned the following Tuesday to receive his salary.³²⁴ YAP testified that on that Tuesday (the fourth visit) the director sent the hospital ambulance to pick him up from and return him back to his house. Witness YAP did not tell the Chamber about anything he saw at the hospital on this visit.

³¹⁷ T. 6 June 2005, p. 6.

³¹⁸ T. 7 June 2005, p. 17.

³¹⁹ T. 6 June 2005, p. 8 (I.C.S.).

³²⁰ T. 6 June 2005, p. 13.

³²¹ T. 6 June 2005, pp. 13-14.

³²² T. 6 June 2005, p. 26 (I.C.S.).

³²³ T. 6 June 2005, p. 16.

³²⁴ T. 6 June 2005, pp. 17-18 (I.C.S.). Witness YAP gave evidence that on the third occasion, he visited the hospital because ESO soldiers who knew him, and who knew that he was a Pentecostal Christian asked him to come to the hospital and pray with them. They guaranteed his security and that was why he went.

Prosecution Witness AFV

239. During the events of April 1994, Witness AFV was an employee of the Butare University Hospital. She testified that normally, she walked from her house to her place of work. However, on 7 April, as a result of the death of President Habyarimana, the “security situation was precarious. People could not move around freely; roadblocks had been erected; Tutsis could not move around; they were being asked to present their identification papers, and everywhere, where they had to pass, they had to go through roadblocks which were manned by soldiers.” Due to this difficult security situation, the service vehicle picked her up for work on 7 April. However, on 19 and 20 April, the said vehicle did not pick her up, so she had to walk to work. When she arrived at the hospital on 20 April, Witness AFV noticed the presence of an unusually large number of armed soldiers on the premises. This was unusual because normally, “a few soldiers would come there to seek treatment and they would not be carrying weapons.”³²⁵ The armed soldiers were wearing camouflage uniforms, the same type of uniforms that Witness AFV “saw the soldiers of the ESO putting on.” She further testified that given their uniforms and the proximity of the ESO to the University Hospital, she believed that the soldiers came from ESO. AFV said she did not know what the soldiers were doing at the hospital, and that she left upon their arrival at about 1.00 p.m. She left at that time because the hospital director, one Jotham, denied her access to the hospital vehicle on the ground that she was Tutsi. According to AFV, Jotham said to her, “Come out, your time has come”.³²⁶ AFV testified that she walked home that afternoon, and on her way, she encountered a roadblock that was manned by soldiers.³²⁷

Prosecution Witness YAK

240. Prosecution Witness YAK testified that on or about the 25 April 1994, he left his aunt’s house at about 3.00 a.m. to seek refuge at the Butare University Hospital. He said there was no other way of getting there, so he walked through the bush at night.

241. Upon his arrival at the University Hospital, he saw some tents in which Burundian refugees were living. The refugees were being supported by “Doctors Without Borders”. In addition to the Burundian refugees, he also saw soldiers who came from ESO. He knew the soldiers were from ESO because when one stood at the hospital reception area, one could clearly see the soldiers coming from ESO.

242. YAK said that about five days after his arrival at the hospital, Muvunyi visited together with a female Major, and two soldiers wearing black berets. That was the first time he saw Muvunyi; in fact it was a female refugee who indicated to him that the visitor was Muvunyi. On that occasion, Muvunyi was wearing a single colour military uniform with no hat. A few minutes before Muvunyi’s arrival, a bus carrying wounded soldiers had entered the hospital premises. Muvunyi arrived in a red Hilux vehicle. The female Major who came with Muvunyi said, “Are these refugees? I didn’t bring any food for them. Let them go back to where they were.” Muvunyi then asked a soldier who was on guard about what the refugees were doing at the hospital. As the soldiers began to carry their wounded colleagues

³²⁵ T. 21 June 2005, pp. 3-4.

³²⁶ T. 21 June 2005, p. 4.

³²⁷ T. 21 June 2005, p. 4.

in on stretchers, Muvunyi asked the female Major, in apparent reference to the refugees, “What are they still doing here?”³²⁸

243. Witness YAK further testified that during his stay at the University Hospital, soldiers from ESO came and told the female refugees to follow them to ESO so that they could give them food. The girls complied and followed the soldiers. However, the girls returned in tears. They told YAK and the other refugees that instead of giving them food, the ESO soldiers forced them to have sexual intercourse.³²⁹

244. YAK also gave an account of the activities of an *Interahamwe* called Diogène Harindintwali and a lady called Mukamurera who were widely known “to the public”. The duo came and spoke to the soldiers at the University Hospital. The woman then walked among the refugees and pointed out some people. The soldiers following her then put aside the people she pointed out. All the people who were pointed out and put aside were young male refugees. YAK estimated that about 20 to 30 refugees were selected in this manner. Diogène, the *Interahamwe* put some of the selected refugees on board a double-cabin Toyota vehicle and the soldiers walked with the others to ESO Camp. YAK added that all but one of those selected and taken away from the hospital were killed. Some of the bodies were buried close to the laboratory, and Witness YAK and others had to give them a decent burial after 1994.³³⁰ He said the lone survivor is still alive and lives with his family in Rwanda.

Prosecution Witness NN

245. Prosecution Witness NN testified that he learnt of a massacre of Tutsis at the Butare University Hospital sometime in May 1994. He said he was not in Butare when the massacre took place because Colonel Gatsinzi had sent him to Cyangugu, but learnt about it upon his return.³³¹ According to NN’s testimony, those responsible for the massacre were wounded soldiers from Kanombe in collaboration with ESO soldiers assigned to protect the hospital. NN added that a number of hospital employees and wounded Tutsis were killed during the massacre. These wounded Tutsis were living in tents on the hospital compound. Witness NN further testified that after the attacks, he was requested to help save a female employee of the hospital who had been badly wounded during the attacks. With the assistance of one of the hospital doctors, he was able to evacuate the said female employee to his house and subsequently to the Burundian border.³³² NN said he did not witness anyone being killed within the premises of the ESO Camp.³³³

³²⁸ T. 29 June 2005, pp. 34 -35.

³²⁹ T. 29 June 2005, p. 35.

³³⁰ T. 29 June 2005, pp. 35-36.

³³¹ T. 18 July 2005, pp. 53-54. (I.C.S.) “I remember I was not there when those killings took place. Colonel Gatsinzi had sent me to Cyangugu and by the time I returned the killings had been committed.” When asked by the Prosecutor if he remembered the month during which he was sent to Cyangugu by Gatsinzi, Witness NN replied: “It was in May.”

³³² T. 18 July 2005, pp. 53-54 (I.C.S.).

³³³ T. 20 July 2005, p. 41 (I.C.S.).

Prosecution Witness YAA

246. Witness YAA testified that in 1994, the Butare University Hospital was situated about 400 metres from the ESO Camp. In the witness's view, "someone at ESO Camp could call out to someone at the university hospital at the top of his voice and ... the latter could hear him or her easily."³³⁴ He said the hospital was guarded by ESO soldiers. YAA testified that after he returned to Butare from Kigali around the 16 May 1994, he stayed inside the ESO Camp because he feared for his security. On 8 June 1994, his Tutsi wife went into labour and he took her to the Butare University Hospital. He was accompanied by an ESO soldier called Kirezi, who was in charge of health at ESO, as well as Corporal Modeste Kayitana.³³⁵ Kirezi called one Dr. Jotham at the University Hospital to ask for help, but the latter said he could not help them. Witness YAA and Kirezi therefore decided to take YAA's wife to the hospital. Upon their arrival, YAA noticed that the hospital was guarded by trainees from ESO. In particular, he saw a Sergeant called Sekimonyo and five ESO trainees accompanied him and his wife to the hospital maternity wing.³³⁶

247. Witness YAA said that even though he heard that people were killed at the Hospital, he did not witness any such killings. However, when he requested one of the nurses to allocate a room for his wife to rest after the delivery, the nurse advised YAA that he must stay with his wife in the room, otherwise she would be killed.³³⁷ This nurse further told YAA that the ESO soldiers had killed people at the hospital, and that "those soldiers were not there to provide for the safety of patients. They, instead, contributed to exterminating the patients."³³⁸ YAA added that the nurse advised him to stay with his wife because she was Tutsi. He further stated that people who were killed at the Hospital were Tutsis. After his wife delivered, YAA decided to take her back to the ESO Camp because they had "nowhere else to go."³³⁹

Defence Witness MO73

248. Defence Witness MO73 testified that during his stay at ESO between end of April and the beginning of May 1994, he went to the University Hospital on two occasions to visit a friend.³⁴⁰ On both occasions, he did not notice a security presence at the hospital, and the environment appeared the same as it was prior to 6 April 1994. Witness MO73's friend told him that the *Interahamwe* had abducted some civilian patients from the hospital, and thought that those abducted might have been killed or otherwise harmed. The witness did not see any soldiers during his two visits to the hospital.³⁴¹

³³⁴ T. 9 March 2005, p. 29 (I.C.S.).

³³⁵ T. 14 March 2005, p. 10 (I.C.S.).

³³⁶ T. 9 March 2005, p. 29; 14 March 2005, p. 10 (I.C.S.).

³³⁷ T. 9 March 2005, p. 29: YAA testified that when he asked the nurse to give them a room for his wife to rest after delivering their baby, the nurse responded as follows: "I am willing to give you a room provided you keep - - you guard your wife, but if you leave, you run the risk of finding your wife dead."

³³⁸ T. 9 March 2005, p. 30.

³³⁹ T. 14 March 2005, p. 10. "I did not (sic) return to ESO because, of course - - not because it was safer, but because I had nowhere else to go. Besides, that is where I lived."

³⁴⁰ T. 6 March 2006, pp. 26-27 (I.C.S.).

³⁴¹ T. 6 March 2006, p. 28 (I.C.S.).

Defence Witness MO30

249. Witness MO30 testified that he visited the Butare University Hospital on two occasions during May and June 1994.³⁴² On his first visit in May, he went to the hospital to receive treatment for a hand injury he sustained at work. Because Witness MO30 knew the Chief Surgeon of the hospital he went straight to the surgery department where the wound on his finger was stitched. On the second visit, he went to see a person named Jonathan. According to Witness MO30 he did not observe any visible security presence when he went to the hospital on these two occasions, he did not have any problem moving around the hospital premises, and no one demanded to see his identification documents.³⁴³

5.6.3. Deliberations

250. It is alleged in the Indictment that on or about 15 of April 1994, the Accused, in the company of a section of soldiers, participated in an attack on wounded refugees at the Butare University Hospital. According to the Indictment, the attack involved separating the Tutsi from the Hutu and killing the former. The Prosecution specified in the Schedule of Particulars that it was charging Muvunyi with individual responsibility for the alleged crime pursuant to Article 6(1) and 6(3). In support of this allegation, the Prosecution relied on the evidence of Prosecution Witnesses XV, YAP, AFV, YAK, NN and YAA. On his part, the Accused called Defence Witnesses MO73 and MO30 to counter the allegation.

251. The Chamber finds that there are a number of inconsistencies in Witness XV's testimony which necessarily affect his credibility. In addition, there are some material discrepancies between the dates of the events as alleged in the Indictment and those given by Witness XV. For instance, whereas the Prosecution alleged in the Indictment that the attack on the refugees occurred around 15 April 1994, XV claimed he continued to go to work until about 19 April, that he fled to the Mukura forest around 21 April, where he survived an attack on refugees. Then, despite the lack of security and the apparent killing of Tutsis at the University Hospital, not only did he send his wife and children to seek refuge there, but he also went there himself. Additionally, it is not clear to the Chamber when exactly XV's family was sent to stay at the hospital and for how long they stayed there.

252. There are also some contradictions regarding the place of death of XV's sister. During his evidence-in-chief, XV suggested that soldiers from the ESO abducted his sister along with other Tutsi refugees who were never seen again. During cross-examination, however, it emerged that in judicial proceedings before the Rwandan courts, XV had sought compensation from a certain medical doctor for the death of his sister.³⁴⁴

253. The Chamber remains equally unpersuaded by XV's account of the alleged visit by the Accused to the Butare University Hospital premises. This is both because of XV's inability to indicate the timeframe within which the visit might have taken place and because of the alleged purpose of the visit. Moreover, the witness oscillated between saying that he knew and saw Muvunyi in the past, to saying that one of his colleagues at the hospital indicated to him that the military officer who visited the hospital on that day in May was "commander Muvunyi". Finally, the Defence was fairly successful in impeaching XV's credibility by pointing to material discrepancies between his pre-trial statements and his in-court testimony. Having considered all the above, the Chamber is not satisfied that

³⁴² T. 14 March 2006, p. 14 (I.C.S.).

³⁴³ T. 14 March 2006, pp. 12, 13 (I.C.S.).

³⁴⁴ T. 16 May 2005, p. 24; T. 17 May 2005, pp. 11-12; T. 18 May 2005, pp. 5-6, 39 (I.C.S.).

Witness XV's evidence supports the allegation in the Indictment that Muvunyi participated in an attack on wounded Tutsi refugees at the Butare University Hospital on or about 15 April 1994.

254. The Chamber is satisfied that YAP is generally an honest and credible witness and has no reason to disbelieve his testimony. YAP appears to have known many of the ESO soldiers present at the Butare University Hospital and even identified some of them by name. He saw these soldiers at the hospital during three of his visits; after his first visit, he withdrew to a vantage point not far from the hospital from where he could observe the soldiers and *Interahamwe* loading refugees onto a pick-up truck. The Chamber notes that the attack on Tutsi refugees at Butare University Hospital about which Witness YAP testified, appeared to have taken place on 20 April but there is no evidence that the Accused was present during this attack or otherwise participated in it. In the end, the Chamber finds that while Witness YAP is credible, his evidence fails to support the allegation contained in Paragraph 3.29 of the Indictment.

255. The Chamber is satisfied that Prosecution Witness AFV gave relevant evidence to the effect that she saw an increased number of soldiers at the University Hospital on 20 April and that she thought they came from ESO. However, she did not speak of the abduction or killing of any refugees at the hospital nor did she at any time place Muvunyi at that location.

256. The Chamber finds that despite the passage of time and the fact that YAK was only 15 years old in 1994, in light of the totality of the evidence, he is a credible witness and gave an honest account of the events he witnessed at the Butare University Hospital in April and May 1994.

257. The Chamber considers that Witness NN gave hearsay evidence of the attack on refugees at Butare University Hospital in April 1994. However, his evidence is corroborated by the account given by other Prosecution witnesses including YAK, YAP, AFV, and XV. The Chamber has already concluded that the payment of US\$ 5,000.00 to Witness NN by the Office of the Prosecutor as compensation did not affect his credibility.

258. The Chamber notes that whereas the Indictment alleges that the attack on the refugees at the Butare University Hospital occurred around 15 April 1994, Witness YAA acknowledged that he only returned to Butare from Kigali around 16 May 1994, a full month after the alleged attack. It is apparent that YAA's account of killings at the University Hospital constitutes hearsay evidence, as he did not witness any killings but only heard that Tutsis were killed. Furthermore, YAA, being a soldier at ESO, knew the Accused personally, but did not place him at the scene of the alleged attack. However, his eyewitness account of the presence of ESO soldiers at the hospital lends credence to the testimony of other witnesses who said they saw soldiers and *Interahamwe* abducting Tutsi refugees from the hospital and killing them.

259. The Chamber observes that Witness MO73's testimony goes against the grain of the other witnesses' testimonies and finds him to be generally lacking in credibility. Whereas most of the others testified that ESO soldiers were present at the University Hospital during the relevant period and that they saw the soldiers conducting identity checks and separating the Tutsis from the Hutus, MO73 said that during his visits to the hospital in April and May, he did not see any soldiers on the premises. MO73 implicated only the *Interahamwe* in the abductions at the hospital while exonerating the soldiers. Noting that MO73 also stated that the Accused offered protection to him and his father, the Chamber cannot

discount the possibility that MO73's purpose in coming to testify is to repay the Accused for his assistance rather than to assist the Chamber in finding out the truth.

260. The Chamber notes that Defence Witness MO30's visits to the University Hospital occurred during the months of May and June 1994, a considerable amount of time after the alleged attacks on the refugees. Thus, while he is generally a credible witness, his testimony is not relevant to the issue at hand.

261. Having considered all the evidence adduced by the Prosecution, the Chamber is not satisfied that it has been proved beyond reasonable doubt that Muvunyi participated in an attack on Tutsi refugees at the Butare University Hospital on or about 15 April 1994. However, the Chamber has heard evidence that sometime after 20 April 1994, ESO soldiers, in collaboration with *Interahamwe* and civilians abducted about 20 to 30 refugees from the University Hospital and killed them. The Chamber has considered the close proximity of ESO to the University Hospital, the presence of large numbers of Tutsi refugees at the hospital, and the presence of ESO soldiers at that location. Taking all relevant circumstances into account, the Chamber is satisfied beyond reasonable that the Accused had reason to know about the attack on Tutsi refugees at Butare University Hospital by ESO soldiers on or about 15 April 1994. Despite his superior military position over the said soldiers, and his material ability to intervene, he failed to do anything to prevent the attack or punish the soldiers' murderous conduct.

5.7. ATTACK AT BENEBERIKA CONVENT

5.7.1. Indictment

262. Paragraph 3.27 reads:

3.27 On the 30th of April 1994, Lieutenant-Colonel Muvunyi in the exercise of his *de facto* and *de jure* authority, ordered soldiers of the Ngoma Camp to the Beneberika Convent and kidnap the refugees at the Convent including women and children. A certain Lieutenant led this attack, and he kidnapped 25 people including the children of Professor Karenzi, who were never seen again.

5.7.2. Evidence

Prosecution Witness QCQ

263. Prosecution Witness QCQ estimated that she was 11 years old in 1994. She testified that she was living at the Beneberika Convent when the war began in 1994, and that her parents died during the war.³⁴⁵

264. Witness QCQ testified that on 6 April 1994, the nuns at the Convent told her that they had heard the news of President Habyarimana's death on the radio. The witness testified that as a result of this news, all activities inside the Convent, including their routine prayer sessions, ceased, and they no longer felt safe.³⁴⁶

265. Witness QCQ testified that afterwards, refugees from Butare, Kigali, and Gikongoro arrived at the Convent, and told QCQ that they had fled their homes because they were being attacked by *Interahamwe* and soldiers. According to QCQ, there were around 27 refugees, including young people, women, children, and an 18 month-old child.³⁴⁷ QCQ further testified that all the refugees were killed, "except a few children who were amongst them".³⁴⁸

266. The witness testified that during her stay at the Convent, various attacks were launched on the Convent by *Interahamwe* and soldiers. QCQ said that during the first attack, the attackers did not get into the compound because a sister named Frédérique met them at the gate and told them that there were no Tutsis at the Convent.³⁴⁹

267. Witness QCQ testified that the second attack was also launched by *Interahamwe* and soldiers. She stated that the *Interahamwe* wore ordinary clothing, that they were armed with guns, clubs and machetes, and that they came with dogs. QCQ said that she was able to identify the soldiers because they wore uniforms. Some of the soldiers wore red caps, while others did not, and some wore military trousers and carried guns on their shoulders.³⁵⁰

268. QCQ testified that during the attack, she was not more than five metres away from the attackers. She said that the attackers asked the refugees to show their identity cards, but that not everyone had an identity card. QCQ testified that the assailants referred to those who refused to show their identity cards as *Inkotanyi* accomplices, and confiscated property

³⁴⁵ T. 14 March 2005, p. 23 (I.C.S.).

³⁴⁶ T. 14 March 2005, p. 25.

³⁴⁷ T. 14 March 2005, p. 25.

³⁴⁸ T. 14 March 2005, p. 26.

³⁴⁹ T. 14 March 2005, p. 26.

³⁵⁰ T. 14 March 2005, p. 27.

belonging to some of the refugees. QCQ further testified that the assailants labelled some people as *Inkotanyi* merely by virtue of their physical appearance. The witness said that the assailants were Hutu, and that they referred to the Tutsi as *Inyenzi* and *Inkotanyi*.³⁵¹ Witness QCQ further testified that the assailants hit her and asked the nuns to confirm that she lived at the Convent, which they did.³⁵²

269. QCQ testified about another child who was hit by the assailants. When the child's mother intervened to beg for mercy, the assailants said that they would only spare the child if it was a girl; if it was a boy, they would kill him, because "a serpent could not be spared". The assailants verified that the child was a girl and handed her to the nuns, but her mother was killed.³⁵³ QCQ said that after the child's mother was killed, QCQ was the one who looked after the child.³⁵⁴

270. The witness testified that other children at the convent were killed by soldiers and *Interahamwe*. According to the witness, "All those children were killed, except Diane, Cecile, and Théodosie". In particular, QCQ indicated that the following children were killed: Thierry, Solange, and Marc Karenzi. According to QCQ, the Karenzi children were wounded when they arrived at the Convent: "Solange was wounded on the head. Her clothes had been torn. Her brother Marc Karenzi was bleeding on a leg." Witness QCQ testified that the children sustained these injuries as the result of the beatings they received from soldiers and *Interahamwe*.³⁵⁵

271. The witness testified that she was not present when the refugees were killed. However, she knew that they had been killed because she saw them being taken away by soldiers and *Interahamwe* in a Hilux vehicle, after which the soldiers returned to the Convent to fetch some beer and informed QCQ and the others of "what had happened".³⁵⁶

272. Witness QCQ further testified that the soldiers attacked the Convent again, ten minutes after the refugees left in the Hilux vehicle. According to QCQ, the soldiers had been drinking beer before this attack. They counted the children and told the nuns that "none of [them] must be missing". When they returned, one of the soldiers said, "Looking at the faces of these children, don't you think they are *Inkotanyi*?" A second soldier replied, "You are drunk. Let us go", at which point the soldiers left.³⁵⁷

273. Witness QCQ gave evidence that during the third attack, the assailants went inside the Convent looking for walkie-talkies. In the process, they took off the veils of some of the nuns to see if the veils had left permanent marks on their foreheads. The purpose of this was to determine whether there were any people disguised as nuns.³⁵⁸ Witness QCQ testified that she did not know the ESO.³⁵⁹

³⁵¹ T. 14 March 2005, p. 27.

³⁵² T. 14 March 2005, p. 28.

³⁵³ T. 14 March 2005, p. 28.

³⁵⁴ T. 14 March 2005, pp. 30-31.

³⁵⁵ T. 14 March 2005, p. 29.

³⁵⁶ T. 14 March 2005, p. 29.

³⁵⁷ T. 14 March 2005, p. 30.

³⁵⁸ T. 14 March 2005, p. 30.

³⁵⁹ T. 14 March 2005, p. 31.

Prosecution Witness QCM

274. Prosecution Witness QCM testified that she knew Idelphonse Hategekimana to be the commander of the Ngoma Camp, which was located about two kilometres from the Beneberika Convent, where the witness lived.³⁶⁰ QCM arrived at the Convent, which was located in Buye *cellule*, Butare,³⁶¹ in 1992.³⁶² QCM said that she first met Hategekimana in 1992.³⁶³ He used to visit the Convent because one of the occupants, Frédérique Marie, was a friend of his. The witness testified that during the genocide, Hategekimana was also known by the nickname “Bikomago”, which was the name of a Burundian soldier who killed many people after President Ndadaye was assassinated.³⁶⁴

275. Witness QCM testified that she saw Hategekimana at Buye on 30 April 1994. He was in military uniform, was carrying a stick in his hand, and was with many soldiers, civilians, and *Interahamwe*.³⁶⁵ The witness stated that she saw two vehicles outside, one with a “UNO” inscription and the other belonging to the “GK” project, but she was not sure whether Hategekimana and the others had arrived in those vehicles. The witness testified that there were about 100 or more soldiers in Hategekimana’s company,³⁶⁶ coming from ESO and Ngoma Camps.³⁶⁷ The soldiers carried firearms, while the civilians, who numbered about 100, were armed with clubs and machetes.³⁶⁸ The *Interahamwe* took positions behind the fence next to the vehicles that were parked outside the compound.³⁶⁹

276. Witness QCM identified a few people whom she recognised from the group who came to the Convent. They included the cardiologist Dr. Pierre Mugabo, his son Remy Mugabo, a man named Ignace, a lecturer from the *Groupe scolaire* called Valence, a person nicknamed Nyati, someone that Hategekimana called Makete, and Professor Blaise.³⁷⁰

277. QCM testified that she saw this group of over 200 people surround the Convent at about 11:00 a.m. on 30 April 2004.³⁷¹ The Convent had an outer wall with two gates and an inner wall with two gates leading inside. The witness stated that there were about 40 sisters at the Convent, including some who had come from different places to seek refuge. There were also neighbours who had sought refuge at the complex, and about 45 refugees who had come at various times. The majority of the refugees were children.³⁷²

278. The witness stated that the nuns hid the refugees upon their arrival. The nuns were in their respective rooms when the assailants arrived, but when they came into the courtyard and started shooting in the air, some of the nuns panicked and came out of their rooms. According to QCM, the nuns opened the gates into the courtyard for the assailants because

³⁶⁰ T. 11 July 2005, pp. 4-5 (I.C.S.).

³⁶¹ T. 11 July 2005, p. 3 (I.C.S.).

³⁶² T. 11 July 2005, p. 17 (I.C.S.).

³⁶³ T. 11 July 2005, p. 3 (I.C.S.).

³⁶⁴ T. 11 July 2005, p. 4.

³⁶⁵ T. 11 July 2005, p. 4.

³⁶⁶ T. 11 July 2005, p. 5 (I.C.S.).

³⁶⁷ T. 11 July 2005, p. 28 (I.C.S.).

³⁶⁸ T. 11 July 2005, p. 5 (I.C.S.).

³⁶⁹ T. 11 July 2005, p. 27 (I.C.S.).

³⁷⁰ T. 11 July 2005, p. 5 (I.C.S.).

³⁷¹ T. 11 July 2005, p. 6 (I.C.S.).

³⁷² T. 11 July 2005, pp. 7-8 (I.C.S.).

the soldiers threatened to kill them if they did not do so.³⁷³ While the assailants were knocking hard on the door, the Mother Superior of the Convent called *bourgmestre* Kanyabashi on the phone, but QCM did not know what happened, because Kanyabashi did not intervene.³⁷⁴

279. Witness QCM stated that the assailants claimed they had come to take all the civilians who were in the Convent. After firing in the air, they searched the Convent to find the people who were hiding, and then separated the refugees from the other people. The nuns remained in the Convent, whereas the refugees, including the children, were put in the GK project vehicle and taken away by the soldiers.³⁷⁵ QCM testified that there were two Hutu children staying with them who had initially been placed with the civilians, but Hategekimana ordered a soldier to take them back into the house, as they were Hutus.³⁷⁶

280. The witness testified that the soldiers asked the nuns to display their identity cards, but they refused to do so, after which Hategekimana waved a document in the air and asked for their superior. They pointed out the superior to Hategekimana, at which point he said to her, “This warrant of arrest has been given to me by Muvunyi so that I should go and fetch civilians who are here”.³⁷⁷ QCM said that Hategekimana read the document out to them,³⁷⁸ saying that it was an arrest warrant that allowed him to arrest the people he was seeking and to kill them.³⁷⁹ When QCM asked him to show her the warrant, he refused to give it to her, so she never read it herself.³⁸⁰

281. Witness QCM stated that the refugees were mainly Tutsis. There were a few Hutus among them, but it was only the Tutsis who were ordered to board the vehicles. The identification of the Tutsis was made possible because a nun who was Hategekimana’s friend helped him to identify the Tutsis.³⁸¹ Witness QCM said that she was aware that the children were going to be killed and begged Hategekimana to spare them, but he refused and told her that once they were handed over to the *Interahamwe*, he no longer had any means of saving them.³⁸²

282. The witness testified that after the vehicle was loaded with the children, she continued to beg the attackers to leave them behind and attempted to get into the vehicle herself. Professor Blaise struck her with a cutting tool and told her to leave, saying that those were not her children.³⁸³

283. QCM also stated that she saw Remy Mugabo beating a student who went to secondary school with him and calling him an *Inyenzi*, but the soldiers around did nothing to stop him.³⁸⁴

³⁷³ T. 11 July 2005, p. 9 (I.C.S.).

³⁷⁴ T. 11 July 2005, p. 17 (I.C.S.).

³⁷⁵ T. 11 July 2005, p. 9 (I.C.S.).

³⁷⁶ T. 11 July 2005, p. 10 (I.C.S.).

³⁷⁷ T. 11 July 2005, p. 19 (I.C.S.); T. 11 July 2005, p. 10 (I.C.S.).

³⁷⁸ T. 11 July 2005, p. 19 (I.C.S.).

³⁷⁹ T. 11 July 2005, p. 10 (I.C.S.).

³⁸⁰ T. 11 July 2005, p. 19 (I.C.S.).

³⁸¹ T. 11 July 2005, p. 11 (I.C.S.).

³⁸² T. 11 July 2005, pp. 10-11 (I.C.S.).

³⁸³ T. 11 July 2005, p. 13 (I.C.S.).

³⁸⁴ T. 11 July 2005, p. 13 (I.C.S.).

284. The witness testified that the vehicles carrying the Tutsi refugees left the house at about 1:00 p.m., but the soldiers came back around 3:00 p.m. to get some drinks that were left over from a party that they had had. The witness asked them where they had put the children, and the soldiers told her that they had handed them over to the *Interahamwe*.³⁸⁵

285. Witness QCM stated that she only knew of Colonel Muvunyi as the commander of the ESO Camp. She said she had not met him and would not have been able to identify him.³⁸⁶ However, QCM testified that she knew by sight more than 20 soldiers from among the assailants; she knew they were from ESO because they were her neighbours; but she did not know their names.³⁸⁷

5.7.3. Deliberations

286. The Indictment alleges that on 30 April 1994, the Accused ordered soldiers of the Ngoma Camp to kidnap refugees, including women and children, at the Beneberika Convent and that none of the 25 persons kidnapped was ever seen again. The Prosecution presented the evidence of Witnesses QCQ and QCM in support of this allegation.

287. Prosecution Witness QCQ was about 11 years old in 1994 and did not state the specific dates of the events she was describing. The Chamber concludes that despite her tender age in 1994 and the passage of time, she is very credible and provided a clear and convincing account of what she experienced. What is not clear from QCQ's testimony, however, is the provenance of the soldiers who attacked the Beneberika Convent or the date of the attacks.

288. The Chamber has considered the testimony of QCM and finds her to be a very credible witness. Not only did she recount facts based on her direct knowledge and personal experience, but her evidence is also strongly corroborated by that of Witness QCQ. There is no doubt that QCM knew Hategekimana as the Commander of the Ngoma Camp. She had seen him before because he had a friend at the Convent whom he used to visit. She even knew his nickname, "Bikomago".

