



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

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**ORIGINAL: ENGLISH**

**TRIAL CHAMBER I**

**Before:** Judge Jai Ram Reddy, presiding  
Judge Sergei Alekseevich Egorov  
Judge Flavia Lattanzi

**Registrar:** Adama Dieng

**Date:** 11 September 2006

**THE PROSECUTOR**

**v.**

**Jean MPAMBARA**

*Case No. ICTR-01-65-T*

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**JUDGEMENT**

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**The Prosecution**

Richard Karegyesa  
Andra Mobberly  
Didace Nyirinkwaya  
Ousman Jammeh

**The Defence**

Arthur Vercken  
Vincent Courcelle-Labrousse

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## **CHAPTER I: INTRODUCTION**

1. The Accused, Jean Mpambara, was formerly the *bourgmestre* of Rukara Commune in eastern Rwanda. Before April 1994, the Commune enjoyed a reputation as a relatively peaceful place, where moderation generally prevailed over ethnic extremism. In that fateful month, however, Rukara was engulfed by ethnic violence which culminated in a massacre of between one and two thousand Tutsi men, women and children who had sought refuge at the Rukara Parish church.
2. The Indictment charges the Accused with the crimes of genocide and extermination. Mpambara is not accused of having physically killed anyone; rather, he is alleged to have instigated, materially supported and facilitated attacks on Tutsi civilians. As the case proceeded, the Prosecution also made clear that it wished to hold the Accused criminally responsible for his failure to prevent the attacks.
3. Mpambara denies these allegations, protesting that he attempted to maintain security and to protect the Tutsi refugees. The Defence also contests whether the failure to prevent the attacks was properly pleaded in the Indictment.
4. The case against the Accused revolves around three sets of events in Rukara Commune over a six-day period: looting and killing in Gahini *Secteur* on 7 and 8 April 1994; an attack on Gahini Hospital on 9 April; and two attacks at the Parish Church of Rukara where, on 12 April 1994 attackers using guns, grenades, machetes and spears killed up to two thousand Tutsi civilians in a single night.
5. Chapter II of this judgement sets out the legal requirements of the crimes and forms of participation with which the Accused is charged. In Chapter III, the Chamber reviews the evidence heard during the trial, and will reach factual and legal findings in respect of each of the allegations against the Accused.

## CHAPTER II: APPLICABLE LAW

### 1. Introduction

6. The Indictment charges the Accused with genocide or, in the alternative, complicity in genocide; and extermination as a crime against humanity.<sup>1</sup> The Indictment alleges that the Accused committed or participated in these crimes by: (i) participating in a joint criminal enterprise; (ii) ordering the commission of the crimes; and (iii) instigating and otherwise aiding and abetting those who actually did commit the crimes.<sup>2</sup> In its Closing Brief, the Prosecution withdrew the alternative count of complicity, noting that aiding and abetting was a more appropriate description of the conduct of the Accused.<sup>3</sup> Accordingly, section two below will discuss the elements of genocide and extermination, and section three will describe the forms of participation in these crimes attributed to the Accused.

7. During the course of the trial, and in its Closing Brief, the Prosecution argued that the Accused was criminally liable under Article 6 (1) of the Statute for having failed to prevent crimes committed by others, and that this allegation is encompassed by the charges in the Indictment.<sup>4</sup> The Defence argues that the Indictment contains no such charge and that the Accused was not otherwise informed that such a charge was made against him. Section four of this chapter will examine the ways in which an accused may be criminally liable for omissions. Section five and six discuss whether the Accused was given adequate notice that he was charged with criminal responsibility for failing to prevent criminal acts.

### 2. Crimes

#### (i) Genocide

8. Genocide, as defined in Article 2 (2) of the Statute, is

...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....

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<sup>1</sup> Counts 1, 2 and 3, respectively.

<sup>2</sup> Indictment, paras. 6, 21. As will be discussed, *infra*, Prosecution submissions subsequent to the Indictment are ambiguous as to the relationship between joint criminal enterprise liability and the other forms of criminal responsibility provided in Article 6 (1). The Prosecution appears to consider aiding and abetting as a form of joint criminal enterprise. The Indictment itself, however, is clear that joint criminal enterprise and aiding and abetting are distinct and separate modes of participation in a crime: “*In addition* [to ordering, instigating, and aiding and abetting], the accused wilfully and knowingly participated in a joint criminal enterprise....” Few, if any references, to “ordering” or “planning” are to be found in the Prosecution Closing Brief and final arguments, but the Chamber cannot say that these have been dropped. The Chamber has accordingly considered any evidence which may be relevant to those modes of individual criminal responsibility.

<sup>3</sup> Prosecution Closing Brief, para. 272: “Given the divergent views on the distinction between Complicity under Art. 2 (3)(e) and aiding and abetting Genocide under Art (6)(1) the Prosecutor subscribes to the *Krstic* approach and submits that where 'knowledge' is proved the accused should be convicted of aiding and abetting Genocide on the basis that it is a better characterization of the culpability of the accused. In those circumstances, the Prosecutor submits that Complicity as an alternative count need not be considered by the Chamber”.

<sup>4</sup> The Indictment contains no allegation of superior responsibility under Article 6 (3) of the Statute, and the Prosecution has not argued that this form of liability was pleaded in this case.

The victims must be targeted because of their membership in the protected group, and the perpetrator must intend to destroy at least a substantial part of that group.<sup>5</sup> Intent may be proven by overt statements of the perpetrator or by drawing inferences from circumstantial evidence, such as any connection to a wide-scale attack against the targeted group.<sup>6</sup> The *actus reus* of genocide does not require the actual destruction of a substantial part of the group; the commission of even a single instance of one of the prohibited acts is sufficient, provided that the accused genuinely intends by that act to destroy at least a substantial part of the group.<sup>7</sup>

(ii) *Extermination*

9. Extermination is a crime against humanity which, as defined by Article 3, must be “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”. The crime itself has been described as the widespread or systematic killing of a group of persons, or systematically subjecting a large number of persons to conditions of living that would inevitably lead to death on a large scale.<sup>8</sup> The *actus reus* of the offence is that the perpetrator participates with others in a collective or ongoing mass killing event.<sup>9</sup> The act need not directly cause any single victim’s death, but must contribute to a mass killing event.<sup>10</sup> As to the nature of the contribution

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<sup>5</sup> *Krstic*, Judgement (AC), para. 12 (“The intent requirement of genocide under Article 4 of the [ICTY] Statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group”); *Akayesu*, Judgement (TC), para. 521 (“Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group”); *Bagilishema*, Judgement (TC), para. 65 (“[I]f a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide”); *Semanza*, Judgement (TC), para. 312 (membership in group determined by subjective intentions of perpetrator, not objective criteria); *Jelusic*, Judgement (TC), para. 70 (membership in group determined by subjective intentions of perpetrator, not objective criteria); *Rutaganda*, Judgement (TC), para. 55 (membership in group determined by subjective intentions of perpetrator, not objective criteria).

<sup>6</sup> *Rutaganda*, Judgement (AC), para. 528; *Semanza*, Judgement (AC), para. 262; *Jelusic*, Judgement (AC), para. 47 (“As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts”); *Simba*, Judgement (TC), para. 415; *Ndindabahizi*, Judgement (TC), para. 454.

<sup>7</sup> *Ndindabahizi*, Judgement (TC), para. 471. The perpetrator of a single, isolated act of violence could not possess the requisite intent based on a delusion that, by his action, the destruction of the group, in whole or in part, could be effected.

<sup>8</sup> Statute, Article 3 (b). *Ntakirutimana*, Judgement (AC), para. 522; *Simba*, Judgement (TC), para. 422; *Ndindabahizi*, Judgement (TC), para. 479. No numeric threshold of deaths need be reached for the killings to be deemed “large-scale”. *Ntakirutimana*, Judgement (AC), para. 516.

<sup>9</sup> *Ntakirutimana*, Judgement (AC), para. 516 (“the crime of extermination is the act of killing on a large scale”); *Ndindabahizi*, Judgement (TC), para. 479 (the acts must be “directed at a group of individuals collectively, and whose effect is to bring about a mass killing”). *Bagosora et al.*, Judgement on Motions for Acquittal (TC), 2 February 2005, para. 28 (“The essential distinction between murder and extermination is that the latter is directed at a group collectively resulting in a mass killing, and that the forms of commission (‘participation’) are broader than what is required for murder”); *Vasiljevic*, Judgement (TC), para. 227 (“the act of extermination must be collective in nature rather than directed towards singled out individuals”).

<sup>10</sup> *Ndindabahizi*, Judgement (TC), para. 479 (“may be committed less directly than murder, as by participation in measures intended to bring about the deaths of a large number of individuals”); *Krstic*, Judgement (TC), para. 498 (“...we surmise that the crime of extermination may be applied to acts committed with the intention of bringing about the death of a large number of victims either directly, such as by killing the victim with a firearm, or less directly, by creating conditions provoking the victim’s death”); *Rutaganda*, Judgement (TC), para. 83 (“includes, but is not limited to the direct act of killing. It can be any act or omission, or cumulative acts

required, a standard of “sufficient contribution” has been adopted in some cases, assessed according to “the actions of the perpetrator, their impact on a defined [victim] group, and awareness [by the accused] of the impact on the defined group”.<sup>11</sup>

10. The *mens rea* of extermination is that the accused must intend by his actions to bring about the deaths on a large-scale.<sup>12</sup>

11. In addition to these specific elements of extermination, the chapeau requirements for a crime against humanity must also be satisfied. First, the crime must have been committed as part of a widespread or systematic attack. “Widespread” is defined as massive or large-scale, involving many victims; “systematic” refers to an organized pattern of conduct, as distinguished from random or unrelated acts.<sup>13</sup> Second, the attack must be carried out against a civilian population on “national, political, ethnic, racial or religious grounds”.<sup>14</sup> The perpetrator must know that his acts form part of this discriminatory attack but need not possess the discriminatory intent.<sup>15</sup>

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or omissions, that cause the death of the targeted group of individuals”); *Vasiljevic*, Judgement (TC), para. 227; *Kayishema and Ruzindana*, Judgement (TC), paras. 143, 146. The Appeals Chamber has held that it is unnecessary to name the victims of an extermination. *Ntakirutimana*, Judgement (AC), para. 521. This would not be the case for murder, if the accused participated, and if the Prosecution had this information in its possession. This reflects a fundamental distinction between the nature of murder and extermination.

<sup>11</sup> *Ndindabahizi*, Judgement (TC), para. 479 (the issue is whether an accused “contributed sufficiently to the mass killing”); *Bagosora et al.*, Judgement on Motions for Acquittal (TC), 2 February 2005, para. 28 (“Whether the participation is sufficient to constitute extermination depends on a concrete assessment of the facts, including the actions of the perpetrator, their impact on a defined group, and awareness of the impact on the defined group”). The definition of the minimum level of participation has not been addressed by the Appeals Chamber: *Vasiljevic*, Judgement (TC), para. 227 (“‘extermination’ only attaches to those individuals responsible for a large number of deaths, even if their part therein was remote or indirect”); *Kayishema and Ruzindana*, Judgement (TC), para. 146 (planning alone may be sufficient for commission, provided that the “nexus between the planning and the actual killing” is shown); G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford UP, 2005), p. 176 (commission may occur where perpetrator’s role “remote or indirect”); Simon Chesterman, “An Altogether Different Order: Defining the Elements of Crimes Against Humanity”, 10 *Duke J. Comp. & Int’l L.* 307, 338 (2000) (advocating the standard of “‘contributed directly’ in the definition of extermination’s *actus reus*”); *Ntakirutimana*, Judgement (AC), para. 522 (“participation”).

<sup>12</sup> *Stakic*, Judgement (AC), para. 260 (“The *mens rea* of extermination clearly requires the intention to kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their deaths”); *Simba*, Judgement (TC), para. 422; *Ndindabahizi*, Judgement (TC), para. 480 (“The *mens rea* for the offence of extermination is that the Accused participated in the imposition of measures against many individuals intending that their deaths should be brought about on a large-scale”). There is no need in the present case to decide whether recklessness would also satisfy the *mens rea* of extermination. *Kayishema and Ruzindana*, Judgement (TC), para. 144 (finding that recklessness is sufficient); *cf. Semanza*, Judgement (TC), para. 341 (requiring intent to perpetrate or participate in a mass killing); *Vasiljevic*, Judgement (TC), para. 229 (requiring actual intention to kill, or to cause grievous bodily harm or injury with the knowledge that such actions are likely to cause death).

<sup>13</sup> *Niyitigeka*, Judgement (TC), para. 439; *Ntakirutimana*, Judgement (TC), para. 804; *Semanza*, Judgement (TC) paras. 328-29. *See also Kunarac et al.*, Judgement (AC), paras. 93-97 (interpreting the same words as part of a judicially-created condition for crimes against humanity).

<sup>14</sup> *Ntakirutimana*, Judgement (TC), para. 803; *Semanza*, Judgement (TC), para. 331.

<sup>15</sup> *Kunarac et al.*, Judgement (AC) paras. 99-100; *Simba*, Judgement (TC), para. 421; *Ndindabahizi*, Judgement (TC), para. 478; *Semanza*, Judgement (TC), para. 332. *See also Semanza*, Judgement (AC), paras. 268-269. It is hard to imagine, however, that an accused could possess the *mens rea* for extermination, and yet not share the intent of the widespread or systematic attack of which it formed a part.

### 3. Modes of Commission and Participation

12. The Indictment recites all of the modes of participation prescribed by Article 6 (1) of the Statute, namely that a “person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime ... shall be individually responsible for the crime”.<sup>16</sup> More particularly, the Indictment alleges that the Accused (i) “ordered those over whom he had command responsibility and control” to attack the Tutsi population; (ii) “instigated and aided and abetted those over whom he did not have command responsibility or control to attack the Tutsi population”; and (iii) “participated in a joint criminal enterprise whose object, purpose and foreseeable outcome was the destruction of the Tutsi racial or ethnic group throughout Rwanda”.<sup>17</sup>

#### (i) Joint Criminal Enterprise

13. A joint criminal enterprise arises when two or more persons join in a common and shared purpose to commit a crime under the Statute.<sup>18</sup> Unlike conspiracy, no specific agreement to commit the crime need be shown: the common purpose may arise spontaneously and informally, and the persons involved need not be associated through a formal organization.<sup>19</sup> Any act or omission which assists or contributes to the criminal purpose may attract liability: there is no minimum threshold of significance or importance, and the act need not independently be a crime.<sup>20</sup>

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<sup>16</sup> Article 6 (1).

<sup>17</sup> Indictment, para. 6. Although no express reference to joint criminal enterprise is to be found in Article 6 (1), it is well-established that a person may “commit” a crime in that manner, as discussed below in more detail. *Tadic*, Judgement (AC), para. 190 (“Whoever contributed to the commission of crimes by a group of persons or some members of the group, in execution of a common criminal purpose, may be held criminally liable, subject to certain conditions, which are specified below”).

<sup>18</sup> It is also often said that the requisite common purpose exists where it “involves the commission” of such a crime. *Stakic*, Judgement (AC), para. 64 (“the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required”); *Kvočka et al.*, Judgement (AC), para. 81 (“A joint criminal enterprise requires a plurality of co-perpetrators who act pursuant to a common purpose involving the commission of a crime in the Statute”); *Limaj*, Judgement (TC), para. 510 (“When a number of persons are involved in a common plan aimed at the commission of a crime, they can be convicted of participation in a joint criminal enterprise (“JCE”) in relation to that crime”); *Simba*, Judgement (TC), para. 387 (“the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required”).

<sup>19</sup> *Stakic*, Judgement (AC), para. 64 (the persons involved “need not be organized in a military, political or administrative structure”); *Kvočka et al.*, Judgement (AC), para. 117 (“The common purpose need not be previously arranged or formulated; it may materialize extemporaneously”); *Vasiljevic*, Judgement (AC), para. 100; *Milutinovic et al.*, Decision on Dragoljub Ojdanic’s Motions Challenging Jurisdiction-Joint Criminal Enterprise (AC), 21 May 2003, para. 23 (“while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that agreement”).

<sup>20</sup> *Stakic*, Judgement (AC), para. 64 (“the participation of the accused in the common purpose is required. This participation need not involve the commission of a specific crime under one of the provisions [of the Statute] (for example, murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose”); *Kvočka et al.*, Judgement (AC), para. 97 (“there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise”); *Kvočka et al.*, Judgement (AC), para. 187 (“...the accused’s participation in carrying out the joint criminal enterprise is likely to engage his responsibility as a co-perpetrator, without it being necessary in general to prove the substantial or significant



14. A co-perpetrator (a term used to refer to a participant in a joint criminal enterprise) must intend by his acts to effect the common criminal purpose.<sup>21</sup> Mere knowledge of the criminal purpose of others is not enough: the accused must intend that his or her acts will lead to the criminal result. The *mens rea* is, in this sense, no different than if the accused committed the crime alone. As the Appeals Chamber has aptly remarked, a “joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself”.<sup>22</sup> Determining whether a co-perpetrator possessed the necessary intent may be more difficult than in the case of a single perpetrator who, of necessity, must physically commit the crime. Although the *actus reus* may be satisfied by any participation, no matter how insignificant, “the significance and scope of the material participation of an individual in a joint criminal enterprise may be relevant in determining whether that individual had the requisite *mens rea*”.<sup>23</sup>

15. There are three forms of joint criminal enterprise: “basic”, described above; “systemic”; and “extended”. Neither the systemic nor the extended forms of joint criminal enterprise are alleged in the present case, and need not be considered further.<sup>24</sup>

(ii) *Aiding and Abetting*

16. Aiding and abetting, though distinct concepts, are frequently combined to refer to any form of assistance or encouragement given to another person to commit a crime under the Statute.<sup>25</sup> The assistance or encouragement must have had a “substantial effect upon the

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nature of his contribution: it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose”).

<sup>21</sup> *Stakic*, Judgement (AC), para. 65 (“it must be shown that the accused and the other participants in the joint criminal enterprise intended that the crime at issue be committed”); *Kvočka et al.*, Judgement (AC), para. 82 (“In the first form of joint criminal enterprise, all of the co-perpetrators possess the same intent to effect the common purpose”); *Vasiljevic*, Judgement (AC), para. 101 (“...what is required is the intent to perpetrate a certain crime (this being the shared intent of the part of all co-perpetrators)”); *Tadic*, Judgement (AC), para. 196 (“the accused, even if not personally effecting the killing, must nevertheless intend this result”); *Limaj*, Judgement (TC), para. 511 (“In the first type of joint criminal enterprise, the accused intends to perpetrate a crime and this intent is shared by all co-perpetrators”).

<sup>22</sup> *Kvočka et al.*, Judgement (AC), para. 91.

<sup>23</sup> *Id.*, para. 97 (“In practice, the significance of the accused’s contribution will be relevant to demonstrating that the accused shared the intent to pursue the common criminal purpose”).

<sup>24</sup> Prosecution Closing Brief, para. 25 “The Prosecutor relies on the theory of JCE (JCE I) to establish the individual criminal responsibility of the accused...”). The Chamber notes that the intent required for the systemic form of liability, in which there is an organized criminal system such as a prison camp whose purpose is to persecute the inmates, is very similar to that of the basic form. It “requires personal knowledge of the organized system and intent to further the criminal purpose of that system”. *Kvočka et al.*, Judgement (AC), para. 82. Although this formulation is slightly different from the intent required in the basic form of liability, the similarity is sufficient to permit this Chamber to rely on the pronouncements in the *Kvočka et al.* Appeal Judgement, which was concerned primarily with the systemic form of joint criminal enterprise liability.

<sup>25</sup> *Vasiljevic*, Judgement (AC), para. 102 (defining the *actus reus* of aiding and abetting as “acts specifically directed to assist, encourage or lend moral support to the perpetration of a specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect on the perpetration of the crime”); *Semanza*, Judgement (TC), paras. 384-385; *Limaj*, Judgement (TC), para. 516 (“‘Aiding and abetting’ has been defined as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime”); *Gacumbitsi*, Judgement (TC), para. 286 (“Aiding means assisting or helping another to commit a crime. Abetting means facilitating, advising or instigating the commission of a crime”).

perpetration of the crime” to attract liability.<sup>26</sup> The aider and abettor need not (although he or she may) share the principal’s criminal intent, but must at least know that his or her acts are assisting the principal to commit the crime.<sup>27</sup>

17. Joint criminal enterprise may be distinguished from aiding and abetting in two respects. Aiding and abetting requires a “substantial effect upon the perpetration of the crime”; by contrast, no minimum threshold of participation is required in a joint criminal enterprise. The extent or significance of the contribution may, however, be important in showing that the perpetrator possessed the requisite criminal intent. The aider and abettor, on the other hand, need only be aware of the criminal intent of the principal whom he assists or encourages.<sup>28</sup> A person who contributes substantially to the commission of a crime by another person, and who shares the intent of that other person, is criminally liable both as a co-perpetrator and as an aider and abettor.<sup>29</sup>

(iii) *Instigation*

18. Instigation is urging or encouraging, verbally or by other means of communication, another person to commit a crime, with the intent that the crime will be committed.<sup>30</sup> In accordance with general principles of accomplice liability, instigation does not arise unless it has directly and substantially contributed to the perpetration of the crime by another person.<sup>31</sup> Unlike the crime of direct and public incitement, instigation does not give rise to liability unless the crime is ultimately committed.<sup>32</sup>

(iv) *Ordering*

19. The *actus reus* of ordering is that a person in a position of authority instructs another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of the part of the accused that would compel another to commit a crime in following the accused’s order.<sup>33</sup>

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<sup>26</sup> *Blaskic*, Judgement (AC), para. 48; *Vasiljevic*, Judgement (AC), para. 102; *Kayishema and Ruzindana*, Judgement (AC), para. 198; *Krstic*, Judgement (AC), para. 137.

<sup>27</sup> *Blaskic*, Judgement (AC), para. 49; *Krnojelac*, Judgement (AC), para. 51; *Vasiljevic*, Judgement (AC), para. 102; *Semanza*, Judgement (TC), para. 388 (“The Accused need not necessarily share the *mens rea* of the principal perpetrator; the accused must be aware, however, of the essential elements of the principal’s crime including the *mens rea*”). The Appeals Chamber has ruled that this principle – that only knowledge of the intent of the perpetrator is sufficient for liability – applies even in respect of the specific intent required for genocide: *Ntakirutimana*, Judgement (AC), paras. 499-501; *Krstic*, Judgement (AC), paras. 140-141. Certain authors have criticized imposition of liability based on mere knowledge of the principal’s intent: G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford UP, 2005), p. 212.

<sup>28</sup> *Vasiljevic*, Judgement (AC), para. 102.

<sup>29</sup> The Appeals Chamber has offered a further distinction: a co-perpetrator is guilty of all the crimes committed by his co-perpetrators, whereas an aidor and abettor is only liable for the specific crime which he or she assists or encourages. *Kvočka et al.*, Judgement (AC), para. 90.

<sup>30</sup> *Semanza*, Judgement (TC), para. 381; *Akayesu*, Judgement (TC), para. 482.

<sup>31</sup> *Kayishema and Ruzindana*, Judgement (AC), para. 198; *Bagilishema*, Judgement (TC), para. 30.

<sup>32</sup> *Nahimana et al.*, Judgement (TC), paras. 1015, 1029; *Musema*, Judgement (TC), para. 115.

<sup>33</sup> *Semanza*, Judgement (AC), para. 361.

(v) *Planning*

20. Planning is the formulation of a design by which individuals will execute a crime. Participation in such planning must be substantial, such as actually formulating the criminal plan or endorsing a plan proposed by another, for individual liability to arise.<sup>34</sup>

**4. Liability for Omissions**

21. Evidence was heard during the trial which the Prosecution characterizes as showing the Accused's failure to do certain things at certain times. The permissible legal significance of this evidence (or, more accurately, of this characterization) is disputed. In this section, the Chamber will consider the various ways in which omissions may be relevant to the crimes and forms of participation with which the Accused is charged.

(i) *Omission as Evidence of Aiding and Abetting*

22. Evidence which is characterized as an omission can be used to show that an accused aided and abetted a crime. A well-established example is the mere presence of a person in authority at the scene of a crime. Such presence could "bestow[] legitimacy on, or provide[] encouragement to, the actual perpetrator", particularly when the accused is in a position of some authority over the attacker.<sup>35</sup> Liability is not automatic, even for a person of high office, and must be proven by showing that the accused's inaction had an encouraging or approving effect on the perpetrators; that the effect was substantial; and that the accused knew of this effect and of the perpetrator's criminal intention, albeit without necessarily sharing the perpetrators' criminal intent.<sup>36</sup> Of course, by choosing to be present, the accused is taking a positive step which may contribute to the crime. Properly understood, criminal responsibility is derived not from the omission alone, but from the omission combined with the choice to be present.

23. Other examples of aiding and abetting through failure to act are not to be easily found in the annals of the *ad hoc* Tribunals. The Appeals Chamber has left the category open, observing that "in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting".<sup>37</sup> On the other hand, inaction without being present at the scene of a crime has been excluded as a basis for proving these elements:

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<sup>34</sup> *Semanza*, Judgement (TC), para. 380; *Bagilishema*, Judgement (TC), para. 30; *Aleksovski*, Judgement (TC), para. 61.

<sup>35</sup> *Limaj*, Judgement (TC), para. 517; *Bisengimana*, Judgement (TC), para. 34; *Blaskic*, Judgement (TC) para. 284 ("In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commandant, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime").

<sup>36</sup> *Kayishema and Ruzindana*, Judgement (AC), para. 201 (approving that an accused may "incur individual responsibility provided he is aware of the possible effect of his presence (albeit passive) on the commission of the crime. In the case at bar, the Trial Chamber held that the Accused's failure to oppose the killing constituted a form of tacit encouragement in light of his position of authority"); *Ndindabahizi*, Judgement (TC), para. 457 ("It is not the position of authority itself that is important, but rather the encouraging effect that a person holding the office may lend to events"); *Semanza*, Judgement (TC), para. 386 ("Responsibility, however, is not automatic, and the nature of the accused's presence must be considered against the background of the factual circumstances"); *Blaskic*, Judgement (TC), para. 284; *Krnojelac*, Judgement (TC), para. 89 ("Presence alone at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant legitimising or encouraging effect on the principal offender").

<sup>37</sup> *Blaskic*, Judgement (AC), para. 47 ("The Appeals Chamber leaves open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting").

Criminal responsibility as an “approving spectator” does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct.<sup>38</sup>

This would not, of course, preclude aiding and abetting liability for a person who had previously committed positive acts of assistance or encouragement which contributed substantially to the commission of a crime in his absence.<sup>39</sup>

(ii) *Omission as Evidence of Participation in a Joint Criminal Enterprise*

24. Involvement in a joint criminal enterprise may also be proven by evidence characterized as an omission. The objective element of participation is satisfied as long as the accused has “committed an act or an omission which contributes to the common criminal purpose”.<sup>40</sup> Although it is hard to imagine that total passivity could demonstrate the requisite intent for co-perpetratorship, an omission in combination with positive acts might have great significance. The Appeals Chamber upheld an inference of guilt where an omission was combined with a series of other findings concerning the position and conduct of the accused, namely:

that he held a high-ranking position in the camp and had some degree of authority over the guards; that he had sufficient influence to prevent or halt some of the abuses but that he made use of that influence only very rarely; that he carried out his tasks diligently, participating actively in the running of the camp; that through his own participation, in the eyes of other participants, he endorsed what was happening in the camp.<sup>41</sup>

The failure of the accused to intervene more frequently was an omission; but its significance in proving the criminal mental state of the accused, and its consequence for the victims, depended on a series of positive acts preceding the omission.

(iii) *Omission as Failure of Duty to Prevent or Punish*

25. Liability for an omission may arise in a third, fundamentally different context: where the accused is charged with a duty to prevent or punish others from committing a crime. The culpability arises not by participating in the commission of a crime, but by allowing another person to commit a crime which the Accused has a duty to prevent or punish.

26. The circumstances in which such a duty has been recognized in international criminal law are limited indeed. As stated by the Appeals Chamber in *Tadic*:

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<sup>38</sup>*Semanza*, Judgement (TC), para. 386; *Bagilishema*, Judgement (TC), paras. 34, 36. The Chamber is aware that this comment may refer only to a particular type of aiding and abetting by omission, and that it was not necessarily intended to be a comprehensive statement about aiding and abetting.

<sup>39</sup> One recent exception is *Bisengimana*, Judgement (TC). Although the Chamber formally found the accused to have been guilty of aiding and abetting on the basis of an omission, no findings were made that the accused’s inaction had substantially contributed to the commission of the crime. On the contrary, the Chamber made a finding, conceded by the accused, that he owed a “a duty to protect” the victims. This represents a basis for liability different from aiding and abetting.

<sup>40</sup> *Kvočka et al.*, Judgement (AC), para. 187.

<sup>41</sup> *Id.*, para. 195.

The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).<sup>42</sup>

Article 6 (3) of the Statute creates an exception to this principle in relation to a crime about to be, or which has been, committed by a subordinate. Where the superior knew or had reason to know of the crime, he or she must “take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof”.<sup>43</sup> In *Blaskic*, the Appeals Chamber extended this liability by finding that a superior could also be liable under 6 (1) for the mistreatment by his subordinates of prisoners used as human shields, not because he had given an order to do so, but because, as commandant, he was under a direct “legal duty ... to care for the persons under the control of [his] subordinates. Wilful failure to discharge such a duty may incur criminal responsibility pursuant to Article [6 (1)] of the Statute in the absence of a positive act”.<sup>44</sup> The Geneva Conventions were relied upon as imposing specific positive obligations on the accused.<sup>45</sup>

27. Some Trial Chambers have discovered duties to prevent the criminal acts of others in situations other than the superior-subordinate relationship.<sup>46</sup> In light of the findings below concerning notice, this Chamber need not consider the correctness of those judgements. The important point, for present purposes, is that liability for failing to discharge a duty to prevent or punish is a species of criminal liability distinct from omissions which prove aiding and abetting or joint criminal enterprise. On any view, liability for failing to discharge a duty to prevent or punish requires proof that: (i) the Accused was bound by a specific legal duty to prevent a crime; (ii) the accused was aware of, and wilfully refused to discharge, his legal duty; and (iii) the crime took place.<sup>47</sup> Although the Prosecution need not use any magic formulation of words, the pleadings must at least, in substance, articulate these three elements.