289. Based on the evidence of Witnesses QCM and QCQ, the Chamber is satisfied that a group of soldiers and civilians under the leadership of Lieutenant Hategekimana of Ngoma Camp attacked Beneberika Convent on or about 30 April 1994 and abducted and subsequently killed a large number of unarmed Tutsi civilians. However, the Chamber has not received any direct evidence that Muvunyi ordered the said attack. The question for the Chamber's determination is whether it could be reasonably inferred from all the circumstances, including the allegation that Hategekimana waved a piece of paper which he claimed was a search warrant from the Accused, that Muvunyi ordered the said attack. In the Chamber's view, there is insufficient circumstantial evidence from which to conclude beyond reasonable doubt that Muvunyi ordered soldiers of ESO or Ngoma Camp to attack Beneberika Convent.

290. However, the Chamber must also determine in light of Paragraph 10, Sub-paragraph 2 of the Schedule of Particulars, whether the Accused bears superior responsibility for the attack on Beneberika Convent. In this respect, it is relevant to note that the Accused was the most senior military officer in Butare; that the attack was highly organized and targeted to the specific location of the Convent and the Tutsi refugees living there; and that soldiers

³⁸⁵ T. 11 July 2005, p. 14 (I.C.S.).

³⁸⁶ T. 11 July 2005, p. 10 (I.C.S.).

³⁸⁷ T. 11 July 2005, p. 24 (I.C.S.).

from Ngoma Camp were acting together with soldiers from ESO and *Interahamwe*. The Chamber recalls Witness QCM's testimony to the effect that she knew some of the assailants. She could identify about 20 of them as being from ESO. The Chamber also notes from the evidence of Prosecution Witness Ghandi Shukry that the Convent was located at a distance of about 1.7 kilometres from the ESO Camp within the central corridor of Butare *préfecture* which fell within the security jurisdiction of the ESO Camp.

291. There is evidence before the Chamber that Ngoma Camp soldiers collaborated with ESO soldiers such as Captain Nizeyimana, Lieutenant Modeste Gatsinzi and Lieutenant Gakwerere to attack civilian refugees at the *Groupe scolaire* and other locations. These circumstances support the conclusion that such high-level co-ordination of military operations could not have taken place without the knowledge of the Accused, who was the most senior military officer in Butare at the time. In light of the circumstantial evidence, the Chamber is satisfied beyond reasonable doubt that the Accused had reason to know about the attack on Tutsi refugees at Beneberika Convent by soldiers from ESO and Ngoma Camps, together with the *Interahamwe*. Despite his effective control over the ESO soldiers, he failed to take necessary and reasonable measures to prevent the attack and to punish the perpetrators.

5.8. ATTACK ON TUTSI LECTURERS AND STUDENTS AT THE UNIVERSITY OF BUTARE

5.8.1. Indictment

292. Paragraph 3.34(i) reads:

3.34 (i) Furthermore, during the events referred to in this Indictment, soldiers from the ESO went to the University of Butare to kill the Tutsi lecturers and students as part of plans to exterminate the Tutsi intelligentsia. Lieutenant-Colonel Muvunyi by reason of his position of authority over the soldiers of the ESO and the widespread nature of these massacres, knew or had reason to know, that these acts were being committed and he failed to take measures to prevent, or to put an end to these acts, or punish the perpetrators.

5.8.2. Evidence

Prosecution Witness KAL

293. Prosecution Witness KAL testified that he knew Sergeant Major Sibomana, who was a student at ESO, but had the rank of a Sergeant Major. Sibomana was granted study leave to go to university. KAL said that Sibomana abducted students from the University and brought them back to the ESO Camp; he worked with the soldiers as if he had come back to the Army.³⁸⁸

294. According to KAL, Sergeant Major Sibomana had the duty of identifying students who were *Inkotanyi*. He and other soldiers scoured the town looking for such students, put them on board commandeered vans, and brought them to ESO Camp. The witness said that all the abducted students were subsequently taken out of the ESO Camp and killed.³⁸⁹

³⁸⁸ T. 8 March 2005, pp. 6-7 (I.C.S.) (Cross-examination).

³⁸⁹ T. 8 March 2005, p. 10 (I.C.S.) (Re-examination). When asked what happened to the students when they were taken out of ESO Camp, the witness stated that, "All those who had been taken to ESO Camp, not only the students, anyone who was taken out of that camp, was killed. It was not only those students, it was everyone."

295. KAL testified that Sibomana did not act alone. KAL said that Sibomana, as well as others who were no longer in the Army, had received orders to look for *Inkotanyi* from the commander of the camp.³⁹⁰ KAL explained that Sibomana sometimes went with students from ESO *nouvelle formule*, but there was total disorder and he went with whomever he wanted.³⁹¹

296. When asked by the Chamber how he knew that Sibomana had received orders from the camp commander, KAL said that it was common knowledge that the Commander had issued an order. The witness explained that these events did not only take place over two or three days but over a long time. He added that Sibomana went out every day to look for these students, acting under orders from the commander of the camp.³⁹²

Prosecution Witness NN

297. Prosecution Witness NN testified that Chief Warrant Officer Damien Ntamuhanga was involved in the killing of students at Butare University. Ntamuhanga was the leader of an anti-looting team consisting of six *gendarmes* and other soldiers. This team was formed by Bizimana after the meeting chaired by Muvunyi on 20 April, and although it was purportedly designed to prevent soldiers from looting, the team went to kill civilians at the University.³⁹³

298. Witness NN described the killings at the University in further detail, noting that he had saved a female student from the University at the request of her family, and that student told him that Ntamuhanga and members of his military police group were killing students at the University and openly boasting about and describing the killings in detail. The girl that NN saved was studying at the Faculty of Medicine, which was located next to the University Hospital, not inside the main University campus. The Faculty of Medicine was two kilometres away from the ESO Camp. According to NN, the girl told him that the soldiers who had committed the massacres at the University were members of Ntamuhanga's military police group. NN added that if anyone had heard that he had gone to save that girl, he "would have had problems".³⁹⁴

299. NN further testified that Chief Warrant Officer Innocent Sibomana was also in charge of the group that killed students at the University,³⁹⁵ and that Ntamuhanga was relieved by Colonel Marcel Gatsinzi as chief of the Military police in mid-May.³⁹⁶

5.8.3. Deliberations

300. The Indictment alleges that ESO soldiers set out to kill Tutsi lecturers and students at the University of Butare as part of the plan to exterminate the Tutsi intelligentsia and that the Accused, by virtue of his position and authority over the soldiers, knew or had reason to know of these activities due to their widespread nature, but failed to stop the massacres or to punish their perpetrators.

³⁹⁰ T. 8 March 2005, p. 11 (I.C.S.) (Re-examination).

³⁹¹ T. 8 March 2005, p. 11 (I.C.S.) (Re-examination).

³⁹² T. 8 March 2005, p. 11 (I.C.S.) (Re-examination).

³⁹³ T. 18 July 2005, p. 49 (I.C.S.).

³⁹⁴ T. 18 July 2005, p. 50 (I.C.S.).

³⁹⁵ T. 18 July 2005, p. 50 (I.C.S.).

³⁹⁶ T. 20 July 2005, p. 19 (I.C.S.) (Cross-examination).

301. The Chamber notes that Prosecution Witness KAL did not state any basis for his assertion that the Accused ordered the abduction and killing of Tutsi intellectuals. KAL neither saw any written order nor directly heard the Accused giving any orders in this regard. Rather, KAL appears to presume that there was such an order since it was common knowledge. In the Chamber's view, the Prosecution has not proved beyond reasonable doubt that the Accused issued an order for the abduction and killing of Tutsi intellectuals. The remaining issue, then, is whether the Accused knew or had reason to know about these attacks in view of their frequency, and the identity and position of the alleged perpetrators.

302. The Chamber recalls the testimony of Prosecution Witness NN, that Chief Warrant Officer Sibomana was one of those responsible for the attacks on Tutsi intelligentsia at the University of Butare, and that Sibomana and Ntamuhanga were members of the Military Police Unit set up by the Accused on 20 April 1994. According to NN, although the unit was intended to serve as an anti-looting squad, it ended up operating as a death squad instead, abducting and killing people at the University. NN personally helped save one student, who told him that Ntamuhanga and members of his Military Police group were killing students at the University and openly boasting about their acts. Furthermore, Witness NN's account of Sibomana's activities is largely corroborated by Witness KAL's testimony.

303. The Chamber notes that none of the 24 witnesses for the Defence testified specifically on this allegation. Based on the evidence before it, the Chamber concludes that ESO soldiers systematically sought and killed Tutsi lecturers and students from the University of Butare. Due to the widespread nature of these attacks, and the proximity of the ESO Camp to the University of Butare,³⁹⁷ the Chamber finds that the Accused had reason to know that the attacks were taking place. The Chamber further finds that the Accused, as the commanding officer of the ESO, failed to do anything to stop the killing by ESO soldiers or to punish them for their illegal behaviour even though he had the material ability to do so. The Chamber is therefore satisfied that the Prosecution has proved the allegation in Paragraph 3.34(i) beyond reasonable doubt.

5.9. ARREST AND KILLING OF TWO PRIESTS AT GIHINDAMUYAUA MONASTERY

5.9.1. Indictment

304. Paragraph 3.28 of the Indictment reads:

3.28 On or about the 4th of May 1994, Lieutenant-Colonel Muvunyi requested that the Reverend Fathers at Gihindamuyaua Monastery to be brought to him (*sic*) and he subsequently separated the two Tutsi Fathers in the monastery from the Hutus, and they were subsequently killed.

5.9.2. Evidence

305. The Chamber has not heard any evidence supporting the allegation contained in Paragraph 3.28 of the Indictment and therefore finds that the Prosecution has failed to prove the said allegation.

³⁹⁷ Exhibit P.6, admitted on 16 March 2005.

5.10. MASSACRE OF TUTSI CIVILIANS BY SOLDIERS AND *INTERAHAMWE*

5.10.1. Indictment

306. Paragraphs 3.30, 3.31, 3.35, 3.36, 3.40, 3.46 and 3.48 read:

3.30 During the events referred to in this Indictment, Lieutenant-Colonel Muvunyi had the duty of ensuring the security and safety of the civilian population in the prefecture, as well as ensuring the discipline of the armed men under his command but failed in this duty. On several occasions in April 1994, Lieutenant-Colonel Muvunyi failed or refused to assist those whose lives were in danger or who asked for his help, particularly in Groupe *scolaire* and Ngoma Parish where Tutsi refugees were massacred.

3.31 Lieutenant-Colonel Muvunyi in most cases instigated, encouraged, facilitated, and or acquiesced to among others, the *Interahamwe* and soldiers committing killings, kidnappings and the destruction of property.

3.35 During the events referred to in this Indictment, the militiamen, i.e. the *Interahamwe*, with the help of the soldiers, participated in the massacres of the civilian Tutsi population in Butare *préfecture* and elsewhere.

3.36 During the events referred to in this Indictment, officers and soldiers acting under the orders of Lieutenant-Colonel Muvunyi participated in the massacres of the civilian Tutsi population and of Hutu moderates in the opposition. Some of these civilian Tutsis were arrested and taken to either the Ngoma Camp or the ESO and later killed.

3.40 During the events referred to in this Indictment, thousands of civilians, mostly Tutsi, in Butare *préfecture*, were massacred, including at the following locations:

- Ngoma Parish, Ngoma *commune*
- Matyazo Dispensary, Matyazo
- Kibeho Parish, Mugusa *commune*
- Beneberika Convent, Sovu, Huye *commune*
- Groupe *scolaire*, Ngoma
- *Économat général*, Ngoma *commune*
- Nyumba Parish, Gatara *commune*
- Muslim Quarters, Ngoma *commune*.

3.45 On or about the 30th of April 1994, the Ngoma Parish was attacked. The Parish Priest requested for help from the Ngoma Camp and an hour later 2nd Lieutenant Niyonteze, who was second in command at the Ngoma Camp, arrived with 6 soldiers. Rather than take any action, 2nd Lieutenant Niyonteze demanded to know what right the Parish Priest had in keeping so many *Inyenzi* near a military camp. He proceeded to count the refugees and leave the parish without taking any action to stop the attackers. Lieutenant-Colonel Muvunyi by reason of his position of authority and the widespread nature of these massacres, knew or had reason to know that these acts were being committed and he failed to take measures to prevent, or to put an end to these acts, or punish the perpetrators.

3.46 On or about 5.00 p.m. of the same day, a certain Lieutenant arrived at the Parish with intent to arrest the Parish Priest who had escaped; but the refugees at the Parish including the women and children were all subsequently attacked by the soldiers and the *Interahamwe*. Muvunyi as an authority figure failed to provide for the safety or security of the refugees but rather encouraged the attacks.

3.48 On or about the 24th of April, the refugees at the Groupe *scolaire* comprising of orphans evacuated from the Red Cross Centre at Kacyiru and other orphanages, were attacked by soldiers from the Ngoma Camp and the ESO. The soldiers from the Ngoma Camp were led by a certain Lieutenant while the soldiers from ESO were dispatched on the orders of a certain Captain and were led by 2nd Lieutenant Niyonteze. The Supervisor of the children called the ESO for assistance and spoke with Lieutenant-Colonel Muvunyi, who refused to send any assistance during the massacre.

307. As a preliminary matter, the Chamber notes on the one hand that it has not heard any evidence relating to attacks on Kibeho Parish, or Nyumba Parish. On the other hand, it has received evidence of attacks on Cyanika Parish and Mukura Forest which are not specifically listed in the Indictment. Having concluded above that the Defence did receive adequate warning of the Prosecution's intention to prove the said attacks, the Chamber will consider the evidence relating to them. In the following sections, the Chamber considers evidence relating to attacks on Ngoma Parish, Matyazo School, *Groupe scolaire*, Mukura Forest, and Cyanika Parish.

5.10.2. Attack at Ngoma Parish and the Matyazo School Complex

5.10.2.1. Attack at Ngoma Parish

Prosecution Witness QX

308. Prosecution Witness QX testified that from around 7 April 1994, people were being killed in the Butare area, and members of the population were therefore afraid to leave their homes. The witness testified that on 8 April, a young man called Rugomboka was taken away by soldiers, and later his body was found in a forest. On 14 April, he heard that Queen Rosalie Gicanda had been killed. Witness QX added that on that same day, he could see smoke coming from the direction of Runyinya *commune* and many refugees started fleeing from these areas because their houses were being burnt down, and people were being killed. Witness QX testified that *bourgmestre* Kanyabashi prevented the refugees from moving into Butare town, so they went to the Matyazo Health Centre. On 21 April, Witness QX heard intense gunfire and explosions coming from the direction of Matyazo. He subsequently saw people flocking to the Ngoma Parish to seek refuge. Witness QX explained that the fleeing refugees "hid in the sorghum fields, others hid in the bush, and at night they would crawl to the parish and hide at the parish itself."³⁹⁸ He added that most of the refugees had wounds on their heads, and that they appeared to have been "hacked with sharp objects."

309. On 21 April, Witness QX and another person received a telephone call from a lady who advised them to flee from Ngoma Parish because she had information that people were planning to come and kill them. As a result of this information, Witness QX said they spent the night in the bush, but returned to the Parish the next morning and took the decision to remain there. He added that at this time, there was "a continuous influx of refugees" to the Ngoma Parish.³⁹⁹

310. According to Witness QX, about two or three days later, the *conseiller* of Matyazo loaded many "orphans whose parents had been killed in the night of the 21", onto a pick-up vehicle and brought them to Ngoma Parish. These children were among a group of between 480 and 490 refugees at the parish. Witness QX added that all the refugees were Tutsi, "there was no soldier among them", and none of them was carrying a weapon.⁴⁰⁰

311. On 29 April 1994, Witness QX heard a group of people knocking very hard on the Parish gate. As a result, he and those with him concluded that they were being attacked, and decided to telephone for assistance and protection from the Ngoma Military Camp, which was located about 600 to 700 metres from the Parish. About 50 minutes after their call, a

³⁹⁸ T. 4 December 2003, p. 17 (I.C.S.).

³⁹⁹ T. 4 December 2003, p. 17 (I.C.S.).

⁴⁰⁰ T. 4 December 2003, p. 18 (I.C.S.).

non-commissioned officer arrived at the parish with soldiers. He asked what was happening, asked if there were any refugees at the Parish and left saying they would be back the following day.⁴⁰¹

312. Witness QX said that at around 10.00 a.m. on the following day, he “saw soldiers standing within the premises of the Parish” and he came out to greet them. The commander of the group asked where the Parish priest was, but left when he was told that the Parish priest was not around. However, the soldiers who had accompanied the commander stayed behind. The witness later found out that the said commander’s name was Idelphonse Hategekimana, and that he was commander of the Ngoma Camp. He added that he noticed there were a lot of civilians who had come with the soldiers, that they were standing outside the church building, and that they “were carrying knives.”⁴⁰²

313. After Hategekimana’s departure, two of the soldiers who remained behind “went into the church building and got the refugees, all the refugees out.” The crowd of armed people who were waiting outside the parish gate rushed into the compound “wanting to kill the refugees.” Witness QX asked the soldiers to allow him to take the refugees back into the church to pray. The soldiers agreed. Because he knew the refugees were going to be killed, Witness QX took them back into the church building and they prayed together.⁴⁰³ After this, the soldiers assured the refugees that no one would kill them, and that they would bring buses to take the refugees to a safe place where they would be protected. Thereafter, the soldiers started selecting people from among the refugees and taking them out in groups of four or five. Witness QX explained that he later learnt from survivors that once outside, these refugees were handed over to the crowd of armed civilians, who took them away and killed them. The witness stated “they were hit with clubs and they fell, they were killed – they were finished immediately. They made sure they finished them such that nobody cried out when they were killing them.”⁴⁰⁴ Witness QX emphasized that among the refugees who were killed at the Ngoma Parish were “orphans whose parents had been killed on the night of 21st April,” and who had been brought to the parish by the *conseiller* of Matyazo.⁴⁰⁵

314. Witness QX explained that he knew the refugees were killed because after the attack, there were “a lot of dead bodies on the ground.” He added that one of the soldiers told him to ask one of the priests to come out of hiding, and they agreed to pay this soldier 500,000 Rwandan francs, so that he would not kill the priest. However, they arranged to pay in instalments so that the soldier would keep coming back to ensure their protection.⁴⁰⁶

Prosecution Witness CCQ

315. This witness testified that on 20 April 1994, he had to telephone the Ngoma Parish for assistance because his wife had suffered a heart attack. He spoke to a priest who later came in his vehicle and transported the witness and his sick wife to the medical centre at the Butare school complex.⁴⁰⁷ Witness CCQ explained that they drove with the Tutsi Priest through several roadblocks on their way to the medical centre, including at Hotel Faucon

⁴⁰¹ T. 4 December 2003, p. 19 (I.C.S.).

⁴⁰² T. 4 December 2003, p. 20 (I.C.S.).

⁴⁰³ T. 4 December 2003, p. 21 (I.C.S.).

⁴⁰⁴ T. 4 December 2003, p. 22 (I.C.S.).

⁴⁰⁵ T. 4 December 2003, p. 18 (I.C.S.).

⁴⁰⁶ T. 4 December 2003, p. 24 (I.C.S.).

⁴⁰⁷ T. 26 May 2005, p. 14.

and *Chez Bihira*, and subsequently arrived at the medical centre. The priest dropped off Witness CCQ and his wife, but before his departure, requested the witness to check on him later to make sure that he had safely arrived back to the Parish.

316. According to CCQ's testimony, on 21 April 1994, he first went to Matyazo to the school of the Pentecostal church where some members of his family had sought refuge and then proceeded to the Ngoma Parish to check on the priest who had helped him and his wife. Upon his arrival, he saw many refugees at the Parish. CCQ narrated that the refugees were initially afraid when they saw him, and thought he might have been one of the killers. However, the refugees were reassured when they saw him talking with the priest. Witness CCQ said that he visited the Ngoma Parish again on 22 April. On 24 April, as he passed by the Parish on his way to Matyazo, he discovered that the refugees had been killed. He saw their bodies, and could tell that they had been shot to death. Witness CCQ testified that he continued on his way to Matyazo to make sure that members of his family were alive.⁴⁰⁸

5.10.2.2 Killings at Matyazo School Complex

Prosecution Witness CCQ

317. Prosecution Witness CCQ testified that he was at Matyazo school complex on the night of 21 April 1994 together with members of his family and many other refugees. The witness testified that the school was attacked, that the attackers threw grenades at the refugees, shot at them, and used petrol to burn them. CCQ stated that some members of his family, including his sisters, uncles and aunts survived the attack, but were wounded. He added that his family members remained in Matyazo *secteur* until May when they were killed.⁴⁰⁹

Prosecution Witness QX

318. Witness QX testified that on that 14 April 1994, he could see smoke coming from the direction of Runyinya *commune* and many refugees started fleeing from these areas because their houses were being burnt down, and people were being killed.⁴¹⁰ Witness QX further stated that *bourgmestre* Kanyabashi prevented the refugees from moving into Butare town, so they went to the Matyazo health centre. He added that the refugees were supposed to have been moved to Simbi Parish, but a certain priest informed that he had encountered "some members of the population who were armed with machetes and spears and who were going to the Simbi Parish in order to kill refugees who had sought refuge at the parish."⁴¹¹ Witness QX said he heard intense gunfire and explosions coming from the direction of Matyazo on 21 April. He subsequently saw people flocking to the Ngoma Parish to seek refuge. Witness QX explained that the fleeing refugees "hid in the sorghum fields, others hid in the bush, and at night they would crawl to the parish and hide at the parish itself."⁴¹² He added that most of the refugees had wounds on their heads, and that they appeared to have been "hacked with sharp objects." The witness said that on 21 April, "Tutsis living in Matyazo were killed, and the refugees at the Matyazo Health Centre, too, were killed."

⁴⁰⁸ T. 26 May 2005, p. 19.

⁴⁰⁹ T. 26 May 2005, p. 19.

⁴¹⁰ T. 4 December 2003, p. 14 (I.C.S.).

⁴¹¹ T. 4 December 2003, p. 15 (I.C.S.).

⁴¹² T. 4 December 2003, p. 17 (I.C.S.).

Witness QX testified that a man who had survived the attack at Matyazo Health Centre narrated to him what had happened.⁴¹³

Prosecution Witness QY

319. Witness QY testified that in April 1994, she was 17 years old and lived in Matyazo, in Tonga *cellule*.⁴¹⁴ She testified that on 7 April 1994, she observed that people in her *commune* were buying and stockpiling provisions and that the security situation had begun to deteriorate. Witness QY said a vehicle carrying soldiers then arrived and took away the property of someone called Ngarambe. She believed that the soldiers came from ESO, because ESO was the closest camp to their neighbourhood. Witness QY added that the soldiers took away Ngarambe and killed him near a pit in Karubanda. She further testified that later that evening, Tutsis were gathered in the Matyazo school complex.

320. As a result of the deteriorating security situation, Witness QY left for the Matyazo primary school which was located at about a 10-minute walk from her residence. Upon her arrival at the school, QY saw *Interahamwe* armed with traditional weapons and firearms, and there were many Tutsi refugees. According to QY's testimony, the refugees arrived at the school complex at about 6.00 p.m., and were killed by soldiers and *Interahamwe* at about 8.00 p.m. She said she was one of three survivors of this attack. Later on she said she was the sole survivor.

321. Witness QY said that the *Interahamwe* were led by two men called Janvier and Bakare. She explained that during the attack by the *Interahamwe*, a vehicle carrying soldiers suddenly appeared. The soldiers joined the attack by pouring petrol on the refugees and starting a fire. QY explained that the refugees used their clothes to try to extinguish the fire. Witness QY was in a classroom that was set on fire, and she therefore came out. She tried to speak to one of the soldiers whom she knew, and asked him for help, but the soldier hit her with a machete on her head. The soldiers fired gunshots to force the refugees inside the blazing classroom. QY testified that in addition to the wound on her head, she also realised that one of her hands was burnt, and thought that it might have been because the hand bag she was carrying caught fire. Witness QY showed the Chamber both the scar on her forehead caused by the machete blow and her severely burnt left hand. QY stated that most of the refugees died during this attack, and that she was one of three survivors. She said she lay among the dead bodies and that she was subsequently carried away by some *Interahamwe* who had come to finish off the surviving refugees.

5.10.2.3 *Deliberations*

322. It is alleged in the Indictment that *Interahamwe* militiamen, with the help of soldiers under the orders of the Accused, participated in the massacre of the civilian Tutsi population and politically moderate Hutus in Butare *préfecture* and elsewhere. It is further alleged that Tutsi refugees at Ngoma, the *Groupe scolaire* and other locations were attacked and killed by soldiers under the authority of the Accused acting in concert with

⁴¹³ T. 4 December 2003, p. 17 (I.C.S.).

⁴¹⁴ T. 8 June 2005, pp. 11, 12. During cross-examination, Defence counsel pointed out to the witness that in her statement of 15 January 1997, she indicated that in 1994, she lived in Ruhenda *cellule*. Under oath, before the Chamber, witness testified that she never lived in Ruhenda, and that she might have been confused in 1997 when she made the statement, because this was soon after the war. She added that when she gave her statement in 1997, she lived in Tonga Cellule.

Interahamwe militia. During some of these attacks, several pleas for assistance were made by victims at various locations across the *préfecture* to both the ESO and the Ngoma military camps and directly to the Accused, but no assistance was provided. In paragraphs 17, 21 and 27 of the Schedule of Particulars, the Prosecution alleges that Muvunyi bears individual criminal responsibility for the said attacks pursuant to Article 6(1) and 6(3) of the Statute.

323. The Chamber recalls that due to a number of exceptional circumstances, Prosecution Witness QX was allowed to give a deposition before the start of this trial. The Chamber is satisfied that QX gave a coherent and reliable account of the events he witnessed at the Ngoma Parish in April 1994. The Chamber finds that the Prosecution has proved beyond reasonable doubt that a large-scale attack was launched on the Tutsi refugees including orphans at the Ngoma Parish on 29 April 1994. The attack was led by Ngoma Camp soldiers and *Interahamwe* militia. There is no evidence to suggest that ESO soldiers participated in this attack, or that Muvunyi gave direct orders for the attack to be carried out. Since most of the incidents recounted by Witness QX involved Ngoma Camp soldiers, the question arises as to whether the Accused had any control over the Ngoma Camp. As stated above, the Chamber finds that the Accused effectively assumed the position of ESO Commander, but it has not been proved beyond reasonable doubt that he was also *Commandant de place* of Butare and Gikongoro *préfectures*. Consequently, he cannot be held responsible for the actions of the Ngoma Camp soldiers. The only matter left to be determined is whether or not the Prosecution has adduced any evidence to prove beyond reasonable doubt that ESO soldiers collaborated with the Ngoma Camp soldiers in the alleged attacks.

324. The Chamber considers that Witness CCQ's evidence on the killing of Tutsi refugees at Ngoma Parish corroborates that of Witness QX. The Chamber attributes the slight difference in the dates mentioned by the witnesses to the lapse of time between 1994 and the dates of their testimony, as well as to the effect of trauma on the witnesses' memory. This minor discrepancy does not affect the overall reliable evidence that both witnesses gave about the attack and killing of several hundred unarmed Tutsi civilians at Ngoma Parish by soldiers and *Interahamwe*.

325. With respect to the alleged attack on Matyazo, the Chamber notes that the Prosecution witnesses gave different accounts of the location of this attack. Prosecution Witnesses CCQ and QY testified to an attack on Matyazo Primary School on or around 21 April 1994. Prosecution witness QX spoke of an attack on Matyazo Health Centre on 21 April 1994. CCQ did not state whether he was present during the attack, or who the alleged perpetrators were. QY only heard gunfire and explosions from the direction of Matyazo and gave hearsay testimony that the refugees at the Matyazo Health Centre were killed on 21 April.

326. The evidence of Witness QY that *Interahamwe* and ESO soldiers were responsible for that attack on Matyazo Primary school sometime after 7 April is not consistent with the evidence of the other witness for the Prosecution. The Chamber therefore finds that there was an attack on Tutsi refugees at Matyazo primary school sometime around 21 April 1994. However, the Chamber has not heard any reliable evidence on the identity of those responsible for the attack, and therefore cannot conclude that the Accused bears any form of responsibility for that attack. The allegation about the attack on Matyazo therefore fails.

327. Similarly, there is no doubt in the Chamber's mind that a large-scale attack was launched against Tutsi refugees at Ngoma Parish on or about 29 April 1994. The only evidence before the Chamber is that the attack was led by soldiers under the leadership of

Lieutenant Hategekimana of Ngoma Camp. There is no evidence that ESO soldiers were involved in this attack. Furthermore, the Chamber has not heard any evidence to suggest that the Accused ordered, instigated or otherwise aided and abetted the said attack; nor has the Chamber heard any evidence pointing to the conclusion that the Accused knew or had reason to know about this attack. For these reasons, the Chamber finds that the Prosecution has failed to prove beyond reasonable doubt that the Accused was responsible for the attack on Tutsi refugees at Ngoma Parish on 29 April 1994.

5.10.3. Attack at the *Groupe scolaire*

5.10.3.1 Evidence

Prosecution Witness QBE

328. Witness QBE was an employee of the *Groupe scolaire* in April and May 1994. He testified that he was an eyewitness to two attacks launched on *Groupe scolaire* in the second half of April 1994.⁴¹⁵ According to QBE's testimony, the first attack was by a group of people apparently led by an *Interahamwe* dressed in *Kitenge* cloth. QBE added that this person was later identified as a member of the Presidential Guard, but he did not give a name. Witness QBE said that the attackers from outside were assisted by some employees of the *Groupe scolaire* including Faustin Twagirayezu, Faustin Niyonzima, Jean Paul, Jean-Marie and Diogène.⁴¹⁶

329. Witness QBE explained that during the attack, he came out of the building but the attackers ordered him not to move, so he sat down in front of the Principal's office. He saw the attackers lead the refugees out of their dormitories and assemble them on a volleyball court. The attackers then proceeded to examine the refugees' identity cards and separated the Tutsi from the Hutu. The witness explained that the refugees who did not possess identity cards were separated based on their physical features.⁴¹⁷

330. Witness QBE testified that on this occasion, the refugees were not killed because a certain Bicunda paid the attackers about 200,000 Rwandan francs to save their lives. The witness added that as a result of this incident, the rumour spread that Witness QBE was a member of the RPF and that he was the one paying money to save Tutsi lives.⁴¹⁸

331. Witness QBE explained that the second attack also occurred in the second half of April. He narrated that one evening, as he prepared to leave the *Groupe scolaire* at about 5.00 p.m., he saw a camouflage military vehicle with a uniformed-soldier on board. Witness QBE tried to stop the vehicle, and asked the soldier where he was going to. According to QBE's testimony, the said soldier refused to stop the vehicle or answer the witness's question; instead, he retorted that he knew Witness QBE was a member of the RPF. The soldier drove out of the school complex.⁴¹⁹ QBE said that later on, he learnt from Bicunda who appeared to know the soldiers, that the soldier who was driving the vehicle was Lieutenant Gatsinzi and that he came from the Ngoma Military Camp. Bicunda also

⁴¹⁵ T. 15 June 2005, p. 20 (I.C.S.); T. 16 June 2005, p. 5 (I.C.S.).