## 5. Notice

### (i) Failure to Plead Duty to Prevent or Punish Criminal Acts

28. In its Closing Brief, the Prosecution purports to characterize the Accused’s criminal responsibility as “Aiding and Abetting By Omission”. Four conditions of this form of criminal liability are then set forth:

For an accused to incur criminal liability for an omission in furtherance of the objectives of a JCE, the following elements must be proved: That the accused had a duty to act; That the accused had the ability to act; That the accused failed to act,

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<sup>42</sup> *Tadic*, Judgement (AC), para. 186.

<sup>43</sup> See *Blaskic*, Judgement (AC), paras. 53-85, discussing the conditions for such liability.

<sup>44</sup> *Id.*, para. 663.

<sup>45</sup> *Id.*, para. 663, fn. 1384 and fn. 1385. The possibility of positive duties being created by international criminal law also appears to have been recognized in *Tadic*, Judgement (AC), para. 188 (“[Article 6(1)] covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law”).

<sup>46</sup> *Rutaganira*, Judgement (TC), paras. 67-91; *Ntagerura et al.*, Judgement (TC), paras. 659-60.

<sup>47</sup> *Blaskic*, Judgement (AC), para. 663; *Rutaganira*, Judgement (TC), paras. 67-91; *Ntagerura et al.*, Judgement (TC), paras. 659-60.

intending or with knowledge that a crime or crimes would be committed; and That the failure to act resulted in the commission of a crime.<sup>48</sup>

The Closing Brief then discusses at length the evidence which purports to show that the Accused had a legal duty to act under Rwandan law; that he had a variety of legal powers and resources at his disposal as *bourgmestre* to prevent or punish criminal acts; that he failed to exercise such authority knowing that crimes would result; and that such crimes did, in fact, take place.<sup>49</sup> In substance, this form of liability is the type described in the previous section: a failure of a duty to prevent or punish. The Defence argues that it had no notice of this form of criminal liability and that, accordingly, the Accused cannot be convicted on this basis.

29. Article 20 (4)(a) of the Statute requires that an accused “be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her”. An accused can be convicted of only those crimes with which he or she is charged in the Indictment.<sup>50</sup> The level of specificity required to describe the accused’s mode of participation in a crime has been explained as follows:

If an indictment merely quotes the provisions of Article [6 (1)] without specifying which mode or modes of responsibility are being pleaded, then the charges against the accused may be ambiguous. When the Prosecution is intending to rely on all modes of responsibility in Article [6 (1)], then the material facts relevant to each of those modes must be pleaded in the indictment. Otherwise, the indictment will be defective either because it pleads modes of responsibility which do not form part of the Prosecution’s case, or because the Prosecution has failed to plead material facts for the modes of responsibility it is alleging.<sup>51</sup>

A vague indictment may be remedied by giving the accused timely, clear and consistent information concerning the nature of the charges or material facts so as to remedy the ambiguity.<sup>52</sup> Where such clarifying information has been communicated, if a party raises an objection during trial, the Chamber must still consider whether fairness requires amendment of the indictment, an adjournment, or the exclusion of evidence.<sup>53</sup> Even in the absence of any objection, no conviction can be entered against an accused if he or she was not in a reasonable position to understand the charges against him or her.<sup>54</sup>

30. The types of communication which can remedy an unclear indictment were recently canvassed by the Appeals Chamber:

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<sup>48</sup> Prosecution Closing Brief, para. 200. On another occasion, the Prosecution argues that the failure of the duty to act proves aiding and abetting: T. 3 May 2006 p. 42 (“our submission is that the evidence led before you has passed the test of culpable omission we set out in our brief – in our closing brief, and can therefore form the basis for a conviction for aiding and abetting through, *inter alia*, the omissions proved”). These four conditions appear to have been adapted from the *Rutaganira* Judgement, para. 67.

<sup>49</sup> Prosecution Closing Brief, paras. 200-37.

<sup>50</sup> *Naletilic*, Judgement (AC), para. 26; *Kvočka et al.*, Judgement (AC), para. 33.

<sup>51</sup> *Kvočka et al.*, Judgement (AC), para. 29; *Kordic and Cerkez*, Judgement (AC), para. 129 (“the alleged mode of liability of the accused in a crime pursuant to Article [6 (1)] of the Statute should be clearly laid out in an indictment .... The nature of the alleged responsibility of an accused should be unambiguous in an indictment”).

<sup>52</sup> *Ntakirutimana*, Judgement (AC), para. 27.

<sup>53</sup> *Kvočka et al.*, Judgement (AC), para. 31.

<sup>54</sup> *Naletilic*, Judgement (AC), para. 27.

[T]he Appeals Chamber has in some cases looked at information provided through the Prosecution's pre-trial brief or its opening statement. The Appeals Chamber considers that the list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and the charges in the indictment as to which each witness will testify and including specific references to counts and relevant paragraphs in the indictment, may in some cases serve to put the accused on notice. However, the mere service of witness statements or of potential exhibits by the Prosecution pursuant to disclosure requirements does not suffice to inform an accused of material facts that the Prosecution intends to prove at trial.<sup>55</sup>

31. Neither the Indictment nor the Pre-Trial Brief make any allegation reasonably recognizable as a duty to prevent or punish the crimes of other persons, whether because of a superior-subordinate relationship or otherwise. The Indictment comes closest to doing so in paragraph 19:

At all times material to this indictment Jean Mpambara failed to maintain public order, or deliberately undermined the public order, in districts over which he exercised administrative authority, in agreement with or in furtherance of the policies and objectives of the MRND, the Interim Government or the joint criminal enterprise referred to in paragraph 6, knowing that those policies and objectives intended the destruction, in whole or in part, of the Tutsi population.

This pleading fails to give reasonable notice of a failure to discharge a duty to prevent or punish in several respects. First, the paragraph is ambiguous as to whether the failure to maintain public order is intended to prove participation in a joint criminal enterprise or aiding and abetting, on the one hand; or whether it constitutes a breach of a duty to prevent or punish criminal acts, on the other. This ambiguity is not resolved by any subsequent communications. Paragraph 7 of the Pre-Trial Brief charges that the Accused "used his office and position of authority as Bourgmestre to *actively* undermine public order in furtherance of the criminal enterprise". Paragraph 22 does use the language of failure to prevent or punish the attacks, but in an ambiguous manner.<sup>56</sup> Paragraph 26 of the Pre-Trial Brief states that the Accused's failure to prevent attacks "not only encouraged and lent moral support to the perpetrators but showed that he shared the same intent with the perpetrators in the commission of the crimes charged". A reasonable reader would infer that the Accused's omissions were part of an overall picture which proved his participation in a joint criminal enterprise, or that he aided and abetted a crime.

32. Neither the Indictment nor the Pre-Trial Brief identify the source of the legal duty on the accused, nor is the scope of the legal duty described in any way. This is an essential element for charging an accused with a failure to prevent or punish. An accused must at least know the scope of his obligations to be in a position to dispute his alleged default. No material facts are presented in the Indictment or elsewhere as distinctly supportive of the

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<sup>55</sup> *Naletilic*, Judgement (AC), para. 27 (citations omitted).

<sup>56</sup> Paragraph 22 of the Pre-Trial Brief, cited by the Prosecution during closing arguments, similarly gives the impression that the omissions are only relevant to proof that the accused is guilty of aiding and abetting or joint criminal enterprise: "From the facts outlined above, Jean Mpambara prompted, enabled and facilitated the actions of the attackers. His presence during the attacks, and his failure to prevent the attacks or punish the attackers, not only encouraged and lent moral support to the perpetrators but also shows that he shared the same intent with the perpetrators and was not merely an aider and abettor, but a principal perpetrator in the commission of the crimes charged". T. 3 May 2006 p. 42.

failure to discharge a duty to prevent or punish criminal acts. Although the summaries of the testimony of witnesses contain information which could be characterized as omissions, there is no specification that those omissions are related to a duty to prevent or punish crimes, rather than being probative of participation in a joint criminal enterprise or aiding and abetting. Indeed, all indications in the Indictment and the Pre-Trial Brief suggest otherwise.

33. The Prosecution could have pleaded that the accused's omissions demonstrated both that he was a co-perpetrator or aider and abettor, on the one hand; and, on the other, that the omissions constituted a failure to prevent or punish crimes. The problem is not that the claims are incompatible, but that the failure to prevent is never distinctly pleaded.

34. The nature of the case against the accused was concisely, fairly, and eloquently summarized by the Prosecutor on the opening day of trial:

What is the case against the Accused? In a nutshell, it is this: That within hours of the death of President Habyarimana on the 6th of April 1994, Jean Mpambara, the Accused, who was then *bourgmestre* of Rukara *commune*, acting in concert with others and in furtherance of a common criminal enterprise, knowingly and willfully embarked on a deliberate path of destruction whose singular objective was the annihilation of the Tutsi ethnic group in his *commune*. As a result, thousands of Tutsi civilians were killed... The Prosecution alleges, and will establish, that Jean Mpambara is criminally responsible for having planned, ordered, instigated, committed, or otherwise aided and abetted in the commission of the crimes alleged as a key participant in the joint criminal enterprise. Evidence we will lead will further show that, in the course of the killings, Jean Mpambara was at all times aware that they were a part of a broader, widespread, or systematic attack on the Tutsi civilian population and that he used his office and position of authority as *bourgmestre* to actively undermine public order in furtherance of the criminal enterprise.<sup>57</sup>

This was the Prosecution theory of liability as of the first day of trial. There is no mention of any duty to prevent or punish crimes. It bears repeating that the Prosecution is permitted to bring potentially incompatible charges against the Accused. The defect here is not the incompatibility, but the failure to distinctly explain that the omissions alleged against the Accused constituted a breach of his duty to prevent or punish the crimes of others.

35. The Accused was not in a reasonable position to understand that the Prosecution was charging him with a duty to prevent or punish crimes. Accordingly, no conviction can fairly be entered against the accused for any alleged default in discharging that duty. The Chamber will, however, consider the evidence of omissions adduced at trial to the extent that they may be probative of the accused's participation in a joint criminal enterprise or having aided and abetted another in the commission of a crime.

## **6. Confusion of Legal Categories in Prosecution Submissions**

36. As previously discussed, the Indictment itself delineates distinct modes of commission and participation by the Accused, under Article 6 (1): commission (by participating in a joint criminal enterprise); instigating; planning; ordering; and aiding and abetting.<sup>58</sup> In some of its submissions, however, the Prosecution has blurred the distinction

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<sup>57</sup> T. 19 September 2005 p. 4.

<sup>58</sup> Indictment, paras. 6, 21.



between joint criminal enterprise and aiding and abetting. More seriously, it has failed to observe the important distinction between, on the one hand, a failure to prevent criminal conduct by others; and on the other hand, participation in a joint criminal enterprise to commit a crime.

37. The Prosecution argues that it seeks to prove “criminal responsibility for commission by aiding and abetting the physical perpetrators in furtherance of a JCE”.<sup>59</sup> This statement is legally incoherent: aiding and abetting is a form of accomplice liability, whereas participation in a joint criminal enterprise is a form of direct commission, albeit with other persons.<sup>60</sup> There are important differences in the mental and objective elements for each of these forms of participation which have been discussed above. As the Appeals Chamber has stated, “it would be inaccurate to refer to aiding and abetting a joint criminal enterprise”.<sup>61</sup> The fact that the same material facts may prove both aiding and abetting and participation in a joint criminal enterprise does not diminish the importance of distinguishing between the two. To the extent that the Prosecution has, on some occasions in its submissions, suggested that the joint criminal enterprise is proven by aiding and abetting, the Chamber will ignore this legal characterization and consider whether the material facts show either that the Accused participated in a joint criminal enterprise, or that he aided and abetted others in the commission of crimes.

38. As discussed above, joint criminal enterprise is a way of committing a crime. The *mens rea* which must be possessed by a co-perpetrator is no different from the *mens rea* which must be possessed by a person committing a crime on his or her own. Thus, a person is not guilty of participating in a joint criminal enterprise merely because he knows that others are about to commit a crime, and yet does nothing to prevent the crime from being committed. The proper inquiry in such a case is whether, by doing nothing, the person (i) intended to commit, or to contribute to the commission of, the crime; and (ii) actually did contribute to the crime. Any evidence which tends to prove these elements of the crime are relevant.

39. The four-part test suggested by the Prosecution does not correspond to the requirements for commission of a crime through a joint criminal enterprise. The four-part test purports to describe something quite different: the conditions in which a duty to prevent others from committing a crime will be imposed on an accused. By conflating these two tests, the Prosecution comes perilously close to equating the failure to prevent or punish a crime with the commission of that same crime through a joint criminal enterprise. The Chamber emphatically rejects this approach. Failure to prevent or punish a crime cannot be characterized as a form of commission of that same crime.

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<sup>59</sup> Examples of this include: T. 3 May 2006 p. 41 (referring to “the culpability of the Accused for his participation in a joint criminal enterprise by aiding and abetting”); Prosecution Closing Brief, para 37 (“In order to establish Art. 6(1) criminal responsibility for commission by aiding and abetting the physical perpetrators in furtherance of a JCE, the Prosecutor must prove that the acts and/or omissions of the accused were committed with the same criminal intent as that of the physical perpetrators of the alleged crimes”).

<sup>60</sup> *Milutinovic et al.*, Decision on Dragoljub Ojdanic’s Motions Challenging Jurisdiction-Joint Criminal Enterprise (AC), 21 May 2003, para. 20.

<sup>61</sup> *Kvočka et al.*, Judgement (AC), para. 91.

## **7. Conclusion**

40. The Accused is charged with co-perpetrating, ordering, instigating, and aiding and abetting genocide and extermination. The facts as discussed in the next section will be considered in accordance with the mental and objective elements of these crimes and forms of participation. Due to lack of notice, the Chamber will not consider whether the Accused failed to discharge a duty under international criminal law to prevent others from committing a crime. Nonetheless, the Chamber may consider any evidence which the Prosecution characterizes as an omission in relation to the charges which have been properly pleaded. As more fully elaborated above, the Chamber will examine whether:

- the Accused, by his acts or omissions, joined with others in a common purpose: to kill or cause serious bodily or mental harm to Tutsis, with the intention to destroy at least a substantial part of the group (genocide); or to kill civilians on a broad scale (extermination);
- the Accused, by his acts or omissions, contributed substantially to others doing so, with at least knowledge that this was the others' intention (aiding and abetting);
- the Accused planned, ordered or instigated these crimes.

### CHAPTER III: FACTUAL and LEGAL FINDINGS

#### 1. Introduction

41. The case against the Accused revolves around three sets of events over a six-day period: looting and killing of Tutsi residents of Gahini *Secteur* on 7 and 8 April 1994; an attack on Gahini Hospital on 9 April, in which Tutsi civilians were chased from their hiding places and killed; and attacks on 9 and 12 April at the Parish Church of Rukara where, on the latter date, between one and two thousand Tutsi men, women and children were massacred in a single night.<sup>62</sup> The Accused is not alleged to have physically participated in the killing; rather, he is said to have verbally instigated the attacks; distributed weapons on various occasions; and omitted to do things which shows that he aided and abetted the crimes.

42. The Prosecution theory is that these attacks were the product of an ongoing joint criminal enterprise. To the extent that direct evidence of the Accused's involvement in that joint criminal enterprise may be lacking, the Prosecution has invited the Chamber to infer his involvement based on the inferences from the totality of the evidence. The Chamber has accordingly been mindful of the totality of the evidence and, where necessary, has explicitly analyzed the cumulative effect of relevant evidence. The Chamber has also in some respects been presented with a circumstantial case, which "consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him".<sup>63</sup> In assessing whether circumstantial evidence proves a conclusion beyond reasonable doubt, the Chamber has applied the following standard:

It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.<sup>64</sup>

43. This Chapter is structured around each of the material facts posited in the Prosecution Closing Brief. The relevant evidence is weighed to determine whether the material fact has been proven beyond a reasonable doubt. In so doing, the testimony of individual witnesses, including the Accused, will be summarized to the extent necessary to understand the totality

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<sup>62</sup> Other events are pleaded in the Indictment, but were withdrawn by the Prosecution at the close of its case: The Prosecutor's Response to the Defence Motion for Judgement of Acquittal Under Rule 98 *bis* of the Rules of Procedure and Evidence, 10 October 2005, para. 11 (withdrawing paras. 9 (iii), 9 (iv), 9 (v), 14, 16, and 20).

<sup>63</sup> *Mucic et al.*, Judgement (AC), para. 458.

<sup>64</sup> *Id.*, para. 458; *Stakic*, Judgement (AC), para. 219 ("Where the challenge on appeal is to an inference drawn to establish a fact on which the conviction relies, the standard [of reasonable doubt] is only satisfied if the inference drawn was the only reasonable one that could be drawn from the evidence presented. In such circumstances, the question for the Appeals Chamber is whether it was reasonable for the Trial Chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime was not proven"). The Prosecution recognizes throughout its Closing Brief that evidence concerning one discrete event is often only indirectly and circumstantially relevant to another event: "on the basis of the direct and circumstantial evidence ... the Chamber can safely infer that Rukara Parish was deliberately left undefended ... consistent with Mpambara's prior planning and preparation for the attack on the Tutsi refugees at the parish through instigating and facilitating the attackers with grenades, in furtherance of the JCE" (para. 142); "the only inference to be drawn from the foregoing analysis of the evidence is that the accused, consistent with his conduct and statements in Paris that morning, convened the Ruyenzi meeting to issue instructions for the attack on the Tutsi refugees" (para. 156).

of relevant evidence heard by the Chamber. This does not mean, unless otherwise indicated, that the evidence is accepted. The Chamber has made factual findings only in relation to matters which, in its view, are necessary for the determination of the material facts. Where necessary, the overall credibility of a witness is discussed. The Chamber has not considered it necessary to explicitly address each and every argument presented by the parties: some arguments are discussed only generally or indirectly, or not at all where the Chamber did not consider it necessary to do so.<sup>65</sup>

## 2. Position of the Accused

44. Jean Mpambara was appointed *bourgmestre* of Rukara Commune in July 1989. Although Rukara was his native commune, he had not lived there for more than a decade, having attended university in Butare and worked in Kigali as a civil servant. Immediately before his appointment, Mpambara worked in the Office of the President, where he was in charge of publication of the official gazette.<sup>66</sup>

45. As *bourgmestre*, Mpambara was the chief executive authority of the Commune. He reported to the *préfet* and *sous-préfet* of Kibungo, who were, in turn, answerable to the Minister of the Interior and the President of Rwanda.<sup>67</sup> The *bourgmestre* acted in consultation with a council of eight *conseillers*, each elected to five-year terms by their respective *secteurs*.<sup>68</sup> Mpambara lived in an official residence located about one hundred metres from the commune offices and several hundred metres from the Rukara Parish Church complex.<sup>69</sup> The nearest town of significance was a place called Rwamagana, about 30 minutes away by car, where there were a *gendarmerie* camp, the residence of the *sous-préfet*, and a telephone line to the outside world.<sup>70</sup>

46. The communal police force normally consisted of seven officers, although one was on annual leave in April 1994, and another never reported for duty after 7 April.<sup>71</sup> The commune armoury contained four Kalashnikov rifles, two Enfield rifles, and six other spare rifles.<sup>72</sup> Neither the police nor the commune had telephones or two-way radios, and the police travelled on bicycles unless transported in one of the commune's two vehicles, one of which was a white pick-up truck.<sup>73</sup> After the RPF invasion of northern Rwanda in 1990, a squad of *gendarmes* was posted near the commune office, but frequently departed on

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<sup>65</sup> *Kunarac et al.*, Judgement (AC), paras. 47-48 (“Consonant with the settled practice, the Appeals Chamber exercises its inherent discretion in selecting which submission of the parties merit a ‘reasoned opinion’ in writing. The Appeals Chamber cannot be expected to provide comprehensive reasoned opinions on evidently unfounded submissions. Only this approach allows the Appeals Chamber to concentrate on the core issues of an appeal”); *Musema*, Judgement (AC), paras. 118-123.

<sup>66</sup> T. 6 February 2006 pp. 2-4 (Mpambara).

<sup>67</sup> *Id.* pp. 18-19; T. 8 February 2006 p. 12 (Mpambara).

<sup>68</sup> T. 6 February 2006 pp. 12-13 (Mpambara).

<sup>69</sup> *Id.* pp. 8-9 (Mpambara).

<sup>70</sup> *Id.* pp. 18-19 (Mpambara); T. 9 January 2006 p. 18 (Santos); T. 13 January 2006 p. 44 (Hardinge); T. 19 September 2005 p. 26 (Wilson).

<sup>71</sup> T. 6 February 2006 pp. 15-16, 43; T. 7 February 2006 p. 13 (Mpambara); T. 23 January 2006 pp. 9, 12-13 (Murwanashyaka). The Prosecution did not contest this evidence.

<sup>72</sup> T. 6 February 2006 pp. 17 (Mpambara). Mpambara denied that the communal police possessed any grenades.

<sup>73</sup> T. 23 September 2005 p. 27 (Witness AOI); T. 26 September 2005 p. 6 (Witness LED); T. 27 January 2006 p. 14 (Habineza); T. 6 February 2006 p. 15 (Mpambara).

missions for days at a time, as it did on the morning of 7 April.<sup>74</sup> The Defence presented evidence, which the Prosecution did not seriously contest, that the *bourgmestre* had no legal authority over the *gendarmes*, who remained under the direction of their commanding officer even when posted in a commune at the *bourgmestre*'s request.<sup>75</sup>

### 3. Attacks in Gahini Secteur on 7 and 8 April

#### 3.1 Introduction

47. On the evening of 7 April and the morning of 8 April 1994, attacks occurred in Gahini Secteur, Rukara Commune, resulting in the deaths of Tutsi residents and in the looting and burning of many homes.<sup>76</sup> The attacks originated at a small marketplace called Akabeza Centre and were said to have been organized and led by the *Conseiller* of Gahini Secteur, Jean Bosco Butera. Three meetings were purportedly held at Akabeza Centre to plan and instigate the attacks: one on the morning of 7 April, and one preceding each of the two attacks on 7 and 8 April. The Accused is alleged to have participated in these meetings with *Conseiller* Butera and to have publicly instigated the attacks. Mpambara is also alleged to have given Butera weapons on the morning of 7 April, which were later used in the attacks. The Accused testified that he went to Akabeza Centre on several occasions over the course of these two days but asserted that, rather than fomenting the violence as claimed by the Prosecution, he tried to discourage the attacks.

#### 3.2 Indictment

48. The Indictment reads:

7. Jean MPAMBARA participated in the preparation and execution of the campaign against the Tutsi civilian population in Rukara commune, Kibungo préfecture. The campaign consisted of ... (iii) distributing arms to *Interahamwe* and Hutu civilians for purposes of attacks against the Tutsi population.<sup>77</sup>

...

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<sup>74</sup> T. 6 February 2006 pp. 33-34; T. 8 February 2006 p. 47 (Mpambara); T. 23 January 2006 p. 13 (Murwanashyaka).

<sup>75</sup> T. 6 February 2006 pp. 14, 24; T. 8 February 2006 pp. 18-19 (Mpambara); T. 23 January 2006 pp. 13-14 (Murwanashyaka); Prosecution Closing Brief, paras. 14-17. Although the Prosecution argued generally that the acts and omissions of the Accused must be considered in the context of his "office and position of authority as Bourgmestre" (Prosecution Closing Brief, para. 10) the legal authority associated with his office was not a matter on which the Chamber heard extensive testimony. Most of the evidence on this question was adduced through the Accused himself. The present discussion of the legal authority of *bourgmestre* under Rwandan law in 1994 is, accordingly, more limited than in some other judgements of this Tribunal. See, e.g., *Bagilishema*, Judgement (TC), paras. 147-225. In the absence of more comprehensive evidence, or any need to make more detailed findings, the Chamber's description here must be understood as based on the limited evidence placed before it.

<sup>76</sup> The Accused does not, however, contest that killings took place in Umwiga and Ibiza *Cellules* on 7 and 8 April 1994. *Déclarations des Admissions de la Défense*, 30 May 2005, paras. 9-10.

<sup>77</sup> The Prosecution's Pre-Trial Brief considerably narrowed the scope of these allegations and asserted that "[o]n or about 7<sup>th</sup> April between 9.00 and 11.00 a.m. at Rukara Commune office Samson Gacumbitsi, Jean Bosco Butera, Samuel Gasana and Manasse Kanyamurerea received ten guns from Jean Mpambara, with orders that all Tutsis should be killed. The said guns were later that day distributed to attackers by Jean Bosco Butera and used to kill Tutsi civilians".<sup>77</sup> Prosecution Pre-Trial Brief, para. 21. See also paras. 25, 28.

9. Jean MPAMBARA organized or participated in meetings, as follows:

(i) on or about 7 April 1994, at Samson GACUMBITSI's place in Akabeza Trading Center, with other *commune* authorities and influential persons including *conseiller de secteur* Jean Bosco BUTERA, *Police Brigadier* RUHIGURI, Samson GACUMBITSI and Samuel GASANA.

(ii) on or about 8 April 1994, at Samson GACUMBITSI's place in Akabeza Trading Center, with other *commune* authorities and influential persons.<sup>78</sup>

...

11. On the evening of 7 April 1994, after the meetings in Akabeza Trading Center, Jean MPAMBARA ordered the gathered Hutu militia to attack the Tutsi population. Other members of the joint criminal enterprise including Jean Bosco BUTERA, Samson GACUMBITSI and Samuel GASANA led groups of armed Hutu civilians and *Interahamwe* to attack Tutsis in Umwiga Cellule. They attacked and killed a number of Tutsi civilians including KAYITESI and her two children, ANATALIE and GATSINZI.

12. On the morning of 8 April 1994, members of the joint criminal enterprise including Jean Bosco BUTERA led groups of armed Hutu civilians and *Interahamwe*, who gathered in Akabeza Trading Center, to attack Tutsis in Ibiza Cellule. They attacked and killed a number of Tutsi civilians including a man named DAVID.

The legal characterization of the Accused's participation is expressed in paragraph 6 of the Indictment:

Jean MPAMBARA ordered those over whom he had command responsibility and control as a result of his position and authority described in paragraph 2. He instigated and aided and abetted those over whom he did not have command responsibility and control to attack the Tutsi population. In addition, the accused willfully and knowingly participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was the destruction of the Tutsi racial or ethnic group throughout Rwanda. To fulfill this criminal purpose, the accused acted with military and community leaders and members of the *Interahamwe* in Rukara Commune such as ... *conseiller de secteur* Jean Bosco BUTERA, *Police Brigadier* RUHIGURI, Businessman Samson GACUMBITSI, Samuel GASANA ... and other unknown participants.<sup>79</sup>

### **3.3 Evidence**

#### **3.3.1 Overview of Submissions**

49. The Prosecution argues that the evidence shows that the Accused:

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<sup>78</sup> The meetings on 7 and 8 April at Gacumbitsi's place are alleged as part of a joint criminal enterprise, through which the Accused knowingly and willfully acted with military and community leaders as well as members of the *Interahamwe* in a scheme to eliminate the Tutsi population throughout Rwanda (and specifically in Rukara Commune between 7 and 16 April 1994). Indictment, paras. 6-7, 10.

<sup>79</sup> This paragraph supports the charges of genocide and complicity in genocide. Similar allegations appear in paragraph 21 for the charge of extermination as a crime against humanity.

- distributed weapons at the Rukara Commune office on the morning of 7 April 1994, which were later used in attacks in Gahini *Secteur*;
- met with other influential persons at Akabeza Centre on the morning of 7 April 1994 to discuss plans for killing Tutsis, and publicly encouraged such attacks;
- publicly encouraged attacks at Akabeza Centre again on the evening of 7 April 1994, which led to attacks that evening in the Umwiga and Ibiza *Cellules*;
- patrolled Umwiga and Ibiza *Cellules* on 8 April 1994 with two *gendarmes* and actively encouraged killings of Tutsis; and
- purposefully failed to arrest those responsible or otherwise prevent the killings or take stronger action to stop the violence on 8 April 1994 as killings were taking place.<sup>80</sup>

### 3.3.2 Distribution of Weapons at Commune Office, 7 April

50. The Prosecution relies principally on the testimony of Witness AVK to establish that the Accused distributed rifles and grenades to Butera, Gasana, Gacumbitsi and others at the Rukara Commune office on the morning of 7 April 1994, which were later stored at Gacumbitsi's place in Akabeza Centre and used in attacks on Tutsis.<sup>81</sup> Witness AVK, who served a prison sentence in Rwanda for his role in attacks against Tutsis in Gahini *Secteur*, testified that on the morning of 7 April at approximately 9.30 or 10.00 a.m., he saw Butera, Gasana, Gacumbitsi, Kanyamurera and Semana leave Akabeza Centre in Gasana's vehicle, heading toward the commune office.<sup>82</sup> Butera said that they wanted the *bourgmestre's* advice.<sup>83</sup> At approximately 10.30 or 11.00 a.m., they returned and carried 10 Kalashnikov rifles and a box into Gacumbitsi's shop.<sup>84</sup> Witness AVK later learned that the box contained grenades, but was never told where the weapons had come from.<sup>85</sup>

51. The Accused acknowledged that Butera, Gasana, and Gacumbitsi came to the commune office that morning but denied that he distributed any weapons to them.<sup>86</sup> He testified that they arrived around 7.30 a.m. and asked how they should conduct themselves in light of the President's death.<sup>87</sup> The Accused testified that he told them to return to their

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<sup>80</sup> Prosecution Closing Brief, paras. 52-90; T. 2 May 2006 pp. 2-4, 9-21 (closing arguments). No evidence or submissions were offered in support of paragraph 9 (ii) of the Indictment, to the effect that the Accused participated in a second meeting at Gacumbitsi's place on 8 April 1994.

<sup>81</sup> Prosecution Closing Brief, paras. 55-58, 198. T. 2 May 2006 pp. 9-12 (closing arguments).

<sup>82</sup> T. 20 September 2005 pp. 62-63 (Witness AVK); T. 21 September 2005 pp. 7-9 (Witness AVK). *See also* T. 13 January 2006 pp. 35-36 (Hardinge) (testifying that the commune office was approximately ten kilometres away from Gahini Hospital).

<sup>83</sup> T. 21 September 2005 p. 8 (Witness AVK).

<sup>84</sup> *Id.* pp. 8-9, 25 (Witness AVK).

<sup>85</sup> *Id.* pp. 9, 25 (Witness AVK). Witness AVK testified that he was told by an ex-soldier named Shyaka that the box contained grenades.

<sup>86</sup> *Mémoire Final Aux Fins d'Acquittement*, pp. 64-65; T. 2 May 2006 pp. 58-60 (closing arguments).

<sup>87</sup> T. 6 February 2006 p. 40 (Mpambara). The Accused denied that Kanyamurera and Semana were present at the meeting. T. 8 February 2006 p. 45.

*secteurs* and tell people to remain in their homes and avoid trouble.<sup>88</sup> Butera asked for a rifle to maintain security, but the Accused refused, saying that Butera was a civilian and was not authorized to carry a gun.<sup>89</sup> Butera became angry, and the three individuals left the commune office without any weapons, returning in the direction of Gahini.<sup>90</sup>

52. The Prosecution also relies on Witness LEV, who testified that he saw the Accused at the commune office with three communal policemen at approximately 6.30 a.m.<sup>91</sup> Later that morning, he saw two cars heading from the commune office toward Gahini *Secteur*: the first carrying Butera, Gatambara, Musirikare and others; and the second, approximately twenty minutes later, carrying Mpambara, a driver and two communal police.<sup>92</sup> Witness LEV did not, however, witness the meeting at the commune office, nor did he see Butera or the other men in possession of any weapons.

53. There is no direct evidence that the Accused distributed weapons to Butera or the other men. No witness saw any such distribution or heard that it had taken place. The Chamber will only infer criminal conduct on the basis of circumstantial evidence where, as previously mentioned, it is “the *only* reasonable conclusion available”.<sup>93</sup> The evidence presented, assuming that it is credible, does not foreclose the reasonable possibility that the weapons were obtained elsewhere.<sup>94</sup> No evidence was heard, for example, suggesting that the communal armoury was the only possible source of the weapons in Butera’s possession. The Chamber does not find beyond a reasonable doubt that Mpambara distributed weapons to Butera on the morning of 7 April.

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<sup>88</sup> T. 6 February 2006 p. 40 (Mpambara).

<sup>89</sup> *Id.* p. 40 (Mpambara). The Accused testified that an arsenal of weapons was kept in a store room at the commune office for use by the communal police and that the head of the communal police, *Brigadier* Ruhiguri, had the key to the room. *Id.* pp. 16, 21 (Mpambara). It is unclear from the record whether the Accused also had means to gain access to the store room.

<sup>90</sup> *Id.* p. 40 (Mpambara).

<sup>91</sup> T. 27 September 2005 pp. 13-14 (Witness LEV). The Prosecution also points to the testimony of Witness LEF, but his testimony has no probative value other than that it fails to corroborate the account given by Witness AVK. Witness LEF, who rented a room from Gacumbitsi in Akabeza Centre, testified that he did not see Butera, Gacumbitsi, and Gasana leave Akabeza Centre that morning nor did he see them return in Gasana’s vehicle. T. 21 September 2005 p. 64. Witness LEF also stated that he saw weapons stockpiled at Gacumbitsi’s place. T. 22 September 2005 pp. 3-5. However, Witness LEF only saw the weapons there around 17 April 1994, after the Rwandan Patriotic Front arrived in Rukara commune and broke the door open on Gacumbitsi’s shop, leaving it exposed to looters. T. 21 September 2005 p. 57; T. 22 September 2005 p. 7. This testimony is insufficient to link the stockpiling of weapons at Gacumbitsi’s place in Akabeza to the events of the morning of 7 April 1994 and does not connect the weapons to the Accused in any way.

<sup>92</sup> T. 27 September 2005 pp. 15-17. While Witness LEV mentioned that others were traveling with Butera when he passed by the witness’s place of employment, the Chamber notes that Witness LEV failed to mention Gacumbitsi and Gasana, two prominent figures in the community, who were alleged to have been with Butera that morning.

<sup>93</sup> *Mucic et al.*, Judgement (AC), para. 458; *Stacic*, Judgement (AC), para. 219.

<sup>94</sup> The Prosecution conceded during closing arguments that “it’s circumstantial evidence, but looking back on the train of events as they unfolded, it’s our submission that you can be sure that you can make that inferential finding that there is a direct causation. MR. PRESIDENT: Is that -- is that finding the only finding that is open, that it was, indeed, the Accused who is the source of those weapons? MS. MOBBERLEY: Obviously, it’s not, Your Honours...”. T. 2 May 2006 pp. 11-12 (closing arguments).



### 3.3.3 First Gathering at Akabeza Centre, 7 April

54. Witnesses AVK and LEF alleged that the Accused came to Akabeza Centre on the morning of 7 April 1994; that he met with the leaders of the subsequent attacks; and that he verbally encouraged killing of Tutsis.

55. According to Witness AVK, the Accused arrived in the white communal pick-up truck around 11.00 a.m., accompanied by a driver and an armed communal policeman.<sup>95</sup> Mpambara entered Gacumbitsi's shop and met with Gacumbitsi, Gasana and Butera.<sup>96</sup> After approximately twenty minutes, the group reemerged onto the veranda, where Gacumbitsi told the crowd that the President's death was the work of the Tutsis and that his death needed to be avenged by killing them.<sup>97</sup> While Gacumbitsi was still speaking, but after these remarks instigating the killings, Mpambara boarded his vehicle and drove away.<sup>98</sup>

56. Witness LEF, a Tutsi who ran a small shop behind Gacumbitsi's bar, testified that he saw the Accused arrive between 9.00 and 10.00 a.m. at Akabeza Centre with two communal police named Ngarambe and Ruhiguri as well as a driver.<sup>99</sup> Upon exiting his truck, the Accused said, "in a very loud voice": "I used to think that the people from Gahini were strong, courageous, and how can there be no – any Tutsi corpses around when the head of state has been killed?".<sup>100</sup> Mpambara entered Gacumbitsi's place for a meeting, while Butera stayed outside and told the crowd that they needed to avenge the President's death.<sup>101</sup> Mpambara came out of Gacumbitsi's shop and left after speaking briefly with Butera.<sup>102</sup> Butera and Gacumbitsi then discussed how to carry out the attacks.<sup>103</sup>

57. The Accused testified that he visited Akabeza Centre around 10.30 a.m. as part of a tour of the commune, following reports of violence.<sup>104</sup> Mpambara told the population to close their shops and return to their homes.<sup>105</sup> Although it is not entirely clear from the record, he appears to have been driving himself in the communal vehicle, accompanied by Ngarambe, a communal policeman.<sup>106</sup> The Accused testified that he did not stay long at Akabeza Centre and continued on toward Kawangire and Rwimishinya *Secteurs*, where he crossed paths with Father Ganuza Lasa Santos, the Spanish priest of Rukara Parish<sup>107</sup>

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<sup>95</sup> T. 21 September 2005 p. 2. Witness AVK did not recognize the communal policeman.

<sup>96</sup> *Id.* pp. 2-3 (Witness AVK). The witness stated that they may have been others who went into Gacumbitsi's shop with the Accused but that he could not recall.

<sup>97</sup> *Id.* p. 3 (Witness AVK).

<sup>98</sup> *Id.* p. 4 (Witness AVK).

<sup>99</sup> *Id.* pp. 54, 65; T. 22 September p. 2 (Witness LEF).

<sup>100</sup> T. 21 September 2005 pp. 54, 67 (Witness LEF).

<sup>101</sup> *Id.* p. 55; T. 22 September 2005 pp. 12-13 (Witness LEF).

<sup>102</sup> T. 21 September 2005 pp. 55-56 (Witness LEF). Witness LEF stated that he was hiding beside Gacumbitsi's shop by that time because he had become frightened by the events that were transpiring. Consequently, he did not actually see the Accused leave Gacumbitsi's shop or drive away. He also could not hear what was said between Butera and the Accused just before the Accused's departure.

<sup>103</sup> *Id.* p. 56 (Witness LEF).

<sup>104</sup> T. 6 February 2006 pp. 42-43; T. 8 February 2006 p. 46 (Mpambara).

<sup>105</sup> T. 6 February 2006 pp. 42-43 (Mpambara).

<sup>106</sup> T. 6 February 2006 pp. 16-17, 42-43; T. 7 February 2006 p. 41 (Mpambara).

<sup>107</sup> T. 6 February 2006 p. 44 (Mpambara). Father Santos provided a similar account before the Tribunal. T. 9 January 2006 pp. 12-13 (Santos).

Mpambara and Father Santos returned to the Parish church together, where they arrived at approximately 11.00 a.m.<sup>108</sup>

58. The testimony of Witnesses AVK and LEF diverge in several significant respects.<sup>109</sup> First, Witness AVK did not hear the Accused ask why there were no Tutsi corpses, even though he testified that he saw the Accused arrive.<sup>110</sup> Second, the witnesses differ as to whether Butera entered Gacumbitsi's place to participate in the meeting or rather remained outside on the veranda. Witness AVK specifically recalled seeing Butera enter Gacumbitsi's shop and remain there for twenty minutes, whereas Witness LEF was adamant that Butera stayed outside to hector the crowd.<sup>111</sup> Third, Witness LEF recalls no speech being made by Gacumbitsi after the meeting, whereas Witness AVK testified that Gacumbitsi addressed the crowd in the presence of the Accused, instigating them to kill Tutsis.<sup>112</sup>

59. These discrepancies cannot be explained by the witnesses' different vantage points, as argued by the Prosecution. Each witness gave specific eyewitness testimony describing the Accused's arrival, entry into Gacumbitsi's shop, emergence from the shop, and then departure from Akabeza. The discrepancies are significant enough to raise a reasonable doubt as to the reliability of both witnesses in respect of this event. The overall credibility of Witness AVK is also undermined by his testimony concerning the Accused's presence at Gahini Hospital on 9 April, discussed by the Chamber in Section 4.3.7 below. Accordingly, in light of the irreconcilable discrepancies in the testimony of the only Prosecution witnesses to this event, and overall unreliability of Witness AVK's testimony concerning the Accused,

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<sup>108</sup> T. 6 February 2006 p. 44 (Mpambara); T. 9 January 2006 p. 13 (Santos).

<sup>109</sup> In addition to the discrepancies to be discussed in detail by the Chamber, other minor discrepancies exist which further diminish the weight to be given their testimonies. For example, Witnesses AVK and LEF differ in their accounts as to the number of communal police that accompanied the Accused that morning and the identity of these policemen. At trial, Witness AVK testified that the Accused arrived with one communal policeman whom the witness did not recognize and a driver. T. 21 September 2005 p. 2. The witness specified that the policeman was not the *Brigadier* Gervais Ruhiguri. T. 21 September 2005 p. 3. However, in his statement to OTP investigators dated 11 October 2004, he expressly stated that the Accused was accompanied by *Brigadier* Ruhiguri and a driver. Exhibit D-11 p. 3. Witness LEF, on the other hand, testified before the Tribunal in this case and in the *Bizimungu et al.* case that the Accused arrived with two communal policemen named Ruhiguri and Ngarambe and a driver. T. 21 September 2005 p. 65; *Prosecutor v. Bizimungu et al.*, T. 15 March 2004 p. 35. In his 17 July 2001 statement to OTP investigators, Witness LEF stated that the Accused arrived with only one communal policeman named Ngarambe and a driver. Exhibit D-8A p. 3. He made no mention of the *Brigadier* Ruhiguri. The Chamber notes that, in addition to the witnesses' internal inconsistencies, their accounts may be inconsistent with each other on these issues. Witness LEF also failed to discuss the meeting at Gacumbitsi's place and Butera's address to the crowd during this meeting in his 2001 statement to OTP investigators. Exhibit D-8A. In addition, the Defence argues that LEF's testimony that a man named Alphonse Mugiraneza was present at Akabeza Centre that morning is contradicted by Witness LET's testimony that the man was at Gahini market, approximately two kilometres away, at the same time. *Mémoire Final Aux Fins d'Acquittement* p. 10. Finally, the Defence takes issue with the witnesses' assertions that the Accused had a driver, as the Accused and several other witnesses testified that the Accused did not have a driver during the events of April 1994. *Mémoire Final Aux Fins d'Acquittement* p. 9; T. 6 February 2006 pp. 16-17 (Mpambara); T. 7 February 2006 p. 41 (Mpambara); T. 27 January 2006 pp. 14-16 (Habineza). T. 26 September 2005 p. 7 (Witness LED); T. 31 January 2006 p. 12 (Serukwavu).

<sup>110</sup> T. 21 September 2005 p. 2 (Witness AVK) ("He didn't say anything in particular other than greeting those people that were present").

<sup>111</sup> T. 21 September 2005 pp. 2-3 (Witness AVK); T. 21 September 2005 p. 55 (Witness LEF); T. 22 September 2005 pp. 12-13 (Witness LEF).

<sup>112</sup> T. 21 September 2005 pp. 55-56 (Witness LEF); T. 21 September 2005 p. 3 (Witness AVK).

the Chamber entertains a reasonable doubt that the Accused verbally instigated attacks on the Tutsi population, or that he stood by while others did so.

### 3.3.4 Second Gathering at Akabeza Centre and Ensuing Attacks, 7 April

60. The Prosecution relies solely on the testimony of Witness AVK to establish that Mpambara met Gacumbitsi and others at Akabeza Centre on the evening of 7 April 1994 and that he instigated a crowd to kill Tutsis. Witness AVK testified that people began to reassemble at Akabeza Centre around 6.00 p.m. that evening.<sup>113</sup> Mpambara arrived shortly thereafter and entered Gacumbitsi's place.<sup>114</sup> When the Accused reemerged, he and Butera stood on Gacumbitsi's veranda as they had earlier that day.<sup>115</sup> Butera blew a whistle, drawing people to gather around.<sup>116</sup> Witness AVK heard Mpambara tell the crowd that they needed to avenge the death of their father by killing Tutsis and to prevent themselves from becoming slaves.<sup>117</sup> After the Accused's departure, Butera blew the whistle again, and the group moved about ten metres down the road.<sup>118</sup> Witness AVK testified that Butera gave instructions for carrying out the killings and identified the houses to be targeted.<sup>119</sup> Butera blew his whistle a third time, leading attacks on the homes of five Tutsis that evening.<sup>120</sup> The attackers surrounded each house, broke down doors, killed anyone inside, and looted whatever could be found.<sup>121</sup> After the attack, the mob returned to Akabeza Centre where they were given beer and soda by Gacumbitsi and Gasana and told to return the following morning to continue the attacks.<sup>122</sup>

61. The Accused denied these allegations, testifying that he passed through Akabeza Centre in the afternoon, told people gathered there to return to their homes immediately, and that he returned to the commune office shortly before 6.00 p.m.<sup>123</sup>

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<sup>113</sup> T. 21 September 2005 pp. 4, 25-26 (Witness AVK).

<sup>114</sup> *Id.* pp. 4-5 (Witness AVK).

<sup>115</sup> *Id.* p. 5 (Witness AVK).

<sup>116</sup> *Id.* pp. 5-6 (Witness AVK). Witness AVK estimated that two hundred armed Hutu were present by that time. The Chamber notes, however, that Witness AVK estimated the crowd at Akabeza Centre in the morning to be one hundred persons whereas Witness LEF attested to twenty to thirty persons. *Compare id.* p. 2 (Witness AVK) *with id.* p. 54 (Witness LEF). The crowd consisted of Hutu civilians and former soldiers in civilian clothes. *Id.* pp. 67 (Witness AVK). The head of the communal police, *Brigadier* Ruhiguri, and another communal policeman were also present and carried rifles. *Id.* pp. 9-10 (Witness AVK).

<sup>117</sup> *Id.* p. 5 (Witness AVK). Witness AVK testified that he was standing five metres away from Mpambara at the time. He testified that the crowd reacted favorably to Mpambara's speech. *Id.* p. 9.

<sup>118</sup> *Id.* pp. 10, 25-26 (Witness AVK). It is not clear from the record exactly how long after the address the Accused left.

<sup>119</sup> *Id.* pp. 10-11 (Witness AVK).

<sup>120</sup> *Id.* pp. 10-12 (Witness AVK). The homes of Rugomwa, Shabayiro, and Cassien were located in Umwiga *Cellule*, and the homes of Janvier and Higiuro were situated in Ibiza *Cellule*. During the course of the attacks, several people were killed, including Rugomwa's wife, Shabayiro and his sister Dina. Defence witness Innocent Bagabo corroborated that the attacks took place that evening. T. 26 January 2006 p. 39; Exhibit P-21A p. 3.

<sup>121</sup> T. 21 September 2005 p. 11-12 (Witness AVK).

<sup>122</sup> *Id.* p. 12 (Witness AVK).

<sup>123</sup> T. 7 February 2006 p. 2 (Mpambara) ("The night of the 7th saw nothing extraordinary, so nothing special in Rukara Commune. I went round and I found everything was normal. There was no problem of security anywhere I went, except that I was telling the population whenever I went round to go to their homes and take care of themselves and ensure their security, and that is all"). Father Santos testified that the Accused returned to Rukara Parish that afternoon to assess the refugee situation, but he provides no indication of time. T. 9 January 2006 pp. 13-14 (Santos).

62. Defence witness Félicien Serukwavu, a local carpenter of Tutsi origin, found a group of twenty to twenty-five people with machetes and clubs at Akabeza Centre in the late afternoon that day.<sup>124</sup> Butera was telling the crowd that they had to avenge their parent's death.<sup>125</sup> Serukwavu continued home and did not leave his home again until the following day.<sup>126</sup>

63. For reasons discussed more fully in Section 4.3.7, the Chamber entertains a reasonable doubt concerning Witness AVK's uncorroborated testimony incriminating the Accused. Moreover, Serukwavu's credible testimony contradicts that of Witness AVK, although it does not exclude the possibility that the Accused may have been present at Akabeza at some moment that evening. Nevertheless, the Chamber finds that the testimony of Witness AVK does not establish beyond a reasonable doubt that the Accused instigated the killing of Tutsis on the evening of 7 April at Akabeza Centre, or that he attended a meeting at Gacumbitsi's place as part of a joint criminal enterprise to kill the Tutsi population.

### 3.3.5 Third Gathering at Akabeza Centre and Ensuing Attacks, 8 April

64. The Prosecution again relies on the uncorroborated testimony of Witness AVK to prove that the Accused encouraged killings in Ibiza *Cellule* on 8 April 1994.<sup>127</sup> Witness AVK testified that he and other attackers reconvened at Akabeza Centre that morning.<sup>128</sup> Butera gave instructions for carrying out more killings and divided the attackers into four groups, which proceeded to ravage Ibiza *Cellule* for the remainder of the day.<sup>129</sup> The attackers chased a Tutsi man named David Twamugabo into his house, where they tried to kill him with a grenade.<sup>130</sup> According to Witness AVK, the Accused arrived on the scene in the communal vehicle, accompanied by two *gendarmes*. Mpambara beckoned to Witness AVK and asked him where the grenade had exploded. When Witness AVK responded that it was Twamugabo's house, the Accused asked, "What are you doing? Are you failing to carry out your operations? What is it?"<sup>131</sup> The *gendarmes* accompanying the Accused then said, "Maybe you are short of firearms. Should we give you more weapons?"<sup>132</sup> Witness AVK gave no response, and the Accused and the *gendarmes* drove away.<sup>133</sup>

65. Defence Witness Félicien Serukwavu also saw the attacks that day, including the one on Twamugabo's house. After hearing shouts from that direction, Serukwavu went to Ibiza

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<sup>124</sup> T. 31 January 2006 pp. 67 (Serukwavu). The witness, who was on his way to drop off wood at his workshop, could not recall exactly what time he reached Akabeza Centre. *Id.* pp. 32-33. He testified that it was still daylight but that it was beginning to be twilight by the time he left Akabeza Centre. *Id.* pp. 6-7.

<sup>125</sup> *Id.* p. 7 (Serukwavu).

<sup>126</sup> *Id.*

<sup>127</sup> Prosecution Closing Brief, para. 82; T. 2 May 2006 p. 17 (closing arguments).

<sup>128</sup> T. 21 September 2005 pp. 12-13 (Witness AVK).

<sup>129</sup> *Id.* p. 13 (Witness AVK) ("Butera told us that it was not a matter of getting into homes but, rather, going to the bushes to flush out people"). The attackers were divided into four groups led by Ruvugo, Nyagutungwa, Mugiraneza, and Butera. Although the witness's testimony was ambiguous as to which group he joined, it is at least clear that he was not in the group led by Butera.

<sup>130</sup> *Id.* p. 14. Twamugabo was not injured by the grenade. However, all of the attackers came to his house when they heard the grenade and began throwing arrows and stones at the house. Finally, Butera and Munyemana entered the house and killed Twamugabo, according to the witness.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

*Cellule* around 11.00 a.m. and stood a short distance away from Twamugabo's house.<sup>134</sup> Attackers using clubs, machetes and sticks removed the roof, door and windows of the house, but Serukwavu neither heard nor saw any explosions.<sup>135</sup> A short time later, Serukwavu saw Mpambara arrive accompanied by two communal policemen carrying rifles.<sup>136</sup> Mpambara looked angry as he exited his vehicle and said, "Anybody who loots the property of Tutsis or hunts down Tutsis trying to kill them should know that he should be – he will be tried in courts for it ... I ask everybody to leave this premises and return home".<sup>137</sup> Many attackers fled when they saw Mpambara arrive, and others dispersed at his instruction.<sup>138</sup>

66. Witness NK5, a peasant farmer living in the area who had come to buy food at Gacumbitsi's shop, confirmed the Accused's presence at Akabeza Centre that morning.<sup>139</sup> She testified that the Accused addressed a group outside Gacumbitsi's shop and told them not to turn against each other.<sup>140</sup> Witness NK5 described the Accused as "very sad" and "almost crying".<sup>141</sup> After his departure, a number of people gathered around Butera and began calling the Accused an accomplice of the Tutsi.<sup>142</sup>

67. Another Defence witness, Marie Rose Niwemugeni, testified that Mpambara came to Gahini market, which is not far from Akabeza Centre, around noon that day, accompanied by communal police.<sup>143</sup> According to Niwemugeni, the Accused told people gathered there to go back to their homes and not to engage in the same type of violence that was occurring in the neighbouring commune of Murambi.<sup>144</sup> As the Accused drove off in the direction of Gahini Hospital, the witness saw many residents begin to return to their homes and heard people call Mpambara a Tutsi accomplice.<sup>145</sup>

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<sup>134</sup> T. 31 January 2006 pp. 7-8. Serukwavu testified that he had gone back to Rwinkuba forest that morning to recover his carpentry tools and put them in a safe place. The Prosecution tried to establish that Serukwavu had participated in the attacks that day, including on Twamugabo's house, but Serukwavu denied the allegation. T. 31 January 2006 p. 31.

<sup>135</sup> T. 31 January 2006 pp. 8, 27 (Serukwavu).

<sup>136</sup> *Id.* pp. 8-9 (Serukwavu). Witnesses AVK and Serukwavu differ as to whether the two persons traveling with the Accused were *gendarmes* or communal police, but the Chamber does not find this discrepancy to be significant insofar as both witnesses establish that the Accused was traveling with two law enforcement officers. The Chamber notes, however, that Mpambara recalled only having one communal policeman with him on that day. T. 8 February 2006 p. 56.

<sup>137</sup> T. 31 January 2006 pp. 8-9 (Serukwavu).

<sup>138</sup> *Id.* p. 9 (Serukwavu).

<sup>139</sup> T. 30 January 2006 pp. 2-6. The witness initially placed the encounter with the Accused near 11.00 a.m. However, in response to suggestive questioning by the Defence to which the Prosecution objected, she stated that she was not sure of the exact time. Her sighting of Butera suggests that she may be referring to Mpambara's earlier visit to Akabeza Centre that day because the Accused testified that he did not find Butera at Akabeza Centre when he returned there around 11.30 a.m. after his trip to Rwamagana. T. 7 February 2006 p. 4.

<sup>140</sup> *Id.* pp. 6, 13 (Witness NK5) ("People, I'm telling you once again, if you hear my message, go and tell other residents of this message. Tell your neighbours, tell any passenger. I'm giving you a message, you are all kith and kin, don't turn against each other, don't say, 'This is a Hutu,' 'This is a Tutsi.' The war is a bad thing").

<sup>141</sup> *Id.* p. 6 (Witness NK5).

<sup>142</sup> *Id.* p. 7 (Witness NK5). The Accused drove off in the direction of Gahini market. *Id.* pp. 7, 13.

<sup>143</sup> T. 27 January 2006 pp. 22-23 (Niwemugeni). The Accused did not testify to passing through Gahini market that morning or addressing residents there.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* p. 23 (Niwemugeni).

68. The Accused acknowledges that killings took place in Ibiza *Cellule* that day but denies that he encouraged the attacks in any way. He testified that he was informed of killings in Gahini *Secteur* by *Brigadier* Ruhiguri on the morning of 8 April at around 7.00 a.m.<sup>146</sup> The two immediately went to Akabeza Centre, where residents told them of the events of the previous evening.<sup>147</sup> After touring the *secteur* to assess the damage, they returned to Akabeza Centre, where Mpambara reprimanded the crowd for the attacks and told them that the killings had to stop.<sup>148</sup> He also spoke directly with Butera, reiterating the need to quell the violence and instructing him to prepare a report identifying those responsible.<sup>149</sup> The Accused told Butera that he would go to Rwamagana to call on the *gendarmerie* to investigate the killings.<sup>150</sup> Prosecution Witness Dr. Robert Wilson, a British physician who worked at Gahini Hospital in April 1994, generally corroborated this testimony, saying that when he arrived at Akabeza, Mpambara was meeting with approximately seventy to eighty people.<sup>151</sup> Dr. Wilson testified that he did not have the impression that the Accused was inciting violence and only heard him giving instructions about civil defence and emphasizing the need for calm.<sup>152</sup> Both Dr. Wilson and the Accused testified that they spoke to each other after this meeting.<sup>153</sup> Dr. Wilson told the Accused that a Tutsi man had taken refuge at his house and sought advice.<sup>154</sup> Mpambara told Dr. Wilson to keep the man in hiding until he returned from Rwamagana with *gendarmes* and could transport him to a more secure place.<sup>155</sup>

69. The Accused testified that after his unsuccessful attempt to obtain *gendarmes* from Rwamagana, he returned to Akabeza Centre around 11.30 a.m.<sup>156</sup> Mpambara was told that Butera and others were carrying out attacks in Umwiga *Cellule*.<sup>157</sup> The Accused took Ruhiguri and headed to Umwiga and Ibiza *Cellules*, where he found houses on fire.<sup>158</sup> The

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<sup>146</sup> T. 7 February 2006 p. 3 (Mpambara).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (“I was extremely disturbed and I went back to Akabeza centre and I called people from that area and told them that what they had done the previous night is very, very bad that they had started the killings that cannot be explained, cannot be justified, and that I wanted those things to stop”). The Accused estimated their return to Akabeza Centre to be between 9.00 and 9.30 a.m. *Id.* p. 4.

<sup>149</sup> *Id.* p. 3.

<sup>150</sup> *Id.*

<sup>151</sup> T. 19 September 2005 p. 18 (Wilson).

<sup>152</sup> *Id.* Dr. Wilson testified that, although his knowledge of Kinyarwanda was not good, he could understand some of what was being said and that he recalled the Accused telling people to be vigilant for the enemy and to remain calm. T. 19 September 2005 p. 38.

<sup>153</sup> T. 7 February 2006 p. 3 (Mpambara); T. 19 September 2005 p. 18 (Wilson).

<sup>154</sup> T. 7 February 2006 p. 3 (Mpambara); T. 19 September 2005 p. 18 (Wilson).

<sup>155</sup> T. 7 February 2006 p. 3 (Mpambara); T. 19 September 2005 p. 18 (Wilson). Later that day, a group of German volunteers passed by Dr. Wilson’s house with *gendarmes* to ask if Dr. Wilson and his family wanted to leave Rukara with them. Dr. Wilson decided to stay, but the group evacuated the Tutsi man to the commune office. Dr. Wilson heard that the man was later seen at the commune office but had no idea of what ultimately happened to him. T. 19 September 2005 p. 20 (Wilson).

<sup>156</sup> T. 7 February 2006 pp. 4-5 (Mpambara). Mpambara left Akabeza Centre and headed to Rwamagana between 9.30 and 10.00 a.m. where he met with the *sous-préfet* and the *gendarmerie* commandant to explain the situation and to request that *gendarmes* be deployed to Rukara. The *gendarmerie* commandant told the Accused that he could not send *gendarmes* immediately because many *gendarmes* had been sent to the front lines to fight, leaving very few behind, and because he needed to obtain the approval of his own superior prior to deploying them. The commandant agreed to contact his superiors and to send *gendarmes* to Rukara that afternoon.