⁴¹⁶ T. 16 June 2005, pp. 27, 28, 29 (I.C.S.).

⁴¹⁷ T. 15 June 2005, p. 21 (I.C.S.).

⁴¹⁸ T. 15 June 2005, pp. 21, 22, 24.

⁴¹⁹ T. 15 June 2005, p. 22 (I.C.S.).

informed the witness that Lieutenant Gatsinzi had said because Witness QBE was hiding *Inkotanyi* at the *Groupe scolaire*, Gatsinzi would return the next day to kill QBE.⁴²⁰

332. Witness QBE further said that at about 6.00 p.m. the same day, he and the other people at the *Groupe scolaire* realised that while people could enter the school compound, no one was free to leave. He testified that two nuns who worked at the Butare Hospital had entered the school premises on their way home, but were prevented by soldiers from leaving the school. They spent the night at the school complex. QBE testified that having heard the nuns' story, and recalling his previous encounter with Lieutenant Gatsinzi, as well as the fact that two soldiers were guarding the main entrance of the school, he concluded that they were under attack by soldiers from Ngoma Camp.⁴²¹

333. In light of Witness QBE's conclusion that the *Groupe scolaire* was under attack by soldiers from Ngoma Camp, he decided to seek assistance from the ESO Military camp, which was the Camp closest to the school, located approximately one or two kilometres away. He placed a telephone call to ESO Camp and spoke to a person at the guard post and requested to speak with the Camp Commander. The person who answered the call then handed it to someone else whom Witness QBE believed to be the Commander of the ESO Camp. According to QBE's testimony, he told the alleged Camp Commander that the *Groupe scolaire* was under attack and requested that he send troops to save them. The Camp Commander promised to come to their rescue. However, Witness QBE and the other refugees waited the whole night but no one came to protect them. Witness QBE testified that he learnt later that the Commander of ESO Camp was Tharcisse Muvunyi, but admitted he had never met the said person and did not know him personally.⁴²²

334. Witness QBE testified that between 8.00 and 9.00 a.m. the next day, the *Groupe scolaire* was attacked. The witness said he saw Lieutenant Gatsinzi standing near the administrative buildings of the complex. Gatsinzi showed him a search warrant and asked him to read it and move back. QBE testified that even though he was too scared to read the document, he confirmed to Gatsinzi that he had read it. QBE further said that at the same time as he was being asked to read the search warrant, he saw other soldiers and *Interahamwe*, led by a *gendarme* called Diogène, arrive at the school. Gatsinzi then asked Witness QBE to accompany him and open the doors to the buildings in the school so that Gatsinzi could search for those he referred to as *Inkotanyi* in hiding. QBE added that he led Gatsinzi around the school complex and opened a few doors for him, but not the doors to the rooms where he knew Tutsi refugees to be hiding in. Lieutenant Gatsinzi marked those doors with a cross and said he would return later to check.⁴²³

335. Witness QBE explained that as he and Gatsinzi left the building, he saw a group of soldiers arriving at the *Groupe scolaire* from all directions. QBE further explained that the soldiers acted together with *Interahamwe* who were armed with traditional weapons and appeared to be under the leadership of Faustin Twagiramungu. Together, the military and civilian attackers discovered some of the refugees, including children who came from an orphanage in Kigali. They took the refugees outside, asked for their identity cards, and separated Tutsi from Hutu. Witness QBE testified that at this point, it became clear to him

⁴²⁰ T. 15 June 2005, p. 22 (I.C.S.).

⁴²¹ T. 15 June 2005, pp. 22, 25, 26 (I.C.S.); T. 16 June 2005, pp. 18, 37.

⁴²² T. 15 June 2005, pp. 22, 23, 26, 30 (I.C.S.).

⁴²³ T. 15 June 2005, p. 27 (I.C.S.); T. 16 June 2006 pp. 44, 45 (I.C.S.).

that the attackers were not looking for *Inkotanyi* but for Tutsis, because they referred to some people as *Inkotanyi* simply because of their physical features.⁴²⁴

336. Witness QBE further explained that as the Tutsis were being separated from the Hutus, they were being beaten by the soldiers, and were asked to lie down on the veranda of the office of the school director. The soldiers then brought two Mazda pick-up vehicles from the Red Cross and EMUJECO and, with the help of the *Interahamwe*, as well as Diogène and Jean-Marie, loaded the refugees on the vehicles. The two vehicles made two trips each with intervals of about thirty minutes and carried the refugees away. Witness QBE testified that the vehicles left the school premises at about 3.00 p.m, and that as they did, the refugees on board were still being beaten and some of them were almost dead. Witness QBE said that he never saw any of those refugees again. Witness QBE said that at about 6.00 p.m. on the day of the attack, he was informed by a nun that the refugees had been killed near the Butare CARAES centre, which is the psychiatric clinic of Butare. Witness QBE testified that one of the people taken away on that day was called Vincent and that he was in charge of the Red Cross orphans. By Witness QBE's account, the people who participated in the attack were approximately fifty soldiers, assisted by *Interahamwe* and some teachers of the school. He also estimated that about 100 Tutsi refugees were carried away in this manner.⁴²⁵

337. Witness QBE said that later that evening, Lieutenant Gatsinzi returned to the *Groupe scolaire* together with another soldier. They asked the witness to come with them into his office and demanded that he give them money. Witness QBE initially gave them 40,000 Rwandan francs, but they only left after demanding and receiving a further 40,000 francs from the witness. Witness QBE explained that there were no further attacks on the school until he left at the end of May, but that people continued to be abducted and killed.⁴²⁶

Prosecution Witness TQ

338. Prosecution Witness TQ testified that on 29 April 1994, at around 6:30-7:00 p.m., a large-scale attack was launched on the *Groupe scolaire* complex. TQ testified that at the time of the attack he did not know who had launched it, but he subsequently learnt that the attack was led by Second-Lieutenant Modeste Gatsinzi, who was a member of the Armed Forces and who, according to the witness, was from ESO. He was accompanied by soldiers and civilians, and in particular by a teacher from the Butare school complex, called Faustin Twagirayesu, who was also the *responsable de cellule* for Kabutare. Certain persons named Ndora and Muterere were also present.⁴²⁷

339. TQ estimated that there were over 50 assailants. The soldiers were wearing their camouflage uniforms and were carrying firearms. According to Witness TQ, they came from the ESO. TQ said that at the time, he was not aware that the soldiers were from the ESO, but he obtained this information afterwards from people who had followed what had happened.⁴²⁸ Nathan Bicunda, the director of a company called SULFO in Kigali, who had

⁴²⁴ T. 15 June 2005, pp. 27, 28 (I.C.S.); T. 16 June 2005, pp. 45, 49 (I.C.S.).

⁴²⁵ T. 15 June 2005, pp. 28, 29 (I.C.S.); T. 16 June 2005, pp. 46, 49, 51, 52 (I.C.S.).

⁴²⁶ T. 15 June 2005, pp. 29, 30 (I.C.S.).

⁴²⁷ T. 27 June 2005, pp. 25, 26 (I.C.S.).

⁴²⁸ T. 27 June 2005, p. 26 (I.C.S.).

come to take refuge at the orphanage on 7 April,⁴²⁹ told him that he knew Modeste Gatsinzi, and that he had come from the ESO. Other people told TQ that they saw soldiers from the ESO. There was also a young soldier who told TQ that the soldiers who launched the attack were from ESO.⁴³⁰ TQ also recalls that soldiers had already started to surround the *Groupe scolaire* complex the day before the attack.⁴³¹

340. When the attack was launched on 29 April 1994, Witness TQ was in the refectory with the orphans. TQ first saw the attackers in front of the director's office. They then dispersed within the complex and went and asked the people in the dormitories to emerge. The refugees were gathered in the volleyball court opposite the director's office. At that point, the selection process started and the Tutsis were set apart from the others.⁴³² During this time, one of the Brothers was standing in front of the director's office, from where he could see the refugees being gathered on the volleyball court.⁴³³ TQ testified that he was able to identify a number of the people on the court, including Vincent Wutabariyo, TQ's colleagues, and 18 of the Red Cross orphans, as well as some other children and refugees. Ten of the Red Cross supervisors were among those set aside on the volleyball court. Those set aside on the court were taken in front of the veranda, asked to lie down, and the soldiers and civilian *Interahamwe* fell on them. They were beaten, undressed, and loaded onto vehicles, taken to Rwasave and killed. According to Witness TQ, over 140 people were loaded onto the vehicles and taken away. TQ said that Rwasave was about two kilometres from the *Groupe scolaire*.⁴³⁴ Witness TQ asked one of the Brothers to contact the authorities but he does not know if this was done.⁴³⁵

341. Witness TQ said that Bicunda, a Tutsi refugee, was not one of the persons taken away and killed.⁴³⁶ This was because a soldier said, "Those members of Muvunyi's family should come closer",⁴³⁷ whereupon Bicunda and other members of his family moved out and stood aside, and nobody touched them.⁴³⁸ However, a child from Bicunda's family, nicknamed Kibwa, stayed away from other members of Bicunda's family and was taken away and killed. TQ learnt that an ambulance was sent for the child but it was already too late.⁴³⁹ That child was the only person for whom an ambulance was sent that day.⁴⁴⁰

342. On the morning of 29 April 1994, TQ talked to Witness QBE and told him to ask for help from the Commander of ESO because the attack was coming from soldiers under the Commander's charge.⁴⁴¹ TQ testified that Witness QBE told him that he had telephoned the ESO and had spoken to Colonel Muvunyi.⁴⁴² QBE told TQ that Colonel Muvunyi said

⁴²⁹ T. 27 June 2005, p. 15 (I.C.S.).

⁴³⁰ T. 27 June 2005, p. 26 (I.C.S.).

⁴³¹ T. 30 June 2005, pp. 44, 45 (re-examination) (I.C.S.).

⁴³² T. 27 June 2005, pp. 27, 28 (I.C.S.).

⁴³³ T. 27 June 2005, p. 27 (I.C.S.).

⁴³⁴ T. 27 June 2005, p. 28 (I.C.S.).

⁴³⁵ T. 27 June 2005, p. 29 (I.C.S.).

⁴³⁶ T. 27 June 2005, p. 28 (I.C.S.).

⁴³⁷ T. 27 June 2005, p. 28 (I.C.S.).

⁴³⁸ T. 27 June 2005, p. 28 (I.C.S.); T. 30 June 2005, pp. 22, 23 (cross-examination) (I.C.S.).

⁴³⁹ T. 30 June 2005, p. 23 (cross-examination) (I.C.S.).

⁴⁴⁰ T. 30 June 2005, p. 45 (re-examination) (I.C.S.).

⁴⁴¹ T. 27 June 2005, p. 27 (I.C.S.); T. 30 June 2005, pp. 45, 46 (re-examination) (I.C.S.).

⁴⁴² T. 27 June 2005, p. 27 (I.C.S.); T. 30 June 2005, p. 12 (cross-examination) (I.C.S.).

he would first check which soldiers were attacking them and then he would send help,⁴⁴³ but nothing happened. Witness TQ also said he would not be surprised if Witness QBE said he did not make that call on the morning of 29 April 1994 but the night before.⁴⁴⁴ TQ said that he subsequently learnt that Colonel Muvunyi refused to help and said he did not know the soldiers in question. In the afternoon, TQ asked Witness QBE to tell Colonel Muvunyi and the *préfet* that a number of persons had been abducted.⁴⁴⁵

343. On cross-examination, Witness TQ explained that when he gave his statement to the ICTR investigator on 28 and 29 July 1998, he knew a few of the assailants' names, but he did not know their complete respective identities. Witness TQ testified that he knew Lieutenant Modeste Gatsinzi, although not before the attack. He saw Lieutenant Gatsinzi the day of the attack and after that he often saw him moving around town, for instance in early May. TQ testified that he came to know Gatsinzi's name on the day of the attack.⁴⁴⁶ Witness TQ further explained that when he gave his statement on 28 and 29 July 1998, he did not give Lieutenant Gatsinzi's name to the investigators for personal reasons.⁴⁴⁷ TQ explained that at that time he himself had a pending case and that he had learnt that Gatsinzi held a position and that he had gone back to the RPF so TQ was afraid to mention his name for security reasons.⁴⁴⁸

344. Witness TQ first mentioned the involvement of Modeste Gatsinzi in the 29 April attack when he came to testify at the ICTR in the *Butare* case.⁴⁴⁹ He did not recall mentioning any other soldier in the course of that testimony.⁴⁵⁰ Witness TQ testified that now he can also identify Captain Nizeyimana, who was based at the ESO in 1994, as well as Mugabarigira, Hategekimana, as soldiers who took part in the attack of 29 April 1994 at the *Groupe scolaire*.⁴⁵¹ Witness TQ came to know the identity of those men during his trial before the Rwandan War Council.⁴⁵² Witness TQ testified that he did not know who was in charge of those soldiers on 29 April 1994.⁴⁵³ TQ said that in the *Butare* trial before the ICTR, he did not say anything about Nizeyimana because no question was put to him in that regard.⁴⁵⁴ Witness TQ further testified that a friend of Nathan Bicunda gave him information concerning the soldiers who took part in the attack of 29 April 1994.⁴⁵⁵ TQ testified that Hategekimana was the commander of the Ngoma camp.⁴⁵⁶

345. In regards to the civilians who took part in the attack of 29 April 1994, Witness TQ can remember Diogène Nsabimana, whom he knew because they attended the same school

⁴⁴³ T. 27 June 2005, p. 27 (I.C.S.). Part of the sentence is missing in the English language transcripts. The French language transcripts were used.

⁴⁴⁴ T. 30 June 2005, pp. 12, 13, 14 (cross-examination) (I.C.S.).

⁴⁴⁵ T. 27 June 2005, p. 27 (I.C.S.).

⁴⁴⁶ T. 28 June 2005, p. 11 (cross-examination) (I.C.S.).

⁴⁴⁷ T. 28 June 2005, pp. 11, 12 (cross-examination) (I.C.S.).

⁴⁴⁸ T. 28 June 2005, p. 12 (cross-examination) (I.C.S.).

⁴⁴⁹ T. 28 June 2005, pp. 13, 14 (cross-examination) (I.C.S.).

⁴⁵⁰ T. 28 June 2005, pp. 13, 14, 15 (cross-examination) (I.C.S.).

⁴⁵¹ T. 28 June 2005, p. 15 (cross-examination) (I.C.S.).

⁴⁵² T. 30 June 2005, pp. 40, 41 (re-examination) (I.C.S.).

⁴⁵³ T. 28 June 2005, p. 15 (cross-examination) (I.C.S.).

⁴⁵⁴ T. 28 June 2005, p. 16 (cross-examination) (I.C.S.).

⁴⁵⁵ T. 28 June 2005, p. 17 (cross-examination) (I.C.S.).

⁴⁵⁶ T. 30 June 2005, p. 44 (re-examination) (I.C.S.).

and then were colleagues.⁴⁵⁷ Witness TQ could not remember if Nsabimana also took part in the attack of 21 April 1994. TQ remembered that Deogène Nsabimana was working at the *Groupe scolaire* at the time of the attack and that he was the person who opened the dormitory.⁴⁵⁸ Witness TQ further testified that Jean-Marie Ovibar also participated in the attack of 29 April 1994.⁴⁵⁹

346. TQ testified that during the 29 April attack, he and others were able to identify soldiers from ESO, but during the proceedings before the War Council in Rwanda, Modeste Gatsinzi mentioned certain officers from Ngoma Camp, including Mugabarigira and Hategekimana.⁴⁶⁰

347. Following that attack, the atmosphere at the *Groupe scolaire* was bad. Distrust had increased. Tutsis were saying that Hutus were plotting against them, and Hutus did not want to stay close to Tutsis so that no one could say that they were together and thus kill them.⁴⁶¹

348. Witness TQ testified that nobody, to his knowledge, did anything to prevent the attack on the refugees at the *Groupe scolaire* on 29 April 1994. TQ estimates that the military authorities could have prevented the attack because during the killings the soldiers supervised the others.⁴⁶²

349. TQ testified that when the attack occurred on 29 April 1994, he did not think about asking for assistance from Colonel Munyamunyi and his soldiers, who were being used for security across the street.⁴⁶³ TQ said that at that time he did not know who Munyamunyi was. Witness TQ added that the soldiers who were guarding the school complex knew the attack was happening, so they could have protected the children and the refugees if they had wanted to do so. Witness TQ testified that on that date they knew who attacked them: people coming from ESO Commanded by Lieutenant Gatsinzi. These soldiers had been sent by the Commander of ESO along with other soldiers from the Ngoma Camp.⁴⁶⁴

350. Witness TQ testified that he reported the attack of 29 April 1994 to the Red Cross authorities and that they wanted to alert the authorities such as the *préfet*.⁴⁶⁵ However, no written report was made.⁴⁶⁶ TQ believes that he talked about this to the Italian Counsel, Pierre Antonio Costa, to whom he gave a report on the general situation, as well as to a nun, named Annunciata. Although he asked Witness QBE to report to the *préfet*, Witness TQ does not remember receiving any answer from him.⁴⁶⁷ When TQ testified in the *Butare* case in 2004, he said that he was present when QBE telephoned *préfet* Nsabimana and that he

⁴⁵⁷ T. 28 June 2005, p. 18 (cross-examination) (I.C.S.).

⁴⁵⁸ T. 28 June 2005, p. 18 (cross-examination) (I.C.S.).

⁴⁵⁹ T. 28 June 2005, p. 19 (cross-examination) (I.C.S.).

⁴⁶⁰ T. 28 June 2005, p. 2.

⁴⁶¹ T. 27 June 2005, p. 29 (I.C.S.).

⁴⁶² T. 27 June 2005, p. 29 (I.C.S.).

⁴⁶³ T. 30 June 2005, pp. 21, 22 (cross-examination) (I.C.S.).

⁴⁶⁴ T. 30 June 2005, p. 22 (cross-examination) (I.C.S.).

⁴⁶⁵ T. 30 June 2005, pp. 23, 24 (cross-examination) (I.C.S.).

⁴⁶⁶ T. 30 June 2005, p. 24 (cross-examination) (I.C.S.).

⁴⁶⁷ T. 30 June 2005, p. 24 (cross-examination) (I.C.S.).

heard what QBE was saying.⁴⁶⁸ However, TQ never said that he was sure QBE was talking to the *préfet* at that time.⁴⁶⁹

Prosecution Witness NN

351. Witness NN testified that from April to June 1994, he was a soldier at ESO.⁴⁷⁰ He said that during the 1994 events, there were two different groups of soldiers at ESO. The first group was under the leadership of Captain Nizeyimana and included other officers such as Chief Warrant Officer Kayinamura, second-Lieutenant Bizimana, and Second-Lieutenant Gakwerere. According to Witness NN, this group consisted mainly of soldiers from the north of Rwanda, they were extremists, and they engaged in widespread massacres of the civilian Tutsi population. Witness NN explained that the second group consisted of those who did not support the massacres. Witness NN said he was part of the second group that consisted of Tutsis, people who looked like Tutsis and others who were not from the north and did not support the massacres. He explained that this group had its “own information network”, and that they tried to obtain information about the killings to learn who was responsible.⁴⁷¹

352. Witness NN testified that Second-Lieutenant Gatsinzi, an ESO soldier, participated in the killings at the *Groupe scolaire*, and that the victims were orphan children from SOS Kacyiru who had sought refuge in Butare.⁴⁷² He explained that while there were both adults and children at the *Groupe scolaire*, most of the refugees were children, and that he had seen them when he went to visit one Bicunda. Witness NN added that all the refugees he saw were civilians. He further stated that he was not an eyewitness to the killings, but saw the body of one of Bicunda’s children at the mortuary. The Witness estimated that the killings at the *Groupe scolaire* took place in late May.⁴⁷³

Defence Witness MO38

353. Defence Witness MO38, a Tutsi woman, testified that in 1994 she lived in Kacyiru, in Kigali *préfecture* and worked as a nurse. On 6 April 1994, she heard about the death of President Habyarimana and also heard gunfire.⁴⁷⁴ On 7 April she received a telephone call from someone who told her that some people had been killed in Kyovu district, and that the attackers were looking for witness M38’s home with the intention of killing her and members of her family.⁴⁷⁵

354. Witness and her family therefore moved to the orphanage at Kacyiru and stayed there for two nights. On 9 April 1994, Witness MO38 and her family were evacuated to Butare together with the other children from the orphanage.⁴⁷⁶ They arrived in Butare at 9.30 p.m. and lodged at the *Groupe scolaire*. According to the witness, Butare was quiet

⁴⁶⁸ T. 30 June 2005, p. 26 (cross-examination) (I.C.S.).

⁴⁶⁹ T. 30 June 2005, pp. 26, 27 (cross-examination) (I.C.S.).

⁴⁷⁰ T. 18 July 2005, p. 4 (I.C.S.).

⁴⁷¹ T. 18 July 2005, pp. 42-43 (I.C.S.).

⁴⁷² T. 18 July 2005, p. 52 (I.C.S.).

⁴⁷³ T. 18 July 2005, pp. 55, 56 (I.C.S.).

⁴⁷⁴ T. 13 December 2005, p. 21 (I.C.S.).

⁴⁷⁵ T. 14 December 2005, p. 6 (I.C.S.).

⁴⁷⁶ T. 13 December 2005, p. 22 (I.C.S.); T. 14 December 2005, p. 8 (I.C.S.).

when they arrived, but around the 20 April, the security situation deteriorated.⁴⁷⁷ Witness MO38 stated that on 21 April, the *Groupe scolaire* was attacked by the *Interahamwe* who wanted to kill the orphan children. The attackers separated the children into groups, based on their ethnicity. Witness MO38 initially testified that the children were protected by the other refugees, but later said it was soldiers who protected the children from the *Interahamwe*. She added that Prosecution Witnesses TQ and QBE paid 500,000 Rwandan francs to the *Interahamwe* in order to save the children.⁴⁷⁸

355. Witness MO38 further explained that at about 6.00 a.m. on 29 April, another attack was launched on the *Groupe scolaire* by soldiers and *Interahamwe*.⁴⁷⁹ The soldiers remained outside the complex, while the *Interahamwe* came inside and together with one Diogène, asked all the refugees to come out to the courtyard. The soldiers and *Interahamwe* asked the refugees, including children, to lie down on the floor and they did. However, Witness MO38 explained that she and members of her family were asked to stand away from the other refugees; she later understood this was because Colonel Marcel Gatsinzi had asked the soldiers to protect them.⁴⁸⁰ According to the witness, the remaining refugees were killed and their bodies dumped somewhere in ponds in Kabutare.⁴⁸¹

356. Witness MO38 testified, without giving a specific figure, that there were many people at the *Groupe scolaire* during this attack including the orphans from Kigali. She confirmed that over fourteen children were killed during the attack by the *Interahamwe* “under the supervision of the soldiers.” All the victims were unarmed Tutsi civilians.⁴⁸² On the other hand, the soldiers and *Interahamwe* were armed with various types of weapons. Witness MO38 said the soldiers who attacked the *Groupe scolaire* said they were coming from Gisenyi.⁴⁸³

5.10.3.2. Deliberations

357. It is alleged in the Indictment that on or about 24 April 1994, refugees at the *Groupe Scolaire*, including orphans evacuated by the Red Cross from Kigali to Butare, were attacked by soldiers from Ngoma and ESO Camps. During the attack, the supervisor of the orphans called the ESO Camp for assistance and spoke with the Accused, but the latter refused to send troops to protect the refugees.

358. The Chamber has considered the testimony of Prosecution Witness QBE and finds him to be very credible. It is apparent from QBE’s testimony that the *Groupe scolaire* was attacked by soldiers under the leadership of Lieutenant Modeste Gatsinzi working in collaboration with *Interahamwe*. The Chamber is satisfied from the totality of the evidence before it that Lieutenant Gatsinzi actually came from ESO, and not from Ngoma Camp as stated by Witness QBE. This error, in the Chamber’s view, does not affect the reliability of Witness QBE’s testimony. The Chamber also notes QBE’s assertion that he telephoned the ESO Camp and spoke directly to the Camp Commander, even though there remains a lingering doubt as to whether the person at the other end of the telephone line was in fact

⁴⁷⁷ T. 13 December 2005, p. 25 (I.C.S.).

⁴⁷⁸ T. 13 December 2005, pp. 28, 29 (I.C.S.).

⁴⁷⁹ T. 13 December 2005, pp. 32, 33 (I.C.S.).

⁴⁸⁰ T. 13 December 2005, p. 35 (I.C.S.).

⁴⁸¹ T. 13 December 2005, p. 36 (I.C.S.).

⁴⁸² T. 14 December 2005, p. 21 (cross-examination).

⁴⁸³ T. 14 December 2005, pp. 20, 26 (cross-examination).

the Accused. In any event, QBE testified that the ESO Camp was the closest military facility to the *Groupe scolaire*, as it was located only one or two kilometres away. Thus, it was reasonable to expect the Accused, as the highest-ranking military official at the Camp in late April 1994, to provide protection for the refugees at the school or to prevent soldiers under his command from attacking the facility. Due to the repeated nature of these attacks on the *Groupe scolaire*, the Accused had reason to know of them, but failed to take action either to prevent them or to punish their perpetrators.

359. The evidence of Prosecution Witness TQ corroborates that of Witness QBE with respect to the fact that the *Groupe scolaire* was attacked by ESO soldiers on or about 29 April 1994. TQ's evidence tends to suggest that the Accused was at least aware of the ongoing attack, even if he did not directly order it. TQ's testimony further corroborates QBE's assertion that he placed a telephone call to the ESO Commander to request for assistance. From the evidence of these two witnesses the Chamber notes that Bicunda and his family, who were Tutsis, were spared on account of their relation to the Accused.

360. The Chamber considers that the evidence of Witnesses QBE and TQ is corroborated in every material particular by that of Witnesses NN and MO38. In fact the salient issues that an attack was perpetrated on *Groupe scolaire* on 29 April 1994 by soldiers and *Interahamwe*, that Bicunda's family was saved by the Accused, that one of the Bicunda children was killed during the attack due to a mistaken identity, and that an ESO soldier called Lieutenant Modeste Gatsinzi led the group of military and civilian attackers, have all been corroborated and established beyond reasonable doubt. The Chamber notes Witness TQ's suggestion that during criminal proceedings in Rwanda, he learnt that both Hategekimana from the Ngoma Camp and Nizeyimana from the ESO Camp took part in the attack on the *Groupe scolaire*. This evidence, together with QBE's account that it was soldiers from Ngoma Camp who attacked the school, established that this attack was a joint operation involving soldiers from both ESO and Ngoma Camps.

361. The Chamber believes that MO38 deliberately tried to minimise the role of the Accused in saving her and her family and therefore does not believe her evidence that Colonel Gatsinzi was her family's saviour. Similarly, the Chamber disbelieves MO38's evidence that it was a group of *Interahamwe* with the assistance of soldiers from Gisenyi, who attacked the *Groupe scolaire*. The Chamber attributes this evidence to Witness MO38's desire to shield ESO soldiers and the Accused, their commander, from responsibility for the *Groupe scolaire* massacres. The Chamber recalls its finding that ESO soldiers were under the effective control of the Accused. The Chamber also notes that the Accused saved the Bicunda family from being killed; that he sent an ambulance to rescue one of Bicunda's children; that Witness QBE telephoned the ESO Camp and reported the attack to someone alleged to be the Camp Commander; and that the attackers were under the leadership of Lieutenant Modeste Gatsinzi from ESO. These facts suggest that the Accused knew of the attack but failed to do anything to prevent or stop it, or otherwise punish the perpetrators.

362. The Chamber notes a number of apparent discrepancies in the testimony of Prosecution Witness TQ. For instance, it emerged during the cross-examination that TQ had deliberately failed to mention Lieutenant Modeste Gatsinzi's name to the ICTR Investigators in 1998, but that he had mentioned Gatsinzi's name during his 2004 testimony in the *Butare* trial before this Tribunal. Apparently, this was because TQ himself was an accused person in a pending case before the Rwandan War Council and he was afraid of mentioning Gatsinzi's name. TQ also testified that it was during the proceedings in Rwanda that he got to know the names of some of the other soldiers who participated in the attack

on the *Groupe scolaire*, including Nizeyimana, Mugabarigira and Hategekimana, the Commander of the Ngoma Camp. TQ also stated that it was Modeste Gatsinzi who, during the proceedings in Rwanda, first mentioned the involvement of Ngoma Camp soldiers such as Mugabarigira and Hategekimana in the *Groupe scolaire* massacre. However, having considered all supporting and corroborative evidence relating to the attack on the *Groupe scolaire*, the Chamber is satisfied that Witness TQ gave a truthful and honest account of the events he witnessed at that location on 29 April 1994. Moreover, the Chamber is satisfied, on the basis of the Judgement of the Rwandan War Council of 20 January 2003 that Witness TQ was acquitted of the genocide-related charges laid against him in Rwanda.⁴⁸⁴

363. The Chamber finds that as Interim Commander of the ESO Camp and as the highest-ranking military official in Butare during these events in late April 1994, the Accused had a duty to act to prevent the attacks perpetrated by soldiers under his command on the civilian Tutsi population seeking refuge at the *Groupe scolaire*, barely two kilometres away from ESO. The Chamber finds that the nature and scale of the attack at the *Groupe scolaire* were such that the Accused could not have been unaware of it. His position as the most senior military officer in Butare placed on him a special duty to investigate actual or potential violations of criminal law by his subordinates and to prevent or punish such violations. In this regard, the Chamber recalls the view expressed in *Kayishema and Ruzindana* that military superiors have a more active duty to inform themselves of the activities of their subordinates when they knew, or, owing to the circumstances, should have known that those subordinates were committing or about to commit crimes.⁴⁸⁵

364. The evidence presented by Prosecution Witnesses QBE and TQ strongly suggests that the attack on the *Groupe scolaire* was a joint operation involving soldiers from both ESO and Ngoma Camps. Despite a direct telephone request made by Witness QBE to the ESO Camp to send help to protect the refugees, including orphans and Red Cross employees, no help was sent. Even if the Accused did not personally receive the call for help, Bicunda's family was spared because of an order from the Accused. Therefore, it is clear that he knew about the attack and had the material ability to stop it, but did nothing. The Chamber therefore finds that the Prosecution has proved beyond reasonable doubt that soldiers from ESO in collaboration with men from Ngoma Camp and *Interahamwe* militia attacked and killed a group of Tutsi civilians at *Groupe scolaire* on 29 April 1994. As Interim Commander of ESO and the most senior military officer in Butare, the Accused knew about this attack by his subordinates from ESO, but failed to take measures to prevent its occurrence or to punish the perpetrators in its aftermath.

⁴⁸⁴ Judgement of the Rwandan War Council dated 20 January 2003 admitted and marked as Exhibit P.25 (English), P.25A (French) and P.25B (Kinyarwanda). See T. 30 June 2005, p. 33 (I.C.S).

⁴⁸⁵ *Kayishema and Ruzindana*, Judgement (TC), para. 227.

5.10.4. Attack on Tutsi Refugees at Mukura Forest

5.10.4.1 Evidence

Prosecution Witness XV

365. Witness XV, an employee of the University Hospital, testified that from about 7 April 1994 when the news of the death of Rwanda's president spread in his *commune*, the security situation deteriorated. He said soldiers set up roadblocks and Tutsis were asked to show their identity cards.⁴⁸⁶ XV testified that in light of this security environment, he decided to stay at home with his family. On 15 or 16 April, he received a letter from the Director of the university establishment, which was co-signed by "Commander Muvunyi", instructing him to go back to work, which he did. However, around the 18 or 19 April, he again stopped going to work on the advice of his boss because "houses were being burnt and people were running away."⁴⁸⁷

366. Witness XV further testified that around 21 April, houses near his own were being burnt down "and people were being told to ensure their own security." Witness XV therefore chose to move towards Mukura forest where some of his friends had already sought refuge. According to Witness XV's testimony, when he got to Mukura forest, he found about 800 Tutsi refugees, including "children, old women, old men, young men, and young women." He explained that shortly after the refugees arrived at the forest, "civilians and *Interahamwe* became aware of that" and "started to kill" them. Witness XV further explained that the refugees defended themselves "with sticks and other resources in order to ward off the situation" but they failed because soldiers had been called in to reinforce the *Interahamwe*. These soldiers, who Witness XV said came from the ESO and Ngoma Camps, soon arrived bearing arms and grenades.⁴⁸⁸

367. Witness XV informed the Chamber that after the attacks, he "noticed that there were some dead bodies", and that he escaped through the bushes and went towards to Tumba valley.⁴⁸⁹

Prosecution Witness YAK

368. Prosecution Witness YAK was a 15 year-old school boy in 1994, living in Huye *commune*, Butare *préfecture*. He testified that on 7 April 1994, he learnt that the plane carrying President Habyarimana had been shot down, and that the President was dead. Witness YAK said it was further announced that the *Inyenzi* were responsible for the President's death; and that the word "*Inyenzi*" meant Tutsi. YAK said the security situation in his *commune* changed after this date; night patrols were initially set up and operated jointly by Hutus and Tutsis, but later, the Hutus developed their own "means of communication" and did not want to conduct joint patrols with the Tutsis. The joint night patrols stopped around 15 to 17 April 1994. According to YAK's testimony, the Hutus from neighbouring *secteurs* started wearing banana leaves and marching; they told other Hutus to wear banana leaves on their person and place them on their houses, and that anyone who did not do so would be killed. YAK explained that this was a way of

⁴⁸⁶ T. 16 May 2005, p. 7.

⁴⁸⁷ T. 16 May 2005, pp. 8, 9.

⁴⁸⁸ T. 16 May 2005, pp. 9, 13.

⁴⁸⁹ T. 16 May 2005, p. 13.

distinguishing Hutus from Tutsis. He said; “One could feel that there was something organised and they killed us.”⁴⁹⁰

369. As a result of this deteriorating security situation, Witness YAK and other Tutsis spent the night in the bush, not far from a school. The refugees filled the classrooms of the school, and there was not enough space for everyone. Witness YAK said that the refugees came from neighbouring *secteurs* such as Dudinana, Runyinya, Karama, and Bvumbi. He said they remained at the school but were attacked by people wearing banana leaves. Some of the men tried to defend themselves, but realised it was impossible to do so. The refugees therefore decided to move towards Gasharu. By Witness YAK’s account, there were between 4,000 and 5,000 refugees.⁴⁹¹ They went past Gasharu and settled on a platform called Nyagasoze, which was located in Mukura forest. YAK testified that because they had not eaten for a number of days, someone slaughtered one of his cows and distributed the meat among the refugees. As they settled down to eat, they were attacked by a group of civilians. Witness YAK said the refugees managed to repel this initial attack.⁴⁹²

370. Shortly after this first attack, there was another attack by soldiers who came from the direction of the tarred road, and descended from CT military trucks. YAK testified that in his estimation, there were about 100 armed soldiers in uniform; they wore black berets bearing the insignia of the Rwandan Army. Witness YAK further stated that he believed the soldiers came from ESO, because another Tutsi refugee told them that an *Interahamwe* called Diogène Harindintwali had gone to seek reinforcements from the ESO Military Camp. Witness YAK added that he could distinguish between soldiers and *gendarmes* because the latter wore red berets, while the soldiers wore black ones. He also explained that the soldiers at ESO were trainees.⁴⁹³

371. YAK explained that upon their arrival, the soldiers first fired three grenades mounted on guns towards the refugees, but that these grenades did not claim any victims. YAK stated the Chamber that the soldiers started shooting at the refugees, who because they were afraid to see the soldiers, had gathered in one place. He said this facilitated the “work” of the soldiers.⁴⁹⁴ YAK said some people who stood close to him fell to the ground. He managed to slip away and lie down in a sorghum field. YAK said that the shooting lasted for about two hours. When the gunfire stopped and everything was quiet, YAK observed the soldiers withdraw into a nearby pine forest, and then back to their trucks. They drove off towards the direction of Butare. After the soldiers’ departure, “members of the population came to finish off all those who hadn’t been killed on the spot with guns - - with gunshots”. YAK explained that from his hiding spot in the sorghum field, he could hear the noise of striking machetes, as well as the screams and groans of the refugees who were being attacked. He said “those agonising cries” ended about 3.00 p.m., but he waited until nightfall and then walked to his aunt’s place. His aunt was married to a Hutu man. He said he walked in the rain and under the cover of darkness and that those manning the

⁴⁹⁰ T. 29 June 2005, p. 26.

⁴⁹¹ T. 29 June 2005, p. 27.

⁴⁹² T. 29 June 2005, pp. 28-29.

⁴⁹³ T. 29 June 2005, p. 30.

⁴⁹⁴ T. 29 June 2005, pp. 29-30. Witness YAK stated as follows: “We were refugees scattered all over the place. We saw soldiers and as Rwandan civilians were not used to soldiers, was (*sic*) afraid because those soldiers hadn’t come to save us. We expected something to happen. So we assembled and apparently facilitated their work. ... We assembled so they could shoot us easily, a gun, a bullet could hit more than one person, and that is exactly what those soldiers wanted to see.”

roadblocks had already left. He arrived at his aunt's place at about 8.30 p.m., but had to leave again at 3.00 a.m., to join other refugees at the Butare University Hospital.⁴⁹⁵

5.10.4.2. *Deliberations*

372. In the Chamber's view, Prosecution Witnesses XV and YAK largely corroborate each other on the attack on Tutsi refugees at Mukura forest and the identity of the attackers. The Chamber finds that soldiers from the ESO and Ngoma Camps were involved in the attack and that they worked in close collaboration with the *Interahamwe*. The Chamber also finds that the Accused, by virtue of his position as Interim ESO Commander and the most senior military officer in Butare, had reason to know of the attack on the civilian Tutsi population at Mukura forest. Due to the large number of refugees staying at Mukura and the nature of the attacks on them by the *Interahamwe*, the Accused had reason to know of their situation. Yet, instead of protecting the refugees and preventing the *Interahamwe* from further victimising them, ESO soldiers under the authority of the Accused participated in massacring them. The Chamber therefore concludes that the Prosecution has proved beyond reasonable doubt that ESO soldiers under the command and authority of the Accused collaborated with *Interahamwe* and other soldiers from Ngoma Camp to attack and kill Tutsi civilian refugees at Mukura forest. The Chamber further finds that the Accused had reason to know of this attack but failed to prevent it or to punish the perpetrators.

5.10.5. Killing of Civilians at Cyanika Parish and at Kabutare

5.10.5.1. *Evidence*

Prosecution Witness YAO

373. Prosecution Witness YAO testified that on 7 April 1994, she heard about the death of the Rwandan President. At the time, she lived with her parents and five siblings. They were all Tutsi. YAO testified that after the President's death, the behaviour of people in her area changed and members of her family were afraid. They therefore decided to leave their home and seek refuge elsewhere. Her parents and siblings went to Mushubi Parish, while Witness YAO spent the night in the bush. YAO testified that her parents, one of her brothers, as well as other people such as Kageruka, Rugambara, and Félicité were killed at Mushubi Parish on the night of 7 April. She learnt about this from her younger sisters who were with their parents when they died.⁴⁹⁶

374. YAO stated that after receiving the news of the death of her parents, she continued her flight so that she would not be killed. She first went to her aunt's place and subsequently to Cyanika Parish. Upon arrival at the Parish, she found two priests who were living there; later on, other refugees including men, women and children arrived from Karama and Rukondo. The refugees looked dirty and tired. YAO said that she spoke to some of the refugees and they told her they were fleeing because they had been attacked and their cows taken away; some said that their neighbours had been killed and so they decided to flee.⁴⁹⁷ YAO said that she heard that on 16 April 1994, there was an attack on the refugees at Cyanika Parish. YAO testified she "heard that grenades were thrown, but...

⁴⁹⁵ T. 29 June 2005, p. 33.

⁴⁹⁶ T. 21 March 2005, p. 7.

⁴⁹⁷ T. 21 March 2005, p. 8.

did not see the assailants.’⁴⁹⁸ She said she left the Cyanika Parish on 17 April 1994 and went to the Butare Cathedral. She found a priest and other refugees who had sought shelter there. YAO explained that it was quite a distance between the parish and the Cathedral and that it might have taken them up to three hours to walk the distance.

375. YAO explained that on 20 April 1994, while at the Cathedral, soldiers came and took the refugees to Kabutare. She explained that these soldiers wore military uniforms and were armed with guns. She said the soldiers asked the refugees to walk ahead of them and the soldiers followed on foot. Witness YAO said that when they arrived at Kabutare, the soldiers asked the refugees to lie down and then began shooting at them. As a consequence, most of the refugees were killed, others were injured, and there were a few survivors. Witness YAO explained that people survived because as the refugees were asked to lie down, some people fell on top of others and some of those beneath the crowd survived. Witness YAO said she was one of the lucky survivors.

5.10.5.2. *Deliberations*

376. The Chamber is unable, on the basis of Witness YAO’s testimony, to conclude that an attack took place at Cyanika or that the Accused or his subordinates were involved in it. It is not clear whether Witness YAO was present at Cyanika Parish during the alleged attack or if she was merely recounting hearsay evidence. Furthermore, she did not give any evidence regarding the identity of the assailants. The Chamber therefore finds that the Prosecution has failed to prove this allegation beyond reasonable doubt.

5.10.6. General Conclusion on Massacre of Tutsi civilians

377. In conclusion, the Chamber finds that the Prosecution has proved beyond reasonable doubt that as ESO Commander, the Accused knew of the attacks by ESO soldiers on Tutsi refugees at the *Groupe scolaire*. The Chamber is also satisfied that the Accused had reason to know about the attacks at Mukura forest. However, the Chamber finds that the Prosecution has failed to prove that the Accused directly participated in, knew, or had reason to know about the attack on Tutsi refugees at Ngoma Parish, Matyazo School, and Cyanika Parish.

5.11. RAPE AND SEXUAL VIOLENCE BY SOLDIERS AND *INTERAHAMWE* DURING ATTACKS ON TUTSI CIVILIANS

5.11.1. Indictment

378. Paragraphs 3.41 and 3.41(i) read:

3.41 During the course of the acts referred to in Paragraph 3.40 above, many women and girls were raped and sexually violated in these locations or were taken by force or coerced to other locations, where they were raped and subjected to acts of sexual violence by *Interahamwe* and soldiers from the Ngoma Camp. Lieutenant-Colonel Muvunyi by reason of his position of authority and the widespread nature of these acts, knew or had reason to know, that these acts were being committed and he failed to take measures to prevent, or to put an end to these acts, or to punish the perpetrators.

3.41(i) In most cases the rapes were aggravated by circumstances of gang rape, multiple rape, rape of virgin girls, rape of daughters in front of their mothers or other family members, which involved violence and degrading treatment to the persons involved. Most of these acts of sexual violence were accompanied by the killing of the victim.

⁴⁹⁸ T. 21 March 2005, p. 8.

5.11.2. Evidence

Prosecution Witness AFV

379. Witness AFV, a Tutsi woman, worked at the Butare University Hospital at the time of President Habyarimana's death.⁴⁹⁹ At about 1:00 p.m. on 20 April 1994, while walking home from work, she was stopped by soldiers manning a roadblock located at the intersection of the roads leading to the University Laboratory and the University Hospital.⁵⁰⁰ There were about four armed soldiers in military uniforms with spotted colours similar to the uniforms she knew soldiers from the ESO wore. They also wore cartridge belts and carried grenades. AFV did not notice the headgear of the soldiers, or even if they wore any. The witness believed the soldiers came from the ESO because the roadblock was not far from the ESO Camp "and the soldiers took turns" at the roadblock.⁵⁰¹

380. AFV estimated that the roadblock was about a 10-minute walk from the ESO.⁵⁰² The soldiers asked passers-by to present their identity cards and separated the Hutu from the Tutsi. Hutu were allowed to pass, but Tutsi were asked to stay and were searched.⁵⁰³

381. Witness AFV testified that the soldiers searched her, beat her, and asked if she thought she was extraordinary. They asked her how she could dare go to work. They took her service keys. The witness feared the soldiers would harm her, because a Tutsi girl who had walked with AFV to the roadblock was killed by the soldiers when they discovered that she had torn up her identity card in order to conceal her ethnicity. Her body was thrown into the gutter.⁵⁰⁴

382. One of the soldiers said, "Let us look at this Tutsi's sexual organs. How come you are working when the others aren't?" The soldier then added, "Let's go along with her, but tomorrow you will have to come back and present yourself to me."⁵⁰⁵ AFV believed the soldiers meant that they would kill her after looking at her sexual organ.⁵⁰⁶ Two gun-toting soldiers said they would accompany Witness AFV home, but they in fact beat her up and took her into the woods.⁵⁰⁷ She told them to kill her on the spot instead of taking her away to torture her.⁵⁰⁸

383. Once in the bush, one of the soldiers continued to beat and insult her. Another one took off his trousers. They undressed her, took off her underpants while she was sitting, tied her with her sweater, and blindfolded her with her other clothing. She protested that they should kill rather than rape her. One of the soldiers hit her head against the ground and she lost consciousness.⁵⁰⁹

⁴⁹⁹ T. 21 June 2005, p. 2; p. 28 (I.C.S.); Exhibit P.21 (Under seal).

⁵⁰⁰ T. 21 June 2005, p. 5.

⁵⁰¹ T. 21 June 2005, pp. 4, 5; p. 26 (Cross-examination).

⁵⁰² T. 21 June 2005, p. 11; p. 21 (Cross-examination).

⁵⁰³ T. 21 June 2005, pp. 12, 13.

⁵⁰⁴ T. 21 June 2005, p. 13.

⁵⁰⁵ T. 21 June 2005, p. 14.

⁵⁰⁶ T. 21 June 2005, p. 14.

⁵⁰⁷ T. 21 June 2005, p. 14.

⁵⁰⁸ T. 21 June 2005, p. 15.

⁵⁰⁹ T. 21 June 2005, p. 15: Witness AFV quoted one of the soldiers as saying: "Don't kill her before we have a look at the sexual organ of a Tutsi, or of a Tutsi woman."

384. When she regained consciousness, her attackers had left. She felt very weak, could not bring her legs together, and noticed she had lost a lot of blood; she had difficulty getting up.⁵¹⁰ AFV could see the blood coming from her sexual organ despite the fact that it was not daylight. She was still bleeding when she arrived home;⁵¹¹ under the lights at home, she also noticed a white liquid or substance near her pubic area. Witness AFV believed the bleeding from her sexual organ and the white substance around her pubic area were because she was raped by the two soldiers.⁵¹²

385. AFV testified that at the time of the events she was a nun and a virgin and had never had sexual intercourse before. Witness AFV added that she was no longer a nun because she could not continue to be one after losing her virginity; she said that the soldiers had deprived her of that status.⁵¹³

Prosecution Witness QY

386. Prosecution Witness QY, a Tutsi, was 17 years old in 1994.⁵¹⁴ She testified that when the security situation in her *cellule* deteriorated after 7 April 1994, she went to the Matyazo Primary School, which was located about 10 minutes away from her residence.⁵¹⁵ As a result of an attack on Matyazo Primary School, Witness QY fled to different locations and ended up at the *préfecture* office where she found armed soldiers and *gendarmes*.⁵¹⁶

387. QY recognised the *gendarmes* because they were wearing red berets.⁵¹⁷ She said the soldiers were raping girls. QY did not know how long she stayed at the *préfecture* Office, but subsequently she and other refugees were taken to the E.E.R. by soldiers and young bystanders.⁵¹⁸

388. The refugees arrived at E.E.R. at about 6.00 p.m., and soon thereafter, QY was taken by a soldier to a nearby woodlot and raped. The soldier was wearing military gear and carried a gun. Witness QY suspected that the soldier came from ESO because the E.E.R. “was very close to the ESO, and that is where the military camp was. Even those who were at the Office of the *préfet* were from ESO.”⁵¹⁹ Once they got inside the woods, the soldier forced her to take off her clothes. He then removed his trousers, remained in his underpants, and proceeded to insert his sexual organ into hers. QY started bleeding. The soldier then took her to the lower part of the woods and forced her to lie down. She did. Witness QY further explained: “When I lay down, he once again put his sexual organ into mine and did the same exercise, and after that he said, ‘We are going to put our blood together, and I will not kill you.’” After this experience, she realised that she was “bleeding profusely” from

⁵¹⁰ T. 21 June 2005, p. 16.

⁵¹¹ T. 21 June 2005, p. 17.

⁵¹² T. 21 June 2005, p. 17.

⁵¹³ T. 21 June 2005, p. 18 (I.C.S.); p. 28 (Cross-examination) (I.C.S.).

⁵¹⁴ Exhibit P.18 (Under seal).

⁵¹⁵ T. 8 June 2005, p. 13.

⁵¹⁶ T. 8 June 2005, p. 14.

⁵¹⁷ T. 8 June 2005, p. 18.

⁵¹⁸ T. 8 June 2005, pp. 18, 19; T. 13 June 2005, p. 18 (cross-examination) (I.C.S.); T. 14 June 2005, p. 30 (cross-examination) (I.C.S.).

⁵¹⁹ T. 8 June 2005, p. 19.

her sexual organ and her clothes were wet. The soldier then took her back to the other refugees.⁵²⁰

389. Witness QY testified that sometime between April and July 1994, she was taken by three soldiers from the *préfecture* Office to a place at Rwabayanga. She could not identify the soldiers because the event took place at night and the population was “going through a very difficult time.” The soldiers took her to a bar and restaurant, and then into “a small house which looked like a toilet.” They put her on a bed inside the room. QY said, “One got on me, the other one spread my legs apart, and the other took to one side and took one of my legs, and the other took the other leg. ... One of the soldiers got on me, and they took turns and then they left.” When asked by the Prosecutor to explain what she meant by “they took turns”, QY replied: “each of them introduced his sexual organ into mine.”⁵²¹

390. About three weeks after this incident, Witness QY said she was raped again by a soldier in the back courtyard of the *préfecture* Office. She said she could not remember the exact month this incident took place, but explained that the soldier took her to a very small house where he raped her. She said, “And he put me up against the wall ... and then he raped me against the wall. ... He took his sexual organ and introduced it into mine.” The soldier left Witness QY in the small house. Later she went back to the other refugees within the premises of the *préfecture* Office.⁵²²

391. QY further explained to the Chamber that at some point between April and July 1994, she was taken away from the *préfecture* Office by a person “dressed in civilian clothes” to a place known as *Chez Mahenga*.⁵²³ When this civilian took her away, soldiers were present at the *préfecture*. Witness QY and other refugees at the *préfecture* were subjected to several rapes by many people. All these rapes took place in the presence of soldiers as “the soldiers were practically living there.”⁵²⁴

392. *Chez Mahenga* was about seven minutes away from the *préfecture* Office. Witness QY described it as a bar, or a drinking place which also had rooms. Upon their arrival at *Chez Mahenga*, she saw soldiers who had “forcibly married girls” and kept them at that location.⁵²⁵ The girls were in rooms opposite her own; she could see them from her veranda, but could not speak to them. QY was kept in a room by her captor for about two to three days. He locked her up in that room and returned whenever he wanted to have sexual intercourse. QY explained that she “became a sort of wife” to her captor.⁵²⁶ With respect to the general condition of women kept at *Chez Mahenga*, Witness QY told the Chamber, “we had become their women. We had no idea when they were going to come and take us out of where we were. We had simply become like their women. Nobody was spared; everybody was raped. ... Many people were raped, and most of them died. There are others who were traumatized and still others who even had children with the rapists.”⁵²⁷ Her captor took her back to the *préfecture* Office after an announcement was made that there would be a search

⁵²⁰ T. 8 June 2005, p. 19.

⁵²¹ T. 8 June 2005, p. 21.

⁵²² T. 8 June 2005, p. 22.

⁵²³ T. 8 June 2005, p. 23; T. 14 June 2005, p. 21 (I.C.S.).

⁵²⁴ T. 8 June 2005, p. 23.

⁵²⁵ T. 8 June 2005, p. 23.

⁵²⁶ T. 8 June 2005, pp. 23-24.

⁵²⁷ T. 8 June 2005, p. 24.

at *Chez Mahenga*. From the *préfecture* Office, she and other refugees were subsequently transported in buses to Nyange forest at the instructions of the *préfet*.⁵²⁸

393. During cross-examination, the witness was questioned about one Mazimpaka. She stated that while at the *préfecture* Office, she was raped by Mazimpaka. She explained that she could not remember when this incident took place, or if it was before or after the three soldiers raped her at Rwabayanga. QY further added that Mazimpaka was a soldier or a *gendarme*,⁵²⁹ and that she came to know Mazimpaka's name during the latter's trial in Rwanda.⁵³⁰

Prosecution Witness TM

394. In 1994, Prosecution Witness TM was a 44-year-old Tutsi farmer living in Gikongoro.⁵³¹ She testified that sometime around mid-April 1994, a group of civilians and soldiers came to her house to search for Tutsis. A Tutsi child called Rusunika, then living with her, was chased after and killed by the attackers.⁵³² The soldiers in the group included Katabirora, Seuhoro and another who was referred to as "GP, *Garde présidentielle*."⁵³³ TM knew both soldiers Katabirora and Seuhoro well, and had in the past seen them manning a roadblock located about one kilometre from her house. She further said she used to see Katabirora who worked in Gikongoro town.⁵³⁴ She believed that Katabirora was Hutu. The other people who came to her house included Ndayisaba, Ntawuhiganayo, and Isidore. The soldiers carried firearms and the civilians carried small hoes and machetes.⁵³⁵

395. Witness TM testified that after killing Rusunika, the Tutsi child, the attackers returned and raped her. Soldier Katabirora was the first to rape her. When she tried to resist, the latter hit her.⁵³⁶ At the time of the rape, Witness TM was six months pregnant. Three days after she was raped, she suffered a miscarriage. She testified that she still felt pain in her back and head.⁵³⁷

Prosecution Witness YAI

396. Witness YAI testified that in late May 1994, at a security meeting held at Gikore, Muvunyi spoke about Hutu men who had forcefully taken Tutsi women as wives and asked the men to "[s]end these women back to their homes".⁵³⁸ According to the witness, when Muvunyi asked that the women be sent back to their homes, he simply meant that they should be delivered to the killers because the homes of the Tutsi women had already been destroyed.⁵³⁹

⁵²⁸ T. 8 June 2005, p. 24.

⁵²⁹ T. 14 June 2005, pp. 18, 19, 24 (Cross-examination) (I.C.S.).

⁵³⁰ T. 14 June 2005, p. 17 (Cross-examination) (I.C.S.).

⁵³¹ Exhibit P. 22 (Under seal).

⁵³² T. 22 June 2005, pp. 3-4.

⁵³³ T. 22 June 2005, p. 7.

⁵³⁴ T. 22 June 2005, p. 6: "The soldiers worked in Gikongoro town, but I do not know where their camp was, I never went there."

⁵³⁵ T. 22 June 2005, p. 3.

⁵³⁶ T. 22 June 2005, p. 4.

⁵³⁷ T. 22 June 2005, p. 4.

⁵³⁸ T. 25 May 2005, p. 8.

⁵³⁹ T. 25 May 2005, pp. 8-9, 41.

Prosecution Witness CCP

397. Prosecution Witness CCP, a Hutu,⁵⁴⁰ testified that he attended the meeting at Gikore in May 1994.⁵⁴¹ He heard Muvunyi say that the Hutu men who had married Tutsi girls had to kill those girls, or if they were not capable of killing them, to send them away so they could be killed elsewhere.⁵⁴² According to CCP, Muvunyi stated that the Tutsi girls should die because they could poison their Hutu husbands.⁵⁴³

Prosecution Witness YAK

398. Witness YAK was 15 years old in 1994.⁵⁴⁴ He found refuge at the Butare University Hospital after his family was killed.⁵⁴⁵ According to the witness, soldiers from ESO came to the University Hospital and tried to lure the girls who were there. The refugees were hungry; the soldiers told the girls to follow them to ESO where they would be given food. However, the girls returned in tears and Witness YAK heard from another refugee that the girls were raped by the ESO soldiers.⁵⁴⁶

399. YAK testified that the soldiers within the University Hospital compound came from ESO. According to him, if one stood at the hospital reception area, one could see the soldiers coming from ESO.⁵⁴⁷

5.11.3. Deliberations

400. The Indictment alleges that many women and girls were raped and sexually assaulted by *Interahamwe* and soldiers from the Ngoma Camp. At Paragraph 82 of its Pre-Trial Brief, however, the Prosecution stated that the acts of rape were committed by *Interahamwe* as well as soldiers from the Ngoma and ESO Camps and the *gendarmerie*. Similarly, during its Opening Statement, the Prosecution indicated that it would lead evidence to show that soldiers from the ESO and Ngoma Camps under the command of the Accused committed rape. The question to be considered is whether by including the ESO soldiers in the Pre-Trial Brief and its Opening Statement, the Prosecution discharged its obligation to give clear and timely notice in order to put the Defence on alert in respect of this charge.

401. Pursuant to Article 20(4)(a) of the Statute, an accused has the right to be informed of the nature and cause of the charges against him. According to the Appeals Chamber, when considered in light of Rule 47(C), this provision translates into a prosecutorial obligation “to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven.”⁵⁴⁸ The Chamber notes that the evidence of Witnesses AFV and QY that they were raped by soldiers from ESO does not support the very clear and specific allegation in the Indictment that soldiers from Ngoma

⁵⁴⁰ T. 9 June 2005, p. 8.

⁵⁴¹ T. 9 June 2005, p. 3.

⁵⁴² T. 9 June 2005, pp. 6-7.

⁵⁴³ T. 9 June 2005, p. 6.

⁵⁴⁴ Exhibit P.24, admitted on 29 June 2005 (under seal).

⁵⁴⁵ T. 29 June 2005, p. 33.

⁵⁴⁶ T. 29 June 2005, pp. 35-36.

⁵⁴⁷ T. 29 June 2005, p. 34.

⁵⁴⁸ *Semanza*, Judgement (AC), para 85; *Ntakirutimana*, Judgement (AC), para 25; *Gacumbitsi*, Judgement (AC), para. 49; *Kupreškic*, Judgement (AC), para. 88.

Camp and *Interahamwe* were responsible for the said rapes. In the Chamber's view, the allegation that ESO soldiers committed rape in Butare in 1994 is a material fact that should have been pleaded in the Indictment, not a mere evidential detail that could be introduced at a later stage.

402. It is clear from the jurisprudence of the *ad hoc* Tribunals that in certain limited circumstances the Prosecution may cure a defective indictment by giving timely, clear and consistent notice to the Defence through subsequent communications such as the Pre-Trial Brief, witness statements, or the opening statement.⁵⁴⁹ Thus, a vague or otherwise defective indictment can be cured through these means if it merely fails to set out the particulars of the Prosecution case with sufficient specificity. As stated by the ICTY Appeals Chamber, "the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defense."⁵⁵⁰

403. In the instant case, however, the Chamber is confronted with a very different problem. With respect to the rape charge, the Chamber is of the view that the Indictment is not vague. On the contrary, the Indictment clearly states that soldiers from Ngoma Camp committed rape. This is a clear and straightforward charge. There is no ambiguity in this. A careful consideration of all the charges contained in the Indictment reveals that the Prosecution clearly distinguished between the criminal acts attributed to soldiers from the Ngoma Camp and those attributed to ESO soldiers. There is specific reference to the Ngoma and ESO Camps in some charges while other charges refer only to one Camp and not to the other. Therefore, it cannot be said that it was a mistake on the part of the Prosecution to have listed only the Ngoma Camp under the rape charge. When the evidence was presented in Court during the trial, however, it turned out that it was not the soldiers from Ngoma Camp but those from the ESO Camp who had committed these acts. Lack of evidence to prove a charge does not make the charge defective.

404. For the Prosecution to turn around in its Pre-Trial Brief and state that the ESO soldiers as well as soldiers from Ngoma Camp and *Interahamwe* committed rape could be interpreted as a radical transformation of the Prosecution case. It is clear that the Accused did not have the opportunity to defend himself against such a fundamentally different case. The Chamber therefore considers that it would be prejudicial to consider the evidence of rape by ESO soldiers in light of the allegation in the Indictment.

405. It is clear from the Rules that the Prosecution cannot amend an existing charge in an indictment or introduce a new charge without following the proper procedure. Rule 50 deals with the amendment of indictments. Once the indictment is confirmed it can be amended only with leave of the Confirming Judge or the Trial Chamber, as the case may be. If new charges are added when the accused has already made an initial appearance before a Trial Chamber, a further appearance shall be held in order to enable the accused to enter a plea on the new charges.

406. These provisions would be null and void if the Prosecution could amend existing charges merely by giving notice in the opening statement or Pre-Trial Brief. As mentioned earlier, if the existing charge were merely vague or otherwise defective, such defects could

⁵⁴⁹ *Kupreškic*, Judgement (AC), para. 114; See also *Gacumbitsi* Judgement (AC), para. 55; *Ntakirutimana* Judgement (AC), para 27; *Niyitigeka* Judgement (AC), para. 195.

⁵⁵⁰ *Kupreškic*, Judgement (AC), para. 88.

be cured by providing timely, clear, and consistent notice. However, when these are new charges, the matter has to be referred to the Chamber to have the indictment amended.