<sup>157</sup> T. 7 February 2006 p. 4 (Mpambara).

<sup>158</sup> *Id.* pp. 4-5.

Accused testified that he ran around trying to stop the disturbances but that he could not control the situation because people scattered as soon as he approached.<sup>159</sup> The Accused did not mention having seen Butera.

70. Although the differences between Witness AVK and Serukwavu may be attributable to different perspectives or periods of time, they nevertheless reflect a fundamentally contradictory picture of Mpambara's general behaviour.<sup>160</sup> It seems unlikely that the Accused would have been actively encouraging the killings in Ibiza *Cellule* and, at the same time, scolding participants of the very same attack. Moreover, the Chamber views Witness AVK's uncorroborated testimony with caution in light of his testimony about the Accused at Gahini Hospital, discussed in section 4.3.7. Consequently, the Chamber finds that the evidence does not establish beyond a reasonable doubt that the Accused instigated or encouraged the killings occurring in Ibiza *Cellule* on 8 April 1994.

### 3.3.6 Failure to Arrest Butera and Others, or to Take Stronger Action to Prevent Attacks on 8 April

71. The Prosecution argues that the Accused's failure to arrest those responsible for the attacks, particularly Butera, and his failure to take additional steps to end the violence on 8 April 1994 were intended to allow other members of a joint criminal enterprise to carry out killings in Umwiga and Ibiza *Cellules*.<sup>161</sup> In addition to the testimony of Witness AVK, the Prosecution relies on Defence Witness Félicien Serukwavu, who stated that he did not hear the Accused give any orders to the armed communal police who were traveling with him to take any action whatsoever.<sup>162</sup>

72. The Accused testified that he did not realize that the situation had become critical until 8 April 1994 when he found people dead in Umwiga and Ibiza *Cellules*, and that he immediately tried to take the necessary measures to restore order to the commune.<sup>163</sup> Upon learning of the killings of the previous evening, he went immediately to Akabeza Centre to gather information and to assess the situation first-hand:

I went with Ruhiguri, the policeman. We went straight to Umwiga *cellule* and when I reached there, I found that some homes of the Tutsis had already been torched. When I reached there, I asked him what was happening and – there were doing it – was that whenever I reached a home, a home that was being torched, people would flee running in every direction and I wouldn't see anyone. The only people I would see would be some women and children who would come around to see and I ask people, 'What are you doing here?' And people would scatter into the banana growth, into the bushes and I wouldn't see anyone – anyone to arrest and every time I reached every

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<sup>159</sup> *Id.* pp. 4, 6. ("I went round the *cellule* in that kind of confusion and I didn't know what to do").

<sup>160</sup> The witnesses appear to have been situated at slightly different locations near Twamugabo's house, and consequently they appear to have had separate encounters with Mpambara. They may also have arrived at the scene at slightly different times, which would account for why they did not both hear grenade explosions or witness the looting of Twamugabo's house.

<sup>161</sup> Prosecution Closing Brief paras. 27, 79; T. 2 May 2006 pp. 20-21 (closing arguments).

<sup>162</sup> T. 31 January 2006 pp. 9-10 (Serukwavu) ("They did not do anything. I didn't see them do anything. They were carrying rifles, but they didn't shoot at anyone .... I didn't see any action like that [referring to whether Mpambara gave them any orders]").

<sup>163</sup> T. 8 February 2006 pp. 50-52 (Mpambara) ("I realized that we were living an emergency period ... on the 8<sup>th</sup> of April, when I found people dead at Gahini, that's when I realized that we were in critical times, and I decided to take the necessary measures").

home, it would happen like that. I could not control anything. I ran all over the place through the bushes, through the banana growth and I said that this is serious, I have to find a way of stopping all these disturbances.<sup>164</sup>

73. According to the Accused, his attempts to stop the violence were futile because he was unable to determine who was responsible.<sup>165</sup> The Prosecution suggested that Mpambara knew at the time that Butera was leading the attacks because Ruhiguri and others had told him so that morning.<sup>166</sup> Mpambara gave somewhat inconsistent responses as to his state of knowledge concerning Butera's culpability, but ultimately testified that, despite certain suspicions of Butera's involvement, he had no concrete reason to believe Butera was involved in the killings at that time.<sup>167</sup> More generally, the Accused testified that he did not have sufficient means to effectuate arrests or prevent the violence.<sup>168</sup>

74. The Accused also points to efforts he made that day to restore order in the commune. He made several trips to Akabeza Centre to speak with residents, urging them to remain calm and to return to their homes.<sup>169</sup> He patrolled Umwiga and Ibiza *Cellules* to see what was happening and to stop the violence.<sup>170</sup> He made two trips to Rwamagana to plead for *gendarmes*, once in the morning when he met with the *sous-préfet* and *gendarmerie* commandant, and again in the afternoon with Father Santos.<sup>171</sup>

75. In the Chamber's view, the evidence does not establish that the Accused's alleged omissions demonstrate a criminal intent. The evidence leaves open the reasonable possibility that Mpambara was overwhelmed by the situation, did not know with any degree of certainty who was leading the attacks in Ibiza and Umwiga *Cellules* on 7 and 8 April, and was incapable of restoring order with the law enforcement resources at his disposal. Moreover, the Defence presented evidence that the Accused made attempts to restore order to the commune. Although Mpambara may, arguably, have been able to do more than he did, the Prosecution has not established beyond a reasonable doubt that the Accused's failure to arrest Butera and others, or to take stronger measures to quell the violence, shows that he was involved in a joint criminal enterprise, or that his omissions had a substantial effect on the commission of crimes by others so as to make him liable for aiding and abetting.

### 3.4 Conclusion

76. The evidence of the events in Gahini *Secteur* on 7 and 8 April 1994 does not show beyond a reasonable doubt that the Accused's alleged acts and omissions amounted to planning, instigating, ordering or aiding and abetting the killings, or that he was a participant in a joint criminal enterprise.

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<sup>164</sup> T. 7 February 2006 pp. 3-4 (Mpambara).

<sup>165</sup> *Id.* pp. 4, 6 (Mpambara).

<sup>166</sup> T. 8 February 2006 pp. 54-57.

<sup>167</sup> Mpambara first testified that, upon his third passing at Akabeza Centre on the morning of 8 April, he was told that Butera and several youths had gone to Ibiza *Cellule* to torch houses and kill people. T. 7 February 2006 p. 5. Mpambara then stated that he did not know at the time that Butera was taking part in the killings but that he merely had suspicions without any tangible evidence. T. 7 February 2006 p. 8; T. 8 February 2006 pp. 56-57. Mpambara claimed that he did not learn of Butera's true involvement in the killings across Rukara Commune until he reached Tanzania as a refugee. T. 7 February 2006 p. 8.

<sup>168</sup> T. 9 February 2006 pp. 2-3 (Mpambara).

<sup>169</sup> T. 7 February 2006 pp. 3-4 (Mpambara).

<sup>170</sup> *Id.* pp. 3-5 (Mpambara).

<sup>171</sup> *Id.* pp. 4, 9-10 (Mpambara). Father Santos corroborated Mpambara's testimony about the trip to Rwamagana. T. 9 January 2006 p. 17.



#### 4. Attack on Gahini Hospital, 9 April

##### 4.1 Introduction

77. Gahini Hospital is perched atop a ridge overlooking Lake Muhazi, about 10 kilometres by road from Rukara Parish. A wire-mesh fence encloses several buildings in a compound; the main gate gives access to the road to Rukara Parish, and a back gate leads to a small collection of shops called Akabeza Centre.<sup>172</sup> The evidence shows, and it is not disputed, that on the morning of 9 April 1994, a mob armed with clubs, spears, machetes, and other traditional weapons, surrounded the hospital compound, prevented the evacuation of Tutsi civilians who had taken refuge there, and then invaded the compound and violently killed the Tutsis who were trapped there. Mpambara came to the compound at some stage during the morning, assessed the situation, and then went to the Rwamagana *gendarmerie* camp. Another attack on the hospital then took place, before the Accused returned in the early afternoon with the *gendarmerie* commandant and the *sous-préfet*.<sup>173</sup>

##### 4.2 Indictment

78. The Indictment reads:

13. On the morning of 9 April 1994, members of the joint criminal enterprise including *conseiller de secteur* Jean Bosco BUTERA and *Communal Police Brigadier* RUHIGURI led groups of armed Hutu civilians and *Interahamwe* to attack Tutsis who took refuge in Gahini Hospital. They attacked and killed a number of Tutsis who took refuge in Gahini Hospital. They attacked and killed a number of Tutsi civilians including KALENZI MUZUNGU from Umwiga Cellule, MWIZERWA a.k.a. BEBE and his father HIGIRO, RUHAGAZA from Kawangire, MUKARUGWIZA, KARASIRA Israel from Kawangire, HAJABAKIGA Simeon from Bicumbi in Kigali, MUHIKIRA a.k.a. TOTO, MURENZI from Kawangire, BUSHORISHORI from Kawangire and a child. During the attack, Jean MPAMBARA arrived at the Hospital and Jean Bosco BUTERA reported to him the names of the Tutsis they killed.

The legal characterization of the Accused's participation is that he:

ordered those over whom he had command responsibility and control as a result of his position and authority described in paragraph 2. He instigated and aided and abetted those over whom he did not have command responsibility and control to attack the Tutsi population. In addition, the accused willfully and knowingly participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was the destruction of the Tutsi racial or ethnic group throughout Rwanda. To fulfil this criminal purpose, the accused acted with military and community leaders and

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<sup>172</sup> T. 19 September 2005 p. 12 (Wilson).

<sup>173</sup> Witnesses LET, AVK and LEK were not in a position to confirm whether the Accused visited Gahini Hospital on two distinct occasions. However, their testimony is not inconsistent with that of Witnesses Wilson and Hardinge, who gave detailed eyewitness testimony concerning the Accused's first visit, his departure, and his return. Witnesses LET and LEK both confirm that the Accused was present at the compound at some stage, and then appeared to have left the scene. T. 26 September 2005 p. 71; T. 26 September 2005 p. 73 (French) (Witness LEK could not confirm whether Mpambara actually left the compound, although he saw him walking towards the main gate); T. 20 September 2005 pp. 20, 30 (Witness LET saw the Accused drive out of the main gate).

members of the *Interahamwe* in Rukara Commune, such as ... *conseiller de secteur* Jean Bosco Butera, Police Brigadier Ruhiguri ... and other unknown participants.<sup>174</sup>

79. Even more broadly, paragraph 10 alleges that the Accused “planned, ordered, instigated, facilitated or otherwise aided and abetted the attack on the Tutsi civilian population”; and paragraph 19, that he “failed to maintain public order, or deliberately undermined the public order”.

### 4.3 Evidence

#### 4.3.1 Overview of Submissions

80. The Prosecution argues that the evidence shows that the Accused:

- commanded attackers to withdraw on his first visit to the hospital, thus showing that he was behind the attacks;
- conducted an “audit” of those killed, and of those remaining, with the assistance of Butera;
- exposed the refugees to attack by calling them out of their hiding places, and then leaving the hospital;
- instigated attackers to kill the refugees as he was departing the hospital;
- instructed one of the policemen under his command, Ruhiguri, to protect hospital supplies, but not the Tutsi refugees.<sup>175</sup>

The Accused admits that he visited the hospital twice that day, first in the morning, and then in the early afternoon, but he denies that he participated in, or encouraged, the attack in any manner whatsoever. He concedes that the attackers fled upon his arrival, but rejects that they were under his command. On the contrary, he maintains that he investigated what had happened; attempted to re-establish and maintain security there; and, upon his return with reinforcements in the early afternoon, evacuated the refugees to Rukara Parish where he thought they could be more effectively protected.

#### 4.3.2 Background to the Attacks

81. The arrival of the Accused on the morning of 9 April was preceded by a number of events which shaped the actions and perspectives of the witnesses that day. Prosecution Witness Dr. Robert Wilson testified that on the afternoon of 7 April, he intervened to save a young man who was being beaten by a gang of youths in the hospital compound. When he returned to castigate the group, he found that they had dispersed or withdrawn out of the Akabeza Gate. Just outside the gate, he found Mpambara standing beside his vehicle with

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<sup>174</sup> Indictment, para. 6.

<sup>175</sup> Prosecution Closing Brief, paras. 93-114. The Prosecution lists a sixth assertion, concerning the presence of a man named Toto (also known as Jean-Claude Muhikira) during one of the Accused’s visit. The Chamber will consider the significance of this evidence in the course of its analysis. Witness LET made two additional incriminating allegations against the Accused: that he led the attackers into the compound at the beginning of the first attack, and was present throughout its duration; and that he was present during, and acquiesced in, the killing of a certain Jean-Claude Muhikira. Neither of these allegations are contained in the Indictment, nor were they retained as part of the Prosecution case in its Closing Brief.

other community elders.<sup>176</sup> Wilson asked what could be done to protect the patients and others seeking refuge at the hospital. Mpambara responded that the hospital should be for patients only, and that it should not be used as a refuge, particularly by able-bodied young men who might be RPF spies.<sup>177</sup> He did not want the hospital to become either a base for the insurgency, or a target. Wilson testified that he had “no problem with those instructions at that point”.<sup>178</sup>

82. Tutsi refugees did start to take shelter at the hospital, however. Prosecution Witness LET was a nurse at Gahini Hospital, who was married to a Tutsi man.<sup>179</sup> On 7 April, a family friend came to her house and warned her that killings were about to begin in the *cellule* and that she should take refuge somewhere.<sup>180</sup> She went to the hospital with her children, staying first in the paediatric ward and then in the maternity ward.<sup>181</sup> Witness LEK, a former school teacher of Tutsi ethnicity, also took refuge in the paediatric ward on 8 April 1994, hiding in the ceiling.<sup>182</sup>

83. Defence Witness Elizabeth Hardinge, a British physiotherapist who had worked at Gahini Hospital since 1969, testified that late in the afternoon of 8 April, she went to Rukara Parish to ask Mpambara for police protection for the hospital, as there had been disturbances at Gahini.<sup>183</sup> He answered that he had only seven or eight *gendarmes* available and that they were all needed to protect the refugees at Rukara Parish; he promised, however, to send a patrol during the evening.<sup>184</sup> Mpambara testified that a squad of five *gendarmes* arrived at Rukara Parish soon after Hardinge had left. Mpambara proposed splitting them up, so that some of them could be stationed at Rukara Parish, while others would go to Gahini Hospital. The sergeant in command insisted on keeping his unit together, and said that they would

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<sup>176</sup> T. 19 September 2005 pp. 13-14 (Wilson) (“I think I wanted to try to remonstrate with them, to ask them what they were doing, and to try to keep them out of the hospital compound. I think that they had withdrawn out of the gate, and so I went out of the gate. And it was there that I – I met the *bourgmestre*”). Two boys had been attacked; Wilson believed that the other had been able to escape without his assistance. He recalled the time as between 3:00 and 3:30 p.m. Witness LET gives a different account of this event, alleging that the Accused was inside the compound watching as the young men were beaten. T. 20 September 2005 pp. 10-13. The Accused denied that he saw the beating, but acknowledged that he saw Dr. Wilson taking an injured youth into the hospital, and that he spoke to a group of youth from Gahini who seemed to acknowledge that they had beaten the young man because they “didn’t know him in that area”. The Accused claims to have told them that “even if you don’t know the person, you don’t have the right to beat anybody”. T. 7 February 2006 p. 2. The Chamber need not make any factual finding on this allegation, which is not part of the Indictment.

<sup>177</sup> T. 19 September 2005 pp. 14-16, 37 (Wilson). Mpambara generally confirmed the testimony. T. 7 February 2006 p. 2 (Mpambara) (“And I said that if people fleeing from Murambi had come to the hospital and taken refuge there, people would react and say that these people are going to disturb their security. So I told the people to go back home and I also told the doctor that he shouldn’t take in anybody who is not sick”).

<sup>178</sup> T. 19 September 2005 p. 37 (Wilson)

<sup>179</sup> T. 20 September 2005 pp. 6, 30 (Witness LET).

<sup>180</sup> *Id.* pp. 36-37 (Witness LET).

<sup>181</sup> *Id.* pp. 10, 13-14, 37, 41 (Witness LET)

<sup>182</sup> T. 26 September 2005 pp. 65, 75 (Witness LEK), Exhibit P-13.

<sup>183</sup> T. 13 January 2006 pp. 35, 36 (Hardinge). Hardinge also mentioned that “threats were being made” and that the situation was “very tense”.

<sup>184</sup> *Id.* p. 36. Mpambara generally confirmed this account. T. 7 February 2006 p. 10 (Mpambara) (“Hardinge told me that at Gahini Hospital there were refugees who had sought refuge ... she was asking for either policemen or *gendarmes* to come and stop any possible attacks at the hospital. I explained to her that there, I had a few policeman, they were just five and they were there, she could see them [in front of the Rukara Parish church]. I said I was waiting for some *gendarme*[s]. When the *gendarme*[s] c[a]me, they could work with the police and I could send some to Gahini to restore order”).

maintain security at both locations by patrolling in their vehicle.<sup>185</sup> After showing them around Rukara Parish, Mpambara led the *gendarmes* to the hospital, where he left them in their vehicle.<sup>186</sup>

84. Early on the morning of 9 April, rumours spread amongst the refugees at the hospital of an impending attack.<sup>187</sup> A nurse told them that Dr. Wilson had agreed to assist with their evacuation. Between 20 and 50 refugees gathered on the steps of the main building, opposite the front gate, waiting for the hospital's double-cabin pick-up to arrive.<sup>188</sup> As they were waiting, the communal ambulance arrived, carrying two wounded, as well as two or three *gendarmes* and a driver.<sup>189</sup> After the patients were unloaded, the *gendarmes* agreed to transport the refugees to Rukara Parish in the ambulance.<sup>190</sup>

85. As these arrangements were being made, a small but menacing group of *Interahamwe* assembled outside the main gate armed with "bows and arrows and machetes nonchalantly swung".<sup>191</sup> Witness LET testified that they had encircled the entire hospital compound, blowing whistles and making threatening noises.<sup>192</sup> The *Interahamwe* blocked the main gate with a tree trunk and let it be known that they would not let the refugees pass. The *gendarmes* refused to attempt to break the blockade, and the refugees ran back towards the hospital buildings.<sup>193</sup> The *gendarmes* also refused to split up so that some of them could remain behind while others returned to Rukara Parish to report on the situation.<sup>194</sup>

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<sup>185</sup> T. 7 February 2006 pp. 11, 16-18 (Mpambara). Mpambara deferred to their opinion, as they were "the experts in security".

<sup>186</sup> *Id.* pp. 11-12 (Mpambara).

<sup>187</sup> T. 19 September 2005 p. 20 (Wilson) ("It was about 7 o'clock that somebody sent a note down from maternity to say that there was a collection of Interahamwe around the hospital perimeter somewhere and that they were – the rumour was that they were going to attack and try to kill the people hiding in the hospital"); T. 20 September 2005 p. 14 (Witness LET) ("[W]e knew that we'd be attacked that morning").

<sup>188</sup> T. 20 September 2005 pp. 14, 41 (Witness LET); T. 19 September 2005 pp. 21-23 (Wilson). Dr. Wilson does not say that he had authorized the evacuation of the refugees before the arrival of the ambulance. On the contrary, he suggests that he asked for the hospital's own vehicle (as distinct from the communal ambulance) to be brought around only once it had become apparent that there was not enough room in the ambulance. T. 19 September 2005 pp. 21-22. Hardinge identifies the hospital vehicle as a "pick-up", T. 13 January 2006 p. 39 (Hardinge); Wilson specifies that it was a double-cabin Toyota Hilux, T. 19 September 2005 p. 23 (Wilson).

<sup>189</sup> Hardinge testified that there were two *gendarmes* and a driver. T. 13 January 2006 p. 37. Witness LET said there were three *gendarmes* and a driver. T. 20 September 2005 pp. 14, 41.

<sup>190</sup> T. 20 September 2005 pp. 14-15, 41-42 (Witness LET). Witness LET testified that the request for evacuation was made to the *gendarmes* by the same nurse who had requested the evacuation of the refugees in the first place, Jeanne de Dieu. Wilson recalled that it was he who "thought it was a prudent time, since there was an empty vehicle there, to ask the *gendarmes* to take these refugees to the commune office"). The refugees boarded the ambulance and Dr. Wilson's car, which had, in the meantime, also arrived to assist with the evacuation.

<sup>191</sup> T. 19 September 2005 p. 23 (Wilson). Witness LET explained that "they had machetes; they had spears; they had clubs – and they also had bows"). T. 20 September 2005 pp. 16-17, 43 (Witness LET). In addition to these weapons, Witness LEK testified that the *Interahamwe* also possessed grenades, although he is the only witness to make that observation. T. 26 September 2005 pp. 65-66, T. 27 September 2005 p. 2 (Witness LEK).

<sup>192</sup> T. 20 September 2005 pp. 16-17, 43.

<sup>193</sup> *Id.* pp. 16, 18 (Witness LET); T. 13 January 2006 pp. 36-37, 38, 39 (Hardinge). Witness LEK explains that the *gendarmes* went to speak with the *Interahamwe* after the gate had been blocked and returned and told the refugees to get out of the vehicles. T. 26 September 2005 pp. 65-66, T. 27 September 2005 p. 2.

<sup>194</sup> T. 19 September 2005 p. 22 (Wilson); T. 13 January 2006 p. 38 (Hardinge).

#### 4.3.3 Commanding the Attackers to Withdraw

86. The witnesses gave different versions of events in respect of the remainder of the events at Gahini Hospital that day. Witness LET asserted that before any of the vehicles had left, the Accused arrived in his car and led the attackers into the compound.<sup>195</sup> Witness LEK testified that at the commencement of the attack, he saw the commune's white pick-up truck approaching the hospital, although he did not see the Accused himself.<sup>196</sup>

87. This testimony is contradicted by Ms. Hardinge. She testified that she left the hospital before the start of any attack in order to seek Mpambara's help, and found him at the commune office, 20 to 25 minutes away by car.<sup>197</sup> He was "obviously concerned about the situation" and agreed immediately to accompany her back to the hospital. Escorted by at least one gendarme and one policeman, they arrived at the hospital at around 10 a.m.<sup>198</sup>

88. The Prosecution does not maintain that the Accused was present at the commencement of the attack, and accepts that Mpambara arrived at Gahini Hospital with Ms. Hardinge at the end of the first attack.<sup>199</sup> However, the Prosecution, relying on the testimony of Dr. Wilson, alleges that the withdrawal of the attackers at the very moment of his arrival shows that he commanded their retreat.<sup>200</sup>

89. The Prosecution's reliance on Dr. Wilson is misplaced. He testified that "the mob dispersed" when Mpambara arrived and that, once inside the compound, "the *bourgmestre* was trying to be clear – he wanted people to just go away, and just try and get some order in the hospital ground".<sup>201</sup> The fact that Mpambara ordered the attackers to disperse upon his arrival does not support the Prosecution's inference that he commanded the attack. Indeed, Dr. Wilson's impression was that Mpambara was genuinely attempting to restore order. Furthermore, Dr. Wilson's opinion was that Mpambara – far from giving commands to obedient followers – was in a state of "almost despair".<sup>202</sup> In the Chamber's view, this testimony does not show that the attackers were his subordinates, much less that they had carried out the attack as a result of some earlier order to do so.

#### 4.3.4 "Auditing" the Victims And Failure to Arrest Butera

90. The Accused acknowledges, and the evidence shows beyond a reasonable doubt, that he spoke with a number of people at the hospital, including Jean-Baptiste Nkurayija, the

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<sup>195</sup> T. 20 September 2005 pp. 18-19, 20, 44. Witness LET estimated that this was about twenty minutes after the refugees had fled back into the Hospital.

<sup>196</sup> T. 26 September 2005 pp. 67-68; T. 27 September 2005 p. 3. The witness explains that he was not running when he spotted the commune vehicle: "I was not running, I was simply starting to move away from the rest of the group. I was looking in all directions and then I saw the vehicle. Then when the alarm was raised, I ran into hiding").

<sup>197</sup> Dr. Wilson corroborates this account. He remembered that Ms. Hardinge was chosen to go and find the *bourgmestre*, and that he heard the vehicles leaving the compound before any attack had started. T. 19 September 2005 p. 22 (Wilson).

<sup>198</sup> T. 13 January 2006 pp. 38-39, 40-41 (Hardinge).

<sup>199</sup> Prosecution Closing Brief, para. 113 ("When the accused arrived at Gahini Hospital at between 10.30 and 11 a.m. the attackers withdrew at his command...."); 2 May 2006 pp. 22-23 (closing arguments).

<sup>200</sup> Prosecution Closing Brief, paras. 94, 96; T. 2 May 2006 pp. 22-23 (closing arguments).

<sup>201</sup> T. 19 September 2005 pp. 24-25 (Wilson).

<sup>202</sup> T. 26 September 2005 p. 26 (Wilson). This "despair" arose in respect of Dr. Wilson's request, made shortly thereafter, to Mpambara to leave some *gendarmes* behind to protect the hospital. His response was "almost despair in that he had so few armed *gendarmes* at his disposal".

hospital administrator; Jean-Bosco Butera, the *Conseiller* of Gahini Secteur; and Dr. Wilson.<sup>203</sup> The Prosecution alleges that the Accused “knew Butera had committed the killings at the Hospital, and that [he] was conducting an audit of how many refugees had been killed and how many were remaining”.<sup>204</sup> Furthermore, the failure to arrest Butera is cited as evidence that the Accused must have been involved with him in a joint criminal enterprise.<sup>205</sup> The Prosecution relies on the testimony of Dr. Wilson to this end, but not of two of its other witnesses to the Accused’s visit, Witnesses LET and LEK.<sup>206</sup>

91. No direct evidence, apart from that given by the Accused, was heard concerning the nature of Mpambara’s conversation with Butera. Dr. Wilson believed that Mpambara was evaluating what had happened and, with Butera and Nkurayija’s input, writing the names of those who had been killed.<sup>207</sup> There is no direct evidence that this list was being prepared as part of a plan to kill the refugees at the hospital, nor is it the only reasonably possible explanation of their actions.

92. Mpambara testified that after he spoke with Dr. Wilson, Nkurayija showed him three corpses just outside the Akabeza gate.<sup>208</sup> While there, Butera approached from Akabeza Centre, claiming that he had just heard news of the attack.<sup>209</sup> Mpambara testified that he did not believe Butera, but that since no one identified him as having participated in the attack, he had no firm basis to make an arrest.<sup>210</sup> Mpambara walked around the hospital with Butera and Nkurayija, noting the names of the dead.<sup>211</sup> He made no arrests because the attackers who were named by the refugees had all fled the scene. In any event, they were all former soldiers, and attempting to arrest them, given the resources at his disposal, would have been “committing suicide”.<sup>212</sup> Indeed, Mpambara doubted the loyalty of the *gendarmes*, whom he

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<sup>203</sup> T. 7 February 2005 p. 20, T. 8 February 2006 p. 61 (Mpambara); T. 19 September 2005 pp. 24-25, 42-43 (Wilson). The group was standing outside the side-door of the operating theatre.

<sup>204</sup> Prosecution Closing Brief, para. 101; T. 2 May 2006 p. 22 (closing arguments).

<sup>205</sup> T. 2 May 2006 p. 4 (closing arguments) (“Now, the culpable omissions, Your Honours, for which we hold him criminally responsible and which we submit are complementary to the positive acts just outlined, generally relate to his deliberate refusal to intervene, despite his duty and material ability to prevent, punish or otherwise impede the efficient execution of the JCE by his co-perpetrators. We list these acts of culpable omissions as follows: ... his deliberate refusal to arrest *Conseiller* Butera and other members of the JCE on 9<sup>th</sup> April at Gahini Hospital”).

<sup>206</sup> Prosecution Closing Brief, paras. 98-101; T. 2 May 2006 pp. 21-27 (closing arguments). Their testimony is relied upon in respect of other matters, but not the colloquy between Butera and Mpambara.

<sup>207</sup> T. 19 September 2005 p. 25 (Wilson) (“I believe he was trying to evaluate what had happened, and he was writing down the names of people who had been killed, which those two people were telling him”).

<sup>208</sup> T. 7 February 2005 pp. 19, 20, 23 (Mpambara) (“I left through the smaller gate that leads to the Akabeza centre where I found three corpses of dead people”). Mpambara’s testimony gives the impression that he spoke first with Dr. Wilson, and certainly before he had met Butera. Dr. Wilson, on the other hand, remembers that the *bourgmestre* was already speaking with Butera when he first saw them. T. 19 September 2005 pp. 24-25 (Wilson).

<sup>209</sup> T. 7 February 2005 p. 20, T. 8 February 2006 p. 61 (Mpambara). Mpambara testified that Butera claimed that he did not know who had participated.

<sup>210</sup> T. 7 February 2005 p. 20, 22-23 (Mpambara) (“They mentioned the names of other people, but they never mentioned the name of the *conseiller* .... The *conseiller* had a role in this. That’s what I think. But he did it in secrecy. He did not – he must have just been sending people to attack, but he did not show himself”); T. 8 February 2006 pp. 63-64 (Mpambara).

<sup>211</sup> T. 8 February 2005 p. 61 (Mpambara).

<sup>212</sup> T. 7 February 2005 pp. 22-23 (Mpambara).

suspected of being partial to the attackers, thus undermining his ability to search for and arrest the attackers.<sup>213</sup>

93. The Chamber entertains a reasonable doubt that the failure to arrest Butera was for the purpose of facilitating the latter's criminal conduct. There is no evidence on record that anyone told Mpambara at the time that Butera had been part of this attack.<sup>214</sup> Even if there had been such an indication, the Chamber could not safely infer that the failure to arrest demonstrates participation in a criminal enterprise with Butera. Other plausible explanations for the failure to arrest have been raised, such as: lack of sufficient evidence against Butera; scarce law enforcement resources which were needed for other priorities; and the concern that failure would have led to a total breakdown of civil authority. The factual issue for the Chamber's determination here is not whether these reasons were correct; rather, the sole question is whether they are reasonably possible explanations for the Accused's failure to arrest Butera. The Chamber is not convinced that the only reasonable explanation for the failure to arrest Butera is that the Accused wished to assist him in the commission of crimes.