407. It is generally alleged in the Indictment that the Accused was Interim Commander of ESO from about 7 April 1994. Thus the issue of his responsibility for the alleged criminal acts of his subordinates is an important matter that needs to be clearly spelt out in the Indictment, not a mere detail that can be added later at the convenience of the Prosecution. The Chamber recalls that the Prosecution sought leave to amend the Indictment, including a specific prayer to drop the rape charge, but its motion for amendment was denied on the ground, *inter alia*, that it came just before the commencement of the trial and that further delay in the opening of trial would prejudice the rights of the Accused.⁵⁵¹ The matter went up to the Appeals Chamber, which proceeded to elaborate on the distinctions between a new charge and the material facts underpinning an existing charge.⁵⁵² It should be noted, however, that the Prosecution did not seek in that instance to amend the rape charge.

408. To establish the rape charge, the Prosecution presented the evidence of three witnesses, viz, AFV, QY and TM, all alleged victims of rape. The Prosecution also presented Witnesses YAI, CCP and YAK to show that the Accused knew or should have known that the widespread rape of Tutsi women was taking place in Butare. The Defence did not present any witness to challenge the evidence on rape but argued that the Prosecution witnesses were not credible.

409. The Chamber has carefully considered the testimonies of Prosecution Witnesses AFV, QY and TM, and finds that their accounts of the rapes they endured are reliable. The Chamber fully understands the unique circumstances of rape victims and sympathises with them. However, in light of the very specific nature of the rape charge contained in the Indictment, and the nature of the evidence adduced at trial, the Chamber is of the view that the Prosecution has not proved beyond reasonable doubt that the Accused can be held responsible for the crime of rape as charged in Count 4 of the Indictment.

⁵⁵¹ *Prosecutor v. Muvunyi*, “Decision on the Prosecutor’s Motion for Leave to File an Amended Indictment” (TC), 23 February 2005.

⁵⁵² *Prosecutor v. Muvunyi*, “Decision on Interlocutory Appeal” (AC), 12 May 2005.

5.12. CRUEL TREATMENT OF TUTSI CIVILIANS BY SOLDIERS

5.12.1. Indictment

410. Paragraph 3.47 reads:

3.47 During the events referred to in this Indictment, soldiers of the ESO and Ngoma Camp participated in the meting out of cruel treatment to Tutsi civilians by beating them with sticks, tree saplings and or rifle butts.

5.12.2. Events at the Butare Cathedral and at ESO

5.12.2.1. Evidence

Prosecution Witness YAO

411. Prosecution Witness YAO testified that on 17 May 1994, soldiers came to the Butare Cathedral and found her hiding in a cupboard located within the sacristy of the cathedral. They brought her out, and one of them called Gakwerere, forced her to roll in the mud. The other soldiers hit her and called her *Inyenzi*.⁵⁵³

412. YAO said the soldiers took her to the “bishop’s house”, from where they took another person out. She explained that when they arrived at the Bishop’s house, some of the soldiers alighted from the vehicle and went inside the house. Witness YAO was left in the vehicle with one soldier. The soldiers who went inside the house said they were going to look for *Inyenzi*, and returned with one person who they were beating, kicking and hitting with gun butts.⁵⁵⁴ From the bishop’s house, the soldiers drove with them to the nun’s Convent, “the Convent of the *Petite Sœurs*”, where they picked up two nuns. These nuns told Witness YAO that soldiers had killed people at the Convent.⁵⁵⁵

413. From the nun’s Convent, the soldiers drove with them to ESO. Upon arrival at ESO, Lieutenant Gakwerere went to speak with Muvunyi. Gakwerere and Muvunyi then called one of the nuns who had been brought together with YAO. Even though YAO could not hear the question that was put to the nun by the soldiers, she heard the nun telling Gakwerere and Muvunyi that the people who had come to the Convent were unarmed refugees. Muvunyi also asked the nun why she did not make a list of all the refugees at the Convent, but she did not answer the question. YAO noted that Muvunyi was speaking in a “visibly angry” tone. She added that Muvunyi asked the soldiers to take the nun they had questioned back to the Convent, and Witnesses YAO and YAN to the Brigade.⁵⁵⁶ YAO testified that Muvunyi was present when they were being taken away. She testified that the Brigade constituted two buildings in which people were jailed, and that it was very close to the ESO. She said it took them about four minutes to drive from ESO to the Brigade.

Prosecution Witness YAN

414. Witness YAN testified that on 6 April 1994 when President Habyarimana’s plane was shot down, he lived in Gikongoro *préfecture*. Around 15 April, he moved to the

⁵⁵³ T. 21 March 2005, pp. 10, 11.

⁵⁵⁴ T. 21 March 2005, p. 13.

⁵⁵⁵ T. 21 March 2005, pp. 12, 13.

⁵⁵⁶ T. 21 March 2005, p. 14.

Procure (*l'Économat général*).⁵⁵⁷ Upon his arrival at the Procure, he found about 20 Tutsi refugees who had come there because they thought that the church buildings would not be attacked.⁵⁵⁸

415. YAN testified that when he got to Butare around 15 April, there was no violence.⁵⁵⁹ However, around mid-May, he was arrested from his residence at the Procure by ESO soldiers under the command of Lieutenant Gakwerere. He explained that he knew the soldiers came from ESO because he had known Gakwerere for a long time. He also knew that at the material time, Ngoma Camp soldiers had been sent to the war front, and Butare town was therefore under the control of ESO soldiers.⁵⁶⁰ YAN stated that at the time of his arrest, the soldiers accused him of being an *Inyenzi*, and that he had fired a gun. He denied that he ever owned a gun or fired one. He explained that the soldiers kicked him, hit him with gun butts, and threw him into the back of a single-cabin pick-up vehicle that belonged to the Nyiramasuhuko family. As a result of this treatment, he suffered multiple injuries to his face, his left side and his ribs. He was also wounded with a bayonet and told the Chamber the scar from that wound was still visible at the time of his testimony.

416. Witness YAN testified that when he was arrested at the Procure, some of the other refugees were killed. He said “I was arrested at the Procure and led outside that area to be placed in detention. It was said that I was an *Inyenzi* who had opened fire because a gunshot had been heard. So I was taken out of there. And other people who were there were killed.”⁵⁶¹ YAN further testified that a guard at the Procure was shot dead when he attempted to resist the attack by the soldiers. According to YAN, the mission of the soldiers “was to commit genocide, to exterminate the Tutsis.” He added that “all the people that they found were killed.”⁵⁶²

417. According to Witness YAN, when he was thrown behind the pick-up truck, there was also a girl at the back of the truck who had been taken from the Butare Cathedral (Witness YAO). He said the two of them were taken together to the ESO where they found “a lot of soldiers and *Interahamwe* dressed in *kitenge*.” He said some of the *Interahamwe* were armed with rifles, while others had machetes and clubs. Witness YAN testified that he was subjected to further mistreatment at ESO: “I was trampled upon, I was beaten, I was maltreated, and I was treated in a very inhumane way.”⁵⁶³ He said he appealed to one soldier whom he knew to intercede on his behalf, but the latter told him he had first to be questioned.

418. Witness YAN and the lady he came with in the pick-up (YAO) were subsequently taken to the Brigade and detained. He explained that the Brigade was located about 400 meters from ESO, and that it was near the Butare *préfecture* Office. He said that there were many other refugees in detention at the Brigade, and that while there, *gendarmes* would come and take out detainees. Whenever they did so, the *gendarmes* said it was Muvunyi

⁵⁵⁷ T. 4 May 2005, p. 4: “When I talk about the *Procure*, I’m talking about the *l'Économat général* which is very close to the Butare school complex. If you go a little lower, you get to the Butare health centre and *l'Économat* is opposite the Butare cathedral.”

⁵⁵⁸ T. 30 May 2005, pp. 4-5.

⁵⁵⁹ T. 30 May 2005, p. 15.

⁵⁶⁰ T. 30 May 2005, pp. 4-5.

⁵⁶¹ T. 30 May 2005, p. 4.

⁵⁶² T. 30 May 2005, p. 18.

⁵⁶³ T. 30 May 2005, pp. 6-7.

who had ordered that specific persons be taken away. Witness YAN explained that a *gendarme* officer sat in an office next to the room where he was being detained, and whenever the phone rang, this officer would say it was Muvunyi who had telephoned to give orders that people be taken away. Witness YAN testified that those taken away in this manner never came back, “they were taken away to be killed”.⁵⁶⁴

419. YAN informed the Chamber that he was released from detention as a result of intervention by someone who spoke to Muvunyi on his behalf. After his release, the *gendarmes* at the Brigade told him that he could not cross all the roadblocks and advised him to stay at the Brigade and die of hunger.⁵⁶⁵ Undeterred by what the *gendarmes* had said, Witness YAN decided to leave the Brigade and head back to the Procure.

Defence Witness MO72

420. Defence Witness MO72 testified that on 17 May 1994, Lieutenant Gakwerere and one of his subordinates transported her and three other sisters from the Convent of the Little Sisters of Jesus Christ to ESO Camp.⁵⁶⁶ They were taken in the back of a pick-up truck with three other individuals, including Callixte, and Witnesses YAN and YAO.⁵⁶⁷ The witness recalled that when they arrived at the ESO, she saw three buses full of new recruits to be taken to the war front and other people whom she believed resided or worked at the ESO.⁵⁶⁸

421. She explained that Lieutenant Gakwerere told people at ESO that the nuns and other people aboard the truck had shot at the soldiers. The people who were in the buses came off and surrounded Witness MO72 and the other refugees brought to ESO by Gakwerere.⁵⁶⁹ She explained that the crowd shoved the refugees, pulled at their clothes, called them *Inyenzis*, but did not strike them.⁵⁷⁰ However, the witness admitted that one person attempted to attack YAN with a metallic implement.⁵⁷¹ She further stated that YAN asked a military Chaplain at ESO for assistance but the latter said he could not come to YAN’s aid.⁵⁷²

422. Witness MO72 also testified that Prosecution Witness YAO was never assaulted during the period they were at ESO. She added that YAO was not treated differently from any of the other persons arrested by the soldiers.⁵⁷³ However the witness stated that YAO’s clothes were wet but that she did not know how they got wet.⁵⁷⁴

423. The witness further explained that she had never met Tharcisse Muvunyi and never spoke to him while at ESO Camp.⁵⁷⁵ According to her account, Lieutenant Gakwerere was

⁵⁶⁴ T. 30 May 2005, pp. 13, 14 (I.C.S.)

⁵⁶⁵ T. 30 May 2005, p. 10 (I.C.S.).

⁵⁶⁶ T. 15 March 2006, p. 9 (I.C.S.).

⁵⁶⁷ T. 15 March 2006, p. 12 (I.C.S.) and French transcripts p. 13 (I.C.S.). The witness gave the real names of Witnesses YAN and YAO in closed session.

⁵⁶⁸ T. 15 March 2006, p. 13 (I.C.S.).

⁵⁶⁹ T. 15 March 2006, p. 13 (I.C.S.).

⁵⁷⁰ T. 15 March 2006, p. 15 (I.C.S.); p. 25 (cross-examination) (I.C.S.).

⁵⁷¹ T. 15 March 2006, p. 13 (I.C.S.).

⁵⁷² T. 15 March 2006, p. 13 (I.C.S.).

⁵⁷³ T. 15 March 2006, p. 15 (I.C.S.); p. 25 (cross-examination) (I.C.S.).

⁵⁷⁴ T. 15 March 2006, p. 15 (I.C.S.); p. 25 (cross-examination) (I.C.S.).

⁵⁷⁵ T. 15 March 2006, p. 16 (I.C.S.).

the only person who came to speak to them. She added that the ESO Chaplain also stated that the nuns had reduced their Convent into an abode for *Inyenzi*.⁵⁷⁶

5.12.2.2. Deliberations

424. The Chamber notes that Prosecution Witnesses YAO and YAN gave strikingly similar testimony about the date they were arrested, the identity of their attackers and their experiences at the time of arrest and subsequently at ESO and the *gendarmerie* Brigade. They both testified that the soldiers who arrested them were led by Lieutenant Gakwerere from ESO, that they were transported in the back of a pick-up truck, that they were beaten with rifle butts, kicked and trampled upon by the soldiers, and then taken to ESO. In particular, Witness YAO was asked to roll in the mud by Lieutenant Gakwerere while other soldiers kicked her and called her *Inyenzi*.

425. The Chamber considers that while Defence Witness MO72 denied that Prosecution Witnesses YAN and YAO were mistreated at ESO or during the course of their transportation to that Camp, when considered in its entirety, her evidence in fact corroborates that of the Prosecution witnesses. Defence Witness MO72 confirmed that she and the two Prosecution witnesses were among the people arrested and transported in the back of a pick-up truck to ESO Camp by soldiers led by Lieutenant Gakwerere on 17 May 1994. She further confirms that while at ESO, Witnesses YAN and YAO were pushed around by soldiers and *Interahamwe* militia and that YAN was threatened with a sharp object. MO72 also confirmed that the two Prosecution witnesses were transported from ESO and detained at the Brigade located some 400 metres from the ESO Camp.

426. Having considered all the evidence on this issue, the Chamber is satisfied beyond reasonable doubt that on or about 17 May 1994, Prosecution Witnesses YAO and YAN were arrested by ESO soldiers under the leadership of Lieutenant Gakwerere and severely beaten with rifle butts and other implements as a result of which Witness YAN sustained severe injuries on his head and abdomen. The Chamber is also satisfied that Witness YAO, a woman, was asked to roll in mud, beaten and called *Inyenzi*. Finally the Chamber finds as a fact that the persons who were responsible for the mistreatment of Witnesses YAO and YAN were subordinates of the Accused.

427. Taking all necessary factors into consideration, the Chamber is satisfied that the Prosecution has proved beyond reasonable doubt that the Accused knew about this attack and mistreatment of Tutsi civilians by his subordinates and did nothing to prevent it or to punish the perpetrators.

⁵⁷⁶ T. 15 March 2006, p. 15 (I.C.S.).

5.12.3. Events at Beneberika Convent

5.12.3.1 Evidence

Witness QCQ

428. Prosecution Witness QCQ testified that Beneberika Convent sheltered approximately 27 Tutsi refugees from Butare, Kigali and Gikongoro in April 1994.⁵⁷⁷ She told the Chamber that several attacks were launched against the Convent during this time, the second of which was a large-scale strike that forced all occupants out.⁵⁷⁸ During this assault, armed soldiers and *Interahamwe*, who were equipped with guns, clubs, machetes and dogs, forcefully entered the Convent and drove refugees out from their hiding places into the garden with their hands in the air.⁵⁷⁹

429. The witness further explained that the soldiers and *Interahamwe* sorted the refugees according to their *préfecture* of origin, beat them up, demanded to see their identity cards, and asked them to sing that the RPF was the source of all their problems.⁵⁸⁰ The witness said that some refugees did not have an identity card, while other simply refused to present theirs.⁵⁸¹ The attackers forced some refugees to produce their cards. At other times, they simply labelled some refugees as *Inkotanyi* based on their physical appearance. According to the witness, the attackers referred to Tutsis as *Inkotanyi* and *Inyenzi*.⁵⁸² She also reported that some soldiers and *Interahamwe* confiscated property from the refugees.⁵⁸³

430. Witness QCQ recalled that “Karenzi’s children,” Solange, Marc and Thierry Karenzi, the youngest of whom was seven years old, were removed from their separate hiding places and beaten. When they arrived in the garden, Solange’s clothes were torn and her head was bleeding, while Marc had a gash on his leg. Originally mistaken for Hutu, Thierry was spared at first, but eventually placed with those to be executed.⁵⁸⁴ QCQ also explained that a group of children from Byumba were set aside except for Diane, Cécile and Théodise. After sorting out the refugees on the basis of ethnicity, the Tutsi refugees were loaded onto a Hilux vehicle, the assailants stepped on top of them and they drove away.⁵⁸⁵ Later that day, the soldiers returned to fetch beer from the Convent and informed the inhabitants that they had killed the refugees.⁵⁸⁶

Witness QCM

431. Witness QCM testified at about 11.00 a.m. on 30 April 1994, a crowd of approximately 200 people. The armed attackers included 100 or more soldiers from ESO and Ngoma camps under the leadership of Lieutenant Hategekimana, along with 100 more

⁵⁷⁷ T. 14 March 2005, pp. 25, 26.

⁵⁷⁸ T. 14 March 2005, p. 26.

⁵⁷⁹ T. 14 March 2005, pp. 25-26.

⁵⁸⁰ T. 14 March 2005, p. 26.

⁵⁸¹ T. 14 March 2005, p. 27.

⁵⁸² T. 14 March 2005, p. 27.

⁵⁸³ T. 14 March 2005, p. 27.

⁵⁸⁴ T. 14 March 2005, p. 29.

⁵⁸⁵ T. 14 March 2005, p. 29.

⁵⁸⁶ T. 14 March 2005, p. 29.

civilians or *Interahamwe*.⁵⁸⁷ QCM recalled that the soldiers carried firearms, while the civilians were armed with clubs and machetes.⁵⁸⁸ The witness recalled that at the time of the attack there were about 40 sisters, and approximately 45 other refugees, the majority of whom were children, living at the Convent.⁵⁸⁹

432. After threatening to kill the nuns if they did not open the gates, the attackers entered the compound and fired shots in the air. As a result, other nuns came out from the dormitories.⁵⁹⁰ The assailants claimed that they had come for all civilians who were in the building. The soldiers pulled individuals from their hiding places and subsequently separated refugees based on ethnicity and put the Tutsis aside.⁵⁹¹ According to QCM, one of the nuns who was a friend of Hategekimana, helped the latter to identify which refugees were Tutsi.⁵⁹²

433. Witness QCM reported that soldiers asked the nuns to present their identity cards. When the nuns refused, Hategekimana read from a document which he said was an arrest warrant from Tharcisse Muvunyi authorising him to arrest civilians from the Convent.⁵⁹³ However, when QCM asked to see this document, Hategekimana refused to show it to her.⁵⁹⁴

434. QCM stated that the soldiers beat the Tutsi refugees as they were sorted from other civilians, loaded Tutsis onto a “GDK” vehicle and ordered them to lie down.⁵⁹⁵ Then, along with a number of civilians, the soldiers stood on top of the refugees as they drove them away at around 1:00 p.m.⁵⁹⁶ Witness QCM stated that she pleaded with Hategekimana to spare the children but the latter refused and told her that those who were handed over to the *Interahamwe* could not be saved.⁵⁹⁷

435. QCM testified that approximately 25 people that the soldiers took from the Convent on that day were never seen again.⁵⁹⁸ She added that the soldiers returned to the Convent two hours later to collect some beer.⁵⁹⁹ The witness asked them where they took the children. They responded that the children had been handed over to the *Interahamwe*.

5.12.3.2. *Deliberations*

436. The Chamber has considered the evidence of Witnesses QCQ and QCM that sometime in April 1994, a group of armed soldiers and *Interahamwe* under the leadership of Lieutenant Hategekimana attacked Tutsi refugees sheltered at the Beneberika Convent. The group of refugees included at least 25 children from various *préfectures* in Rwanda.

⁵⁸⁷ T. 11 July 2005, p. 5 (I.C.S.).

⁵⁸⁸ T. 11 July 2005, p. 5 (I.C.S.).

⁵⁸⁹ T. 11 July 2005, pp.7-8 (I.C.S.).

⁵⁹⁰ T. 11 July 2005, p. 9 (I.C.S.).

⁵⁹¹ T. 11 July 2005, p. 9 (I.C.S.).

⁵⁹² T. 11 July 2005, p. 10 (I.C.S.).

⁵⁹³ T. 11 July 2005, pp. 19-20.

⁵⁹⁴ T. 11 July 2005, p. 10 (I.C.S.).

⁵⁹⁵ T. 11 July 2005, p. 11 (I.C.S.).

⁵⁹⁶ T. 11 July 2005, pp. 11, 13 (I.C.S.).

⁵⁹⁷ T. 11 July 2005, pp. 10-11 (I.C.S.).

⁵⁹⁸ T. 11 July 2005, p. 11 (I.C.S.).

⁵⁹⁹ T. 11 July 2005, p. 14 (I.C.S.).

The nuns and other refugees, including children, were first sorted out based on their *préfecture* of origin, or on the basis of their ethnicity. The Tutsi refugees were consistently denigrated as *Inkotanyi* or *Inyenzi* and were set aside and maltreated by the soldiers and *Interahamwe* attackers. Witnesses QCQ and QCM gave similar accounts of the way the refugees were treated, including the fact that they were beaten, thrown in the back of a vehicle and trampled-upon by soldiers and *Interahamwe*, and that those who were taken away never returned and are presumed dead.

437. The Chamber believes that Prosecution Witnesses QCQ and QCM gave a frank and credible account of the events they witnessed at Beneberika Convent in April 1994. In particular, the Chamber finds that despite her young age (10 years) at the time of the events, Witness QCQ gave an accurate and coherent account of what she saw and experienced on that fateful day in April 1994. The Chamber therefore finds that soldiers under the leadership of Lieutenant Hategekimana, in the company of *Interahamwe* militia, attacked the Beneberika Convent in April 1994 during which they meted out cruel treatment to the refugees including many children.

5.12.4. Events at the *Groupe scolaire*

5.12.4.1. Evidence

Prosecution Witness TQ

438. Prosecution Witness TQ testified that by 16 April 1994, about 700 people, including 400 orphans, 30 instructors and the elderly evacuated by the Red Cross, were transported to the *Groupe Scolaire* in Butare from Kacyiru, Kigali *préfecture*.⁶⁰⁰

439. At around 6:30 or 7:00 p.m. on 29 April 1994, a large-scale attack was launched on the *Groupe scolaire* complex. The witness testified that the assailants consisted of more than 50 armed soldiers from ESO. They were dressed in camouflage uniforms.⁶⁰¹ They gathered the refugees on the volleyball court, and began separating Tutsis from other people.⁶⁰² The soldiers set aside a number of people, including 18 orphans and 10 Red Cross employees who were presumed to be Tutsi. The soldiers then forced the Tutsi refugees to lie down on the floor, and proceeded to severely beat them up with the assistance of the *Interahamwe*. The refugees were then transported to Rwasave, and Witness TQ later learnt that they were all killed.⁶⁰³ TQ estimated that more than 140 people were transported to Rwasave that day.⁶⁰⁴

Prosecution Witness QBE

440. Prosecution Witness QBE testified that the first attack on *Groupe Scolaire*, which took place during the second half of April 1994, was launched by a group of people who appeared to be led by an *Interahamwe*.⁶⁰⁵ When the attack began, Prosecution Witness QBE came outside and was ordered to sit down in front of the principal's office.⁶⁰⁶ The attackers

⁶⁰⁰ T. 27 June 2005, pp. 20-21 (I.C.S.).

⁶⁰¹ T. 27 June 2005, p. 26 (I.C.S.).

⁶⁰² T. 27 June 2005, p. 26 (I.C.S.).

⁶⁰³ T. 27 June 2005, p. 28 (I.C.S.).

⁶⁰⁴ T. 27 June 2005, p. 28 (I.C.S.).

⁶⁰⁵ T. 16 June 2005, pp. 27-28 (I.C.S.).

⁶⁰⁶ T. 16 June 2005, p. 28 (I.C.S.).

led the refugees out of their dormitories and assembled them on a volleyball court. They separated the Tutsis from the Hutus by examining their identity cards or looking at their physical features.⁶⁰⁷

441. According to Prosecution Witness QBE, the second attack began late one evening during the second half of April 1994.⁶⁰⁸ At about 5:00 p.m. he was preparing to leave the premises but encountered a camouflage vehicle with a soldier on board.⁶⁰⁹ Witness QBE asked the soldier about what he was doing at the *Groupe scolaire*, but the soldier retorted that he knew QBE was a member of the RPF. At 6:00 p.m. the same day, other people assembled in the *Groupe Scolaire* and he realized that although it was possible to enter the compound, it was impossible to leave.⁶¹⁰ He therefore concluded that they had been attacked,⁶¹¹ and that it was soldiers from the Ngoma Military Camp who had attacked them.⁶¹²

442. The witness placed a telephone to the ESO Camp and asked to speak to the commander.⁶¹³ He was connected to someone he believed to be in charge and who he later learnt was Tharcisse Muvunyi.⁶¹⁴ QBE testified that Muvunyi promised to send troops to rescue them but that no one came.

443. The following morning, Lieutenant Gatsinzi arrived at the *Groupe scolaire* with a search warrant. QBE led the Lieutenant around the compound, opening a few rooms for him, but not the doors to rooms in which he knew people were hiding.⁶¹⁵ Lieutenant Gatsinzi marked those doors with a cross, and said he would come back later to check.⁶¹⁶ Prosecution Witness QBE further explained that as he left the building with Lieutenant Gatsinzi, he observed that soldiers had arrived and were in all corners of the *Groupe scolaire*.⁶¹⁷

444. QBE stated that some *Groupe scolaire* teachers assisted Gatsinzi's troops and the *Interahamwe*, who eventually discovered some of the refugees, including some of the children from the orphanage in Kigali,⁶¹⁸ took them outside, asked for their identity cards, and separated the Tutsi from the Hutu.⁶¹⁹ The witness recalled that the soldiers and *Interahamwe* beat up the Tutsi refugees as they separated them from the Hutus.⁶²⁰ Then they asked the refugees to lie down on the veranda of the office of the Director of the *Groupe scolaire*.⁶²¹ A total of about 100 Tutsi refugees were then loaded into two Mazda

⁶⁰⁷ T. 15 June 2005, p. 21 (I.C.S.).

⁶⁰⁸ T. 15 June 2005, p. 22 (I.C.S.).

⁶⁰⁹ T. 15 June 2005, p. 22 (I.C.S.).

⁶¹⁰ T. 15 June 2005, p. 22 (I.C.S.).

⁶¹¹ T. 16 June 2005, p. 37 (I.C.S.).

⁶¹² T. 15 June 2005, p. 26 (I.C.S.).

⁶¹³ T. 16 June 2005, p. 38 (I.C.S.).

⁶¹⁴ T. 15 June 2005, p. 24 (I.C.S.).

⁶¹⁵ T. 15 June 2005, p. 27 (I.C.S.).

⁶¹⁶ T. 15 June 2005, p. 27 (I.C.S.).

⁶¹⁷ T. 16 June 2005, p. 45 (I.C.S.).

⁶¹⁸ T. 15 June 2005, p. 28 (I.C.S.).

⁶¹⁹ T. 15 June 2005, p. 28 (I.C.S.).

⁶²⁰ T. 16 June 2005, p. 49 (I.C.S.).

⁶²¹ T. 15 June 2005, p. 28 (I.C.S.).

pickups and taken away.⁶²² From about 3.00 p.m., the vehicles made two trips, between which there was a time period of about 30 minutes.⁶²³ Witness QBE added that due to the beatings the refugees received at the hands of the soldiers and *Interahamwe*, some of them were almost dead when they were taken away.⁶²⁴

Defence Witness MO38

445. Witness MO38 testified that on the night of 28 April, while at the *Groupe scolaire*, she noticed that soldiers had encircled the complex.⁶²⁵ At about 6:00 a.m. the following morning, all doors to the facility were locked. *Interahamwe* entered the *Groupe scolaire* and ordered the refugees to come out, while soldiers remained outside.⁶²⁶ MO38 testified that it was the *Interahamwe* who were directing the people to lie down.⁶²⁷ She also stated that she heard the soldiers saying they were coming from Gisenyi, that they were merciless and that they were not going to spare anyone. She further explained that Witnesses TQ and QBE were among the refugees who were tied and asked to lie on their stomach to prevent them from calling ESO. MO38's husband was lying about one metre from QBE and TQ. MO38 was able to observe the scene from a window.⁶²⁸

446. According to MO38, although Tharcisse Muvunyi did not send soldiers into the facility, he sent soldiers to guard the complex. She added that whenever the *Interahamwe* attacked the complex, people telephoned ESO and soldiers were sent to guard or protect the *Groupe Scolaire* from the *Interahamwe*.⁶²⁹

5.13.4.2. Deliberations

447. The Chamber recalls its earlier conclusion that Witness MO38 was not credible with respect to her account of the role that soldiers played in the attack on *Groupe scolaire*. The Chamber will therefore base its findings on the evidence of Prosecution Witnesses TQ and QBE. From the evidence of those two witnesses, the Chamber is satisfied that during an attack on Tutsi refugees sheltered at the *Groupe scolaire* complex on 30 April 1994, ESO soldiers under the leadership of Lieutenant Modeste Gatsinzi separated Tutsi refugees, including orphan children, from the other refugees, forced them to lie down on the floor of a volleyball court, and proceeded to severely beat them. Furthermore, the Chamber believes that those who were treated in this manner included at least 18 orphan Tutsi children, as well as employees of the Red Cross.

448. Moreover, it is the Chamber's belief that Muvunyi knew that this attack was planned or was taking place, but failed to take the necessary and reasonable measures to prevent it. The attackers were under Muvunyi's effective control because, as previously discussed,⁶³⁰ they obeyed his instructions that members of the Bicunda family should not be killed. Therefore, if he had wanted to save the other refugees he could have done so. The

⁶²² T. 16 June 2005, p. 51 (I.C.S.).

⁶²³ T. 16 June 2005, p. 51 (I.C.S.).

⁶²⁴ T. 15 June 2005, p. 29 (I.C.S.); T. 16 June 2005, p. 52 (I.C.S.).

⁶²⁵ T. 13 December 2005, pp. 32-33; T. 14 December 2005, pp. 17-18, 23 (Cross-examination).

⁶²⁶ T. 13 December 2005, pp. 32-33; T. 14 December 2005, pp. 17-18 (Cross-examination).

⁶²⁷ T. 13 December 2005, p. 35.

⁶²⁸ T. 13 December 2005, pp. 33-34; T. 14 December 2005, p. 26 (Cross-examination).

⁶²⁹ T. 14 December 2005, pp. 22-24 (Cross-examination); p. 30 (Question from the Bench).

⁶³⁰ See the Chamber's discussion of the attack at the *Groupe scolaire*.

Chamber finds that the Accused had the authority to prevent or stop the inhumane treatment of Tutsi civilians but failed to do so.

5.12.5. Events at Various Roadblocks in Butare and Gikongoro

5.12.5.1. Evidence

Prosecution Witness YAA

449. YAA testified that one roadblock was erected in the Arab Quarters, either between 7 and 8 April or even in the night of 6 April.⁶³¹ YAA saw it between 6 and 12 April when he went to a shop. He recalled that it was manned by 12 ESO soldiers, wearing dark green trousers and shirts, a camouflage jacket and shoes and caps that were normally worn by soldiers. They were armed with personal weapons. Each soldier had a loaded gun. The witness told the Chamber that people were intercepted at the roadblock and asked to show their identity cards. According to YAA's account, some people were struck with weapons.⁶³² Most of the persons intercepted were Tutsi and they were beaten up while Hutu were allowed to pass.⁶³³ YAA did not know specifically why the soldiers targeted Tutsis, but surmised that Tutsis were generally perceived as RPF accomplices.⁶³⁴

Prosecution Witness QY

450. Witness QY testified that she also encountered the Arab Quarters' roadblock in early April 1994.⁶³⁵ As she approached the checkpoint, she recalled that ESO soldiers asked her where she was coming from and where she was going. She answered that she was coming from the University Hospital, where she had gone to receive treatment for an injury she had sustained at the hand of some Hutus. According to her account, the soldiers allowed her to pass through the roadblock as she stated that her father was a Hutu and her mother was a Tutsi. However, they undressed her and mocked various sections of her anatomy.⁶³⁶

Prosecution Witness AFV

451. Witness AFV testified that at about 1:00 p.m. on 20 April 1994, she came up to a roadblock at the University Hospital laboratory. She stated that four armed soldiers carrying cartridge belts and grenades were manning the roadblock.⁶³⁷ The soldiers asked passers-by to present identity cards and separated the Hutu from the Tutsi.⁶³⁸ Hutu were allowed to pass, but Tutsi were asked to stay and were searched.⁶³⁹

⁶³¹ T. 8 March 2005, p. 42 (I.C.S.).

⁶³² T. 8 March 2005, p. 42 (I.C.S.).

⁶³³ T. 8 March 2005, p. 43 (I.C.S.).

⁶³⁴ T. 8 March 2005, pp. 41-43 (I.C.S.).

⁶³⁵ T. 8 June 2005, p. 17.

⁶³⁶ T. 8 June 2005, p. 18.

⁶³⁷ T. 21 June 2005, p. 12.

⁶³⁸ T. 21 June 2005, p. 13.

⁶³⁹ T. 21 June 2005, p. 13.

452. AFV said that the soldiers searched her, beat her, and asked if she thought she was extraordinary. One of the soldiers said, “Let us look at this Tutsi's sexual organs. How come you are working when the others aren't?”⁶⁴⁰

453. The witness stated that two armed soldiers then accompanied her from the roadblock, claiming that they would accompany her home, but instead they took her to the woods.⁶⁴¹ As they walked, they beat her and stated that they were going to look at her sexual organ to see to what extent she was extraordinary.⁶⁴² AFV further testified that they then undressed her by taking off her underpants while she was sitting, tied her with her sweater, and blindfolded her with her other clothing.⁶⁴³ She asked that he should kill her rather than rape her. One of the soldiers hit her head against the ground and she lost consciousness.⁶⁴⁴ When she woke up, she realized she was bleeding from her sexual organ, and could not bring her legs together.

Defence Witness MO15

454. Defence Witness MO15 reported that during April 1994 roadblocks were setup at the Arab Quarters, at the Hotel Faucon, at the crossroads between Gikongoro and Kigali, and another at *Chez Bihira*.⁶⁴⁵ According to Witness M015, the company responsible for providing personnel for the roadblocks was the *compagnie d'intervention*, which was commanded by Lieutenant Gakwerere from ESO.⁶⁴⁶

455. Although he did not know what instructions were given to the personnel manning the roadblocks, he knew that the soldiers were there to ensure security in Butare town.⁶⁴⁷ He explained that the soldiers were asking for the identification documents of people who passed through the roadblocks.⁶⁴⁸ Soldiers were always allowed to pass through the roadblocks but he did not know whether civilians who did not have identification papers could also pass the checkpoints.⁶⁴⁹ Under cross-examination the witness explained that it was common knowledge that their enemies were infiltrating among the refugees and were carrying out their terrorist acts in the country; he testified that their enemies were the RPF.⁶⁵⁰

5.12.5.2. *Deliberations*

456. Having considered the evidence of Prosecution Witnesses YAA, AFV, and QY and Defence Witness MO15, the Chamber is satisfied beyond reasonable doubt that ESO soldiers stopped, searched and beat many Tutsi civilians at various roadblocks throughout Butare from April to June 1994. Prosecution Witnesses AFV and QY were among the victims of such mistreatment. Due to the large number of roadblocks set up in Butare, the

⁶⁴⁰ T. 21 June 2005, p. 14.

⁶⁴¹ T. 21 June 2005, p. 14.

⁶⁴² T. 21 June 2005, pp. 14-15.

⁶⁴³ T. 21 June 2005, p. 16.

⁶⁴⁴ T. 21 June 2005, p. 16.

⁶⁴⁵ T 9 March 2006, p. 4 (I.C.S.).

⁶⁴⁶ T 9 March 2006, p. 4 (I.C.S.).

⁶⁴⁷ T 9 March 2006, p. 6 (I.C.S.).

⁶⁴⁸ T 9 March 2006, p. 6 (I.C.S.).

⁶⁴⁹ T 9 March 2006, p. 6 (I.C.S.).

⁶⁵⁰ T 10 March 2006, p. 14 (I.C.S.).

widespread nature of attacks on Tutsis at these roadblocks, the proximity of some of the roadblocks to the ESO Camp, and the fact that ESO soldiers were routinely deployed to man the roadblocks, the Chamber concludes that Muvunyi had reason to know about them. As Commander of ESO Camp, Muvunyi had the human and material resources at his disposal to put a stop to the illegal activities of his subordinates at the roadblocks, but failed to do so. He also failed to punish their criminal conduct.

CHAPTER III: THE LAW

457. In the following sections, the Chamber will discuss the applicable law on individual criminal responsibility relevant to this case, before addressing the specific crimes charged in the Indictment and the Chamber's legal findings on the liability of the Accused.

1. INDIVIDUAL CRIMINAL RESPONSIBILITY UNDER ARTICLE 6(1) AND 6(3)

458. In the Indictment and Schedule of Particulars, the Prosecution charged the Accused with individual criminal responsibility pursuant to Article 6(1) for genocide, or in the alternative complicity in genocide, direct and public incitement to commit genocide, and for rape as a crime against humanity. The Accused is also charged with command responsibility under Article 6(3) for genocide, or complicity in genocide, as well as rape and other inhumane acts as crimes against humanity.⁶⁵¹

459. The principle of individual responsibility for serious violations of international criminal law is one of the key indicators of a paradigm shift from a view of international law as law exclusively made for and by States, to a body of rules with potential application to individuals. It is now recognized that the principle of individual responsibility for serious violations of international law, affirmed in Article 6(1) of the Statute, is reflective of customary international law.⁶⁵² Indeed, it has been established since the Versailles Treaty and especially the Nuremberg and Tokyo trials, that crimes under international law are physically committed by individuals and that irrespective of their official status, only by punishing such individuals for their criminal conduct, can the fundamental values of international law have meaning and efficacy.

Article 6(1)

460. The jurisprudence of the *ad-hoc* Tribunals has clearly established that criminal liability under Article 6(1) is incurred not only by individuals who physically commit a crime, but also by those who are accomplices because they participated in or otherwise contributed to the commission of a crime by others.⁶⁵³ Such forms of participation include planning, instigating, ordering, or aiding and abetting the principal offender's actions. Moreover, the participation of the Accused must have substantially contributed to, or have

⁶⁵¹ *Prosecutor v. Muvunyi*, Indictment, filed on 23 December 2003; Schedule of Particulars filed on 28 February 2005. Article 6(1) of the Statute of the ICTR provides: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime."

Article 6(3) provides: "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."

⁶⁵² *Delalic et al. (Celebici)*, Judgement (TC), para 321 and sources cited therein.

⁶⁵³ *Akayesu*, Judgement (TC), para. 473; *Kayishema and Ruzindana*, Judgement (TC), para. 196; *Semanza*, Judgement (TC), para. 377; *Delalic et al. (Celebici)*, Judgement, (TC), para 319.

had a substantial effect on, the completion of the crime.⁶⁵⁴ The Chamber notes that accomplice liability under Article 6(1) is different from the substantive crime of complicity in genocide under Article 2(3)(e) of the Statute.

461. The mental element required for responsibility under Article 6(1) depends on the form of participation alleged by the Prosecution. An accused who is alleged to have “committed” an offence, in the sense of direct physical perpetration, must possess the requisite *mens rea* for the underlying offence.⁶⁵⁵ Where it is alleged that the accused participated as an accomplice in the commission of a crime by another, his responsibility under Article 6(1) will depend upon whether the Prosecution proves that he was aware of the *mens rea* of the principal perpetrator.⁶⁵⁶ The requirement that the Accused must have knowledge of, rather than share, the principal perpetrator’s *mens rea*, also applies to a charge of aiding and abetting genocide.⁶⁵⁷

462. Having analysed the general requirements for individual responsibility under Article 6(1), the Chamber will now discuss the various forms of participation as laid down in the jurisprudence. The Chamber’s discussion will be limited only to the forms of participation relevant to the present case.

Committing

463. Generally speaking, “committed” under Article 6(1) has been interpreted to mean “direct and physical perpetration” of the crime by the accused himself or his culpable omission to fulfil a duty imposed by law and attracting a penal sanction. It also includes participation in the commission of a crime by way of joint criminal enterprise.⁶⁵⁸ Since joint criminal enterprise is not pleaded in the present case, the Chamber need not address it in detail. As already discussed, an accused who is alleged to have “committed” an offence, in the sense of direct physical perpetration, must possess the requisite *mens rea* for the underlying offence.⁶⁵⁹

⁶⁵⁴ *Kayishema and Ruzindana*, Judgement (TC), para. 207; affirmed by the Appeals Chamber, at para. 186; *Semanza*, Judgement (TC) para. 379; *Musema*, Judgement (TC) para. 126; *Kajelijeli*, Judgement (TC), para. 759.

⁶⁵⁵ *Semanza*, Judgement (TC), para. 387; *Kayishema & Ruzindana*, Judgement (AC), para. 187: “... any finding of direct commission requires the direct personal or physical participation of the accused in the actual acts which constitute a crime under the Statute, together with the requisite knowledge.”

⁶⁵⁶ *Kayishema & Ruzindana*, Judgement (AC), para. 186; *Aleksovski*, Judgement (AC), para. 162; *Tadic*, Judgement (AC), para. 229; *Blaškic*, Judgement (AC), paras. 46, 49, 50.

⁶⁵⁷ *Ntakirutimana*, Judgement (AC), para. 500, 501 and authorities cited therein; *Krstic*, Judgement (AC), paras. 140, 143. But see G. Mettraux, *International Crimes and the ad-hoc Tribunals*, 2005, p 287, who expresses “serious doubt” about the correctness of this position and suggests that a conviction for aiding and abetting genocide, should in certain circumstances, require proof that the aider and abettor possessed the specific intent to commit genocide.

⁶⁵⁸ *Gacumbitsi*, Judgement (AC), para. 60; *Ntakirutimana*, Judgement (AC), para. 462; *Kayishema and Ruzindana*, Judgement (AC), para. 187, citing with approval *Tadic*, Judgement (AC), para. 188. See also *Simba*, Judgement (TC), para. 385; *Kajelijeli*, Judgement (TC), para. 764; *Kamuhanda*, Judgement (TC), para. 595.

⁶⁵⁹ *Semanza*, Judgement (TC), para. 387; *Kayishema and Ruzindana*, Judgement (AC), para. 187: “... any finding of direct commission requires the direct personal or physical participation of the accused in the actual acts which constitute a crime under the Statute, together with the requisite knowledge.”

Instigating

464. To ground individual responsibility for instigation pursuant to Article 6(1), the Accused must have encouraged, urged, or otherwise prompted another person to commit an offence under the Statute. Such instigation may arise from a positive act or a culpable omission. The instigation of the Accused must have a substantial nexus to the actual commission of the crime. Instigation differs from incitement in that it does not have to be direct or public. Therefore, private, implicit or subdued forms of instigation could ground liability under Article 6(1) if the Prosecution can prove the relevant causal nexus between the act of instigation and the commission of the crime.⁶⁶⁰

465. The *mens rea* required to establish a charge of instigating a statutory crime is proof that the Accused directly or indirectly intended that the crime in question be committed and that he intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of the crime would be a probable consequence of his acts.⁶⁶¹

466. The instigation of the accused must have a substantial effect on the actual commission of the crime and represents a general form of participation relevant to every crime in the Statute. However, direct and public incitement is only relevant in the context of genocide and it is criminalised as such. The Prosecution must therefore prove that a person accused of direct and public incitement to commit genocide shared the special intent of the principal perpetrator.

Ordering

467. Ordering under Article 6(1) requires that a person in a position of authority uses that position to issue a binding instruction to or otherwise compel another to commit a crime punishable under the Statute.⁶⁶² In *Semanza*, the Appeals Chamber held that “no formal superior-subordinate relationship between the Accused and the perpetrator is required” to establish the *actus reus* of “ordering” under Article 6(1).⁶⁶³ However, proof of such a relationship may be evidentially relevant to show that the person alleged to have issued the order, was in a position of authority.

468. The responsibility for ordering the commission of a crime could also be proved by circumstantial evidence, but as required by the jurisprudence, the Chamber will thoroughly evaluate such evidence and treat it with caution.

Aiding and Abetting

469. Aiding and abetting reflect forms of accomplice liability. The aider and abettor is usually charged with responsibility for providing assistance that furthers the principal perpetrator’s commission of a crime. It is therefore required that the conduct of the aider and abettor must have a substantial effect on the commission of the crime by the principal

⁶⁶⁰ *Akayesu*, Judgement (TC), para. 482; *Bagilishema*, Judgement (TC), para. 30; *Kamuhanda*, Judgement (TC), para. 593; *Semanza*, Judgement (TC), para. 381, *Kajelijeli*, Judgement (TC), para. 381.

⁶⁶¹ *Bagilishema*, Judgement (TC), para. 31. See also *Blaskic*, Judgement (TC), para 278; *Kordic and Cerkez*, Judgement (TC), para. 386, 387; *Naletilic and Martinovic*, Judgement, (TC), para. 60.

⁶⁶² *Bagilishema*, Judgement (TC), para. 30.

⁶⁶³ *Semanza*, Judgement (AC), para. 361, citing *Kordic and Cerkez*, para. 28.

perpetrator, although it need not constitute an indispensable element of the ultimate crime.⁶⁶⁴

470. The jurisprudence has been fairly consistent in interpreting “aiding and abetting” as distinct legal concepts. The former implies assistance, and the latter implies facilitating, encouraging, or advising the commission of a crime.⁶⁶⁵ The mental element required for liability as an aider and abettor is knowledge of the Accused that his conduct (either a positive act or culpable omission) assists the principal perpetrator in the commission of the crime.⁶⁶⁶ With respect to aiding and abetting genocide, the only mental element required is proof that the Accused knew of the genocidal intent of the actual perpetrator, but he need not share this specific intent.⁶⁶⁷

471. Aiding and abetting genocide refers to “all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide.”⁶⁶⁸ Although the terms aiding and abetting may appear synonymous, they are in fact different. “Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto”.⁶⁶⁹ Thus, individual criminal responsibility can be incurred where there is either aiding or abetting, but not necessarily both. Besides, the aider or abettor need not be present during the commission of the crime.⁶⁷⁰ Additionally, the ICTY Appeals Chamber has stated that in order for an accused person to be convicted of aiding and abetting the commission of a crime, it must be established that he had knowledge that the principal perpetrator(s) intended to commit the underlying crime.⁶⁷¹

472. Liability for aiding and abetting can also be incurred by way of omission such as the case of the so-called “approving spectator” where a person in a position of authority is present either at the scene of the crime or within its immediate vicinity, under circumstances where his presence leads the perpetrators to believe that he approved, encouraged or was giving moral support to their actions. The *mens rea* required for liability as an approving spectator is knowledge on the part of the Accused that the perpetrators would see his presence as approval or encouragement.⁶⁷²

⁶⁶⁴ *Gacumbitsi*, Judgement (AC), para. 140; *Bagilishema*, Judgement (TC), para. 33, relying upon *Furundžija*, Judgement (TC), para. 199, to the effect that the conduct of the aider and abettor is not a *conditio sine qua non* for the commission of the crime.

⁶⁶⁵ *Semanza*, Judgement (TC), para. 384; *Kamuhanda*, Judgement (TC), para. 596; *Rutaganda*, Judgement (TC), para. 42, 43.

⁶⁶⁶ *Kajelijeli*, Judgement (TC), para. 768; *Kamuhanda*, Judgement (TC), para. 599.

⁶⁶⁷ *Krstic*, Judgement (AC), paras. 140, 143.

⁶⁶⁸ *Blagojevic and Jokic*, Judgement (TC), 2005, para. 777; See also *Brdjanin and Talic*, Judgement (TC), para. 729; *Krnojelac*, Judgement (TC), paras. 88-90.

⁶⁶⁹ *Akayesu*, Judgement (TC), para. 484. See also *Semanza*, Judgement (TC), para. 384.

⁶⁷⁰ *Akayesu*, Judgement (TC), para. 484.

⁶⁷¹ *Vasiljevic*, Judgement (AC), para. 142.

⁶⁷² *Akayesu*, Judgement (TC), para. 692; *Bagilishema*, Judgement (TC), paras. 34, 36.

Article 6(3)

473. Article 6(3) of the Statute lays down the principle of superior or command responsibility which is well established in customary international law and specifically mentioned in the Geneva Conventions on international humanitarian law. While the principle was initially applied to the responsibility of military commanders for the criminal actions of their subordinates during war (hence the term “command responsibility”), it is now clearly established that both civilian and military superiors may, under appropriate circumstances, be held responsible for the actions of those under their authority or command.⁶⁷³ In *Kayishema and Ruzindana*, the Trial Chamber concurred with the distinction drawn in the Rome Statute of the International Criminal Court (the “ICC”) with respect to the mental element required for superior responsibility of military commanders *vis-à-vis* other superiors.⁶⁷⁴ The Chamber in that case noted that Article 28 of the Statute of the ICJ imposes a more active duty on military superiors to control the activities of subordinates under their effective command and control where they “knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.” Under such circumstances, the military commander is under an obligation to take all necessary and reasonable measures to prevent or punish criminal acts committed by his subordinates. On the other hand, non-military superiors are only expected to have known or consciously disregarded information which clearly indicated that their subordinates were committing or about to commit crimes. The Chamber agrees with this distinction and notes that the nature of military service and discipline is consistent with the expectation that superior military officers have a more active duty to inquire about the possible criminal behaviour of men under their command and to prevent or punish such behaviour when it occurs.

474. Irrespective of the civilian or military status of the Accused, the Prosecution must prove four essential elements in order to establish liability under Article 6(3). It must lead evidence that proves beyond reasonable doubt that the Accused was the superior of the actual perpetrators of an offence punishable under the Statute; that he knew or had reason to know that a criminal act was about to be or had been committed; that he had effective control over the perpetrators in the sense of the material ability to prevent or punish their crimes; and that he did not take necessary and reasonable measures to prevent or punish the commission of the crime.⁶⁷⁵

475. While the formal legal status of the Accused may be relevant to the determination of effective control, the power to prevent or punish cannot be inferred solely on the basis of the existence of formal status. Indeed, as stated by the Appeals Chamber in the *Kajelijeli* Judgement, power or authority for the purposes of Article 6(3) responsibility can be attributed to superiors who hold their positions either on a *de jure* or a *de facto* basis.⁶⁷⁶ For

⁶⁷³ *Akayesu*, Judgement (TC), para. 491 suggesting that the application of superior responsibility to civilians is contentious. However, in *Kayishema and Ruzindana*, *Musema*, and *Kajelijeli*, the ICTR held civilian superiors responsible for the actions of their subordinates under Article 6(3). See also the *Celebici* Case, para. 378 where the ICTY Trial Chamber stated that “... the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commander.”

⁶⁷⁴ *Kayishema and Ruzindana*, Judgement (TC), paras. 227, 228.

⁶⁷⁵ *Gacumbitsi*, Judgement (AC), para. 143; *Bagilishema*, Judgement (AC), para. 35; *Delalic et al. (Celebici)*, Judgement (AC), para. 182 ff; *Blaškic*, Judgement (AC), para. 53-85.

⁶⁷⁶ *Kajelijeli*, Judgement (AC), para. 85.

this purpose, effective control reflects the superior's material ability to prevent or punish the commission of offences by his subordinates. Where *de jure* authority is proved, a court may presume the existence of effective control on a *prima facie* basis. Such a presumption can, however, be rebutted by showing that the superior had ceased to possess the necessary powers of control over subordinates who actually committed the crimes.⁶⁷⁷

2. GENOCIDE

476. In Count 1 of the Indictment, the Prosecution charges the Accused with genocide following a series of specifically described acts or omissions through which he is alleged to be responsible for killing and/or causing serious bodily and mental harm to members of the civilian Tutsi population, with the intent to destroy, in whole or in part, the Tutsi ethnic group. These charges are pursuant to Article 6(1) of the Statute, which holds the Accused individually responsible for his alleged direct participation in the crime, and Article 6(3), which holds him individually responsible as a superior for the crimes allegedly committed by his subordinates.

477. The Statute provides a list of specific types of conduct which constitute the *actus reus* of genocide. Under Article 2(2) of the Statute,⁶⁷⁸ 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.

478. Because of its element of *dolus specialis* (special intent), which requires that the crime be committed with the specific intent to destroy in whole or in part, a national, ethnic, racial or religious group as such, genocide is considered a unique crime.⁶⁷⁹

Mens Rea

479. For an accused person to be found guilty of the crime of genocide, it must be proved that he possessed the requisite *mens rea* in addition to committing any of the genocidal acts listed in Article 2 of the Statute.⁶⁸⁰ Therefore, it must be established that he committed any of the enumerated acts in Article 2(2) with the specific intent to destroy, in whole or in part, a group, as such, which is defined by one of the protected categories of nationality, race, ethnicity or religion.⁶⁸¹ While there is no upper or lower limit to the number of victims from

⁶⁷⁷ *Delalic et al. (Celebici)*, Judgement (AC), para. 197.

⁶⁷⁸ Based on Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"), adopted by the United Nations General Assembly on 9 December 1948. The Genocide Convention is 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.

⁶⁷⁹ *Serushago*, Judgement (TC), para. 15; *Rutaganda*, Judgement (TC), para. 59.

⁶⁸⁰ *Semanza*, Judgement (TC), paras. 311-313

⁶⁸¹ Article 2(2) of the Statute; *Simba*, Judgement (TC), para. 412; *Ndindabahizi*, Judgement (TC), paras. 453-454; *Ntagerura et al.*, Judgement (TC), para. 662. See also *Niyitegeka*, Judgement (AC) para. 48; *Ntakirutimana*, Judgement (TC), para. 784; *Bagilishema*, Judgement (TC), paras. 60-61; *Musema*, Judgement

the protected group, the Prosecution must prove beyond reasonable doubt that the perpetrator acted with the intent to destroy at least a substantial part of the group.⁶⁸² Furthermore, an accused can be found guilty of committing genocide even if his personal motivation went beyond the criminal intent to commit genocide.⁶⁸³

480. In *Akayesu*, the Trial Chamber noted that in the absence of a confession or other admission, it is inherently difficult to establish the genocidal intent of an accused. At the same time, it noted that a Chamber may make a valid inference about the mental state of the accused on the basis of a number of factors.⁶⁸⁴ Thus, where it is impossible to adduce direct evidence of the perpetrator's intent to commit genocide, such intent may be inferred from the surrounding facts and circumstances.⁶⁸⁵ In attempting to establish genocidal intent, the Chamber can rely on a variety of factors including the overall context in which the crime occurred, the systematic targeting of the victims on account of their membership in a protected group, the fact that the perpetrator may have targeted the same group during the commission of other criminal acts, the scale and scope of the atrocities committed, the frequency of destructive and discriminatory acts, whether the perpetrator acted on the basis of the victim's membership in a protected group and whether the perpetrator's intent was to destroy that group in whole or in part, as such.⁶⁸⁶

481. The Chamber concurs with this reasoning and will be guided by the above jurisprudence in determining whether the Accused in this case possessed specific genocidal intent.

"To Destroy"

482. Article 2 of the Statute requires a showing that the perpetrator committed any of the enumerated acts with the intent to destroy a group. Trial Chambers at the Tribunal have tended to interpret the term broadly so that it not only entails acts that are undertaken with the intent to cause death but also includes acts which may fall short of causing death.⁶⁸⁷

"In Whole or in Part"

483. In order for an accused person to be convicted of genocide, the Prosecution must prove beyond a reasonable doubt that the accused acted with the intent to destroy the group

(TC), para. 164; *Rutaganda*, Judgement (TC), para. 49; *Kayishema and Ruzindana*, Judgement (TC), para. 91; *Akayesu*, Judgement (TC), para. 517.

⁶⁸² *Simba*, Judgement (TC), para. 412; *Semanza*, Judgement (TC), para. 316.

⁶⁸³ *Ntakirutimana*, Judgement (AC), paras. 302-304; *Niyitegeka*, Judgement (AC), paras. 48-53.

⁶⁸⁴ *Akayesu*, Judgement (TC), para. 523. See also *Bagilishema*, Judgement (TC), paras. 62-63; *Musema*, Judgement (TC), paras. 166-167; *Rutaganda*, Judgement (TC), paras. 61-63; *Kayishema and Ruzindana*, Judgement (TC), para. 93; *Jelišić*, Judgement (TC), para. 73.

⁶⁸⁵ *Simba*, Judgement (TC), para. 413; *Kayishema and Ruzindana*, Judgement (Reasons) (AC), para. 159; *Rutaganda*, Judgement (AC), para. 525; *Gacumbitsi*, Judgement (AC), para. 40, noting that "by its very nature, intent is not usually susceptible to direct proof. Only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent. Intent thus must usually be inferred." See also *Krstić*, Judgement (AC), para. 34; *Jelišić*, Judgement (AC), para. 47.

⁶⁸⁶ *Semanza*, Judgement (AC), paras. 261-262; *Rutaganda*, Judgement (AC), para. 525; *Ndindabahizi*, Judgement (TC), paras. 454; *Ntagerura et al.*, Judgement (TC), para. 663.

⁶⁸⁷ *Kayishema and Ruzindana*, Judgement (TC), para. 95;

as such, in whole or in part.⁶⁸⁸ At the very least, it must be shown that the intent of the perpetrator was to destroy a substantial part of the group,⁶⁸⁹ regardless of the number of victims actually involved.⁶⁹⁰

Protected Groups

484. The jurisprudence of the Tribunal indicates that although the Statute does not clearly establish the criteria for determining protected groups under Article 2, the Trial Chambers have tended to decide the matter on a case-by-case basis, taking into consideration both the objective and subjective particulars, including the historical context and the perpetrator's intent.⁶⁹¹ In *Karemera*, the Appeals Chamber upheld the Trial Chamber's decision taking judicial notice of "the existence of the *Twa*, *Tutsi* and *Hutu* as protected groups falling under the Genocide Convention."⁶⁹² It is not disputed in the present case that the Tutsi are members of a protected group under the Statute.

"As Such"

485. The term "as such" has been interpreted to mean that the prohibited act must be committed against a person based on that person's membership in a specific group and specifically because the person belonged to this group, such that the real victim is not merely the person but the group itself.⁶⁹³

Killing Members of the Group

486. In addition to establishing that an accused person possessed the requisite intent to commit genocide, the Prosecutor must also show that the accused intentionally killed one or more members of the group, and that the victim or victims belonged to the targeted protected group. A showing of premeditation is not necessary.⁶⁹⁴

Causing Serious Bodily or Mental Harm

487. Although the Statute does not provide definitions for the terms "serious bodily harm" and "serious mental harm", the various Trial Chambers have concluded that the

⁶⁸⁸ *Bagilishema*, Judgement (TC), para. 58; *Musema*, Judgement (TC), para. 165; *Rutaganda*, Judgement (TC), para. 60; *Kayishema and Ruzindana*, Judgement (TC), paras. 95, 96, 98; *Akayesu*, Judgement (TC), para. 521.

⁶⁸⁹ *Bagilishema*, Judgement (TC), para. 64.

⁶⁹⁰ *Semanza*, Judgement (TC), para. 316.

⁶⁹¹ See, e.g., *Bagilishema*, Judgement (TC), para. 65; *Musema*, Judgement (TC), paras. 161-163; *Rutaganda*, Judgement (TC), paras. 56-58; *Kayishema and Ruzindana*, Judgement (TC), para. 98; *Akayesu*, Judgement (TC), para. 702. See also *Jelišić*, Judgement (TC), paras. 69-72 (using a subjective approach to determine definition of a group while holding that the intent of the drafters of the Genocide convention was that groups were to be defined objectively).

⁶⁹² *Karemera et al.*, "Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice" (AC), 16 June 2006, para. 25; "Decision on Prosecution Motion for Judicial Notice" (TC), 9 November 2005, para. 8.

⁶⁹³ *Niyitigeka*, Judgement (TC), para. 410; *Akayesu*, Judgement (TC), para. 521.

⁶⁹⁴ *Bagilishema*, Judgement (TC), paras. 55, 57-58; *Musema*, Judgement (TC), para. 155; *Rutaganda*, Judgement (TC), paras. 49, 50, 60; *Kayishema and Ruzindana*, Judgement (TC), paras. 99, 103; *Akayesu*, Judgement (TC), paras. 499-501; *Semanza*, Judgement (TC), para. 319. See also *Kayishema and Ruzindana*, Judgement (AC), para. 151.

intent of the framers was to punish serious acts of physical violence that do not necessarily result in the death of the victim. On the one hand, serious bodily harm has been held to include acts of sexual violence, ones that seriously injure the health of the victim, cause disfigurement, or result in serious injury to the victim's senses or organs.⁶⁹⁵ An accused can be found guilty of causing serious bodily harm even if the injury suffered by the victim is not of a permanent or irremediable nature.⁶⁹⁶ On the other hand, the term "serious mental harm" has been interpreted to mean a significant injury to the mental faculties of the victim.⁶⁹⁷ For an accused to be convicted of causing serious bodily or mental harm under the Statute, it must be shown that the perpetrator, in addition to possessing the requisite *mens rea* for genocide, acted with intent to cause such harm to one or more members of the protected group in question and that the victim or victims did in fact belong to the targeted group.⁶⁹⁸

Other Enumerated Acts

488. The other acts of genocide enumerated in Article 2(2) of the Statute, to wit, deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group, are not at issue in the present case and therefore will not be discussed by the Chamber.

Findings on the Accused's Responsibility for Genocide

489. The Prosecution alleges in Count I of the Indictment that pursuant to Article 6(1) of the Statute, the Accused bears individual criminal responsibility for various acts of genocide.

490. To establish the Accused's individual criminal responsibility pursuant to Article 6(1) of the Statute, the Prosecution relies on Paragraphs 2.2, 2.3, 3.10(ii)-3.10(v), 3.15, 3.17, 3.19, 3.20-3.30, 3.31, 3.32, 3.33, 3.34, 3.36, 3.40, 3.41-3.41(i), 3.46, 3.48, and 3.52 of the Indictment.

491. The Prosecution also charges the Accused with genocide pursuant to Article 6(3) of the Statute. Under this provision, the fact that any of the crimes enumerated in Articles 2 to 4 "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."