#### **4.3.5 Exposing the Refugees to a Second Attack**

94. The Prosecution alleges that the Accused instructed that the refugees be ordered to come out of their hiding places and that he then left Gahini Hospital, thus exposing them to a second murderous attack. Mpambara is specifically alleged to have failed to assist a refugee, Jean-Claude Muhikira, alias Toto, who was bleeding and in obvious distress and fear.<sup>215</sup>

95. Three Prosecution witnesses make reference to the possible involvement of the Accused in bringing refugees out of their hiding places and, in particular, the killing of Muhikira. Witness LET testified that between noon and 1 p.m., she saw the Accused talking with Nkurayija in the hospital compound when a group of eight to ten people, led by Butera, approached from the Akabeza Gate.<sup>216</sup> After speaking with Mpambara, they went to the physiotherapy ward, where Witness LET thought she heard the attackers trying to force open the door. About twenty minutes later, Butera came back to speak to Mpambara, and then returned to the physiotherapy ward again, now accompanied by a gendarme armed with a gun who had been escorting Mpambara. Shortly after hearing a gunshot, Witness LET saw Muhikira coming out of the ward with his hands up. An attacker fired an arrow at Muhikira, piercing his hand.<sup>217</sup> Muhikira, now bleeding profusely, ran up to Mpambara, who said, "Get away. Go there and get treated, and then we'll take you to Karubamba with the

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<sup>213</sup> T. 7 February 2005 pp. 19-22 (Mpambara) (the *gendarmes* "were not sad about what had happened"); T. 7 February 2006 p. 26 (French) ("Mais après, je me suis rendu compte que les *gendarmes*, au lieu de m'aider, aidaient les assaillants"). The Chamber is mindful, however, that Witness Hardinge testified that she thought that, in general, the *gendarmes* who had arrived in the communal ambulance had tried to be helpful, as they had agreed to the original plan to evacuate the refugees. T. 13 January 2006 p. 38. Dr. Wilson also had the impression that the *gendarmes* had genuinely attempted to suppress the attacks. T. 19 September 2005 p. 27 (Wilson). Witness LEK, on the other hand, disagreed. T. 26 September 2005 pp. 66-67 (Witness LEK). The Chamber need not reach any finding on the attitude of the *gendarmes*. It is sufficient to say that the evidence does not show that Mpambara's perception of the *gendarmes* was unreasonable or implausible.

<sup>214</sup> The Prosecution assertion that Mpambara admitted that survivors had named Butera (T. 2 May 2006 p. 22) is not supported by the record. T. 7 February 2006 p. 22 (Mpambara) ("And when I asked them who attacked them, they said ... 'We saw Kanifu, who had been a soldier. We all saw Buringo (phonetic), we saw Bekehan (phonetic), we saw so-and-so.' And they never mentioned the name of the *conseiller*").

<sup>215</sup> Prosecution Closing Brief, paras. 102-107; T. 2 May 2006 p. 23 (closing arguments).

<sup>216</sup> T. 20 September 2005 pp. 23-25, 45 (Witness LET).

<sup>217</sup> *Id.* pp. 24-26, 45-46 (Witness LET).

others”.”<sup>218</sup> But when Muhikira asked one of the nurses for treatment, she responded ““I would be wasting my time if I treat you because in a short while you are going to be killed”.”<sup>219</sup> Muhikira slumped down on the veranda in front of the pharmacy. Witness LET had the impression that the young attackers wanted to kill Muhikira immediately, but hesitated. After Butera and others had conferred with Mpambara, one of the young attackers grabbed Muhikira and took him over to a group which started beating him with clubs and slashing him with their machetes.<sup>220</sup> The two *gendarmes* escorting Mpambara went over and searched Muhikira’s pockets, taking his money. Mpambara did nothing.<sup>221</sup>

96. Witness LEK gives a different account. He testified that he emerged from his hiding place after Butera told him that the killings were over and that he would be evacuated to Karubamba.<sup>222</sup> He found Butera, Nkurayija, a gendarme, a policeman, and others.<sup>223</sup> Butera told everyone to leave the room, but indicated that Witness LEK should remain behind. The policeman or gendarme nevertheless signalled to the witness to leave and, once outside, he saw the Accused. The witness explained that Butera wanted to kill him in that room, and that he “did not want to show me to the *bourgmestre* Mpambara .... He felt that I might get away from him”.<sup>224</sup> Butera ordered Witness LEK to put his hands up, and he did so.<sup>225</sup> Mpambara told Witness LEK to join other Tutsi refugees who were sitting on the steps near the operating theatre.<sup>226</sup> Muhikira, who was amongst the group and had been shot in the palm of his hand with an arrow, entreated Mpambara to take him away from there. Mpambara responded angrily, asking why they should be taken away, and shortly thereafter, left on foot towards the main gate.<sup>227</sup> At that moment, Witness LEK saw about eight *Interahamwe* approaching from the left.<sup>228</sup> Witness LEK and Muhikira leapt over a white doctor who was giving stitches to a patient, and locked themselves in an adjacent room. The white doctor subsequently advised them that the *gendarmes* had chased the *Interahamwe* away, and asked them to come out. They did and joined other refugees in the women’s ward.<sup>229</sup> Fifteen to thirty minutes later, a gendarme came and said that Witness LEK, Muhikira, and a woman

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<sup>218</sup> Id. p. 26 (Witness LET).

<sup>219</sup> Id. pp. 26, 45-46 (Witness LET).

<sup>220</sup> Id. pp. 26-27; T. 20 September 2005 pp. 26-27 (French) (Witness LET).

<sup>221</sup> T. 20 September 2005 pp. 26-27 (Witness LET).

<sup>222</sup> T. 26 September 2005 pp. 68 (Witness LEK). Nkurajiya, the hospital administrator, was also present and may also have made statements to this effect. The witness was apparently also told that if he did not come down he would be shot.

<sup>223</sup> Id. pp. 68-69; T. 27 September 2005 p. 1, 3 (Witness LEK).

<sup>224</sup> T. 27 September 2005 pp. 69-70; T. 27 September 2005 pp. 4-5 (Witness LEK). The witness was unsure why the policeman would have assisted him, but commented that: “He knew me well. He knew my place of birth ... I believe that this policeman was a good person. Later on I learnt that he had become a criminal as well”.

<sup>225</sup> T. 26 September 2005 p. 70 (Witness LEK).

<sup>226</sup> T. 26 September 2005 pp. 70, 71 (Witness LEK). The witness estimated that there were “not more than ten people” on the steps. T. 27 September 2005 p. 5. The *gendarme* appeared to be the leader of the *gendarmes* who were accompanying Mpambara that morning

<sup>227</sup> T. 26 September 2005 p. 71; T. 26 September 2005 p. 73 (French) (Witness LEK) (“...il a dit, pourquoi est-ce qu’il devait nous emmener”). The witness testified that the refugees were frightened by Mpambara’s demeanour.

<sup>228</sup> T. 26 September 2005 p. 71; T. 26 September 2005 p. 73 (French) (Witness LEK). He could not confirm whether Mpambara actually left the compound. T. 27 September 2005 p. 6 [“the left” may possibly refer to the direction of the Akabeza gate].

<sup>229</sup> T. 26 September 2005 p. 72; T. 27 September 2005 p. 7 (Witness LEK). The witness estimated that there were a total of 6 to 8 refugees there.



named Mukaragwiza, had been targeted, but that the others would be spared.<sup>230</sup> The witness locked himself in a room and hid, but heard Muhikira and Mukaragwiza screaming as they were taken away and hacked to death.<sup>231</sup>

97. Witness AVK testified that he arrived at the hospital after the first attack had taken place, and that he noticed several corpses along the path that skirts the hospital compound. Before the second attack started, at around 10 a.m., Mpambara drove through the main gate and immediately summoned Butera and a certain Thadée Ruvugo.<sup>232</sup> After some discussion, Butera and Ruvugo returned to where the attackers were. Mpambara then called to Nkurayija, the hospital administrator, saying: “Tell all the people who are hiding in the halls to come out so that we can provide refuge for them”.<sup>233</sup> People came out of the wards, were told to sit down near the flagpole, and then instructed to board Mpambara’s vehicle.<sup>234</sup> Three of the refugees – Mukaragwiza, Toto, and a third person – were left behind and told to return to where they had been.<sup>235</sup> Mpambara then left for Karubamba with the refugees in his vehicle; the refugees who had been left behind were subsequently killed.<sup>236</sup> Witness AVK saw Muhikira being led away by the police chief Ruhiguri, and Witness AVK later saw his corpse.<sup>237</sup>

98. Dr. Wilson also probably saw Muhikira at the hospital that morning. He had a vivid recollection of a young man who had been wounded in the arm, standing near the group which had been discussing the attack with the *bourgmestre*. The man had “been defending his own life and he was obviously wondering what was happening next”. Wilson did not recall that he spoke to Mpambara, or that anything was said about him. The young man evinced “intense fear”, as he “had just escaped death and yet was going to still be having to face death in a little while”.<sup>238</sup> Wilson was unaware of any killings while the *bourgmestre* was present, but as soon as he left, *Interahamwe* entered the hospital compound through the Akabeza gate.<sup>239</sup> Wilson later found the corpse of the young man outside the operating theatre.<sup>240</sup>

99. Ms. Hardinge heard no gunfire or screams indicating an attack or killings during the thirty to forty-five minutes that she and Mpambara were present at the hospital before they departed for Rwamagana *gendarmerie* camp. Just before their departure, Hardinge did leave

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<sup>230</sup> T. 26 September 2005 p. 72 (Witness LEK).

<sup>231</sup> *Id.* pp. 72-73. The witness said that he heard Mukaragwiza asking to be spared because she was Hutu. The witness speculated that she was targeted because he was married to a Tutsi. *Id.* p. 74. He also heard Butera insisting that they be apprehended and asking how to get into the rooms. *Id.* p. 73

<sup>232</sup> T. 21 September 2005 pp. 15, 28-30, 31 (Witness AVK).

<sup>233</sup> *Id.* p. 15, 31 (Witness AVK).

<sup>234</sup> T. 21 September 2005 p. 15 (French) (Witness AVK) (“On les a fait asseoir près du mât du drapeau; ils ont dit: « Vous, vous, et vous, entrez dans le véhicule »”); T. 21 September 2005 p. 31 (Witness AVK) (“They left in Mpambara’s vehicle, the vehicle which Mpambara had come with”).

<sup>235</sup> T. 21 September 2005 p. 15 (French), T. 21 September 2005 p. 31 (Witness AVK).

<sup>236</sup> T. 21 September 2005 p. 28 (“We started the second attack after his departure”); 29, 31 (Witness AVK).

<sup>237</sup> T. 21 September 2005 pp. 16-17 (Witness AVK).

<sup>238</sup> T. 19 September 2005 p. 25 (Wilson) (“it’s a very intense image that I have in my mind of his eyes and his presence there”).

<sup>239</sup> T. 19 September 2005 p. 42 (Wilson).

<sup>240</sup> T. 19 September 2005 pp. 26-27 (Wilson).

the hospital compound to obtain documents from her house; she testified, however, that she lived close to the hospital.<sup>241</sup>

100. The differences in the testimony of Witnesses LET, LEK, and AVK are substantial.<sup>242</sup> Witness LET sees Muhikira taken directly from the front of the pharmacy and killed, in Mpambara's presence. Witness LEK testified that, at the sight of approaching attackers, which was after Mpambara had left, he and Muhikira fled from where they were waiting and barricaded themselves in a room adjacent to the operating theatre. Muhikira was killed some significant time later, after he had gone to the women's ward. Witness AVK, who is the only witness to testify that he heard the Accused direct that the refugees be brought out of the hospital, also testified that all but three of the refugees left with him in his vehicle. Ms. Hardinge contradicts this testimony, recalling that she and Mpambara went to Rwamagana *gendarmerie* camp without any refugees.<sup>243</sup>

101. The result is that the testimony of these three witnesses does not establish beyond a reasonable doubt that the Accused was present when Muhikira or any other refugees were brought out of their hiding places, much less that he ordered this to happen or was present when any of them were killed. Further reasonable doubt is raised by the testimonies of Dr. Wilson and Ms. Hardinge, neither of whom perceived any indication of killings at the hospital during the Accused's presence.

102. The Prosecution also asserts that the Accused failed to assist Muhikira, whom he must have realized was in distress and danger.<sup>244</sup> Mpambara denies having seen anyone fitting Muhikira's description during his first visit to the hospital, but he acknowledges that he knew that there were still refugees in hiding at the hospital. He nevertheless decided to go to Rwamagana *gendarmerie* camp to obtain reinforcements and to complain about the ineffectiveness of those which had been previously assigned to him. He left the chief of communal police there, along with two *gendarmes*, "plead[ing] with them that they should do everything they can to make sure that no one else is killed in that place".<sup>245</sup> Hardinge and

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<sup>241</sup> T. 13 January 2006 p. 36 (Hardinge) ("Q. Was that night of the 8<sup>th</sup> of April a quiet one at the Gahini hospital? Were there attacks? A. As far as I know, no, but I was in my house, and that was not a long distance from the hospital, but I was certainly in my own house, and we stayed there all night"); T. 13 January 2006 p. 43 (time of departure).

<sup>242</sup> The Prosecution postulates that all three witnesses are describing the same events during the Accused's first visit to Gahini Hospital. Prosecution Closing Brief, para. 107 ("the Prosecutor has produced the evidence of a survivor independently corroborated by a perpetrator that the accused ordered the refugees to be captured and exposed to their attackers before he left for Rwamagana with Elizabeth Hardinge"); T. 2 May 2006 pp. 23-24 (closing arguments). The Chamber accepts Ms. Hardinge's uncontradicted testimony that the time period involved is about thirty to forty-five minutes.

<sup>243</sup> The Prosecution did not challenge Hardinge's testimony in this respect, either on the witness's cross-examination, or in its closing submissions. T. 13 January 2006 pp. 40-41, 43 (Hardinge). A different problem arises is Witness AVK's testimony is treated as referring to the second visit of the Accused: by that time, according to Witness LET, Dr. Wilson, and probably Witness LEK, Muhikira had already been killed, whereas Witness AVK testified that he saw Muhikira being led away by Ruhiguri, the police brigadier.

<sup>244</sup> Prosecution Closing Brief, para. 104; T. 2 May 2006 p. 23 (closing arguments).

<sup>245</sup> T. 7 February 2005 p. 24 (Mpambara). Hardinge believed, but could not definitely recall, that Mpambara left *gendarmes* or policemen at the hospital. T. 13 January 2006 p. 43 (Hardinge). Dr. Wilson recalled specifically that Mpambara left a couple of *gendarmes* stationed at the hospital. T. 19 September 2005 p. 27 (Wilson).

the Accused, without any police or *gendarmes*, then left for Rwamagana some time around 10:30 or 11 a.m. that morning.<sup>246</sup>

103. The evidence shows beyond a reasonable doubt that after Mpambara's departure, *Interahamwe* invaded the hospital compound a second time and killed Tutsi refugees, including Jean-Claude Muhikira.<sup>247</sup>

104. The question for determination is whether the alleged failure to immediately evacuate or otherwise assist the refugees shows that the Accused was part of a joint criminal enterprise to kill the refugees at the hospital, or that he aided and abetted the attacks, which would require that he substantially contributed to them. The uncontradicted evidence of Dr. Wilson and Ms. Hardinge was that the Accused did leave law enforcement officers – indeed, that he left all his escorts – at the hospital while he returned to Rwamagana to request additional *gendarmes*. The Chamber is aware that some witnesses suggested that the *gendarmes* and police colluded with the attackers; indeed, Mpambara shared that suspicion.<sup>248</sup> Nevertheless, the Accused explained that he had no better option than to deploy the forces at his disposal. The Prosecution failed to adduce any direct evidence that the Accused was colluding with the police or *gendarmes* to have the refugees killed. Indeed, Dr. Wilson's testimony was that when the *Interahamwe* invaded the compound a second time, one of the *gendarmes* shot into the air a couple of times, but that the *Interahamwe* "were just jeering, really, at the gendarme" and "I had a feeling that they just carried on and did what they wanted to do".<sup>249</sup> These are the impressions of a witness for the Prosecution, not the Defence.

105. The Chamber finds that the Prosecution has not shown beyond a reasonable doubt that the Accused's alleged inaction was for the purpose of assisting the attackers in killing the Tutsi refugees at the hospital. This is not to say that more effective solutions might not have been available such as, for example, immediately collecting and evacuating the refugees with the escorts available. But the Prosecution did not establish, for example, that there was sufficient room in the vehicles to immediately evacuate all the refugees or that it was safe to do so under the circumstances. In the face of doubts such as these and plausible explanations for the conduct of the Accused other than collusion with the attackers, the Chamber entertains a reasonable doubt that the Accused's conduct had a substantial effect on the commission of the crimes, so as to make him liable as an aider and abettor, or that he intended thereby to commit crimes by participating in a joint criminal enterprise.

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<sup>246</sup> T. 13 January 2006 pp. 40-41, 43 (Hardinge). Mpambara indicates that either they arrived at, or left for, Rwamagana at 11 a.m., which would be consistent with Ms. Hardinge, who estimated that it took about half an hour to go from Gahini Hospital to Rwamagana. T. 13 January 2006 p. 44 (Hardinge); T. 7 February 2005 p. 24 (Mpambara). As to the absence of escorts, Hardinge testified "I'm sure it was just us". T. 13 January 2006 p. 44 (Hardinge).

<sup>247</sup> Although the Chamber does not rely on the Witnesses LET, LEK, and AVK as to the manner of Muhikira's death, they all agree that he was killed. That fact is also corroborated by Dr. Wilson, assuming that the young man he saw was, in fact, Muhikira. Dr. Wilson also saw boys with machetes leading people out of the back gate, whom he suspected were later killed. T. 19 September 2005 pp. 26-27 (Wilson).

<sup>248</sup> Mpambara explained that he believed that the *gendarmes* appeared to be partial to the attackers. Only one gendarme had been on duty at the hospital when it was attacked, and he claimed that he had been overwhelmed, but without giving a clear account of what had happened. Mpambara did not believe this explanation and perceived that the *gendarmes* "were not sad about what had happened". T. 7 February 2005 pp. 19-22; T. 7 February 2006 p. 26 (French) ("Mais après, je me suis rendu compte que les *gendarmes*, au lieu de m'aider, aidaient les assailants").

<sup>249</sup> T. 19 September 2005 pp. 26-27 (Wilson).

#### 4.3.6 Instigating the Attackers to Kill the Refugees

106. Witness AVK testified that the Accused verbally instigated the killing of the Tutsi refugees as he was leaving Gahini Hospital after his first visit there, telling the witness and other attackers:

‘Je ne comprends pas. Est-ce tout ce que vous pouvez faire? Ne pouvez-vous pas faire les choses plus rapidement?’ Nous avons compris qu’on ne nous appréciait pas à notre juste valeur. Nous sommes repartis nous reorganiser et nous sommes revenus, donc, pour tuer ceux qui restaient.<sup>250</sup>

These words are said to have been uttered in front of the main hospital building, just as the Accused was preparing to leave with most of the refugees in his vehicle.

107. The credibility of this description is questionable for a number of reasons. First, Witness AVK makes no mention of any words of instigation in his prior statement to the Prosecutor.<sup>251</sup> Even in the absence of specific questions on cross-examination concerning this omission, the Chamber has difficulty understanding how this striking and highly incriminating utterance would not have been previously mentioned.<sup>252</sup> Second, Witness AVK testified that after these words were spoken, Mpambara transported most of the refugees away from the hospital in his vehicle. This is contradicted by Ms. Hardinge’s credible account, which was implicitly accepted by the Prosecution, that she and Mpambara left together for Rwamagana in his vehicle, without any refugees.<sup>253</sup> Indeed, no witness other than Witness AVK suggested that the Accused evacuated the refugees after his first visit. This is not a minor detail on which Witness AVK could simply have been mistaken, or which would have been overlooked by other witnesses at the Hospital. Third, Witness AVK testified that the only white person present at the hospital at that time was Dr. Wilson, even

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<sup>250</sup> T. 21 September 2005 p. 21 (French), T. 21 September 2005 p. 16 (Witness AVK). The Chamber prefers to cite the French directly, which was the first language of translation from Kinyarwanda, as the English includes some extraneous elements, including the use of the word “we”, which do not appear in the French.

<sup>251</sup> Exhibit D-9. In fact, the statement says that there were people who thought that the Accused was there to protect the refugees. In this context, it is even harder to understand why the witness would not have mentioned the act of instigation, which would directly have contradicted this impression: “Some people said that he had brought the *gendarmes* to protect the people who had taken refuge[] at the hospital. When he came, the *gendarmes* started locating the survivors. The survivors who were about eight (8) in number were put on his pick-up and he left with them .... All the survivors were of Tutsi ethnic group”. Exhibit D-9, p. K0507844.

<sup>252</sup> Counsel did, however, ask questions during his cross-examination about the circumstances in which the statement was given. T. 22 September 2005 pp. 39-40 (Witness AVK).

<sup>253</sup> Prosecution Closing Brief, para. 113 (“When the Accused arrived at Gahini Hospital at between 10.30 and 11 a.m. the attackers withdrew at his command...”). The Prosecution asked Ms. Hardinge only three questions on cross-examination, none of which touched on the substance of her testimony. The Prosecution implicitly accepts that no refugees were evacuated on this occasion, as it argues that the whole group of refugees were exposed and left behind at Gahini Hospital. T. 2 May 2006 p. 22 (closing arguments) (“Still, [Mpambara] left [the *gendarmes*] at the hospital subsequently when he went to Rwamagana with Elizabeth Hardinge with instructions to guard the refugees”). Prosecution Closing Brief, para. 107 (“the Prosecutor has adduced the evidence of a survivor independently corroborated by a perpetrator, that the accused order the refugees to be captured and exposed to their attackers before he left for Rwamagana”). The same position was adopted in closing arguments: “...the Accused left [the Tutsi refugees who had come out of their hiding places], walked to his car before he joined Elizabeth Hardinge, and incited the attackers directly to hurry up and finish killing the Tutsi civilians”. T. 2 May 2006 p. 23. The Chamber is mindful that Witness AVK’s testimony could refer not to the first visit of the Accused to Gahini Hospital, but the second. However, as mentioned above, that would contradict the testimony of Witnesses LET, LEK, and Dr. Wilson, who testified that Muhikira had already been killed by that time.

though Elizabeth Hardinge was nearby and, indeed, left with Mpambara in the very same vehicle which Witness AVK said was full of refugees.<sup>254</sup> Taken together, these discrepancies with the testimony of other credible witnesses cannot be reasonably attributed to a mere error of memory. The Chamber, accordingly, entertains significant doubts about Witness AVK's veracity.

108. For these reasons, the Chamber finds that the Prosecution has not shown beyond a reasonable doubt that the Accused uttered words of instigation or encouragement to the attackers as he left Gahini Hospital.

#### **4.3.7 Instructing Policeman to Protect the Hospital Premises, Not the Refugees**

109. The Prosecution asserts that the Accused instructed the brigadier of communal police, Ruhiguri, to prevent looting of hospital property, but not to protect the Tutsi refugees.<sup>255</sup> The basis for this allegation is the testimony of Witness AVK during cross-examination, who was attempting to explain a prior written statement in which he had said that during the second attack, "[t]here was some kind of scuffle. The chief of police was protect[ing the hospital], and people wanted to enter. Ruhiguri shot in the air, but people managed to enter".<sup>256</sup> This appeared to contradict the witness's testimony that the police and *gendarmes* assisted the attackers. Witness AVK insisted that there was no fighting between Ruhiguri and the attackers and that, indeed, the gunshot had been a signal to invade the premises. The witness explained his prior statement saying that Ruhiguri had only been protecting the hospital premises.

110. As previously mentioned, the Prosecution has failed to adduce any direct evidence that the Accused instructed the police or *gendarmes* to allow or assist in the killing of the refugees.<sup>257</sup> The Accused concedes that he suspected that the *gendarmes* were partial to the attackers. Indeed, it has been proven beyond a reasonable doubt that at least one refugee and probably more were killed during the second wave of attacks, despite the presence of Ruhiguri and two *gendarmes*, who were armed with guns. Notwithstanding Dr. Wilson's testimony that shots were fired into the air by one of the *gendarmes*, the Chamber considers that these killings lead to the inevitable inference that the *gendarmes* or policeman, at the very least, turned a blind eye to the attackers.

111. It does not follow, however, that the Accused was similarly involved. He testified that, despite his suspicions, he pleaded with Ruhiguri and the *gendarmes* to "do everything they can to make sure that no one else is killed in that place".<sup>258</sup> Dr. Wilson seemed to confirm this purpose. When Dr. Wilson asked Mpambara to leave *gendarmes* at the hospital, his response "was almost despair in that he had so few armed *gendarmes* at his disposal, but he said he would try and leave us a few while he went to Rwamagana to get more help from the local *gendarmerie*".<sup>259</sup> The Chamber is alive to the possibility that Mpambara was merely

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<sup>254</sup> T. 21 September 2005 p. 31 (Witness AVK) ("Q. Did you see Mpambara talk with any white people during that incident? A. There was one white man present, but one could not follow everything that was happening from every moment. I saw one white man called Robert. He was standing there in front of the meeting room").

<sup>255</sup> Prosecution Closing Brief, paras. 110-112; T. 2 May 2006 p. 25 (closing arguments).

<sup>256</sup> Exhibit P-5; Exhibit P-4; T. 21 September 2005 p. 37 (Witness AVK).

<sup>257</sup> The testimony of Witness LET – that the Accused allowed *gendarmes* to participate in killing Muhikira – was found not credible by the Chamber. *Supra*, paras. 100-101.

<sup>258</sup> T. 7 February 2005 p. 24 (Mpambara).

<sup>259</sup> T. 19 September 2005 p. 26 (Wilson).

attempting to impress an outside observer of his good intentions. Nevertheless, the Prosecution has not presented any evidence which contradicts the testimony of the Accused concerning what he did at Gahini Hospital or shows that it is implausible. In the absence of such evidence, a reasonable doubt arises as to whether the Accused instructed Ruhiguri or the *gendarmes* not to protect the refugees.

#### **4.4 Conclusion**

112. The attacks on Gahini Hospital on 9 April 1994 were brutal, violent and ethnically motivated. Unarmed Tutsi civilians, men and women alike, were murdered under the blows of clubs and the blades of machetes. One witness heard the mortal cries of family members at close range. The hospital, which had been a place for treating the sick, became a genocide site.

113. The issue before the Chamber, however, is whether the evidence shows that Jean Mpambara is criminally responsible for this attack. The evidence does not show beyond a reasonable doubt that the Accused actively participated in, or was present during, any stage of this attack. Nor has it been shown beyond a reasonable doubt that he ordered or encouraged anyone to participate in the attack. Furthermore, his alleged failures to act have not been shown beyond a reasonable doubt to be proof that he possessed the intent to be part of a joint criminal enterprise or that he substantially contributed to the crimes committed by other persons so as to be guilty of aiding and abetting.

### **5. Attacks at Rukara Parish, 9 and 12 April**

#### **5.1 Introduction**

114. Early on the morning of 7 April, refugees from Murambi Commune began to arrive at the Rukara Parish Church, in Karubamba *Secteur*, saying that their homes had been attacked and burned.<sup>260</sup> Their stories were confirmed by the smoke rising in the distance from the Murambi hills.<sup>261</sup> Tutsi residents of Rukara Commune also started to gather at the church as the day progressed, as groups of thugs roamed on the streets, and people boarded up their homes.<sup>262</sup> Defence Witness Father Santos, testified that “nature itself had gone silent”.<sup>263</sup> By 9 April, the number of refugees had risen to about 3,000, including some 900 children, concentrated mostly at the church and its surrounding buildings, which included separate residences for priests, nuns, and novices, and a cinema hall. Others hid in the parish school, health centre, and maternity building, clustered about a hundred metres away from

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<sup>260</sup> T. 9 January 2006 pp. 7-8, 15 (Santos); T. 23 September 2005 p. 25 (Witness AOI) (“Many of them were there because their homes had been burnt or had been destroyed”); T. 25 January 2006 p. 11 (Witness RU-18) (the witness heard on 8 April that “people from Murambi fled into Rukara. And people said that things had become serious, and it had become an ethnic problem and people had started killing others and torching houses. And the people who were coming saw smoke all over the place, and houses were burning”).

<sup>261</sup> T. 30 January 2006 p. 24 (Kalisa); T. 9 January 2006 p. 9 (Santos); T. 30 January 2006 p. 15 (Murwanshayaka).

<sup>262</sup> T. 9 January 2006 p. 9 (Santos) (“we could see people on the streets and those youths were to be feared”); T. 30 January 2006 p. 23 (Kalisa) (“we found an angry crowd of people” at Gahini market); T. 29 September 2005 p. 14 (Witness AHY) (“In [Paris Centre], no Tutsi had been attacked at his home, but we only saw people fleeing to the church .... when we sat around, people would tell stories about people who had come from Murambi and Ryamanyoni, gathering at the church after fleeing their homes”).