⁶⁹⁵ *Kayishema and Ruzindana*, Judgement (TC), para. 109; *Semanza*, Judgement (TC), para. 320. See also the *Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May – 26 July 1996*, UN GAOR International Law Commission, 51st Sess., Supp. No. 10, p. 91, UN Doc. A/51/10 (1996) ("The bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.").

⁶⁹⁶ *Bagilishema*, Judgement (TC), para. 59; *Musema*, Judgement (TC), para. 156; *Rutaganda*, Judgement (TC), para. 51; *Kayishema and Ruzindana*, Judgement (TC), para. 108; *Akayesu*, Judgement (TC), para. 502.

⁶⁹⁷ *Kayishema and Ruzindana*, Judgement (TC), para. 110; *Semanza*, Judgement (TC), para. 321.

⁶⁹⁸ *Bagilishema*, Judgement (TC), paras. 55, 59; *Musema*, Judgement (TC), paras. 154, 156; *Rutaganda*, Judgement (TC), paras. 49, 51, 60; *Kayishema and Ruzindana*, Judgement (TC), paras. 100, 108-110, 112-113; *Akayesu*, Judgement (TC), paras. 502, 712, 721.

492. In alleging the Accused's superior responsibility pursuant to Article 6(3) of the Statute, the Prosecution relies on Paragraphs 2.2, 2.3, 3.10(ii)-3.10(v), 3.17, 3.19, 3.20-3.30, 3.31, 3.32-3.34(i), 3.35-3.43, 3.45 and 3.52 of the Indictment.

493. During the course of the trial, the Chamber heard extensive evidence from both Prosecution and Defence witnesses pointing to the fact that in the days and weeks following the death of President Habyarimana on 6 April 1994, Tutsi civilians in the Butare area were targeted for elimination. During that period, acts similar to those enumerated in Article 2(2) of the Statute were perpetrated against the Tutsi population by soldiers from the ESO and Ngoma Camps, as well as by members of the *Interahamwe* Hutu militia.

494. The Chamber has carefully examined the Prosecution evidence in support of Count 1 of the Indictment (Genocide) and notes that at least 18 Prosecution witnesses⁶⁹⁹ testified in support of the count of genocide. Among the facts established through these witnesses' testimonies are the following: that the Accused was the Interim Commander of the *École des sous-officiers* (ESO) in Butare, with authority over the school's soldiers and other military personnel; that ESO was charged with responsibility for security in central Butare *prefecture*, including Butare town; that ESO soldiers either by themselves, or in collaboration with soldiers from Ngoma Camp and *Interahamwe* militia, attacked and killed many unarmed Tutsi civilians at various locations throughout Butare town in April and May 1994; that the circumstances under which these attacks took place were such that the Accused knew or had reason to know about them; that the Accused had effective control over the ESO soldiers who conducted these attacks, in the sense that he had the human and material resources at his disposal at ESO to either prevent the attacks or punish the perpetrators; and finally that the Accused failed to take necessary and reasonable measures to prevent attacks by ESO soldiers and *Interahamwe* militia and to punish their perpetrators.

495. The question before the Chamber is whether there is any clear evidence that the Accused planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the genocide. While there is no reliable or convincing evidence of direct participation by the Accused in any of the alleged acts of genocide, the Chamber is satisfied that on the whole there is sufficient and corroborated evidence to demonstrate that the Accused, by virtue of his position, had reason to know that ESO soldiers and other persons were committing genocidal acts. The Chamber also concludes that despite his effective control over the said soldiers, the Accused deliberately refrained from taking appropriate action to prevent such crimes or to punish the perpetrators.

496. On the basis of the testimonies of the various witnesses, it is clear to the Chamber that the Accused himself possessed the intent to destroy, in whole or in part, the Tutsi ethnic group, as such. For instance, when soldiers from the ESO were in the process of attacking unarmed civilian Tutsi refugees at the *Groupe scolaire*, the Accused refused to come to the refugees' assistance. Instead, he gave instructions that members of a certain family should be separated from the other Tutsi refugees and should not be harmed. Indeed, even when one child from this family was mistakenly taken away together with the other Tutsi refugees, the Accused sent a vehicle to try to rescue the child. The overall conduct of the Accused during this event, including the fact that he implicitly allowed a large contingent of soldiers under his command to leave their Camp fully equipped with arms

⁶⁹⁹ Prosecution Witnesses QX, KAL, YAA, QCQ, YAO, XV, CCR, CCQ, YAN, YAQ, YAP, CCP, QBE, TM, TQ, YAK, QCM and NN.

and ammunition to attack unarmed refugees, his instruction to these soldiers not to kill or otherwise harm members of the Bicunda family, while leaving the vast majority of unarmed Tutsi refugees at the mercy of the genocidal killers, amounted to tacit approval of the unlawful conduct of the ESO soldiers. This approval assisted and encouraged the killing of the Tutsi civilians at the *Groupe scolaire*. There is no doubt that in light of the general situation in Rwanda, and specifically in Butare in 1994, the Accused had knowledge that ESO soldiers, who were his subordinates, had attacked or were about to attack unarmed Tutsi civilians at the *Groupe scolaire* for no other reason than their Tutsi ethnic identification. By his tacit approval of the conduct of the ESO soldiers, the Accused substantially contributed to the crime of genocide. The Chamber therefore finds the Accused individually responsible for aiding and abetting genocide pursuant to Article 6(1) of the Statute.

497. Furthermore, the Chamber concludes that the Accused is individually responsible as a superior for the killing of Tutsi civilians by ESO soldiers at the Butare University Hospital, at the University of Butare, at the Beneberika Convent, at Mukura forest, and at various roadblocks in Butare. In light of the material and human resources available to the Accused as Commander of ESO, he exercised effective control over the attackers in the sense of his material ability to prevent or punish their criminal wrongdoing. The Accused failed to take necessary and reasonable measures to prevent the killings or to punish the perpetrators. For the above reasons, the Chamber finds that the Accused bears superior responsibility under Article 6(3) of the Statute for the crime of genocide.

498. The Chamber therefore finds Muvunyi guilty of genocide pursuant to Article 6(1) of the Statute for the attack at the *Groupe scolaire*; and pursuant to Article 6(3) for the attacks at the Butare University Hospital, the University of Butare, the Beneberika Convent, the Mukura forest, and at various roadblocks in Butare.

3. COMPLICITY IN GENOCIDE

499. The Chamber recalls that Count 2 is charged as an alternative to Count 1 of the Indictment. Since the Accused has already been found guilty of genocide on Count 1, the Chamber sees no need to make any finding on the charge of complicity in genocide in Count 2.⁷⁰⁰ Count 2 is hereby DISMISSED.

4. DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE

500. The Chamber notes that Article 2(2) of the Statute defines the offence of genocide, and Article 2(3)(c) provides that direct and public incitement to commit genocide is punishable as a specific crime. The Chamber notes that there is limited jurisprudence on direct and public incitement as an offence at international law. In both *Akayesu* and *Nahimana*, this Tribunal considered the International Military Tribunal (IMT) cases of *Streicher* and *Fritzsche* which dealt with incitement to murder and extermination as crimes against humanity.⁷⁰¹ After *Nuremberg*, this Tribunal's judgement in *Akayesu* was the first occasion on which an international tribunal considered direct and public incitement to commit genocide as a specific offence. The *Akayesu* Trial Chamber considered the meaning

⁷⁰⁰ *Kamuhanda*, Judgement (TC), para. 654.

⁷⁰¹ *Akayesu*, Judgement (TC), para. 550; *Nahimana*, Judgement (TC), paras. 981, 982. The IMT cases could not deal with direct and public incitement because that conduct was first criminalized by the Geneva Conventions of 1948.

of incitement under both the common law and civil law traditions⁷⁰² and concluded that under the Genocide Convention and Article 2(3)(c) of the Statute, direct and public incitement means:

directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places at public gatherings, or through the sale or dissemination, offer for sale or display of written or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.⁷⁰³

501. The Chamber notes that the *Akayesu* definition of direct and public incitement received tacit approval from the Appeals Chamber, and has been consistently applied in other decisions of the Tribunal.⁷⁰⁴ The Chamber therefore adopts the *Akayesu* Trial Chamber's definition of direct and public incitement, as well as its elaboration of the "direct" and "public" elements of that offence.

502. The "direct" element requires more than a vague or indirect suggestion of incitement, and implies that the expression which is alleged to be inciteful, specifically provoke another to engage in criminal conduct. In considering whether incitement is direct, the specific context in which it takes place is important.⁷⁰⁵ Cultural and linguistic factors, as well as the kind of audience the message is addressed to, could help determine whether a particular speech qualifies as direct incitement. An important consideration for the Trial Chamber is whether the members of the audience to whom the message was directed immediately understood its implication.⁷⁰⁶

503. The Chamber agrees with the *Akayesu* judgement that the drafters of the Genocide Convention only intended to criminalize public incitement and to rule out what may constitute private forms of incitement. In determining its "public" character, the Chamber must consider the place where the incitement occurred and whether attendance was selective or limited.⁷⁰⁷ There is no requirement that the incitement message be addressed to a certain number of people or that it should be carried through a specific medium such as radio, television, or a loudspeaker. However, both the number and the medium may provide evidence in support of a finding that the incitement was public.

504. The *Akayesu* Trial Chamber explained the mental element required for direct and public incitement to commit genocide as follows:

The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide.

⁷⁰² *Akayesu*, Judgement (TC), para. 555: "Incitement is defined in Common Law systems as encouraging or persuading another to commit an offence... Civil law systems punish direct and public incitement assuming the form of provocation, which is defined as an act intended to directly provoke another to commit a crime or a misdemeanour through speeches, shouting or threats, or any other means of audiovisual communication. Such provocation... is made up of the same elements as direct and public incitement to commit genocide covered by Article 2 of the Statute..."

⁷⁰³ *Akayesu*, Judgement (TC), para. 559.

⁷⁰⁴ *Akayesu*, Judgement (AC), *Niyitekega*, Judgement (TC), para. 431; *Kajelijeli*, Judgement (TC), paras. 850-855; *Nahimana*, Judgement (TC), paras. 1011-1015.

⁷⁰⁵ *Nahimana*, Judgement (TC), para 1004, noting that context is equally important in considering the potential impact of expression.

⁷⁰⁶ *Akayesu*, Judgement (TC), para. 557, 558; *Niyitekega*, Judgement (TC), para. 431; *Kajelijeli*, Judgement (TC), para 852.

⁷⁰⁷ *Akayesu*, Judgement (TC), para. 555

It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must himself have the specific intent to commit genocide, namely, to destroy in whole or in part, a national, ethnical, racial or religious group as such.⁷⁰⁸

505. The Appeals Chamber has restated and affirmed the Trial Chamber's analysis of *mens rea* for direct and public incitement to commit genocide.⁷⁰⁹ As an inchoate offence or *infraction formelle*, incitement to commit genocide is punishable as such, irrespective of whether or not it succeeded in producing the result intended.⁷¹⁰

Findings on the Accused's Responsibility for Direct and Public Incitement to Commit Genocide

506. The Accused is charged with direct and public incitement to commit genocide under Count III of the Indictment in that he planned, committed, instigated or otherwise aided and abetted the planning, preparation or execution of the said offence pursuant to Article 6(1) of the Statute. In the Indictment, the Prosecution relied on Paragraphs 3.24 and 3.25 in support of this charge; in the Schedule of Particulars, the Prosecution indicated that it was also relying on Paragraph 3.32 of the Indictment. The Chamber has already found that the Prosecution failed to prove the allegation in Paragraph 3.32 of the Indictment.

507. The Chamber has found that at a meeting held at Gikonko in April or May 1994, the Accused addressed a crowd of Hutu male civilians during which he equated Tutsis to "snakes" that should be killed. The Chamber further found that the Accused chastised the *bourgmestre* of Gikonko for hiding a Tutsi man, and asked the latter to produce the said Tutsi so that he could be killed. As a result, a Tutsi man named Vincent Nkurikiyinka, was taken from his hiding place and killed by the mob. The Chamber concludes that Muvunyi's words were spoken in public, were directed to a group of assembled Hutu civilians, and were intended to provoke the said civilians to kill Tutsis. Indeed, when considered in the context of the language and culture of Rwanda, equating Tutsis to snakes was, in the words of socio-linguistic expert Ntakirutimana, synonymous with condemning members of this ethnic group to death. The Chamber is satisfied that Muvunyi knew that his audience immediately understood the genocidal implication of his words and therefore that he had the requisite intent to destroy members of the Tutsi ethnic group in whole or in part as such.

508. The Chamber notes that the Accused's statement that Vincent Nkurikiyinka should be brought out and killed could be interpreted as an order to commit an act of genocide. However, since the Prosecution relied on this incident only to support the count of incitement, the Chamber has not taken into account with respect to the genocide count.

509. The Chamber has also found that at a public meeting held in Gikore in May 1994, Muvunyi made a speech in which he called for the killing of Tutsis, the destruction of Tutsi property, associated Tutsis with the enemy at a time of war, and denigrated Tutsi people by

⁷⁰⁸ *Akayesu*, Judgement (TC), para 560; cited with approval in *Nahimana*, Judgement (TC) para. 1012; and *Kajelijeli*, Judgement (TC), para 854.

⁷⁰⁹ *Akayesu*, Judgement (AC), para. 222-224. See also *Niyitekega*, Judgement, (TC) para. 431; *Nahimana*, Judgement (TC), para. 1012; and *Kajelijeli*, Judgement (TC), para 854.

⁷¹⁰ *Akayesu*, Judgement (TC), para. 562: "... 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 of the perpetrator." See also *Niyitekega*, Judgement (TC) para 431; *Nahimana*, Judgement (TC), para.1013.

associating them with snakes and poisonous agents. The Chamber is satisfied that when considered in the context of the inter-ethnic killings prevalent in Rwanda in 1994, the war between the Tutsi-dominated Rwandan Patriotic Front rebels and the Hutu-dominated Rwandan Army, as well as the culture and language of Rwanda, the audience understood Muvunyi's remarks as a call to kill or otherwise eliminate members of the Tutsi population. The Chamber is also satisfied that Muvunyi knew that his words would be so understood by the audience, and therefore he had the intent to destroy in whole or in part members of the Tutsi ethnic group.

510. The Prosecution has proved all the elements of direct and public incitement to commit genocide under Article 2 (3)(c) of the Statute with respect to the meetings held at Gikonko in April and at Gikore in May 1994. The Chamber therefore finds the Accused bears individual criminal responsibility for that offence pursuant to Article 6(1) of the Statute.

5. CRIMES AGAINST HUMANITY

5.1. GENERAL ELEMENTS

511. The Chamber notes that under Article 3 of the Statute, the definition of "Crimes Against Humanity" consists of two layers. The first layer, ("General Elements") is to the effect that a crime against humanity must be committed as part of a "widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds."⁷¹¹ The second layer lists six specific ("underlying") crimes, plus one residual category of "other inhumane acts" which qualify as crimes against humanity when committed in the context of a widespread or systematic attack on a civilian population on any of the enumerated discriminatory grounds.⁷¹² The two-layered requirement of crimes against humanity under the Statute has been interpreted and applied in a large number of cases before the Tribunal.⁷¹³

512. There is a rich and consistent body of jurisprudence on the meaning of each of the terms that make up the general elements of crimes against humanity. An "attack" is defined as "[a]n unlawful act, event or series of events of the kind listed in Article 3(a) through (i) of the Statute."⁷¹⁴ In accordance with customary international law, the twin elements "widespread" or "systematic" should be read disjunctively and not as cumulative

⁷¹¹ Article 3 provides as follows:

"The International Criminal 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."

⁷¹² *Kupreškic*, Judgement (TC), para. 563; *Akayesu*, Judgement (TC), para. 585.

⁷¹³ *Akayesu*, Judgement (TC), paras. 578-586; *Rutaganda*, Judgement (TC), paras. 64-78; *Musema*, Judgement (TC), paras. 199-213; *Bagilishema*, Judgement (TC), paras. 72-83; *Kamuhanda*, Judgement (TC), paras. 657-676; *Ntakirutimana*, Judgement (TC), paras. 802-804; *Semanza*, Judgement (TC), paras. 324-333; *Niyitegeka*, Judgement (TC), paras. 438-440; *Kajelijeli*, Judgement (TC), paras. 862-883; *Ntagerura et al.*, Judgement (TC), 696-698; *Muhimana*, Judgement (TC), paras. 523-530; *Simba*, Judgement (TC), paras. 420-421.

⁷¹⁴ *Kajelijeli*, Judgement (TC), para 867; *Semanza*, Judgement (TC), para 327; *Akayesu*, Judgement (TC), para. 581.

requirements.⁷¹⁵ “Widespread” refers to the scale of the attack and the multiplicity of victims; “systematic” reflects the organized nature of the attack, excludes acts of random violence, and does not require a policy or plan.⁷¹⁶ However, the existence of such a plan or policy may, for evidential purposes, be relevant in proving that the civilian population was the target of the attack or of its widespread or systematic character.

513. In *Akayesu*, “civilian population” was defined as people not taking an active part in hostilities, members of the armed forces who have surrendered or otherwise laid down their arms, and those who, either for sickness, injury, detention or otherwise, have been placed *hors de combat*. The presence of non-civilians within a group of “civilians” as defined above, does not deny the population of its essential civilian character.⁷¹⁷ The *Bagilishema* Trial Chamber added, relying on *Blaškić*, that in determining the existence of a “civilian population” as a constitutive element of crimes against humanity, the Chamber must consider “the specific situation of the victim at the moment the crimes were committed, rather than his status.”⁷¹⁸

514. In *Akayesu*, the Appeals Chamber stated that except for the offence of persecution, international humanitarian law does not require proof of a discriminatory intent for all crimes against humanity. In providing that a crime against humanity under Article 3 of the Statute must be part of an attack against civilians on national, political, ethnic, racial, or religious grounds, the Security Council did not intend to depart from the meaning of crimes against humanity as understood under customary international law, or to introduce a new legal ingredient. Rather, the Council only intended to limit the jurisdiction of the Tribunal to try those crimes against humanity that fall within the listed discriminatory categories.⁷¹⁹ It follows therefore that it is irrelevant whether the particular victim of a crime against humanity was a member of a listed group if it can be proved that the perpetrator targeted the civilian population on one of the enumerated discriminatory grounds.⁷²⁰

5.2. THE UNDERLYING OFFENCES - RAPE

515. Article 3 of the Statute lays down a non-exhaustive list of acts that constitute crimes against humanity including: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, and other inhumane acts. Under Count 4 of the Indictment, the Prosecution charged the Accused with rape as a crime against humanity. In this sub-section, the Chamber will consider the elements required to prove rape as a crime against humanity.

⁷¹⁵ *Simba*, Judgement (TC), para. 421; *Semanza*, Judgement (TC), para. 328; *Tadić*, Judgement (TC), paras. 646-648.

⁷¹⁶ *Muhimana*, Judgement (TC), para 527; *Kajelijeli*, Judgement (TC), paras 871-872; *Semanza*, Judgement (TC), para 329; *Musema*, Judgement (TC), paras. 203-204.

⁷¹⁷ *Akayesu*, Judgement (TC), para. 582; *Musema*, Judgement (TC), para. 207; *Semanza*, Judgement (TC), para. 330.

⁷¹⁸ *Bagilishema*, Judgement (TC), para. 79, citing *Blaškić*, Judgement (TC) para. 214.

⁷¹⁹ *Akayesu*, Judgement (AC), paras. 464-465. Indeed the Appeals Chamber has similarly held that the requirement under Article 5 of the ICTY Statute that crimes against humanity be “committed in armed conflict”, did not reflect customary international law, that the Security Council only intended to place a jurisdictional limit on the types of crimes against humanity that the Tribunal could try, and that the nexus with an armed conflict was not a new constitutive element of crimes against humanity. See *Tadić*, “Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction”, 2 October 1995, paras 139-140.

⁷²⁰ *Akayesu* (TC), para. 584; *Muhimana* (TC), para 529.

516. The commission of rape constitutes a crime against humanity only if the Prosecution proves that an enumerated crime under Article 3 of the Statute was committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The Prosecution must also prove that the perpetrator acted with the knowledge of the broader context of the attack and with the knowledge that his act(s) formed part of the attack. However, the perpetrator does not need to share the purpose or goals of the broader attack. The “attack” is an element distinct from the acts enumerated in Article 3 of the Statute. There must exist an attack on a civilian population which is discriminatory and widespread or systematic before the perpetrator can be found to have committed a crime against humanity.⁷²¹

517. The jurisprudence of the *ad hoc* Tribunals reveals a rather chequered history of the definition of rape. Initially, in the *Akayesu* Judgement, this Tribunal proposed that a conceptual approach to defining rape would be more useful to international law and opined that a mechanical approach with its focus on objects and body parts, was unsuitable. The *Akayesu* Trial Chamber therefore proceeded to define rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” The broader concept of “sexual violence”, according to *Akayesu*, “includes rape [and] is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.”⁷²² The Chamber notes that this definition was endorsed in the *Musema*, *Niyitegeka*, and *Muhimana* Judgements.⁷²³

518. However, in both *Furundžija* and *Kunarac*, ICTY Trial Chambers reverted to defining rape in terms of sexual penetration through the use of body parts or other objects under forceful or otherwise coercive circumstances.⁷²⁴ The definition of rape as sexual penetration of the vagina, anus, or mouth of the victim by the penis of the perpetrator or some other object used by him under coercive or forceful circumstances was partially approved by the Appeals Chamber in *Kunarac*. However, the Appeals Chamber expressed the view that *Furundžija* and earlier decisions defined rape more narrowly than was required under international law and reasoned that the emphasis on coercion, force, or threat of force did not recognise other factors that could render an act of sexual penetration non-consensual or non-voluntary. Consequently, the Appeals Chamber approved the definition of rape as:

[t]he sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose

⁷²¹ *Semanza*, Judgement (AC), para. 268-269, 327-332; *Muhimana*, Judgement (TC), paras. 524-526; *Gacumbitsi*, Judgement (TC), para. 297; *Kamuhanda*, Judgement (TC), para. 657; *Kajelijeli*, Judgement (TC), paras. 864-865, 869-871; *Kordic and Cerkez*, Judgement (AC), para. 94; *Blaškic*, Judgement (AC), para. 101, referring to *Kunarac et al.*, Judgement (AC), para. 94; *Ntakirutimana*, Judgement (TC), para. 804; *Bagilishema*, Judgement (TC), para. 77; *Rutaganda*, Judgement (TC), para. 68; *Kayishema and Ruzindana*, Judgement (TC), para. 123; *Musema*, Judgement (TC), paras. 202-203; *Ntakirutimana*, Judgement (AC), para. 516; *Ndindabahizi*, Judgement (TC), para. 478; *Akayesu*, Judgement (TC), para. 579; *Simba*, Judgement (TC), para. 421; *Tadic*, Judgement (AC), paras. 248, 646-648; *Krnojelac*, Judgement (TC), para. 55; *Krstic*, Judgement (TC), para. 480; *Kordic and Cerkez*, Judgement (TC), para. 178; *Blaškic*, Judgement (TC), para. 202; *Kupreškic*, Judgement (TC), para. 544.

⁷²² *Akayesu*, Judgement (TC), paras. 598, 686-688.

⁷²³ *Musema*, Judgement (TC), paras. 229; *Niyitegeka*, Judgement (TC), para. 456; *Muhimana*, Judgement (TC), para. 551. See also *Delalic*, Judgement (TC), paras. 478-479.

⁷²⁴ *Furundžija*, (TC), para 185.

must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.⁷²⁵

519. The *mens rea* is the "intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."⁷²⁶

520. In *Muhimana* this Tribunal expressed the view that the *Akayesu* and *Kunarac* definitions of rape are not incompatible and noted that "[w]hereas *Akayesu* referred broadly to a "physical invasion of a sexual nature", *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape."⁷²⁷

521. The Chamber agrees with the above analysis and considers that the underlying objective of the prohibition of rape at international law is to penalise serious violations of sexual autonomy. A violation of sexual autonomy ensues whenever a person is subjected to sexual acts of the genre listed in *Kunarac* to which he/she has not consented, or to which he/she is not a voluntary participant. Lack of consent therefore continues to be an important ingredient of rape as a crime against humanity. The fact that unwanted sexual activity takes place under coercive or forceful circumstances may provide evidence of lack of consent on the part of the victim.⁷²⁸

522. The Chamber considers that in their result, both the *Akayesu* and *Kunarac* definitions of rape reflect this objective of protecting individual sexual autonomy and therefore are not incompatible. The broad language in *Akayesu* that rape constitutes "physical invasion of a sexual nature", when properly interpreted, could include "sexual penetration" as stipulated in *Kunarac*. The Chamber therefore concludes that the offence of rape exists whenever there is sexual penetration of the vagina, anus or mouth of the victim, by the penis of the perpetrator or some other object under, circumstances where the victim did not agree to the sexual act or was otherwise not a willing participant to it. The *mens rea* consists of the intent of the perpetrator to effect such sexual penetration with knowledge that it occurs without the consent of the victim.⁷²⁹

523. In the Indictment, the Prosecutor alleges that the Accused bears superior responsibility pursuant to Article 6(3) for the rapes described under Paragraphs 3.41 and 3.41(i). In the Schedule of Particulars, the Prosecution indicated that the Accused was also being charged for responsibility under Article 6 (1) for aiding and abetting rape.⁷³⁰

524. The evidence provided in this case shows that Tutsi women as young as 17 years old were raped by soldiers during the months of April and May 1994 in the Butare and Gikongoro *préfectures*. The evidence before the Chamber establishes that Witnesses TM,

⁷²⁵ *Kunarac*, Judgement (TC), para 460; *Kunarac*, Judgement (AC), paras. 127-128.

⁷²⁶ *Kunarac*, Judgement (TC), para. 412, 437, 460; *Kunarac*, Judgement (AC), para. 128.

⁷²⁷ *Muhimana*, Judgement (TC), para. 550; *Kunarac*, Judgement (AC), para. 128.

⁷²⁸ Rule 96(ii) provides that "Consent shall not be allowed as a defence if the victim: (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear." See also *Kunarac*, Judgement (TC), para. 457: "The basic principle which is truly common to these ... legal systems is that serious violations of sexual autonomy are to be penalised. Sexual autonomy is violated wherever the person subjected to the acts has not freely agreed to it or is otherwise not a voluntary participant."

⁷²⁹ *Kamuhanda*, Judgement (TC), para. 709.

⁷³⁰ *Prosecutor v. T. Muvunyi*, Case No. ICTR-2000-55A-T, "Indictment", 23 December 2005; "Prosecutor's Notice of the Filing of a Schedule of Particulars to the Indictment Pursuant to the Directive of the Trial Chamber", 28 February 2005.

QY and AFV were raped at various locations in Butare between April and May 1994. In each case, the evidence points to sexual penetration of the victim's vagina under circumstances in which they did not consent to such penetration. Moreover, each of these events took place in the context of widespread attacks against civilians in Butare in 1994. The legal requirements for the offence of rape as a crime against humanity have therefore been satisfied.

525. However, in order to hold the Accused culpable, the Prosecution must also prove that he aided or abetted the commission of these rapes, or otherwise bore superior responsibility for their commission.

526. Having concluded that the evidence heard by the Chamber does not support the specific allegation in the Indictment that soldiers from Ngoma Camp committed rape, and that it would be prejudicial and unfair to hold this evidence against the Accused, the Chamber hereby finds the Accused NOT GUILTY of rape under Count 4 of the Indictment.

5.3. CRIMES AGAINST HUMANITY – OTHER INHUMANE ACTS

527. Count 5 of the Indictment charges Tharcisse Muvunyi with other inhumane acts pursuant to Article 3(i) of the ICTR Statute. The crime of “other inhumane acts” encompasses acts not specifically listed as crimes against humanity, but which are nevertheless of comparable nature, character, gravity and seriousness to the enumerated acts in sub-articles (a) to (h) of Article 3.⁷³¹ The inclusion of a residual category of crimes in Article 3 recognizes the difficulty in creating an exhaustive list of criminal conduct and the need for flexibility in the law's response.⁷³² The ICTY Appeals Chamber recently noted that the crime of “other inhumane acts” cannot in itself violate the principle of *nullum crimen sine lege certa* as it proscribes conduct which is forbidden under customary international law.⁷³³ Whether an act falls within the ambit of Article 3(i) has to be determined on a case-by-case basis.⁷³⁴

528. With respect to the *actus reus* of the offence, inhumane acts have been found to include sexual violence⁷³⁵, forcible transfer of civilians,⁷³⁶ mutilation, beatings and other types of severe bodily harm.⁷³⁷

529. The act or omission must *deliberately* cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.⁷³⁸ If the inhumane act is witnessed by a third party, “an accused may be held liable under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental suffering on the third party, or where the accused knew that his act was likely to cause serious mental suffering and was reckless as to whether such suffering would result. Accordingly, if at the

⁷³¹ *Bagilishema*, Judgement (TC), para. 92; *Kayishema and Ruzindana*, Judgement (TC), paras. 150-151; *Musema*, Judgement (TC), para. 232.

⁷³² See *Kayishema and Ruzindana*, Judgement (TC), paras. 149-150.

⁷³³ *Stacic*, Judgement (AC), para. 315.

⁷³⁴ *Kayishema and Ruzindana*, Judgement (TC), para. 151, cited in *Kajelijeli*, Judgement (TC), para. 932.

⁷³⁵ *Kamuhanda*, Judgement (TC), para. 710; *Niyitegeka*, Judgement (TC), paras. 465-67; *Kajelijeli*, Judgement (TC), para. 916; *Akayesu*, Judgement (TC), para. 688.

⁷³⁶ *Stacic*, Judgement (AC), para. 317; *Krstic*, Judgement (TC), para. 52.

⁷³⁷ *Niyitegeka*, Judgement (TC), paras. 465-67; *Kajelijeli*, Judgement (TC), paras. 934-36.

⁷³⁸ *Kayishema and Ruzindana*, Judgement (TC), para. 151.

time of the act, the accused was unaware of the third party bearing witness to his act, then he cannot be held responsible for the mental suffering of the third party.”⁷³⁹

Findings on the Accused’s Responsibility for Other Inhumane Acts

530. The Chamber recalls its factual findings relating to the treatment of Witnesses YAN and YAO at the *Économat General*, the Butare Cathedral and at ESO, the open humiliation of the two Tutsi women namely, Witnesses QY and AFV at various roadblocks in Butare, the beatings and injuries caused to Tutsi civilians by ESO soldiers at Beneberika Covent and *Groupe scolaire*, and is satisfied that the treatment meted out to these people by ESO soldiers constitute inhumane treatment within the meaning of Article 3(i) of the Statute. The Chamber is satisfied that in each of these instances, the Accused had reason to know of the illegal conduct of his subordinates, he had effective control over their actions, but that he failed to take necessary and reasonable measures to prevent or punish their illegal behaviour. The Chamber’s conclusion on effective control is based in particular on the fact that the Accused had all the material and human resources at ESO at his disposal and could have sent troops to prevent or punish the commission of the said crimes. For example, the Chamber believes that the Accused not only gave instructions that the Bicunda family should not be harmed during the attack on the *Groupe scolaire*, he also attempted to save the life of one Bicunda child when he realised that the latter had been taken away to be killed with the other refugees. The Accused therefore bears criminal responsibility as a superior under Article 6(3) for the actions of these subordinates and is guilty of other inhumane acts as crimes against humanity.