<sup>263</sup> T. 9 January 2006 p. 9 (Santos).

the church.<sup>264</sup> The refugees had also brought five hundred head of cattle, which grazed on parish land near the church.<sup>265</sup> The parish priests and others provided the refugees with food, water, and other assistance.<sup>266</sup>

115. In the late afternoon of 9 April, groups of civilians armed with machetes and a few grenades, allegedly distributed by *gendarmes*, attacked the church.<sup>267</sup> Tutsis who were outside tending their cattle were targeted with grenades and several were killed as they tried to retreat into the church.<sup>268</sup> The attack lasted between thirty minutes and an hour, during which time about twelve people were killed by grenades and machetes, and many cattle were stolen.<sup>269</sup>

116. No attacks occurred on 10 and 11 April, leading some of the refugees to feel secure enough to circulate outside near the parish buildings.<sup>270</sup>

117. In the late afternoon of 12 April, however, the refugees barricaded themselves into the church in the face of looting and sporadic attacks.<sup>271</sup> Fearing an imminent attack, Father

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<sup>264</sup> T. 9 January 2006 pp. 13-14, 16, 21, 24, 33, 34 (Santos) (he had a specific recollection of 300 infants and 600 children under 12, as he assisted in distributing food rations and calculating the amount of food available); T. 27 September 2005 p. 19 (Witness LEV) (“In my estimate, it would be between 2,500 and 4,000 and people were still coming [on the morning of 9 April]”); T. 26 September 2006 p. 3 (Witness LED) (4,000 to 5,000 people). The exact number at the church, as opposed to the whole Parish complex, is not clear, although Father Santos testified that there were 2,000 at the church immediately before the attack on 12 April. T. 10 January 2006 p. 17.

<sup>265</sup> T. 9 January 2006 p. 23 (Santos).

<sup>266</sup> T. 9 January 2006 pp. 21, 24, 37 (Santos); T. 10 January 2006 pp. 9-10 (Santos); T. 13 January 2006 p. 16 (Witness R-01); T. 23 September 2005 p. 39 (Witness AOI); T. 26 September 2005 p. 26 (Witness LED) (“Father Santos used to give us ... rations of beans, using glasses ... that are normally used to drink water. Yes, Father Santos helped us, gave us some assistance”).

<sup>267</sup> Whether and where the two groups coalesced is not expressly agreed upon by the two witnesses to these events. Defence Witness KU-2 testified that a group from Ruyenzi met up with other attackers at Kabuga Centre, not Buyonza. T. 24 January 2006 pp. 4-10. Prosecution Witness AHY insisted that the Buyonza group was joined by the Ruyenzi group. T. 29 September 2005 pp. 10-11. Both witnesses name some of the same attackers (Gahirwa, Kavutse, and Nyirahuku) suggesting that, whatever the precise itinerary, different groups did join forces before the attack. T. 24 January 2006 p. 8 (Witness KU-2); T. 29 September 2005 pp. 11, 15 (Witness AHY). Witness AHY also testified that one of the attackers, a former *gendarme* named Rupaca, was armed with a rifle. T. 29 September 2005 p. 12. Gahirwa is also identified as a lead attacker by other witnesses. T. 26 September 2005 p. 5 (Witness LED); T. 27 September 2005 p. 22 (Witness LEV).

<sup>268</sup> T. 29 September 2005 p. 12 (Witness AHY) (“it was approximately 6 p.m. .... we found some Tutsis who were guarding cattle behind the church”); T. 24 January 2006 pp. 23-24 (Witness KU-2); T. 26 September 2005 pp. 3-5 (Witness LED) (placing the attack at any time between 3.30 and 4.40 p.m.);

<sup>269</sup> T. 26 September 2005 p. 5 (Witness LED) (“twelve people were killed instantly”); T. 24 January 2006 p. 14 (Witness KU-2) (“the refugees went up near the church”); T. 29 September 2005 p. 12 (Witness AHY) (“So Gahirwa threw a grenade at [the Tutsis], so they scattered and they ran away .... [The Tutsis] met the other group [of attackers] that had passed in front of the church, and [the Tutsis] entered the church. And, as they were entering the church, grenades were being thrown at them”); T. 9 January 2006 p. 41 (Santos) (“I got to the front courtyard of the parish and I saw dead bodies at the door, two dead bodies, and the others were dying in front of the door”); T. 12 January 2006 p. 28 (Santos) (“Four of them were killed by grenades, the other eight died of machete wounds”); T. 27 September 2005 p. 22 (Witness LEV) (“After the smoke dissipated, we found that 12 Tutsis had been killed”).

<sup>270</sup> T. 10 January 2006 p. 20 (Santos) (“the courtyard was the territory of the refugees”); T. 25 January 2006 p. 18 (Witness RU-18) ([when the attacks started on 12 April] “people started rushing inside the buildings”); T. 13 January 2006 p. 17 (Witness R-01) (“And in the yard of the parish in front of the church there were a lot of refugees, and in the novitiate there were also a lot of them”. Although this testimony is said to refer to 7 and 8 April, the witness also seems to believe that the refugees remained outside even after the first attack: “the refugees were not passive. They counter-attacked”).

Santos and his captive congregants recited the rosary and sang.<sup>272</sup> The first grenade exploded as darkness fell, beginning a massive attack on the Parish complex that continued until dawn.<sup>273</sup> The Church was attacked with grenades and gunfire; the crowded cinema hall was set afire; and any refugees who tried to flee were hacked or beaten to death with machetes or clubs.<sup>274</sup> By dawn, between one and two thousand Tutsi men, women and children had been massacred.<sup>275</sup> Both soldiers and civilians participated in the killing.<sup>276</sup>

## 5.2 Indictment

118. The Indictment reads:

18. Between 8 and 15 April 1994, Jean Mpambara ordered, planned, facilitated, or aided and abetted these attacks at Rukara Parish by:

- (i) disarming civilians who had gathered, forcibly or by choice, at Rukara Parish, and luring them to exit the building enclosures and to gather in a central location on the Parish compound, allegedly for a security meeting or with promises of protection, as occurred on and between 8 and 13 April 1994;
- (ii) transporting and directing attackers including *Interahamwe* to the Parish compound as occurred on 9, 10 and 12 April 1994;

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<sup>271</sup> T. 25 January 2006 p. 19 (Witness RU-18) (“When the attack by the looters took place that just wanted bicycles and cattle, that was early, and that’s why we [ran] inside the church to hide. That took place early, when you could see them. Then they took ... the cattle, they moved around, around the primary school, around the football field”).

<sup>272</sup> T. 10 January 2006 pp. 16, 21-22 (Santos).

<sup>273</sup> T. 25 January 2006 pp. 19-20 (Witness RU-18) (attack commenced “around 7.30 p.m.”); T. 26 September 2005 pp. 8-9 (Witness LED) (main attack started “around 7 p.m.”); T. 10 January 2006 pp. 22-25, 28, T. 12 January 2006 p. 30 (Santos) (attack commenced at “almost nightfall”, continues until 5 a.m.); T. 23 September 2005 pp. 30-31 (Witness AOI) (testifying that the attacks commenced between 6 and 7 p.m.). As to the time of the end of attacks: T. 25 January 2006 p. 22 (Witness RU-18) (attacks end “around 4.30 or 5 in the morning”); T. 10 January 2006 pp. 22-25, 28 (Santos) (attack continues until 5 a.m.); T. 7 February 2006 p. 67 (Mpambara) (“...in the morning, at eight in the morning, I went to the Parish to see how the situation was. I passed by the maternity ward, found lots of dead bodies in that area”). For reasons discussed below, the Chamber finds this testimony more credible than that of Witness AOI and Witness LED that the attack continued until mid-morning: T. 25 September 2005 pp. 8-9 (Witness LED); T. 23 September 2005 pp. 30-31 (Witness AOI). T. 25 January 2006 pp. 19-20 (Witness RU-18) (attacks on “people at the health centre; they were targeting people at the nutritional centre, at the church”); T. 10 January 2006 p. 23 (Santos) (“At certain junctures the attackers would go towards the maternity, then they would come back towards us”).

<sup>274</sup> T. 10 January 2006 p. 23 (Santos) (“And then we would also hear the attackers shouting while pursuing refugees who were fleeing into the wild”); T. 25 January 2006 pp. 19-20 (Witness RU-18) (“The assailants threw grenades through some openings .... I remember there was one grenade that was thrown at the altar, but did not explode .... Grenade attacks did not take a long time .... Later on, they started using stones, pelting stones, and then people soon managed to see through the window – through the small openings in the church that some soldiers had come, and these soldiers started using rifles”).

<sup>275</sup> T. 26 September 2005 pp. 9-10 (Witness LED) (“But an estimate would base the number at about 2,000 dead – 2,000 people killed during that night or more than 2,000, possibly); T. 10 January 2006 p. 11 (Santos) (“And if we calculate that 1,000 people were killed, they were more than 3,000 people there, and that means that 2,000 persons were saved because of protection”).

<sup>276</sup> T. 25 January 2006 p. 20 (Witness RU-18) (“these soldiers started using rifles”); T. 16 January 2006 pp. 27-31 (Witness RU-62) (“some soldiers came on bicycles in a line, they were carrying grenades on their belts, and they were carrying also rifles”); T. 29 September 2005 p. 18 (Witness AHY) (“they told me that they were planning to attack in the evening; and they said there were soldiers who would be coming from Murambi to give them a hand”).



- (iii) providing firearms and traditional weapons for the attackers as occurred on and between 8 and 13 April 1994;
- (iv) providing and transporting stones to Rukara Parish complex, which were used by the attackers to attack the civilians sheltered at the Parish compound as occurred repeatedly between 9 and 12 April 1994;
- (v) providing petrol which was used by the attackers to attack the civilians sheltered at Rukara Parish compound as occurred on or about 11, 12 and 13 April 1994;
- (vi) ordering or inciting *Interahamwe* and soldiers to attack and kill the civilians sheltered at Rukara Parish compound as occurred on or about 13 April 1994.

The legal characterization of the Accused's participation is that he aided and abetted others to engage in attacks, and that he:

participated in a joint criminal enterprise ... with military and community leaders and members of the *Interahamwe* in Rukara Commune, such as ... Police Brigadier Ruhiguri ... Member of Parliament Innocent Kalibwende ... former *bourgmestre* of Murambi commune Jean Baptiste Gatete ... and other unknown participants.<sup>277</sup>

Paragraph 19 of the Indictment alleges that he "failed to maintain public order, or deliberately undermined the public order, in districts over which he exercised administrative authority, in agreement with or in furtherance of the policies and objectives of the MRND, the Interim Government or the joint criminal enterprise referred to in paragraph 6, knowing that those policies and objectives intended the destruction, in whole or in part, of the Tutsi population".

### 5.3 Evidence

#### 5.3.1 Overview of Submissions

119. The Prosecution submits that the evidence shows that the Accused:

- presided over the distribution of grenades at a place called Paris Centre on the morning of 9 April and verbally instigated an attack on the Tutsi refugees;
- left Rukara Parish undefended with the intent to facilitate attacks on the Tutsi refugees on 9 April and instigated the first attack on the church at a place called Ruyenzi;
- met with Gatete, the former *bourgmestre* of Murambi, after the attack on 9 April to discuss the killing of Tutsi refugees;
- delivered stones on 12 April to be used in the attack on the Parish Church that evening; and

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<sup>277</sup> Indictment, para. 6. Paragraph 10 largely repeats this allegation, that the Accused "planned, ordered, instigated, facilitated or otherwise aided and abetted the attack on the Tutsi civilian population".

- left Rukara Parish undefended and permitted looting with the intent to facilitate attacks on the Tutsi refugees on 12 April.<sup>278</sup>

The Prosecution presented no arguments in support of the allegations in the Indictment that the Accused distributed petrol or that he ordered and incited attacks on 13 April.<sup>279</sup>

120. The Accused asserts that he did not co-operate with or encourage the attacks in any way. He maintains, on the contrary, that he did everything within his limited means as *bourgmestre* to protect the refugees. Testimony was heard purporting to show that he made good faith efforts to protect the refugees; that he opposed the attackers; and that he did not have legal or actual control over *gendarmes* who, rather than protecting the refugees, may have colluded with the attackers.

121. The Prosecution argues that the evidence concerning the Accused's involvement in a joint criminal enterprise must be considered as a whole. The Chamber accepts that where a single crime is constituted by diverse events, it is appropriate to consider whether the evidence of the various events is mutually supportive.<sup>280</sup> The Chamber must also consider whether a sequence of events, "taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him".<sup>281</sup> As previously mentioned, the criminal conduct of the accused must be "the *only* reasonable conclusion" consistent with such evidence. Where "there is another conclusion which is also reasonably open from that evidence" then the accused must be acquitted.<sup>282</sup> In light of the range of factors which the parties have cited to prove or negate the involvement of the Accused in these attacks, the Chamber will make provisional findings in respect of each allegation on which the Prosecution relies, followed by a concluding section assessing the cumulative weight of the evidence.

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<sup>278</sup> Prosecution Closing Brief, paras. 115-172.

<sup>279</sup> Paragraph 18 (v) of the Indictment alleges that the Accused provided petrol for use during the attacks on the church. Prosecution Witness LEV testified that the Accused obtained jerry-cans of petrol from him on 12 April 1994, which may have been intended to prove this allegation. T. 27 September 2005 pp. 22-23 (Witness LEV). However, the Chamber heard no further evidence connecting this event to the use of petrol during the attacks, and the Prosecution presented no arguments on this evidence in its Closing Brief or closing arguments.

<sup>280</sup> *Stakic*, Judgement (AC), para. 55 ("the Trial Chamber's compartmentalized mode of analysis obscured the proper inquiry. Rather than considering separately whether the Accused intended to destroy the group through each of the genocidal acts ... the Trial Chamber should expressly have considered whether all the evidence, taken together, demonstrated a genocidal mental state").

<sup>281</sup> *Mucic et al.*, Judgement (AC), para. 458.

<sup>282</sup> *Id.*, para. 458; *Stakic*, Judgement (AC), para. 219 ("Where the challenge on appeal is to an inference drawn to establish a fact on which the conviction relies, the standard [of reasonable doubt] is only satisfied if the inference drawn was the only reasonable one that could be drawn from the evidence presented. In such circumstances, the question for the Appeals Chamber is whether it was reasonable for the Trial Chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime was not proven"). The Prosecution recognizes throughout its Closing Brief that evidence concerning one discrete event is often only indirectly and circumstantially relevant to another event: "on the basis of the direct and circumstantial evidence ... the Chamber can safely infer that Rukara Parish was deliberately left undefended ... consistent with Mpambara's prior planning and preparation for the attack on the Tutsi refugees at the parish through instigating and facilitating the attackers with grenades, in furtherance of the JCE" (para. 142); "the only inference to be drawn from the foregoing analysis of the evidence is that the accused, consistent with his conduct and statements in Paris that morning, convened the Ruyenzi meeting to issue instructions for the attack on the Tutsi refugees" (para. 156).

### 5.3.2 Distribution of Grenades and Instigation at Paris Centre, 9 April

122. The Prosecution relies on the sole testimony of Witness AHY to prove that some time between 9 and 10 a.m. on 9 April, the Accused arrived at Paris Centre, driving the communal pick-up truck, accompanied by two *gendarmes* in the back. A crowd of twenty to thirty villagers gathered, and the *gendarmes* asked if anyone knew how to use grenades. They distributed four grenades, two to a certain Gahirwa and two to Ntaganda, while Mpambara remained silent inside the truck. As he started to drive away, he stopped the car, reversed, and announced: “The Tutsis who [have] taken refuge in the church have got out of church and are coming to attack you .... All of you should get ready to defend yourselves”.<sup>283</sup> He is also alleged to have said, “People are ready to attack the Tutsis who are at the Karubamba church, so protect yourselves. I am going to tell the people of Ru[y]enzi”.<sup>284</sup> The evidence shows that Gahirwa, amongst others from Paris Centre, participated in the attack on the Parish church later that afternoon.<sup>285</sup>

123. Mpambara denied being at Paris Centre that morning and testified that he was at the communal offices with Elizabeth Hardinge at that time.<sup>286</sup> Ms. Hardinge, whose recollection of the timing of events the Chamber has found to be reliable, testified that:

I can't remember the exact times, but it has to have been around half past nine that I was talking with him at Karubamba [behind the commune offices], and about ten o'clock when we were back at Gahini, but it could be some minutes either way because I never wrote down any timing or anything like that.<sup>287</sup>

Although Ms. Hardinge conceded a margin of error, the Chamber accepts her estimation that it would have been only a matter of “some minutes either way”, as she put it, given her relatively precise recollection of the time of her departure from, and return to, Gahini Hospital. Given that Witness AHY testified that Mpambara's visit lasted between ten and fifteen minutes, the earliest he could have left Paris Centre would have been 9.10 a.m., which would have allowed him just enough time to travel the muddy three kilometres back to the communal offices at around 9.30 a.m.<sup>288</sup> On the other hand, after numerous fluctuations, Witness AHY seemed to settle on 9.30 a.m. as the time of Mpambara's arrival, which conflicts with Hardinge's testimony.<sup>289</sup> The likelihood of a conflict increases in light of a

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<sup>283</sup> T. 29 September 2005 p. 7, T. 15 December 2005 p. 10 (Witness AHY). Other variations of these words were given by the witness. Whether the Accused spoke before or after the distribution of grenades is unclear. The witness said the former during the examination-in-chief, but then gave the detailed description of the Accused reversing the car and speaking to the crowd. The witness did not suggest that Mpambara had spoken twice, which is implicitly excluded by the witness's testimony that “[t]hose are the only words that he said”. T. 29 September 2005 p. 7.

<sup>284</sup> T. 15 December 2005 p. 10 (Witness AHY).

<sup>285</sup> *Supra*, fn. 270. The involvement of Gahirwa and others from Paris Centre is corroborated: T. 24 January 2006 pp. 8, 10, 13-14 (Witness KU-2) (although the spelling in the transcript is not always consistent, it is clear that the witness is referring to Gahirwa).

<sup>286</sup> T. 7 February 2006 p. 18; T. 8 February 2006 p. 60 (Mpambara).

<sup>287</sup> T. 13 January 2006 pp. 39-40 (Hardinge).

<sup>288</sup> T. 29 September 2005 p. 8; T. 15 December 2005 p. 9 (Witness AHY).

<sup>289</sup> T. 29 September 2005 p. 5 (“between 9:30 and 10 a.m.”), p. 5 (“between 9.00 and 9.30 a.m.”), 6 (“between 9.00 and 9.30”); T. 15 December 2005 p. 46 (“I am testifying as someone who was there between 9 and 10 o'clock; I saw Mpambara”), 46 (“It was at about 9.30, or between 9.30 and 10 o'clock”), 47 (“I am sure that between 9.30 and 10 o'clock in the morning, I saw Mpambara at the Paris centre”), 47 (“And that is why I'm telling you that it was between 9.30 and – rather, between 9 and 9.30”), 50-51 (“Q. And about how long after this second sighting [of Nyirahuku at 9:00 a.m.] did the *bourgmestre*, Mpambara, arrive at Paris Centre? A. It

statement given by Witness AHY less than two weeks before his testimony that Mpambara arrived at 11 a.m., by which time Mpambara was on his way to Rwamagana with Hardinge.<sup>290</sup> The witness's explanation that the time must have been recorded incorrectly due to a translation error does not seem plausible.

124. Witness AHY testified that twenty to thirty people gathered around Mpambara's vehicle after he arrived at Paris Centre.<sup>291</sup> None of them appeared before the Chamber to testify. The present situation is not one in which the lack of corroboration may be readily discounted because of the lack of potential witnesses. Accordingly, the witness's testimony must be treated with caution in light of the lack of corroboration, combined with its highly incriminating content.<sup>292</sup>

125. The Chamber entertains a reasonable doubt concerning the reliability of Witness AHY's testimony that Mpambara came to Paris Centre on the morning of 9 April and encouraged the killing of Tutsi refugees, and assisted *gendarmes* in distributing grenades.<sup>293</sup> Whether the totality of the evidence dispels that reasonable doubt shall be considered at the end of this section.

### **5.3.3 Instigating Attackers at Ruyenzi and Facilitating the Attack on Rukara Parish Church Complex on 9 April**

126. The Prosecution interpretation of the evidence is that the apparent ease with which the Parish was attacked on 9 April shows that Mpambara made no effort to protect the refugees, despite the availability of *gendarmes* and police. Either no police or *gendarmes* were deployed to protect the Parish, or if they were, the Accused knew that they were

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was just a few moments after Nyirahuku left. Maybe thirty minutes after Mpambara arrived"). The Prosecution accepts the timeframe of 9.30 to 10.00 a.m. in its Closing Brief, but argues that both Ms. Hardinge and Witness AHY were giving only estimates. Prosecution Closing Brief, paras. 118-121; T. 2 May 2006 pp. 29-30. If ten minutes is the minimum amount of time that he spent at Paris Centre, then he would not have left for Karubamba, some three kilometres away along a dirt track, until 9:40 a.m.

<sup>290</sup> T. 14 December 2005 pp. 39-40 (Witness AHY); Exhibit D-18.

<sup>291</sup> T. 29 September 2005 p. 7 (Witness AHY).

<sup>292</sup> *Kordic and Cerkez*, Judgement (AC), ("The Appeals Chamber has consistently held that the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence. In *Kupreskic et al.*, the Appeals Chamber emphasized that a Trial Chamber is required to provide a fully reasoned opinion, and that where a finding of guilt was made in a case on the basis of identification evidence given by a single witness under difficult circumstances, the Trial Chamber must be especially rigorous in the discharge of that obligation. A Trial Chamber may thus convict an accused on the basis of a single witness, although such evidence must be assessed with the appropriate caution, and care must be taken to guard against the exercise of an underlying motive on the part of the witness. Any appeal based on the absence of corroboration must therefore necessarily be against the weight attached by a Trial Chamber to the evidence in question"). Although identification is not at issue here, the general principle is equally relevant.

<sup>293</sup> The Prosecution attempted to rely on a summary prepared by the Defence of the testimony of a witness who did not appear before the Chamber as corroboration for Witness AHY's testimony. Prosecution Closing Brief, para. 122; T. 2 May 2006 p. 30 (closing arguments). This information was not evidence, could not have been entered into evidence, and is of no evidential value. It is disregarded. Nor does Witness RU-62's testimony that he saw Gahirwa later in the day with grenades, reportedly given to him by *gendarmes*, provide any corroboration whatsoever that Mpambara was involved. Prosecution Closing Brief, para. 125; T. 2 May 2006 pp. 30-31 (closing arguments). Contrary to the Prosecution's suggestion, the evidence is made no stronger by the fact that the Defence put a proposition to the witness (that Mpambara was at a place called Ruyenzi) which conflicted with subsequent Defence evidence (that the Accused was on his way to Gahini Hospital). Prosecution Closing Brief, para. 128; T. 2 May 2006 p. 31 (closing arguments). The Defence may put a proposition to a witness during cross-examination without being thereby bound to that suggestion.

complicit with the attackers. The Prosecution argues that “the Chamber can safely infer that Rukara Parish was deliberately left undefended ... consistent with Mpambara’s prior planning and preparation for the attack on Tutsi refugees at the parish through instigating and facilitating the attackers with grenades, in furtherance of the JCE”.<sup>294</sup>

127. The Accused’s role at Rukara Church began at 8 or 9 a.m. on 7 April 1994, when Mpambara met with the first wave of refugees to gather there.<sup>295</sup> As a result of their stories, he decided to tour Rukara to assess the situation and asked Father Santos and the *Inspecteur de Police Judiciaire*, Théophile Karasira, a Tutsi, to visit parts of the commune as well. Mpambara testified that neither he nor Santos saw any indications of unrest, although Santos testified that he saw threatening gangs of youths and refugees on the move.<sup>296</sup> By the time they returned to the Church at 11 a.m., the number of refugees had increased significantly.

128. Mpambara testified that during this trip, he went to the homes of three of the seven communal police officers, including *Brigadier* Ruhiguri, and asked them either to return to the communal office directly or to join him on the tour. Two other policemen, who had been on duty throughout the night, were already accompanying Mpambara and Santos. Of the remaining two policemen, one was on annual leave, and another never reported for work again.<sup>297</sup>

129. Mpambara recalled that he left the Parish Church for the second time on 7 April around noon, in the company of Karasira, to assess the situation in a *secteur* which they had not visited earlier.<sup>298</sup> Defence Witness RU-18, a Tutsi who was inside the Church when it was attacked on 12 April, provides general corroboration of this account:

[W]hat I recall most is that Mpambara and Karasira started moving around, telling people to stay calm. I remember that at [Karubamba] market people had started forming groups, and Karasira and Mpambara went and told them to disperse and go back to their homes.<sup>299</sup>

Santos testified that Mpambara returned to the Church several times that day to interview the refugees, and that he was “particularly interested in knowing what the situation was”.<sup>300</sup> Mpambara testified that he directed the communal police to protect the Rukara Parish complex as of 6 p.m. that evening, but that their strength at that location over the next several days depended on how many policemen were on duty and not otherwise engaged, for example, with escorting him around the commune.<sup>301</sup>

130. Mpambara said that he first learned of killings in the commune from *Brigadier* Ruhiguri, on the morning of 8 April at his office.<sup>302</sup> After immediately going to Gahini *Secteur* to try to calm the situation, Mpambara testified that he left for Rwamagana around 9.30 a.m. in an unsuccessful effort to obtain additional reinforcements from the *gendarmerie*

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<sup>294</sup> Prosecution Closing Brief, para. 142.

<sup>295</sup> T. 9 January 2006 pp. 8-9, 10 (Santos); T. 6 February 2006 p. 41 (Mpambara).

<sup>296</sup> T. 6 February 2006 p. 44 (Mpambara); T. 9 January 2006 p. 9 (Santos).

<sup>297</sup> T. 6 February 2006 pp. 42-43 (Mpambara).

<sup>298</sup> *Id.* p. 44 (Mpambara). Several witnesses identified Karasira as a Tutsi: T. T. 25 January 2006 p. 9 (Witness RU-37); T. 13 January 2006 p. 20 (Witness R-01).

<sup>299</sup> T. 25 January 2006 p. 10 (Witness RU-18). The witness may have received this information from his wife. *Id.* pp. 41-43.

<sup>300</sup> T. 9 January 2006 p. 14 (Santos).

<sup>301</sup> T. 7 February 2006 pp. 12-14 (Mpambara).

<sup>302</sup> *Id.* p. 3 (Mpambara).

commandant and *sous-préfet*. Mpambara returned to Gahini *Secteur* between 11 and 11.30 a.m., where he saw further evidence of violence, before arriving back at the Church just after midday.<sup>303</sup> By that stage, Santos had apparently become alarmed at the possibility of an attack on the growing number of refugees, and told Mpambara:

“If you cannot protect the refugees at the parish, and if the refugees are attacked by the population and if the refugees are massacred by the population, you[r] cause – the cause of the Hutu would be lost for good. Those images will be aired the world over, and your cause will be lost”. So he stopped and looked at me in a pensive mood. And a few seconds afterwards he asked me, “Would you dare to make such a statement before the *sous-prefet*?”<sup>304</sup>

Santos testified that he accompanied Mpambara to Rwamagana where, having been unable to find the *sous-prefet*, they spoke to the *gendarmerie* commandant about the refugees at Rukara church. After Santos repeated his warning, he left the room while Mpambara spoke with the commandant alone. Santos could not recall whether Mpambara subsequently told him that *gendarmes* would be sent, but he testified that some time on that day or the next, four *gendarmes* armed with sub-machineguns were indeed stationed near Karubamba market, about 200 to 300 metres from the Church.<sup>305</sup>

131. Early in the afternoon of 9 April, the Accused arrived at the Parish church with twelve refugees who had been evacuated from Gahini Hospital, along with the *gendarme* commandant and several *gendarmes* and communal police.<sup>306</sup> Mpambara testified that he was told that a mob was forming near Gitarama with the intention of attacking the refugees at the church.<sup>307</sup> He left immediately, picking up Karasira, the *Inspecteur de Police Judiciaire*, and Innocent Kalibwende, a Member of Parliament, along the way.

132. Some four kilometres from the Parish church, a group of two or three hundred civilians armed with machetes, spears and sticks had gathered at a place called Ruyenzi.<sup>308</sup> According to Defence Witness RU-62, who was one of the would-be attackers, three of his companions, including Gahirwa, were armed with grenades, reportedly given to them that morning by a *gendarme* from Karubamba.<sup>309</sup> Mpambara urged people to return to their homes; said that he wanted peace and security in the commune; and ordered that the refugees be left alone.<sup>310</sup> Karasira reiterated Mpambara’s instructions and said that they should instead

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<sup>303</sup> *Id.* pp. 3-6.

<sup>304</sup> T. 9 January 2006 p. 17 (Santos). Santos’ recollection of times is different than Mpambara’s. Santos recalled this meeting happening at 10 or 11 a.m., rather than between 12 and 12:30 p.m. T. 9 January 2006 pp. 16-17 (Santos). Mpambara told Santos immediately before this exchange that “I told [Santos] that I had a lot of problems and that I was on the way to Rwamagana because I cannot manage the situation with only five policemen, and so I needed reinforcements from Rwamagana”. T. 7 February 2006 p. 6 (Mpambara).

<sup>305</sup> T. 9 January 2006 pp. 17-19, 42 (Santos).

<sup>306</sup> T. 7 February 2006 p. 29 (Mpambara); T. 26 September 2005 p. 75 (Witness LEK) (“And we were lying on our back while the vehicle was moving to Karubamba, until we reached the destination, which was Karubamba church”).

<sup>307</sup> T. 7 February 2006 p. 30 (Mpambara).

<sup>308</sup> T. 16 January 2006 pp. 11-12 (Witness RU-62) (“200 people, or slightly more”; the witness estimate of 2 kilometres is inconsistent with the estimate of Santos and Mpambara that the distance was about 4 kilometres; spears and machetes); T. 9 January 2006 pp. 26-27, 29 (Santos) (estimating the distance to the church as being 4 kilometres, and that the crowd consisted of 300 people); T. 7 February 2006 pp. 30-31 (Mpambara).