⁷³⁹ *Kayishema and Ruzindana*, Judgement (TC), para. 151, cited in *Kamuhanda*, Judgement (TC), para. 717, and *Kajelijeli*, Judgement (TC), para. 932.

CHAPTER IV: VERDICT

531. For the reasons set out in this Judgement, having considered all the evidence and arguments of the Parties, the Trial Chamber unanimously finds in respect of Tharcisse Muvunyi as follows:

Count 1: Genocide: **GUILTY**

Count 2: Complicity in Genocide: **DISMISSED**

Count 3: Direct and Public Incitement to Commit Genocide: **GUILTY**

Count 4: Crimes Against Humanity (Rape): **NOT GUILTY**

Count 5: Crimes Against Humanity (Other Inhumane Acts): **GUILTY**

CHAPTER V: SENTENCE

1. INTRODUCTION

532. In Resolution 955 (1994) which established the Tribunal, the United Nations Security Council reasoned that holding individuals responsible for the serious violations of international humanitarian law committed in Rwanda in 1994, would further the objectives of justice, deterrence, reconciliation and the restoration and maintenance of peace in that country. These objectives largely reflect the goals of sentencing in criminal law which are retribution, deterrence, rehabilitation, and societal protection. In determining the appropriate sentence to impose on the Accused in respect of the crimes for which he has been found guilty, the Chamber will be guided by these goals, as well as the provisions of the Statute and Rules relevant to sentencing. Article 23 of the Statute limits the punishment that the Tribunal can impose to imprisonment, and provides that in determining the terms of imprisonment, the Trial Chamber shall have recourse to the sentencing practice of Rwandan Courts and take into account the gravity of the offence and the individual circumstances of the Accused. Article 23 therefore provides legal authority for both the principles of gradation and individualisation in sentencing.⁷⁴⁰

533. Rule 101 provides that the Trial Chamber can impose a maximum penalty of life imprisonment, and shall take into account both aggravating and mitigating circumstances in determining the appropriate sentence to impose on the Accused. Aggravating circumstances must be proved beyond reasonable doubt, whereas mitigating circumstances need only be established on a balance of probabilities.⁷⁴¹ Where the Trial Chamber imposes a fixed term of imprisonment running short of a life sentence, it should give credit for time served by the accused from the time of his arrest to the date of his conviction and sentence

2. SUBMISSIONS

534. In its Closing Brief and during Closing Arguments, the Prosecution submitted that the crimes charged against the Accused, in particular genocide and rape, are inherently grave offences that deserve the maximum punishment permissible under the Statute. It further argued that the sentencing practice of both this Tribunal and the Rwandan courts is consistent with imposition of the maximum penalty for genocide and rape. Under the Rwandan Organic Law, argues the Prosecution, upon conviction for such Category I offences, the Accused would be liable to capital punishment.

535. The Prosecution also argues that as a senior military officer with responsibility for civilian protection in Butare prefecture, the Accused abused his authority by allowing his subordinates to commit the heinous crimes alleged in the Indictment, and by his own incitement of the population to commit genocide against the Tutsis. It is argued that these are aggravating factors and should be considered as such.

536. According to the Prosecution, there are no mitigating circumstances in favour of the Accused, and he did not show any remorse for his own conduct or for the conduct of his subordinates. Finally, it is argued that the Prosecution did not intend to make the character

⁷⁴⁰ *Musema*, Judgement (AC), para. 380, and authorities cited therein.

⁷⁴¹ *Kajelijeli*, Judgement (AC), para. 294; *Simba*, Judgement (TC), para. 438; *Muhimana*, Judgement (TC), para. 590.

of the Accused an issue in this trial, and therefore that the evidence of his good character introduced by the defence is irrelevant and should not be considered by the Chamber.

537. The Defence did not address sentencing issues in its Closing Brief or during Closing Arguments. It contented itself with the position that the Accused was not guilty of the crimes charged. However, pursuant to Rule 92 *bis*, the Defence introduced the sworn statement of the daughter of the accused to the effect that throughout his life, the Accused has been of good moral character and a law-abiding citizen who never discriminated against anyone on the basis of race, religion or ethnic background.⁷⁴² She added that as a soldier, the Accused treated all his subordinates alike and gave them equal opportunities regardless of their ethnic background. As a husband and father, the accused showed support and loyalty to his family, especially his two sons and one daughter and supported them in every manner possible so as to ensure that they grew up to be responsible and tolerant members of society. She urged that should the Chamber find her father guilty of any of the crimes charged, it should consider a sentence which reflects his entire life and his commitment to his family and to humanity, as well as his sense of honesty, respect and fairness to all manner of people.

3. DELIBERATIONS

3.1. GRAVITY OF THE OFFENCE

538. The Chamber has considered the submissions of the Prosecution that genocide, direct and public incitement to commit genocide, and crimes against humanity such as rape are inherently grave offences deserving severe punishment. Indeed the Chamber considers that all offences subject to the jurisdiction of the Tribunal are inherently serious and offensive of our human conscience. For this reason, in exercising its discretion to determine the most appropriate sentence for the Accused, the Trial Chamber will do so in the context of the form and degree of the Accused's participation, as well as his individual circumstances so as to ensure that the sentence imposed is commensurate with the gravity of the offence. The Chamber has considered that under Rwandan law, Category I and II perpetrators of genocide and crimes against humanity are liable to the death penalty or to imprisonment for life.⁷⁴³ Depending upon the circumstances, rape is punishable by imprisonment for a term of five to forty years.⁷⁴⁴ The Chamber has also examined the jurisprudence of the Tribunal and notes that the maximum penalty of life imprisonment is

⁷⁴² "Tharcisse Muvunyi's Motion for Admission of Witness Testimony Pursuant to Rule 92 *bis*", filed on 16 May 2006. The statement was admitted into evidence by the Chamber's Oral Decision of 23 June 2006.

⁷⁴³ Organic Law No.08/96, on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990, dated 30 August 1996. Article 2 defines category I and II offenders as follows: **Category I.** a) person whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity; b) persons who acted in positions of authority at the national, *préfectoral*, communal, sector or cell level, or in a political party, or fostered such crimes; c) notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; d) persons who committed acts sexual torture;

Category 2: persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death. Article 14 stipulates that persons convicted in categories I and II shall be liable to the death penalty or to life imprisonment.

⁷⁴⁴ *Muhimana*, Judgement (TC), para. 592, citing Articles 360-361 of the Rwandan Penal Code.

usually reserved for those who held positions of authority and planned or ordered atrocities, as well as for those who committed crimes with particular zeal or sadism.⁷⁴⁵

3.2. INDIVIDUAL, AGGRAVATING AND MITIGATING CIRCUMSTANCES

539. The Chamber notes that throughout the events referred to in the Indictment, and in particular from 7 April to about 15 June 1994, the Accused was a senior military officer in the Rwandan Army. The Chamber has found that from about the 7 April 1994 to 15 June 1994, he was the most senior military officer in Butare. Apart from his superior military position, the accused was well-known in Butare and other parts of Rwanda as an active sportsman and basketball player who often participated in athletic and other sports events alongside his military colleagues and members of the civilian population. The official and social standing of the Accused therefore placed him among the leaders of the Butare community, with capacity to influence the course of many events including the conduct of his subordinate officers. The position of trust held by the Accused carried with it authority and responsibility to take all reasonable measures to protect members of the civilian population from attack. In the Chamber's view, the fact that the accused failed to prevent soldiers under his command from committing wide scale atrocities against Tutsi civilians in Butare was an aggravating factor. Moreover, the Chamber considers the following as aggravating circumstances:

- the ethnic separation and subsequent killing of orphan children at the *Groupe scolaire* by soldiers under the command of the Accused in collaboration with civilian militia;
- the fact that the Accused chastised the *bourgmestre* in Nyakizu *commune* for hiding a Tutsi man and that pursuant to his instructions, the said man was produced and killed by an armed mob.

540. The Chamber has also considered evidence from several defence witnesses that the accused was responsible for protecting and thus saving the lives of Tutsi civilians including the former Bishop of Butare, Witness MO73 and his family, the Bicunda family, and the children of Witness MO69's sister. The Chamber does not consider this to be a mitigating factor. On the contrary, the Chamber considers that the selective exercise by the accused of his power to protect civilians based on friendship or family ties, was further evidence of his abuse of office and authority. His duty was to protect all civilians in danger irrespective of ethnicity or personal relationships. The Chamber further considers that the Accused was one of the people entrusted with responsibility for the security of the civilian population in Butare. By using his power, influence and official resources to protect his friends and family while leaving the vast majority of Tutsi civilians at the mercy of the genocidal killers, the Accused abused the trust and confidence placed in him by members of his society.

541. The Chamber also notes that several witnesses testified that the Accused, while the most senior military officer at ESO and in Butare *préfecture*, was in practice powerless. It is suggested that Lieutenant Nizeyimana was the real operational decision-maker at ESO, and that he either perpetrated or masterminded the commission of most of the crimes for which the Accused has been charged. Furthermore, it is alleged that the Accused was never fully

⁷⁴⁵ *Simba*, Judgement (TC), para.434; *Muhimana*, Judgement (TC), paras 606-614, recalling the particular zeal and sadism with which the accused perpetrated crimes against his victims; *Niyitegeka*, Judgement (TC), para. 486.

trusted by the military and political authorities in Kigali, and was at times suspected to be a sympathiser of the RPF. In the Chamber's view, these should not be considered as mitigating circumstances because the Chamber has already found that the Accused had effective control over ESO soldiers and he was fully aware that crimes were being committed by his subordinates. In any case, if at his level, he found it impossible to rein in those subordinates, he had a duty and a responsibility to report their criminal behaviour to officers higher up the chain of command. To sit down and fold his hands on the basis that he could not do anything about the serious crimes being committed by his subordinates, was at a minimum, a dereliction of his duties.

542. The Chamber notes, however, that except for the crime of incitement, the Prosecution has not proved that the Accused at any time gave direct orders for the commission of the crimes for which he has been convicted, or that he was present and directly participated in or encouraged the commission of those crimes. This circumstance must be taken into account in determining the sentence to impose on the Accused.

543. The Chamber also considers that the good character of the Accused prior to 1994, his position as a husband and father of three children, and the fact that he spent most of his life working for the defence of his country are mitigating factors. Moreover, many Defence witnesses portrayed the Accused as a highly respected individual and devoted worshipper, an avid sportsman and basketball player who actively participated in the life of his community alongside his military colleagues, as well as members of the civilian population. Furthermore, the Chamber has heard evidence indicating that prior to 1994, the Accused never discriminated against anyone on the basis of ethnicity.

544. Having considered all the evidence and weighing the aggravating and mitigating circumstances, the Chamber is convinced that some mitigation is warranted.

545. The Chamber sentences Tharcisse Muvunyi to **TWENTY-FIVE (25) YEARS' IMPRISONMENT.**

3.3. CREDIT FOR TIME SERVED

546. The Chamber notes that the Accused was arrested in the United Kingdom on 5 February 2000 and has been in detention since then. This means that he has been in detention for 6 years, 7 months and 6 days. Pursuant to Rule 101(D) of the Rules, the Accused shall be given credit for the time served from the date of his arrest to the date of this Judgement.

547. In accordance with Rule 102(A) the sentence shall begin to run from the date of this Judgement, provided that where notice of appeal is filed, the enforcement of the sentence shall be stayed until the final determination of the appeal.

548. Pursuant to Rule 103 of the Rules, Tharcisse Muvunyi shall remain in the custody of the Tribunal pending his transfer to a State where he shall serve his prison sentence if no appeal is filed, or, until the final determination of any appeal that may be filed.

549. This Judgement is rendered in English, which remains the authoritative version. The Chamber directs the Registry to translate the Judgement into French and Kinyarwanda without delay.

550. Rendered on 12 September 2006, and signed on 17 September 2006, in Arusha, Tanzania.

Asoka de Silva
Presiding Judge

Flavia Lattanzi
Judge

Florence Rita Arrey
Judge

ANNEX I: PROCEDURAL HISTORY

1. INTRODUCTION

1.1. THE TRIBUNAL AND ITS JURISDICTION

1. The Judgement in the case of *The Prosecutor v. Tharcisse Muvunyi* is issued by Trial Chamber II (“the Chamber”) of the International Criminal Tribunal for Rwanda (“the Tribunal”), composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi, and Judge Florence Rita Arrey.

2. The United Nations Security Council established the Tribunal after official United Nations reports indicated that genocide and 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; resolved to put an end to such crimes and to bring to justice the persons responsible for them; and expressed conviction that the prosecution of such persons would contribute to the process of national reconciliation and to the restoration of peace. Thus on 8 November 1994, the Security Council acting under Chapter VII of the United Nations Charter, adopted Resolution 955 establishing the Tribunal.

3. The Tribunal is governed by the Statute annexed to United Nations Security Council Resolution 955 (“the Statute”) and by its Rules of Procedure and Evidence (“the Rules”).

4. The Tribunal has authority to prosecute persons responsible for serious violations of international humanitarian law committed in the Republic of Rwanda, and Rwandan citizens responsible for such violations committed in the territory of neighbouring States. Articles 2, 3 and 4 of the Statute grant the Tribunal subject-matter jurisdiction over acts of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II. Article 1 of the Statute limits the Tribunal’s temporal jurisdiction to acts committed between 1 January 1994 and 31 December 1994.

1.2. THE ACCUSED

5. The Indictment alleges that Tharcisse Muvunyi (the “Accused”) was born on 19 August 1953 in Mukarange commune, Byumba préfecture, Rwanda.

6. According to the Indictment, the Accused was appointed Commander of the Ecole des Sous-Officiers (ESO), a military training school in Butare préfecture, on 7 April 1994. In this capacity, the Accused allegedly exercised authority over the soldiers of the school, the gendarmerie, Ngoma camp, and all military operations in Butare préfecture.

1.3. PROCEDURAL BACKGROUND

1.3.1. Pre-Trial Phase

7. A Warrant of Arrest and Order for Transfer and Detention were issued on 2 February 2000 by Judge Yakov Ostrovsky. On the same date, Judge Yakov Ostrovsky confirmed the joint indictment dated 21 January 2000, and issued an order of non-disclosure until the indictment had been served on all of the accused: Tharcisse Muvunyi, Idelphonse Hategekimana and Idelphonse Nizeyimana.

8. Muvunyi was arrested on 5 February 2000 in the United Kingdom, and was transferred on 30 October 2000 to the United Nations Detention Facility in Arusha, Tanzania. The Accused made his initial appearance before Judge William Sekule on 8 November 2000, and entered a plea of not guilty.

9. On 6 February 2001, Judge Yakov Ostrovsky granted a Prosecution motion to rescind the non-disclosure order regarding the original indictment.

10. On 25 April 2001, Judge Mehmet Güney granted a number of protection measures to prosecution witnesses, including the use of pseudonyms, closed sessions, and the non-disclosure to the public of witnesses' identifying information.

11. Trial Chamber III ("Chamber III"), composed of Judge Lloyd G. Williams, presiding, Judge Andresia Vaz, and Judge Khalida Rachid Khan, conducted the pre-trial proceedings between 11 November 2003 and 7 December 2004. From January 2005 onwards, the proceedings were held in Trial Chamber II for commencement of trial by the Bench rendering this Judgment.

12. On 15 April 2003, the Registrar denied the Accused's request to withdraw Mr. Michael Fischer from the position of Lead Counsel. The Accused applied to the President of the Tribunal for review of the Registrar's decision; his application was dismissed on 12 September 2003. However, in a decision dated 18 November 2003, Chamber III determined that the lack of communication between the Accused and his Lead Counsel hindered the judicial proceedings and constituted exceptional circumstances as provided by Rule 45(H) of the Rules of Procedure and Evidence. Trial Chamber III therefore ordered the Registrar to withdraw Lead Counsel. Mr. Michael Fischer was consequently replaced by Mr. Francis Musei, Duty Counsel, on 19 November 2003.

13. On 11 November 2003, Chamber III authorised the deposition of Witness QX in Rwanda. On 27 November 2003, Chamber III denied the Accused's request for certification to appeal this decision, ruling that the Accused would be adequately represented by Duty Counsel during the deposition. Mr. William Taylor was appointed Lead Counsel on 7 January 2004.

14. At the Status Conference on 7 December 2004, the trial was scheduled to start on 28 February 2005. The Prosecution was ordered to file a Pre-Trial Brief before 25 January 2005.

1.3.2. The Indictment

15. On 11 December 2003, Chamber III granted the Prosecutor's request to sever the indictment and to try the Accused separately, finding that it was in the interests of justice to try the Accused without delay. The Prosecutor filed an Amended Indictment (the "Indictment") on 22 December 2003, bearing the Case Number ICTR-2000-55A.

16. On 23 February 2005, the Chamber denied the Prosecutor leave to further amend the Indictment. The proposed changes included specifying the factual allegations underlying the charges, and dropping counts 4 and 5 (rape and inhumane acts as crimes against humanity). The Trial Chamber found that eight of the proposed amendments amounted to new charges. The Prosecutor was granted certification to appeal, and the Appeals Chamber upheld the Trial Chamber's decision. The Appeals Chamber found that although the Trial Chamber had erred in characterising certain proposed amendments as new charges, it had exercised its discretion reasonably in ruling that to accept changes at a date so close to the start of the trial would result in delays and prejudice to the Accused. On 24 June 2005, the Prosecutor filed a Schedule of Particulars which clarified the Indictment without expanding the charges.

17. The Indictment as amended charges the Accused with five counts: genocide, or alternatively complicity in genocide, direct and public incitement to commit genocide, rape as a crime against humanity, and other inhumane acts as a crime against humanity.

18. The Indictment alleges that these crimes were committed between 1 January and 31 December 1994 in Butare préfecture, Rwanda, where the Tutsi, the Hutu and the Twa were identified as racial or ethnic groups. The Indictment asserts that during this period, widespread or systematic attacks were directed against the civilian population on political, ethnic or racial grounds, and that a state of non-international armed conflict existed in Rwanda.

19. The Indictment alleges that the Accused, by reason of his position, knew or had reason to know that massacres and other atrocities were being committed in Butare by persons under his authority, but failed to prevent or put an end to these acts.

Trial Phase

20. The trial of the Accused commenced on 28 February 2005. In the course of 76 trial days, the Chamber heard a total of 47 witnesses, of whom there were 24 for the Prosecution including one investigator and two expert witnesses, and 23 for the Defence, including one expert witness.

21. On 24 March 2005, the Prosecution filed a motion requesting leave to call 29 additional witnesses in view of the Chamber's decision not to allow the withdrawal of two charges from the indictment. The Chamber directed the Prosecution to reformulate its supplementary witness list to include only those whose testimonies would support counts 4 and 5 i.e. rape and other inhumane acts as crimes against humanity. The Prosecution added six names to its original list of witnesses. In a decision dated 20 June 2005, the Chamber ruled against a Defence motion seeking to exclude these additional testimonies, concluding their statements indicated they could offer evidence regarding counts 4 and 5.

22. On 27 June 2005, the Defence filed a motion seeking to exclude the evidence of Witness TQ who the Defence asserted was a former employee of the International Committee of the Red Cross (ICRC) and who had previously given evidence in the Butare case. The Chamber rendered a decision on 13 October 2005 denying the Defence motion. The Chamber found that it was clear from Witness TQ's preliminary statement that he was working for the Belgian Red Cross Society (BRCS) at the relevant time, not the ICRC and that as BRCS is a national organization, it has no exceptional privilege of non-disclosure of information in the possession of an employee.

23. The Prosecution concluded its case on 20 July 2005.

24. On 15 August 2005, the Defence filed a motion for Judgment of Acquittal pursuant to Rule 98bis. On 14 October 2005, the Chamber ruled against the Accused in relation to each Count of the Indictment. The Chamber concluded that there was sufficient evidence upon which a reasonable trier of fact could sustain a conviction in relation to each of the five counts in the Indictment. The Chamber found that in relation to Counts 1 and 2, a conviction could be sustained pursuant to Articles 6 (1) and 6 (3) of the Statute ; in relation to Count 3, a conviction could be sustained pursuant to Article 6(1) of the Statute ; and in relation to Counts 4 and 5, a conviction could be sustained pursuant to Article 6(3) of the Statute. ,

25. On 20 October 2005, the Chamber granted a number of protective measures for Defence witnesses which had been sought by the Defence and which had not been opposed by the Prosecution. The measures were granted with the proviso that the Defence provide the Prosecution with unredacted statements and witness identity information no less than 21 days prior to the evidence of the witness being heard. The Chamber concluded that further protective measures which had been requested by the Defence and opposed by the

Prosecution, if granted, had the potential to affect the Prosecution's disclosure obligations and therefore were not in the interests of justice.

26. On 6 October 2005, the Defence filed a motion seeking an adjournment of the proceedings from 14 November 2005 to early 2006. The Chamber concluded that the matters raised by Counsel for the Accused could have been resolved internally within the Defence team, rejected the motion and ordered the Defence to commence the presentation of its case on 14 November 2005.

27. On 25 October 2005, the Prosecution filed a motion for disclosure of identifying information of Defence witnesses, indicating that the Prosecution had only received the name of the first Defence Witness MO60 but no further identifying information in relation to either this witness or any of the other 39 Defence witnesses. On 9 November 2005, the Chamber reiterated its orders of 20 October 2005 and further specified the type of identifying information the Defence should provide in relation to its witnesses.

28. On 14 November 2005, the Defence filed an emergency motion for continuance. On that same date, the Chamber handed down an oral decision, ordering the Defence to disclose the statements of its first three designated witnesses, MO60, MO70 and MO38, to the Prosecution no later than 21 November 2005 and the Defence to commence its case on 5 December 2005. In relation to the remaining Defence witnesses, the Chamber ordered that their identifying information be disclosed to the Prosecution at least 21 days prior to the date of their testimony and adjourned the proceedings to 5 December 2005.

29. The Defence case commenced on 5 December 2005.

30. On 21 December 2005, Lead Counsel for the Accused filed an application for the withdrawal of the assignment of his Co-Counsel, citing irreconcilable differences between them, and between Co-Counsel and other members of the Defence Team.

31. During the cross-examination of Defence Witness Augustin Ndindiliyimana on 7 December 2005, the Prosecution attempted to tender a set of documents that purportedly bore the signature of the Accused, in the capacity of "Commandant de Place, Butare-Gikongoro." The Chamber ruled that the documents were inadmissible as exhibits, but would be marked for identification purposes as "PID1". The Chamber further indicated that the Prosecution could prove the authenticity of the documents at a later date by calling witnesses.

32. On 31 January 2006, the Prosecution filed a motion to admit the documents contained in PID1. On 28 February 2006, the Chamber rendered a decision denying the Prosecution motion to admit documents marked PID1 on the basis that, although the three documents appeared at face value to be relevant to the present case, the documents were not *prima facie* reliable to be admissible under the Rules. The Prosecution then filed a further motion on 30 March 2006 seeking leave to call a handwriting expert by the name of Mr. Antipas Nyanjwa to testify to the authenticity of the documents marked PID1. The Chamber concluded that hearing evidence relating to these documents would further the Chamber's overall objective of discovering the truth about the allegations made against the Accused and that Mr. Nyanjwa was qualified to give that evidence. The Chamber concluded that the Defence could be given the opportunity to call evidence to contradict or otherwise challenge the evidence of the proposed handwriting expert if they so desired.

33. On 20 March 2006, the Defence filed a motion to expand and vary the Defence witness list. The Defence sought leave to add a further witness who had recently testified in the "Military II" and "Government II" cases for the Prosecution on the grounds that the

witness had exculpatory information pertinent to the outcome of this case. The Chamber rendered a decision on 28 March 2006 after having conducted an analysis of the transcript of the evidence of Witness AOG in the “Military II” case denying the Defence motion. The Chamber concluded that none of the statements made by this witness in that case directly related to any of the charges in the Indictment against Muvunyi, that in other prior cases the witness had always testified for the Prosecution and the Defence had provided no material to indicate that the witness would be willing to testify on behalf of the Accused.

34. The Prosecution and Defence filed their closing briefs on 15 June 2006. Closing Arguments were heard on 22 and 23 June 2006.

ANNEX II: JURISPRUDENCE

1. ICTR

AKAYESU

Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (TC), 2 September 1998.

Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgement (AC), 1 June 2001.

BAGILISHEMA

Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgement (TC), 7 June 2001.

Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Judgement (AC), 12 December 2002.

GACUMBITSI

Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgement (TC), 17 June 2004.

Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006.

KAJELIJELI

Prosecutor v. Kajelijeli, Case No. ICTR-99-44-T, Judgement and Sentence (TC), 1 December 2003.

Prosecutor v. Kajelijeli, Case No. ICTR-99-44-A, Judgement (AC), 23 May 2005.

KAMUHANDA

Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Judgement (TC), 22 January 2004.

Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-A, Judgement (AC), 19 September 2005.

KAREMERA et al.

Karemera et al., Case No. ICTR-98-44-AR73(C) “Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice” (AC), 16 June 2006

Karemera et al., Case No. ICTR-98-44-T, “Decision on Prosecution Motion for Judicial Notice” (TC), 9 November 2005

KAYISHEMA AND RUZINDANA

Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgement (TC), 21 May 1999.

Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons) (AC), 1 June 2001.

MUHIMANA

Prosecutor v. Muhimana, Case No. ICTR- 95-1B-T, Judgement and Sentence (TC), 28 April 2005.

MUSEMA

Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgement (TC), 27 January 2000.

Prosecutor v. Musema, Case No. ICTR-98-39-A, Judgement (AC), 16 November 2001.

MUVUNYI

Prosecutor v. Muvunyi, Case ICTR-2000-55A-T, “Decision on the Prosecutor’s Motion for Leave to File an Amended Indictment” (TC), 23 February 2005.

Prosecutor v. Muvunyi, Case ICTR-2000-55A-T, “Decision on Interlocutory Appeal” (AC), 12 May 2005.

NAHIMANA et al.

Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003.

NDINDABAHIZI

Prosecutor v. Nindabahizi, Case No. ICTR-2001-71-I, Judgement and Sentence (TC), 15 July 2004

NIYITEGEKA

Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence (TC), 16 May 2003

Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004

NTAGERURA et al.

Prosecutor v. André Ntagerura et al., Case No. ICTR 99-46-T, Judgement and Sentence (TC), 25 February 2004

NTAHOBALI and NYIRAMASUHUKO

Nyiramasuhuko v. The Prosecutor, Case No. ICTR-98-42-T, “Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence”, 4 October 2004, paras. 5, 7.

NTAKIRUTIMANA

Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence (TC), 21 February 2003.

Prosecutor v. Elizaphan and Gérard Ntakirutimana, Case No. ICTR-96-10 & ICTR-96-17-A, Judgement (AC), 13 December 2004.

RUTAGANDA

Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence (TC), 6 December 1999

Prosecutor v. Rutaganda, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003.

RUTAGANIRA

Prosecutor v. Rutaganira, Case No. ICTR-95-1C-T, Sentencing Judgement (TC), 14 March 2005.

SEMANZA

Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003.

Prosecutor v. Semanza, Case No. ICTR-97-20-A, Judgement (AC), 20 May 2005.

SERUSHAGO

Prosecutor v. Serushago, Case No. ICTR-98-39-T, Sentence (TC), 4 September 1998.

SIMBA

Prosecutor v. Simba, Case No. ICTR-0176-T, Judgement and Sentence (TC), 13 December 2005.

2. ICTY

ALEKSOVSKI

Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgement (AC), 24 March 2000.

BLAGOVEJIC and JOKIC

Prosecutor v. Blagovejic and Jokic, Case No. IT-02-60, Judgement (TC), 17 January 2005.

BLAŠKIC

Prosecutor v. Blaškic, Case No. IT-95-14-T, Judgement (TC), 3 March 2000.

Prosecutor v. Blaškic, Case No. IT-95-14-A, Judgement (AC), 29 July 2004.

BRDJANIN and TALIC

Prosecutor v. Brdjanin and Talic, Case No. IT-99-36, Judgement (TC), 1 September 2004

DELALIC ET AL. (CELEBICI)

Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgement (TC), 16 November 1998.

Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgement (AC), 20 February 2001.

FURUNDŽIJA

Prosecutor v. Furundžija, Case No. IT-95-17/1, Judgement (TC), 10 December 1998.

GALIC

Prosecutor v. Galic, Case No. IT-98-29-T, Judgement (TC), 5 December 2003.

JELIŠIC

Prosecutor v. Jelišic, Case No. IT-95-10-T, Judgement (TC), 14 December 1999.

Prosecutor v. Jelišic, Case No. IT-95-10-A, Judgement (AC), 5 July 2001.

KORDIC AND CERKEŽ

Prosecutor v. Kordic and Cerkež, Case No. IT-95-14/2-T, Judgement (TC), 26 February 2001.

Prosecutor v. Kordic and Cerkež, Case No. IT-95-14/2-A, Judgement (AC), 17 December 2004.

KRNOJELAC

Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgement (TC), 15 March 2002.

KRSTIC

Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement (TC), 2 August 2001.

Prosecutor v. Krstic, Case No. IT-98-33-A, Judgement (AC), 19 April 2004.

KUNARAC et al.

Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-23 & IT-96-23/1, Judgement (TC), 22 February 2001.

Prosecutor v. Dragoljub Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgement (AC), 12 June 2002.

KUPREŠKIC et al.

Prosecutor v. Kupreškic et al., Case No. IT-95-16-T, Judgement (TC), 14 January 2000.

Prosecutor v. Kupreškic et al., Case No. IT-95-16-A, Appeal Judgement (AC), 23 October 2001.

KVOCKA et al.

Prosecutor v. Kvocka et al., Case No. IT-98-30/1-T, Judgement (TC), 2 November 2001.

Prosecutor v. Kvocka et al., Case No. IT-98-30/1-A, Judgement (AC), 28 February 2005

NALETILIC and MARTINOVIC

Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34-T, Judgement (TC), 31 March 2003.

STAKIC

Prosecutor v. Stakic, Case No. IT-97-24-T, Judgement (TC), 31 July 2003.

Prosecutor v. Stakic, Case No. IT-97-24-A, Judgement (AC), 22 March 2006.

TADIC

Prosecutor v. Tadic, “Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction”, 2 October 1995.

Prosecutor v. Tadic, Case No. IT-94-1-T, Judgement (TC), 7 May 1997.

Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement (AC), 15 July 1999.

VASILJEVIC

Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Judgement (TC), 29 November 2002.

Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Judgement (AC), 25 February 2004.

ANNEX III: INDICTMENT AND SCHEDULE OF PARTICULARS