<sup>309</sup> T. 16 January 2006 pp. 11-13, 18 (RU-62).

<sup>310</sup> T. 16 January 2006 p. 15 (RU-62); T. 24 January 2006 p. 2 (KU-2); T. 9 January 2006 (Santos) p. 27.

fight people from Murambi who were invading the commune.<sup>311</sup> The crowd was displeased and some of them stood up and started to whistle and shout; some were insulting Karasira.<sup>312</sup> Mpambara, the *gendarmier* commandant and the others were frightened by this reaction and quickly returned to their cars and left.<sup>313</sup> Some *gendarmes* signalled surreptitiously from the back of the pick-up in which they were riding for the crowd to follow them and an indeterminate number did so.<sup>314</sup> Witness RU-62 testified that one of the *gendarmes* told the attackers, apparently referring to Mpambara, that “if he stops you – keeps stopping you from going to the church, you should kill him first before you proceed to the church”.<sup>315</sup> Mpambara testified that although the mob was displeased by what had been said, they started to return to their homes.<sup>316</sup>

133. The Prosecution insists that Mpambara’s purpose at Ruyenzi was to instigate the population to attack the refugees at the Church.<sup>317</sup> The Defence testimony should be disregarded in its entirety because of “discrepancies between the various versions of the same event”.<sup>318</sup> Furthermore, the Prosecution suggests that if the *gendarmes* did beckon the crowd to follow, then those in the cars following Mpambara, including Father Santos, were “complicit[] in the planning and preparation of the attack”.<sup>319</sup>

134. The evidence of the four Defence witnesses to this event – Santos, R-01, RU-62 and KU-2 – is consistent in the following essential elements: the meeting occurred in the early afternoon at Ruyenzi; leading military and civilian authorities, including Karasira, were present; Mpambara exhorted the attackers to return to their homes; and the crowd reacted to his words with hostility. In comparison with these factors, the discrepancies are of rather minor significance. Witness RU-62’s hearsay evidence that Mpambara had some role in

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<sup>311</sup> T. 24 January 2006 p. 2 (KU-2). Karasira’s presence was corroborated by Witness RU-62 (T. 16 January 2006 p. 13) and Witness R-01 (T. 13 January 2006 p. 20).

<sup>312</sup> T. 13 January 2006 p. 21 (Witness R-01); T. 16 January 2006 p. 16 (Witness RU-62) (“They stood up, blew whistles, and they left”); T. 24 January 2006 p. 2 (Witness KU-2) (“They started shouting – talking, shouting at the same time. Maybe about 20 percent of those were present, but they were talking in unison, and they looked as though they wanted to get away from there, because they didn’t welcome what he had said”).

<sup>313</sup> T. 9 January 2006 p. 27 (Santos) (“The crowd stood up and picked up their machetes and sticks, so the military authorities became afraid. Then the commandant turned towards me and told me, ‘There’s nothing for us to do here. Let us leave this place. They threatened me and even the *bourgmestre* .... These people are revolting against us, so there is nothing for us to do”); T. 16 January 2006 pp. 16 (Witness RU-62) (“Mpambara was afraid and entered into the vehicle, and the vehicle left”), 19 (“[t]hey rushed to the vehicle”); T. 17 January 2006 p. 25 (Witness RU-62) (“When they went into the vehicle there was commotion, and people seemed to be ... agitated, and everybody was very excited. It’s like stepping on a group of ants. Those people were many, and when they started moving, it was – looked very dangerous”).

<sup>314</sup> T. 16 January 2006 pp. 16, 19-20 (Witness RU-62); T. 17 January 2006 p. 25 (Witness RU-62); T. 24 January 2006 p. 4 (Witness KU-2) (“the people asked the *gendarme* if they could follow them. And what I noticed is that the *gendarmes* were signalling them to follow them, but they didn’t do anything to the population”). Mpambara seemed to think that none of the attackers followed (T. 7 February 2006 p. 33); Witness RU-62 recalled that more than one hundred followed (T. 16 January 2006 p. 20; T. 17 January 2006 p. 27); Santos only observed a few (T. 9 January 2006 pp. 30-31 (“a small group started walking towards the parish ... [s]ix or eight, no more”). Similar behaviour by *gendarmes* on a different occasion was described by Witness Serukwavu. T. 31 January 2006 pp. 12-13, 37.

<sup>315</sup> T. 16 January 2006 p. 16 (Witness RU-62).

<sup>316</sup> T. 7 February 2006 pp. 32-33 (Mpambara).

<sup>317</sup> Prosecution Closing Brief, para. 156.

<sup>318</sup> Prosecution Closing Brief, paras. 149-154. The Prosecution also suggests that the testimony of Witnesses RU-62 and KU-2 was discredited by contradictions with prior statements.

<sup>319</sup> Prosecution Closing Brief, para. 155.

convening the meeting was explained by Mpambara who testified that the involvement of the *bourgmestre* would often be falsely invoked to encourage attendance. The Prosecution argues that the explanation is implausible if, as Mpambara claimed, he was widely known to be discouraging the violence.<sup>320</sup> Nevertheless, the Chamber cannot exclude the reasonable possibility that the organizers may still have believed that using Mpambara's name could attract people to the meeting.<sup>321</sup>

135. Defence Witness KU-2, who was one of the prospective attackers, had denied being at the meeting in a previous statement. The Prosecution construes this denial as an effort to dissociate himself from a meeting with a malign purpose and in which the Accused was involved as an organizer.<sup>322</sup> This speculation is outweighed by the consistent testimony of the three other witnesses concerning the words and attitude of the Accused on this occasion. At least two of them, Witness R-01 and Santos, were bystanders and have no need to dissociate themselves from the meeting or to concoct a version of events which would explain their presence there.<sup>323</sup>

136. The discrepancies concerning the number of people who headed to Rukara Parish is plausibly attributable to the witnesses' different perspectives.<sup>324</sup> As Witness RU-62 explained, the *gendarmes* gave their signals furtively, so as not to be observed by Mpambara or the others inside the pick-up truck. This suggests that there would likely have been some delay before most of the attackers followed the convoy. The accusation that the "occupants of the two other cars" in the convoy must have been able to observe the signalling and were, therefore, complicit in the attack which followed is presumably an oblique attack on the credibility of Father Santos.<sup>325</sup> The Prosecution failed to present any credible basis to believe that Father Santos would have lied about this incident. Indeed, the evidence shows that Father Santos declined to be evacuated with other Europeans on 10 April, remaining behind to provide assistance to his parishioners besieged at the Church.<sup>326</sup> A more plausible explanation for Father Santos's testimony, and one which is not reasonably excluded by the evidence, is that he simply did not see the gestures described by Witness RU-62.

137. Further doubt is cast on the proposition that Mpambara's true intention was to instigate the attackers by the fact that Mpambara brought Karasira to the scene, which was corroborated by Witnesses R-01, RU-62 and KU-2. If the Accused had wished to instigate an attack on the church, he would not likely have done so in front of a Tutsi judicial officer, whom he later assisted to flee the commune.

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<sup>320</sup> T. 2 May 2006 p. 36 (closing arguments).

<sup>321</sup> The Chamber heard significant evidence that the Accused did engage in such efforts publicly. *See* Section 5.3.7.

<sup>322</sup> Prosecution Closing Brief, paras. 152-53.

<sup>323</sup> The Chamber is also aware of the substantial contradictions between Witness KU-2's testimony and that of Witnesses AHY and LEV concerning KU-2's role in the first attack on the Parish. Witness KU-2 minimizes his participation (T. 24 January 2006 p. 12), whereas both Witness AHY (T. 29 September 2005 p. 11) and Witness LEV (T. 27 September 2006 p. 22) suggest that KU-2 had a leading role. Witness KU-2 has an obvious interest to be untruthful in respect of his own role in the attacks, but this does not necessarily undermine the credibility of his testimony concerning the Ruyenzi meeting.

<sup>324</sup> Prosecution Closing Brief, para. 154.

<sup>325</sup> Prosecution Closing Brief, para. 155; T. 2 May 2006 p. 38 (closing arguments) ("Father Santos ... [is] deemed to have acquiesced in what the *gendarmes* were doing").

<sup>326</sup> *See, e.g.*, T. 26 September 2005 p. 26 (Witness LED); T. 23 September 2005 p. 39 (Witness AOI).



138. When the convoy arrived back at the church, Mpambara spoke to the gathered refugees. Witnesses LED and LEV both testified that he said words to the effect: “‘Isn’t it your relatives who have killed the head of state?’”<sup>327</sup> Witness LEV described Mpambara as angry, derisive and mocking. Despite this hostility, both Mpambara and the *gendarmerie* commandant assured the refugees that they would be protected.<sup>328</sup> When the refugees complained about lack of water for their livestock, Mpambara promised to find a solution.<sup>329</sup> Prosecution Witness AOI saw Mpambara arrive but did not hear him speak; she was later told that he had said that there was no security at the church and that they should go back to their homes.<sup>330</sup> Father Santos arrived almost immediately after the others, but by that time the commandant was already speaking, having been introduced by the *bourgmestre*. The refugees were distrustful of the commandant’s assurances of security, and one of them whispered to Santos: “‘What is he talking about? Is he not making a mockery? He is the one who brought the grenades.’”<sup>331</sup> Santos denied that Mpambara had blamed the refugees for the death of the president or that he was mocking the refugees but accepted that the refugees were critical of the *gendarmerie* commandant who, when told of their views, responded: “‘There is nothing I can do. I am sorry that what I said has been misinterpreted. There is nothing that I can do’”.<sup>332</sup>

139. The Chamber entertains reasonable doubts about the reliability of the observation that Mpambara had a hostile or mocking attitude towards the refugees. Witness LEV admitted that he formed that only later, when the refugees were subsequently attacked. Father Santos testified that Mpambara’s genuine goal throughout this period was “the protection of the refugees” and that “I could see at all times the commitment to defend the refugees”, but that “[Mpambara] felt powerless because of the situation”.<sup>333</sup> Under these circumstances, the Chamber has reasonable grounds to believe that Witness LEV’s impressions of Mpambara’s attitude are mistaken.

140. Mpambara testified that after the meeting with the refugees, the commandant ordered five *gendarmes* to take up a position at a kiosk near the Parish nutritional centre towards Karubamba Market and instructed them to work with the communal police to ensure security. Communal policemen were stationed near the convent, controlling the road approaching the church from the other direction.<sup>334</sup> Soon thereafter, Mpambara and Santos

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<sup>327</sup> T. 26 September 2006 p. 4 (Witness LED); T. 27 September 2005 p. 20 (Witness LEV) (“‘What are they running from since Tutsi had killed President Habyarimana’”).

<sup>328</sup> T. 26 September 2006 p. 4 (Witness LED); T. 27 September 2005 pp. 20-21, 39, 49 (Witness LEV).

<sup>329</sup> T. 27 September 2006 pp. 20, 38, 49 (Witness LEV) (“the kind of tone [in] which he was uttering such words showed a lot of anger. And the words he used before telling us that he was going to ensure our security, the words such as ‘what have you come to do here’ when he knew very well what had brought us there, show that he wasn’t sincere. And when he said ‘You are responsible for the death of the president,’ that really wouldn’t augur for any protection from such a person, and really, eventually that’s what happened, our security was never ensured”). At one stage, the witness suggested that he was not aware of Mpambara’s mocking tone until subsequent events had shown that his promises of security had not been fulfilled. T. 27 September 2005 p. 39. Later, however, the witness confirmed that, at the time, he perceived Mpambara to be, at the least, angry. T. 27 September 2005 p. 49.

<sup>330</sup> T. 23 September 2005 pp. 25-26 (Witness AOI).

<sup>331</sup> T. 9 January 2006 pp. 34-35 (Santos).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* pp. 17, 19-20.

<sup>334</sup> T. 7 February 2006 pp. 36-37 (Mpambara).

went together to fix the pump which supplied the Parish with water, some three or four kilometres away.<sup>335</sup>

141. When Mpambara and Santos were on their way back to the Parish, they saw cattle being stolen from the Parish. Santos went to the church while Mpambara started pursuing the thieves and firing his pistol to frighten them.<sup>336</sup> The attack on the church had started 40 minutes to an hour after Mpambara had been there with the *gendarmerie* commandant.<sup>337</sup> Witness AHY asserted that he saw no *gendarmes* or communal policemen at the Parish while he and others attacked the church.<sup>338</sup> *Gendarmes* and policemen were not only present, according to Witness LED, but actively participated in the attack.<sup>339</sup> Witness KU-2 also testified that *gendarmes* were present at the Parish during the attack. As he was fleeing, they stopped and frisked him; Mpambara, who was nearby, shouted at him angrily.<sup>340</sup> Mpambara said that he heard *gendarmes* shooting in the air, chasing the people who had attacked the Parish, but did not recall having seen or shouted at Witness KU-2.<sup>341</sup>

142. Mpambara testified that when he found dead bodies at the church entrance, he was “amazed, flabbergasted [and] lost [his] head”.<sup>342</sup> He and Santos went to the *gendarmes* and excoriated them for having failed to prevent the attack and asked them how it had happened.<sup>343</sup> Santos testified that the *gendarmes* responded that they had received orders not to shoot to kill anyone. The *gendarmes* also said, according to the Accused, that the attack had happened too quickly to be prevented.<sup>344</sup> The two communal police who had been stationed near the convent also denied having seen anything until the first grenades exploded because the attackers came through the bushes. Mpambara testified that he “did not accept that explanation” and that he entreated the *gendarmes* to shoot to kill to repel any further attacks.<sup>345</sup>

143. The Prosecution submits that the attack of 9 April could lead the Chamber to “safely infer that Rukara Parish was deliberately left undefended”.<sup>346</sup> The Accused concedes that *gendarmes* and communal police acquiesced or cooperated with the attackers, but he insists that this cooperation was contrary to his own wishes and efforts. The vital question, therefore, is whether the lack of effective defence of the Church is attributable to the

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<sup>335</sup> T. 9 January 2005 pp. 37-39 (Santos).

<sup>336</sup> *Id.* p. 41 (Santos).

<sup>337</sup> T. 26 September 2005 p. 5 (Witness LED) (estimating that the attack took place thirty to forty minutes later); T. 27 September 2005 p. 21 (Witness LEV) (estimating one hour later).

<sup>338</sup> T. 29 September 2005 p. 17; T. 15 December 2005 p. 42 (Witness AHY).

<sup>339</sup> T. 26 September 2005 pp. 37-38 (Witness LED) (“Yes, the police were among the attackers ... I saw one policeman called Ruhiguri”), 57 (neither the police nor the *gendarmes* “tried to repel the attacks. Actually, they instead helped the attackers. For instance, during the attack on the 9<sup>th</sup>, that evening the *gendarmes* also came and shot at us. And even in – rather, on the 11<sup>th</sup> and the 9<sup>th</sup>, a police – a communal policeman came with attackers and shot at us”). Cf. Prosecution Closing Brief, paras. 130, 139.

<sup>340</sup> T. 24 January 2006 p. 16-17 (Witness KU-2).

<sup>341</sup> T. 7 February 2006 p. 40 (Mpambara).

<sup>342</sup> *Id.*

<sup>343</sup> T. 12 January 2006 p. 29 (Santos).

<sup>344</sup> T. 9 January 2006 pp. 29, 42 (Santos); T. 7 February 2006 p. 40 (Mpambara). There appears to be a curious inconsistency as to where the two men met the *gendarmes*. Santos testified that he got into his vehicle and went to the *gendarmes* post; Mpambara testified that the *gendarmes* and police came to the church, and that he spoke with them there.

<sup>345</sup> T. 7 February 2006 p. 42 (Mpambara). Santos neither confirmed nor denied that Mpambara had accompanied him to speak to the *gendarmes*. Cf. Prosecution Closing Brief, para. 161.

<sup>346</sup> Prosecution Closing Brief, para. 142.

intentional conduct of the Accused, and whether this shows that he was colluding with the attackers.

144. The Defence has led credible evidence that the Accused took some, albeit ineffective, measures to dissuade or prevent attacks against the refugees and that the *gendarmes* were colluding with the attackers against his wishes. In the absence of any direct evidence (other than the testimony of Witness AHY, which the Chamber has found unreliable) that the Accused ordered, encouraged, or urged the *gendarmes* to facilitate attacks against the refugees, the Chamber cannot safely infer, on the basis of the evidence of events leading up to the 9 April attack, that the Accused facilitated the attack on the Parish complex by deliberately leaving it undefended.

#### **5.3.4 Colluding to Kill Tutsi With Gatete, 9 April**

145. The uncorroborated testimony of Prosecution Witness AHY is that, immediately after the attack on 9 April, he saw Mpambara standing with the former *bourgmestre* of Murambi Commune, Jean-Baptiste Gatete, in front of Mugabo's Bar, near Karubamba Market.<sup>347</sup> Gatete asked "why this Tutsi issue was not over. 'Is there any shortage of bullets or grenades or *Interahamwe*? Tell me if you need *Interahamwe*, and then I send them and this issue is resolved'".<sup>348</sup> Mpambara "did not utter any word in reply".<sup>349</sup> Mpambara denies being present at Mugabo's bar that afternoon.

146. Even if accepted as reliable, this fragmentary account by Witness AHY is inconclusive. Mpambara's silence might suggest opposition, or simply a refusal to cooperate. Indeed, Witnesses RU-37 and RU-18 testified that, two days later, Mpambara had an angry exchange with the *bourgmestre* of Murambi Commune at the time, a certain Mwange. Mwange asked Mpambara why the "weeds", meaning Tutsi, had not been removed from the commune. Mpambara responded "loudly that the problem in Rukara was not the bushes they had to cut down, the problem was the security of the people being killed".<sup>350</sup> The two men parted in anger.

147. Under these circumstances, cooperation between the Accused and Gatete to kill the Tutsi refugees at Rukara Parish is not the only reasonable inference to be drawn from this fragment of conversation. Furthermore, Witness AHY's testimony concerning Mpambara's visit to Paris Centre that morning, discussed above in section 5.3.2, raises doubts about his overall credibility. Finally, the testimony of Witnesses RU-37 and RU-18 concerning the Accused's reaction to Mwange indirectly contradicts the proposition that the Accused was colluding with the attackers from Murambi Commune. Accordingly, it has not been proven beyond a reasonable doubt that Mpambara's conversation with Gatete was for the purpose of discussing the killing of Tutsis.

#### **5.3.5 Delivering Stones to Be Used in an Attack on the Church, 12 April**

148. No further attacks were launched on the Parish on 10 and 11 April, but the refugees were becoming increasingly desperate, and the distribution of food more difficult.<sup>351</sup> On 11

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<sup>347</sup> The MP, Kalibwende, was also said to the present. T. 29 September 2005 pp. 15-16 (Witness AHY).

<sup>348</sup> *Id.* pp. 15-17.

<sup>349</sup> *Id.* p. 17.

<sup>350</sup> T. 20 January 2006 p. 37 (Witness RU-37); T. 25 January 2006 pp. 13-14 (Witness RU-18).

<sup>351</sup> T. 10 January 2006 pp. 8-9, 13 (Santos).

and 12 April, Mpambara and Santos returned to Rwamagana to ask the *gendarmerie* commandant for further reinforcements or evacuation of the refugees to an empty school in Rwamagana. The commandant responded that he didn't have enough manpower or resources for either request.<sup>352</sup> On the second visit, the commandant suggested that Mpambara distribute guns in the communal armoury to former soldiers who could assist in defending the Church.<sup>353</sup>

149. Santos testified that, at around 3 or 4 p.m. on 12 April, Mpambara came and told him that “[t]he assailants have already received orders to attack this evening”.<sup>354</sup> Santos further testified that:

[H]e told me, “... I will try to find out whether I can convince them to postpone the attack to the next day and not today”. He’s saying that he was trying to play the game, sort of, to accept the attack but to have it postponed to the next day. The idea he had was that he would use the intervening period to assemble the retired police officers and the retired soldiers in order to protect the refugees.<sup>355</sup>

150. The uncorroborated testimony of Witness LED is that between 4 and 5 p.m., the Accused arrived in front of the church in his pick-up truck with about eight *Interahamwe* who proceeded to unload quartzite stones.<sup>356</sup> As soon as Mpambara left, these and other *Interahamwe* started throwing the stones at the church, joined shortly thereafter by attackers with other weapons, including a gendarme who started firing his gun.<sup>357</sup>

151. Neither Father Santos nor Witness RU-18, both of whom were inside or near the church during this period, saw the Accused unloading stones or an attack of this nature.<sup>358</sup> This lack of corroboration from others, who were present inside the church and who would not likely have overlooked such an attack, is significant. Furthermore, Witness LED’s account is undermined by a prior statement in which he had indicated that the Accused came to the church “three times”, rather than just once, and that he “deposited the stones at various places outside in the parish”. After Mpambara’s departure “the third time, the *Interahamwe* attacked us”.<sup>359</sup> This discrepancy is not easily explained as a transcription or translation error. Furthermore, Santos explained that cement and stone benches in front of the church were the source of the stones thrown at the church later that evening.<sup>360</sup> Consequently, the testimony of Witness LED does not establish beyond a reasonable doubt that the Accused transported stones and *Interahamwe* to Rukara church for the purpose of aiding and abetting the attack on the Tutsi refugees there.<sup>361</sup>

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<sup>352</sup> *Id.* pp. 9-10, 13.

<sup>353</sup> *Id.* pp. 13-14.

<sup>354</sup> *Id.* p. 14.

<sup>355</sup> *Id.* p. 15. Witness AOI testified that there was “despair in the air” (T. 23 September 2005 p. 29).

<sup>356</sup> Contrary to the Prosecution suggestion, Witness AOI’s testimony provides no corroboration for Witness LED’s testimony. Witness AOI could confirm only that she saw Mpambara driving at around that time in the same direction indicated by Witness LED. Indeed, Witness AOI’s failure to mention an attack of the magnitude mentioned by Witness LED is significant. T. 23 September 2005 p. 29 (Witness AOI). *Cf.* Prosecution Closing Brief, para. 171.

<sup>357</sup> T. 26 September 2005 pp. 6-8, 30, 31-34, 36, 39, 57 (Witness LED).

<sup>358</sup> T. 10 January 2006 pp. 16-20 (Santos); T. 25 January 2006 p. 18 (Witness RU-18).

<sup>359</sup> T. 26 September 2005 p. 36 (Witness LED).

<sup>360</sup> T. 10 January 2006 p. 23 (Santos); T. 25 January 2006 p. 22 (Witness RU-18).

<sup>361</sup> The Prosecution discusses the “credibility of Mpambara’s alibi for 3 p.m. to 6 p.m.” at length in its closing brief, paras. 173-193. Having found that Witness LED’s testimony is not sufficient to establish that the Accused

### 5.3.6 Failing to Arrest Looters or to Otherwise Protect Rukara Church, 12 April

152. The Prosecution asserts that, by his own admission, the Accused failed to arrest looters in Rukara Parish on 10 and 11 April and that he failed to arrest anyone involved in the Parish attack of 12 and 13 April. By 12 April, the Accused knew that the *gendarmes* were not committed to defending the refugees and should have replaced them with communal police or taken other steps to defend the Parish. The Prosecution argues that these actions, or omissions, were for the purpose of permitting other members of the joint criminal enterprise to carry out attacks against the Tutsi refugees, or to aid and abet such attacks.<sup>362</sup>

153. In response to a question about his failure to make more vigorous efforts to track down and arrest those involved in the attack at the Gahini Hospital, the Accused gave the following answer regarding his general strategy:

And I said that if I use violence and I arrest people by force, what am I going to gain from that? ... If I arrest those people and lock them up, then the police will not be available because they would be guarding those people locked up in the *commune* cell .... The second option was to use violence. As you know, in every strategy, an administrator has to think about which way he is going to use. I was with the chief of police and the IPJ, and I asked him whether, f – “With the means we have, can we arrest those people? Can we stop them? Can we shoot them?” Then I said, “Violence leads to violence,” and bearing in mind that most of these people were soldiers ... and Butera had been a soldier and knew how to use a gun and grenades. And I said, “With the staff that we have, we cannot kill those people and overcome them. If we use violence, if I give the order and the police chief shoots at one of them, those could come and kill us – kill all of us, myself and the police, and together with the people we're supposed to protect”. And I found that this strategy wouldn't lead us to anywhere. Instead, it would make matters worse. So, me as *bourgmestre*, I said, “I have to adopt a strategy of dissuasion”. I had to show them that there is administration. And when I looked at the whole situation, I found that we didn't have any leverage. Those people we were facing were stronger than us. So, we have to dissuade them, and without showing that the administration is weak, so that those people may not find that there is no administration and they can do anything they want. The second thing I thought about is that, if I give the order for them to shoot those people, those assailants, those are the policemen I am going to give orders to, and they are local people, they may not accept to shoot their kith and kin. If I tell someone to shoot a brother or a relative, is that possible? ... So I chose the dissuasion strategy and tried to mitigate the situation so that it may not get worse. Mr. Prosecutor, I never said that I shouldn't arrest the assailants, but I was weak. And the only strategy that was left was to show that there is an administration because, in the end, it came to something. But I was not supposed to show the weakness of the authority. That is the strategy that I chose, Mr. Prosecutor, and Your Honour.<sup>363</sup>

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unloaded stones at the church, the Chamber need not examine whether the alibi raises a reasonable doubt concerning the evidence of distribution. The alleged inconsistencies in the alibi evidence do not provide any additional support to Witness LED's testimony.

<sup>362</sup> Prosecution Closing Brief, paras. 228-237. Although these arguments are presented within the context of the accused's “failure to act”, the Chamber will treat these submissions as if they are directed at proving the Accused's involvement in a joint criminal enterprise or aiding and abetting. Indeed, on occasion, the Prosecution also makes that submission: “...is evidence of his intention to ensure that they were not inhibited from carrying out the objective of the JCE...”, paras. 228, 237.

<sup>363</sup> T. 9 February 2006 pp. 2-3 (Mpambara).

Mпамbara testified that, given the inadequacy of communal police resources, he had no choice but to rely on the *gendarmes* even after he became aware of their complicity in the attacks, and hoped that his complaints to the commandant would result in more or better-trained *gendarmes*.<sup>364</sup> The Defence tendered evidence, not seriously contested by the Prosecution, that *gendarmes* were not under the command of the *bourgmestre*.<sup>365</sup>

154. Although a few armed communal policemen could have deterred a large crowd of unarmed attackers, Defence and Prosecution witnesses alike testified that by 12 April the assailants were armed with guns and grenades, and included soldiers and *gendarmes*.<sup>366</sup> Under these circumstances, the Chamber cannot say that the failure of the communal police to maintain order at the Church demonstrates the Accused's collusion with the attackers. Another reasonable explanation is that Mpамbara was afraid to oppose the attackers with direct force, fearing that they would turn on him with superior force. The Chamber does not find that the failure to arrest any of the attackers shows that the Accused was in league with them.<sup>367</sup>

155. In the absence of further evidence showing the Accused's cooperation with the attackers, and with some evidence that the Accused made efforts to secure the Parish, the Chamber cannot find beyond a reasonable doubt that the failure to arrest looters and otherwise protect Rukara Parish demonstrates his involvement in a joint criminal enterprise, or that he or that he substantially contributed to these crimes by other persons so as to be guilty of aiding and abetting.<sup>368</sup>

### **5.3.7 The Evidence in its Totality**

156. The Chamber has been mindful of the inter-relationship of evidence concerning the different events described above and will now explicitly consider whether, taken as a whole, the evidence shows that the Accused was part of a joint criminal enterprise.

157. Father Santos was a central witness for the Defence in describing the atmosphere at the Parish complex and the general conduct of the Accused from 7 to 13 April 1994. The Prosecution attempted to undermine Father Santos' testimony by suggesting that the

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<sup>364</sup> T. 6 February 2006 pp. 22-24; T. 9 February 2006 p. 16.

<sup>365</sup> Exhibit D-48; T. 8 February 2006 pp. 3-4 (Mpамbara).

<sup>366</sup> T. 25 January 2006 p. 20 (Witness RU-18) ("these soldiers started using rifles"); T. 16 January 2006 pp. 27-31 (Witness RU-62) ("some soldiers came on bicycles in a line, they were carrying grenades on their belts, and they were carrying also rifles"); T. 29 September 2005 p. 18 (Witness AHY) ("they told me that they were planning to attack in the evening; and they said there were soldiers who would be coming from Murambi to give them a hand").

<sup>367</sup> The only incidents of failures to arrest are to be derived from the Accused's own testimony.

<sup>368</sup> The Chamber notes that evidence from Witness AOI placing the Accused at the scene of the attack on 12-13 April was not relied upon by the Prosecution in its Closing Brief. If it had been relied upon, the Chamber would have found that the witness's credibility was seriously undermined by an inconsistent prior statement, which gave a very different account of her whereabouts during the attack. T. 23 September 2005 p. 52. Further doubts are raised by her testimony that a close relative of hers was killed during the attack, a fact which was contradicted by several other witnesses, and which she recanted when asked directly to confirm his death. T. 23 September 2005 pp. 48, 51; T. 25 January 2006 p. 23 (Witness RU-18); T. 10 January 2006 p. 30, T. 12 January 2006 p. 27 (Santos).

Accused's apparent good conduct was no more than a smokescreen to conceal his criminal acts.<sup>369</sup> The Prosecution also implied that Santos was biased in favour of Mpambara.<sup>370</sup>

158. Although not all aspects of Father Santos' testimony are equally reliable, particularly in respect to the timing of events, the Chamber nevertheless finds that he was an honest, truthful and unbiased witness. He has been a missionary priest since 1954 and had been in Rwanda since 1967, mostly at Rukara Parish itself. He understands and speaks Kinyarwanda well.<sup>371</sup> Tutsi refugees testified that he helped them at the church, and the Prosecution brought no evidence suggesting that he harboured an anti-Tutsi bias, despite an oblique suggestion to this effect.<sup>372</sup>

159. Father Santos's account of the Accused's reaction to his planned departure on 10 April is significant:

I stopped [Mpambara] and I said, "Goodbye". And he said, "Why?" I said, "We are leaving for Spain". "You are leaving for Spain", he said. "How? And you are leaving the refugees behind?" He was somewhat shocked. He said, "If you leave today, they will kill all the refugees". And he went on to say, "I am not sure that if you stay it will save them". And he was pointing with his finger. "But if I had any bit of hope left, it was you, and if you leave everyone will be killed". I turned to my fellow priest and I told him, "Have you heard? I am remaining behind – I am staying behind..."<sup>373</sup>

If the Accused had wished to assist with the extermination of the Tutsi refugees without being discovered, then it is difficult to understand why he would plead with a foreigner to remain on the scene. It is always possible that the Accused was so Machiavellian and confident in his skills of deception that he wished Santos to remain behind as a dupe who would later attest to his good deeds. The Chamber considers this possibility to be remote, in light of Santos's ability to understand the language and his familiarity with people in the commune.

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<sup>369</sup> T. 9 February 2006 p. 5 (Mpambara) ("Q. In fact, Witness, isn't it the case that that the news delivered by Maniraho [about the meeting of attackers at Ruyenzi] caught you unawares in the company of the *gendarmier* commandant, Santos, and the sous-prefet? ... And you were compelled to go and meet the crowd and purport to discourage them because you didn't want to be associated with the killings...?"); T. 9 February 2005, p. 17 ("Q. In fact, you were playing a double-game, presenting yourself as a helpless victim of circumstances, weren't you?" by not telling Santos that he considered the *gendarmes* to be complicit with the attackers); T. 2 May 2006 p. 25 ("And it's submitted that it's clear that the Accused, as much as a double game as he likes, and liked, to play, was up to it in his neck").

<sup>370</sup> Prosecution Closing Brief, para. 155 (implying that Santos was complicit with *gendarmes* who were beckoning attackers towards Rukara church); T. 12 January 2006 p. 34 ("Q. So, you actually owe your life to Mpambara, don't you?"); T. 12 January 2006 pp. 35-36 ("Q. And, Witness, you couldn't stake your life to protest the slaughter of thousands of your Tutsi flock, did you?"); T. 12 January 2006 p. 2 ("Q. And, in fact ... you were seen in the company of Accused Mpambara on many occasions, isn't it?").

<sup>371</sup> T. 9 January 2006 pp. 4-5 (Santos).

<sup>372</sup> Assistance to refugees: T. 26 September 2005 p. 26 (Witness LED); T. 23 September 2005 p. 39 (Witness AOI). Alleged anti-Tutsi bias: T. 12 January 2006 pp. 6-7 ("Q. Witness, by your own evidence, it would be correct to suggest that you were concerned about the loss of the Hutu cause, 'yes' or 'no'? A. I was concerned about losing sight of the political ideology at the time. The Hutus were in power at the time. I wanted to support the order that existed in Rwanda at the time, whether such a political order was maintained by the Hutus or the Tutsi. The Hutus were in power, and it was my intention to support the action of the authorities to ensure that the tragic events should not destroy the political authority at the time or should not lead your political authority at the time to go astray").

<sup>373</sup> T. 10 January 2006 p. 6 (Santos).

160. Indeed, Santos's testimony is directly and indirectly corroborated by a number of credible Rwandese witnesses. Defence Witnesses RU-37 and RU-18 are partners in a marriage of mixed ethnicity. They testified that the Accused helped them to marry despite the opposition of their families and others in the community.<sup>374</sup> Both witnesses testified that on 11 April, near Karubamba Market, the Accused publicly denounced the *bourgmestre* of Murambi Commune, Mwange, who was advocating attacking the Tutsis.<sup>375</sup> The next day, Mwange was heard saying "You should be patient ... Mpambara is preventing you from killing those people, but I am going to bring people who will help you to kill those people".<sup>376</sup> Mpambara's public calls throughout Rukara Commune for the violence to stop are echoed in the testimonies of numerous witnesses, both Tutsi and Hutu. Félicien Serukwavu, a Tutsi, testified that, some time after 8 April, Mpambara addressed an angry crowd at Akabeza Centre to the effect that 'I am warning you today whoever will again loot Tutsi property, kill, hunt down Tutsis and kill them, I am repeating to you that whoever does it will be prosecuted .... Moreover, all these groups with machetes and clubs, I don't want them. Everybody should go back home'.<sup>377</sup> The four witnesses to the meeting at Ruyenzi on 9 April all agree that the Accused conveyed the same sentiments there, in the presence of Karasira, the Tutsi *Inspecteur de Police Judiciaire*. Father Santos was one of those witnesses, and another was Witness R-01 who, in 1994, was a seminarian who provided medical and other assistance to the Tutsi refugees.<sup>378</sup>

161. Father Santos' general impression of the attitude of the Accused was that:

In the gestures of the *bourgmestre*, I could see at all times the commitment to defend the refugees .... [H]e didn't want to see anyone else being killed. He said he didn't want to be involved in this matter and wanted to go, but later on he said 'I am the *bourgmestre* and I have to stay.' So he felt helpless .... [H]e wanted to flee but his conscience and his sense of responsibility obliged him to hold out .... He could see himself being accused as a *bourgmestre* and he felt powerless because of the situation. He felt like fleeing in order not to be involved but, on the other hand, he felt obliged to stay – in order to live up to his responsibilities.<sup>379</sup>

This conclusion is based on several joint efforts by Mpambara and Santos on behalf of the refugees, including several visits to Rwamagana to obtain more *gendarmes*; attempts to fix the water supply; dissuading gangs from engaging in violence; and urging the *gendarmes* to protect the refugees. The Prosecution failed to raise any significant reason to doubt this testimony.

162. The Accused also undertook a variety of significant efforts to save Tutsis, including: driving eight kilometres from the Parish on 10 April to save the mother of a Tutsi priest, and then driving her, as well one of her sons and his wife and children, from the Parish church to

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<sup>374</sup> T. 20 January 2006 p. 27-30 (Witness RU-37); T. 25 January 2006 pp. 6-7 (Witness RU-18).

<sup>375</sup> T. 20 January 2006 p. 37 (Witness RU-37); T. 25 January 2006 p. 44 (Witness RU-18).

<sup>376</sup> T. 16 January 2006 p. 27 (Witness RU-62).

<sup>377</sup> T. 31 January 2006 pp. 10-11. Although this evidence does not relate directly to the Parish, it provides corroboration for the Accused's efforts there.

<sup>378</sup> T. 13 January 2006 p. 21 (Witness R-01) ("I arrived at the end of the meeting that had already ended. I had the feeling that it was an appeasement meeting because I had spoken with Father Santos earlier. I knew what he was doing. He himself had told me that he and Mpambara went everywhere trying to pacify people, so I concluded that it was an appeasement meeting"); T. 9 January 2006 p. 12 (Santos).

<sup>379</sup> T. 9 January 2006 p. 20 (Santos).



Rwamagana;<sup>380</sup> colluding in the concealment of Witness RU-18, a Tutsi;<sup>381</sup> arranging for the evacuation of Karasira;<sup>382</sup> and giving out identity cards stamped “Hutu” to Tutsi refugees.<sup>383</sup> Although some of these actions may have been motivated primarily by personal attachment, together they demonstrate a significant effort to save Tutsis from danger.

163. By comparison, the evidence of the Accused’s involvement in a joint criminal enterprise or other criminal conduct is weak, disconnected, and uncorroborated. There was direct testimony concerning only two events – instigation and distribution of grenades at Paris Centre and the distribution of stones at the Church – neither of which was corroborated. Neither Witness AHY nor Witness LED were particularly convincing for the reasons described above, and neither event is connected to other events in such a way as to make them more plausible or likely. The alleged intent to leave the refugees open to an attack is speculative and based on possible, but not necessary, inferences. The standard of proof when circumstantial evidence is relied upon is that the criminal conduct of the accused is the only reasonable conclusion. The cumulative weight of the evidence does not alter the finding that the Prosecution has not proven the material elements of the crimes charged beyond a reasonable doubt. On the contrary, the totality of the evidence confirms that there is reasonable doubt.

#### **5.4 Conclusion**

164. The Chamber finds that it has not been proven beyond a reasonable doubt that the Accused distributed weapons and incited genocide at Paris Centre on the morning of 9 April; that he colluded with Gatete to kill Tutsi refugees; that he distributed rocks to aid the attack on the Parish church on 12 April; or that he deliberately left Rukara Parish unprotected as part of his involvement in a joint criminal enterprise.

### **6. Factual Allegations Falling Outside of the Indictment**

165. Article 20 (4)(a) of the Statute requires that an accused “be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her”. This does not mean that all evidence on which the Prosecution intends to rely must be included in the indictment, but that the material facts must be articulated with sufficient particularity and accuracy to put the “accused [] in a reasonable position to understand the charges against him or her”.<sup>384</sup> A Trial Chamber may permit material facts to

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<sup>380</sup> T. 13 January 2006 pp. 7-8 (Witness R-01); T. 10 January 2006 p. 7 (Santos).

<sup>381</sup> T. 20 January 2006 pp. 35-36 (Witness RU-37).

<sup>382</sup> T. 25 January 2006 pp. 12, 46-47 (Witness RU-18)

<sup>383</sup> T. 30 January 2006 pp. 31, 47 (Kalisa); T. 31 January 2006 pp. 15, 16, 22 (Serukwavu).

<sup>384</sup> *Naletilic*, Judgement (AC), para. 27; *Rutaganda*, Judgement (AC) para. 301 (“Accordingly, the indictment must be sufficiently specific, meaning that it must reasonably inform the accused of the material charges, and their criminal characterization”); *Semanza*, Judgement (TC), para. 44 (“The fundamental question in determining whether an indictment is pleaded with sufficient particularity is whether an accused had enough detail to prepare his defence”); *Ntakirutimana*, Judgement (TC), para. 42. As to the requirement of accuracy: *Rutaganda*, Judgement (AC), para. 303 (“Before holding that an event charged is immaterial or that there are minor discrepancies between the indictment and the evidence presented at trial, a Chamber must normally satisfy itself that no prejudice shall, as a result, be caused to the accused. An example of such prejudice is the existence of inaccuracies likely to mislead the accused as to the nature of the charges against him”). *Ndindabahizi*, Judgement (TC), para. 28; *Semanza*, Judgement (TC), para. 44 (“The fundamental question in determining whether an indictment was pleaded with sufficient particularity is whether an accused had enough detail to prepare his defence”); *Ntagerura et al.*, Judgement (TC), para. 32 (“The Chamber, however, does not expect the Prosecutor to perform an impossible task and recognizes that the nature or scale of the crimes, the

be communicated to the Defence after the filing of the indictment as, for example, through the Pre-Trial Brief, opening statement, or other communications which make clear to the Defence that the material fact is part of the Prosecution case, and how it is relevant to the charges.<sup>385</sup> Even in the absence of a contemporaneous objection to the admission of evidence outside of the scope of the indictment, the Chamber may not base a conviction upon material facts of which the accused does not have reasonable notice.<sup>386</sup>

166. Whether a fact is material depends on its nature. An allegation that the Accused physically committed a criminal act is not only material, but must be specifically pleaded in the Indictment; it may not be communicated by other means.<sup>387</sup> On the other hand, details concerning crimes on a broad scale, in which the accused played an indirect role, may be pleaded with less specificity.<sup>388</sup>

167. The Defence objects that it did not have adequate notice of the allegation that the Accused was present during the beating of a young man named Murenzi on the morning of 7 April at Gahini Hospital.<sup>389</sup>

168. The Indictment contains no specific reference to this event. The Pre-Trial Brief, which was disclosed about three months before the start of trial, does indicate that:

On or about the 7<sup>th</sup> of April at around 3.30 p.m. following a meeting at Akabeza at which he had instigated the killing of Tutsis, Jean Mpambara stood by and watched Samuel Gasana and six other armed *Interahamwe* assault and seriously injure two Tutsi civilians, Murenzi and his friend, with machetes and did not intervene to prevent or stop the assault.<sup>390</sup>

169. This allegation is said in the Pre-Trial Brief to be relevant to paragraphs 7(ii) and 7 (vi) of the Indictment, which assert that the Accused participated in a campaign against the Tutsi population, which included “mobilizing Hutu civilians to identify, isolate, marginalize

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fallibility of the witnesses’ recollections, or witness protection concerns may prevent the Prosecution from fulfilling its legal obligations to provide prompt and detailed notice to the accused. If a precise date cannot be specified, a reasonable range of dates should be provided”).

<sup>385</sup> *Naletilic*, Judgement (AC), para. 27 (“In [determining whether the accused had sufficient notice of a material fact], the Appeals Chamber has in some cases looked at information provided through the Prosecutor’s pre-trial brief or its opening statement. The Appeals Chamber considers that the list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and the charges in the indictment as to which each witness will testify and including specific references to counts and relevant paragraphs in the indictment, may in some cases serve to put the accused on notice. However, the mere service of witness statements or of potential exhibits by the Prosecution pursuant to disclosure requirements does not suffice to inform an accused of material facts that the Prosecution intends to prove at trial”).

<sup>386</sup> *Naletilic*, Judgement (AC), para. 26 (“In reaching its judgement, a Trial Chamber can only convict the accused of crimes which are charged in the indictment .... Where the failure to give sufficient notice of the legal and factual reasons for the charges against the accused has violated the right to a fair trial, no conviction may result”). The result of failing to make a specific, contemporaneous objection to the use of evidence of which no notice has been given is that the burden falls on the Defence to show that it was not reasonably informed of the charge, and that it suffered prejudice. *Niyitegeka*, Judgement (AC), para. 200; *Ndindabahizi*, Judgement (TC), para. 29.

<sup>387</sup> *Ntakirutimana*, Judgement (AC), paras. 25, 32.

<sup>388</sup> *Id.*, para. 25.

<sup>389</sup> T. 2 May 2006 p. 57 (closing arguments).

<sup>390</sup> Pre-Trial Brief, para. 21. No mention of this event is made in the opening statement. T. 19 September 2005 pp. 3-6 (Prosecution opening statement).

and attack their Tutsi neighbours” and “strategically directing, facilitating and aiding armed attacks against large groups of Tutsis”. The Pre-Trial Brief also links this allegation to paragraph 11 of the Indictment, which begins with the words “On the evening of 7 April, after the meetings in Akabeza Center....”

170. The allegation in question cannot be relevant to the paragraphs identified in the Pre-trial Brief. Murenzi was with one friend when attacked, not part of a “large group”. Rather than fitting into a campaign to “marginalize and attack their Tutsi neighbours”, the event was an isolated attack on a person who was targeted because he was a stranger in the neighbourhood. Finally, the attack was said to be at 3:30 p.m., which is before the temporal scope of paragraph 11 of the Indictment.

171. The lack of connection between the material fact and the paragraphs in the Indictment points to a more fundamental issue: the conduct would, on its own, be a criminal act which should, in principle, have been expressly pleaded in the Indictment. Although the Accused is not himself alleged to have beaten Murenzi, his alleged involvement is precise, specific, and, if proven, is probably sufficient to show that he was guilty of a crime. The implication of the allegation is that his presence, combined with his inaction, had an encouraging effect on the attackers. In these circumstances, the requirement that “acts that were physically committed by the accused personally must be set forth in the indictment specifically” applies to this allegation. Furthermore, this allegation stands on its own in the sense that it is not significantly relevant to or probative of the broader crimes mentioned in paragraphs 7 and 11 of the Indictment. This distinguishes it from the Accused’s alleged instigation at Ruyenzi which, although not specifically pleaded, is squarely covered by paragraph 18 (ii) of the Indictment that the Accused “transport[ed] and direct[ed] attackers” as part of the Rukara church attacks on 9 and 12 April.

172. Accordingly, the Chamber considers that the allegation of the Accused’s presence during the beating of Murenzi has not been charged as a distinct criminal act, and has only been considered above to the extent necessary to set the scene for events at Gahini Hospital on 9 April.

173. Even assuming that notice of this allegation had been properly given, the Chamber finds that it has not been proven beyond a reasonable doubt. Witness LET testified that, around 3.30 p.m. on 7 April, she saw the Accused inside the compound of Gahini Hospital, standing next to his communal pick-up truck and escorted by two communal police, while a gang of youths beat two young Tutsis. Mpambara allegedly did nothing to stop the attack and left while it was ongoing.<sup>391</sup> As discussed in section 3.3.2, Prosecution Witness Dr. Wilson testified that he also witnessed this attack and that he intervened to rescue one of the young men, a fact which is corroborated by Witness LET.<sup>392</sup> However, Dr. Wilson did not testify that he saw the Accused inside the compound during the attack, or at any other time that day. After he had taken the young Tutsi inside the hospital, and after the attackers had dispersed, Dr. Wilson came upon Mpambara standing next to his vehicle a short distance away from the Akabeza Gate, accompanied by “some of the older members ... of the community”.<sup>393</sup>

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<sup>391</sup> T. 20 September 2005 pp. 10-12 (Witness LET).

<sup>392</sup> T. 19 September 2005 pp. 14, 34 (Wilson). Dr. Wilson believed that the other youth was also able to escape.

<sup>393</sup> T. 19 September 2005 pp. 15, 34 (Wilson) (“[Mpambara] was outside the hospital and a little way along to the south of the – of the back gate”). Dr. Wilson’s testimony is not necessarily irreconcilable with that of

Mpambara himself recalled being there that day and speaking to Wilson, but denied witnessing any attack. He did admit that he learned of the attack and, apparently addressing the attackers themselves, said that “even if you don’t know the person, you don’t have the right to beat anybody”.<sup>394</sup>

174. Witness LET’s overall credibility was significantly undermined by her testimony that she saw Mpambara lead the attackers into the Gahini Hospital compound for the first attack on the morning of 9 April 1994, as discussed above in section 4.3.3. This testimony was contradicted by Prosecution Witness Dr. Wilson, and Defence Witness Elizabeth Hardinge, both of whom testified that he did not arrive until after the end of the first attack.<sup>395</sup> The Chamber has accepted the testimony of Dr. Wilson and Ms. Hardinge as credible in this respect, and finds it difficult to understand how Witness LET’s testimony as to Mpambara’s presence at that time could be the result of a mere error of memory. When this is combined with the lack of corroboration from Dr. Wilson that Mpambara was present inside the hospital compound on the afternoon of 7 April, the Chamber cannot find beyond a reasonable doubt that the Accused was present during the attack and that he knowingly failed to intervene.

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Witness LET, who emphasized that Mpambara left while the attack was ongoing, and that she could not be sure whether Dr. Wilson was there at the same time as Mpambara. T. 20 September 2005 p. 13 (Witness LET).

<sup>394</sup> T. 7 February 2006 p. 2 (Mpambara).

<sup>395</sup> *Supra*, Section 3.3.3. The Prosecution not only refrained from relying on this evidence in its Closing Brief, but implicitly repudiated the testimony, saying that “When the accused arrived at Gahini Hospital at between 10.30 and 11 a.m. the attackers withdrew at his command ...”.

**CHAPTER IV: VERDICT and DISPOSITION**

175. For the foregoing reasons, and having considered all of the evidence and the arguments of the parties, the Chamber finds the Accused **NOT GUILTY** on all counts of the Indictment, and is therefore acquitted.

176. Subject to any applications which may be made by the Parties upon receiving this Judgement, the Trial Chamber orders the immediate release of Jean Mpambara from the custody of the Tribunal, pursuant to Rule 99 (A) of the Rules.

Arusha, 11 September 2006

Jai Ram Reddy  
Presiding Judge

Sergei Alekseevich Egorov  
Judge

Flavia Lattanzi  
Judge

[Seal of the Tribunal]

## **ANNEX 1: Procedural History**

1. Jean Mpambara was transferred into the custody of the Tribunal on 23 June 2001, having been arrested by national authorities in northern Tanzania on 20 June 2001.<sup>396</sup> The Indictment, confirmed by Judge Erik Møse on 23 July 2001, charged Mpambara with one count of genocide.<sup>397</sup> At his initial appearance on 8 August 2001, Mpambara pleaded not guilty.<sup>398</sup> The Chamber granted the Prosecution leave to amend the Indictment on 4 March 2005, by adding a count of complicity in genocide and a count of extermination as a crime against humanity.<sup>399</sup> Mpambara pleaded not guilty to these additional counts on 29 April 2005.<sup>400</sup> On 30 May 2005, the Chamber denied a Defence motion challenging the amended Indictment.<sup>401</sup>

2. The trial commenced on 19 September 2005. The Prosecution case consisted of ten witnesses heard over eight trial days, and twenty-five exhibits. The Prosecution closed its case on 29 September 2005, subject to the cross examination of Witness AHY, which was heard on 14 and 15 December 2005.<sup>402</sup> The Chamber denied the Defence request for a judgment of acquittal on 21 October 2005.<sup>403</sup> The Defence case lasted from 9 January to 9 February 2006, during which the Chamber heard sixteen witnesses, including the Accused, and received forty-eight exhibits.

3. Measures for the protection of witnesses were ordered before the trial started on behalf of the Prosecution on 29 May 2002, and for the Defence on 4 May 2005.<sup>404</sup> The Chamber granted a Prosecution request to add three witnesses to its witness list on 19 September 2005.<sup>405</sup> A second request by the Prosecution, to drop five witnesses on condition that leave would be granted for the addition of one new witness, was denied by the Chamber orally on 22 September 2005, on the basis that the conditional nature of the motion was improper. The Prosecution orally renewed its motion as an unconditional request, and the

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<sup>396</sup> The transfer was authorized under the Order for Transfer and Detention Under Rule 40 *bis* (TC), 21 June 2001, signed by Judge Lloyd G. Williams under Rule *bis* (J). The Accused first appeared before the Tribunal on 29 June 2001, at which time he confirmed his identity and was informed of his rights. T. 29 June 2001 pp. 4-10.

<sup>397</sup> Decision Confirming the Indictment (TC), 23 July 2001. On that same date, the Chamber issued a Warrant of Arrest and Order for Detention.

<sup>398</sup> T. 8 August 2001 p. 25.

<sup>399</sup> Decision on the Prosecution's Request for Leave to File an Amended Indictment (TC), 4 March 2005; Amended Indictment, 7 March 2005.

<sup>400</sup> T. 29 April 2005 p. 3.

<sup>401</sup> Decision on the Defence Preliminary Motion Challenging the Amended Indictment (TC), 30 May 2005. The Defence argued that the Amended Indictment was vague because it failed to specify the basis for the Accused's alleged criminal liability under Art. 6(1) and to identify the form of joint criminal enterprise that the Prosecution intended to pursue.

<sup>402</sup> T. 29 Sept. 2005 p. 28. A brief status conference was held on 30 September 2005 to discuss witness protection measures for Witness AHY for the period between his examination-in-chief and his cross-examination. Together, with the two days of cross-examination held in December, the Prosecution case totaled eleven trial days.

<sup>403</sup> Decision on the Defence's Motion for Judgment of Acquittal, 21 Oct. 2005.

<sup>404</sup> Decision (Prosecutor's Motion for Protective Measures for Prosecution Witnesses) (TC), 29 May 2002; Decision on Protection of Defence Witnesses, 4 May 2005.

<sup>405</sup> The Prosecutor's Motion for Leave to Vary His List of Witnesses Pursuant to Rules 54 and 73 *bis* (E) (TC), 15 Sept. 2005; T. 19 Sept. 2005 pp. 1-2 (ordering the removal of Prosecution Witnesses AOO, APF and AVJ from the Prosecution's witness list).

Chamber subsequently granted leave to drop five witnesses, while adding Witness AHY, but granted the Defence additional time to conduct investigations into the new witness's testimony.<sup>406</sup>

4. Pursuant to a request by both parties, the Chamber granted a motion for a site visit on 10 February 2006. The parties and the Chamber visited Rukara Commune on 27 April 2005.<sup>407</sup> Final briefs were filed by both parties on 24 April 2006, and closing arguments were heard on 2 and 3 May 2006.

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<sup>406</sup> The motion was granted orally on 23 September 2005, with written reasons issued on 27 September 2005. T. 23 September 2005 pp. 59-60; Decision on the Prosecution's Request to Add Witness AHY (TC), 27 September 2005.

<sup>407</sup> Decision on the Prosecution Motion for a Site Visit, 10 February 2006.

## **ANNEX 2: Jurisprudence and Defined Terms**

### **1. Jurisprudence**

#### **1.1 ICTR**

##### **AKAYESU**

*Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (TC), 2 September 1998

##### **BAGILISHEMA**

*Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgement (TC), 7 June 2001

##### **BAGOSORA ET AL.**

*Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgement on Motions for Acquittal (TC), 2 February 2005

##### **BISENGIMANA**

*Prosecutor v. Paul Bisengimana*, Case No. ICTR-00-60-T, Judgement and Sentence (TC), 13 April 2006

##### **GACUMBITSI**

*Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Judgement (TC), 17 June 2004

##### **KAJELIJELI**

*Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Judgement and Sentence (TC), 1 December 2003

##### **KAYISHEMA AND RUZINDANA**

*Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement (TC), 21 May 1999

*Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons) (AC), 1 June 2001

##### **MUSEMA**

*Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement (TC), 27 January 2000

*Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgement (AC), 16 November 2001



**NAHIMANA ET AL.**

*Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence (TC), 3 December 2003

**NDINDABAHIZI**

*Prosecutor v. Emmanuel Nindabahizi*, Case No. ICTR-2001-71-I, Judgement (TC), 15 July 2004

**NIYTEGEKA**

*Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence (TC), 16 May 2003

*Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-A, Judgement and Sentence (AC), 9 July 2003

**NTAGERURA ET AL.**

*Prosecutor v. Andre Ntagerura et al.*, Case No. ICTR 99-46-T, Judgement and Sentence (TC), 25 February 2004.

**NTAKIRUTIMANA**

*Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case Nos. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence (TC), 21 February 2003

*Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgement (AC), 13 December 2004

**RUTAGANDA**

*Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence (TC), 6 December 1999

*Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003

**RUTAGANIRA**

*Le Procureur v. Vincent Rutaganira*, Case No. ICTR-95-1C-T, Jugement Portant Condamnation, 14 March 2005

**SEMANZA**

*Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence (TC), 15 May 2003

*Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Judgement (AC), 20 May 2005

**SIMBA**

*Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Judgement and Sentence (TC), 13 December 2005

**1.2.1 ICTY**

**ALEKSOVSKI**

*Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement (AC), 24 March 2000

**BLASKIC**

*Prosecutor v. Tihomir Blaškic*, Case No. IT-95-14-T, Judgement (TC), 3 March 2000

*Prosecutor v. Tihomir Blaškic*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004

**JELISIC**

*Prosecutor v. Goran Jelusic*, Case No. IT-95-10-T, Judgement (TC), 14 December 1999

*Prosecutor v. Goran Jelusic*, Case No. IT-95-10-A, Judgement (AC), 5 July 2001

**KORDIC AND CERKEZ**

*Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Judgement (AC), 17 December 2004

**KRNOJELAC**

*Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement (TC), 15 March 2002

*Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgement (AC), 17 September 2003

**KRSTIC**

*Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Judgement (TC), 2 August 2001

*Prosecutor v. Radislav 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-A, Judgement (AC), 12 June 2002

**KVOCKA ET AL.**

*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement (AC), 28 February 2004

**LIMAJ**

*Prosecutor v. Fatmir Limaj*, Case No. IT-03-66-T, Judgement (TC), 30 November 2005

**MILUTINOVIC ET AL.**

*Prosecutor v. Milan Milutinovic et al.*, Case No. IT-05-87-A, Decision on Dragoljub Ojdanic's Motions Challenging Jurisdiction-Joint Criminal Enterprise (AC), 21 May 2003

**MUCIC ET AL.**

*Prosecutor v. Zdravko Mucic et al.*, Case No. IT-96-21-A, Judgement (AC), 20 February 2001

**NALETILIC**

*Prosecutor v. Milan Naletilic and Vinko Martinovic*, Case No. IT-98-34-A, Judgement (AC), 3 May 2006

**STAKIC**

*Prosecutor v. Milomir Stakic*, Case No. IT-97-24-A, Judgement (AC), 22 March 2006

**TADIC**

*Prosecutor v. Duško Tadic*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999

**VASILJEVIC**

*Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-32-A, Judgement (TC), 29 November 2002

*Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-32-A, Judgement (AC), 25 February 2004

**2. Books/Chapters in Books**

*Chesterman, Simon*, An Altogether Different Order: Defining the Elements of Crimes Against Humanity, 10 *Duke J. Comp. & Int'l L.* 307 (2000)

*Mettraux, G.*, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford UP, 2005)

### **3. Defined Terms**

#### **Defence Closing Brief**

*Prosecutor v. Jean Mpambara*, Case No. ICTR-01-65-T, Mémoire Finale Aux Fins d'Acquittement, 24 April 2006

#### **ICTR**

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994

#### **Statute**

Statute of the ICTR

#### **ICTY**

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

#### **Indictment**

*Prosecutor v. Jean Mpambara*, Case No. ICTR-01-65-T, Amended Indictment, filed 7 March 2005

#### **Pre-Trial Brief**

*Prosecutor v. Jean Mpambara*, Case No. ICTR-01-65-T, Prosecutor's Preliminary Pre-Trial Brief, filed 13 June 2005

#### **Prosecution Closing Brief**

*Prosecutor v. Jean Mpambara*, Case No. ICTR-01-65-T, The Prosecutor's Closing Brief, filed 24 April 2006

#### **RPF**

Rwandan (also Rwandese) Patriotic Front

#### **Rules**

Rules of Procedure and Evidence of the Tribunal

#### **T.**

Transcript. All references to the transcript are to the official, English transcript, unless otherwise indicated.

#### **Tribunal**

International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994