International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

ENGLISH
ORIGINAL: FRENCH

Before:
Judge Erik Møse, Presiding
Judge Asoka de Z. Gunawardana
Judge Mehmet Güney

Registry: Mr Adama Dieng

Opinion of: 7 June 2001

THE PROSECUTOR
versus
IGNACE BAGILISHEMA

ICTR-95-1A-T

SEPARATE AND DISSENTING OPINION OF JUDGE MEHMET GÜNEY

Office of the Prosecutor:
Ms Jane Anywar Adong
Mr Wallace Kapaya
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1. I agree with the findings in the Judgement, regarding the acquittal of the Accused on certain counts, but I beg to differ with the findings in the majority opinion (hereinafter "the majority") that there is insufficient evidence of the involvement of the Accused as an accomplice in the crimes committed against Tutsi civilians in connection with the activities at Trafipro roadblock in Mabanza *commune* (para. 4.14 of the Indictment), and in the massacres committed against thousands of Tutsi civilians in Kibuye, of whom nearly 1000 to 1500 were natives of Mabanza, as testified to by the Accused [1] (paras. 4.21 to 4.28 and 4.31 of the Indictment).

2. With respect to the activities carried out at the Trafipro roadblock, I find that it has been proved that the Accused had full responsibility for the operation of the roadblock right from the time it was set up, that he had the duty and power to control the operation thereof and possibly to have the said activities discontinued. While I concur with the finding that the evidence tendered does not support a finding that the roadblock was set up for criminal purposes, I am satisfied with the evidence adduced to show that the Accused had sufficient reason to know that the screening system instituted at the roadblock entailed possible risks for the Tutsi civilian population. Consequently, I am of the view that the Accused's responsibility must be assessed on the basis of negligence on his part with regard to the setting up and running of the roadblock. I find that such willful negligence renders him an accomplice to the crimes against humanity committed through the killing of Judith and Bigirimana.

3. With respect to the attacks on and massacre of Tutsi civilians at Gatwaro stadium, Kibuye, I am satisfied that there is sufficient evidence to establish the presence of the Accused at the stadium on several occasions between 13 and 18 April 1994, before and during the attack. This stands in contrast to the testimony of the Accused who denied having gone to Kibuye during the period from 9 to 25 April 1994. Consequently, it is my view that, by such presence and given that he was an official, the Accused, who had a well-established reputation in Kibuye after a 14-year mandate as *Bourgmestre*, aided and abetted the commission of crimes against humanity (extermination and other inhumane acts), and thereby incurred responsibility as an accomplice to the genocide perpetrated at Gatwaro Stadium, by providing moral support to the assailants.

I. Preliminary comments on some points of law

4. For each of the above-mentioned counts, it appears, from the evidence presented at trial in support of the Prosecutor's allegations, that the Accused is liable under Article 6(1), not so much because of his direct participation as a principal or co-perpetrator, as by reason of his contribution to crimes committed by others, as an accomplice.

A. Violation of the principle of due diligence, or culpable negligence

5. In my opinion, it has been proved that the Accused was negligent by setting up an intrinsically dangerous system, to wit, the Trafipro roadblock. It is appropriate to discuss the extent of such negligence in light of a duty to act, reflected by the continuing duty of the Accused from the erection of the roadblock to the organization of its operation. The Accused failed to provide the control system with such safeguards and guarantees against any form of recklessness (See the notions of *dolus eventualis* in Civil Law and "recklessness" in Common Law [2]), as dictated by his public and administrative prerogatives. I therefore find that the criminal liability of the Accused arises out of negligence for deliberately failing to address the risks associated with the erection of a roadblock in the prevailing context of the period under consideration.

6. Although the Prosecutor did not specifically address this particular kind of responsibility at trial, I am of the opinion that gross negligence may be considered to be one of the numerous forms of individual criminal responsibility provided for by Article 6(1) of the Statute of the Tribunal.

7. The principle of criminal negligence by which an accused may incur responsibility for crimes committed by others was applied in the *Blaskic* Judgement, after the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that General Blaskic used forces under his control which he knew, at least in part, were difficult to control, and that having issued orders for certain acts, he could reasonably have foreseen that the said acts would lead to the commission of crimes. [3]

8. The above principle on the various grounds for assigning individual criminal responsibility was illustrated in *Prosecutor v. Tadic*, where the Trial Chamber of ICTY affirmed that:

"(..) aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or an unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it." [4]

9. The ICTY Chamber affirmed further, after reviewing the relevant case-law, that actual physical presence at the time the crime is committed is not necessary, since an accused can be considered to have participated in the commission of a crime, on the basis

of the precedent set by the Nürnberg war crimes trials, if he is to be found to be "concerned with the killing". In the same case, the Appeals Chamber recalled that the Statute of the Tribunal did not limit its jurisdiction to the prosecution of persons who allegedly participated directly in crimes or who, in some other way, personally aided or abetted their commission. The Chamber pointed out that it is apparent from the wording of Article 7(1) of the Statute and the provision setting forth the crimes over which the Tribunal has jurisdiction that such responsibility for serious violations of international humanitarian law is not simply limited to those who actually carry out the *actus reus* of the crimes enumerated, but also extends to other offenders, including those who order them to do so or are accomplices thereto.[5]

10. Thus, it was pointed out in the *Akayesu* Judgement that *mens rea* or the criminal intent of the perpetrator of a crime may be in the form of "negligence that is so serious as to be tantamount to acquiescence." [6]

11. In French criminal law, the general principle on complicity presupposes the performance of an affirmative act, and excludes, *a priori*, complicity by failure to act. However, case-law provides a broader notion of complicity which could allow for the existence of *actus reus* or *mens rea*, on condition that mere presence [7] or omission is construed as assistance, moral support or encouragement. It is no longer a question of mere failure to act, but of accomplice liability. Such was the case of an officer who did a round, thus allowing a colleague to steal one of the objects over which he had a duty to watch. [8] Belgian case-law makes a distinction between deliberate failure to act and a form of "*abstention dans l'action*" where, in the performance of a duty, willful failure to take the necessary steps to prevent harm is equated to an affirmative act of participation. [9]

12. In Common Law, the exception to the principle whereby no criminal responsibility shall arise from an omission has been developed in successive cases in relation to the notion of duty to act. The assessment of a duty of care or due diligence in the context of criminal responsibility was considered by the House of Lords (criminal section of the Appeal Chamber) in *Regina v. Adomako, [10]* where a qualified medical employee was charged with homicide for failure to act. In that case, Lord Mackay stated as follows:

"….in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the Defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterized as gross negligence and therefore is a crime. This will depend on the seriousness of the breach of duty committed by the Defendant in all the circumstances which the Defendant was placed when it occurred."

13. The above case highlights the criteria the jury must consider in ascertaining whether or not there is a breach of duty which may be regarded as gross negligence, and thus be considered a crime.

14. In the instant case, I deem it appropriate to assess the status and functions of the Accused which define the nature and extent of his duties under Rwandan Law.

Prosecution Expert Witness, André Guichaoua, referred to the Law of 23 November 1963 on communal organization, [11] which was in force in Rwanda at the time of the events. That Law provides that the *Bourgmestre* is the representative of the central authority in the *commune* and the embodiment of communal authority (Article 56 of the Law). As a representative of the executive power, the *Bourgmestre* is responsible for the enforcement of laws and regulations (Article 57 of the Law). Administration of the *commune* is under the direct authority of the *Bourgmestre* (Article 60 of the Law) who, in particular, has the power to recruit, suspend and dismiss communal staff after consultation with the *conseil communal* (communal council) (Article 93 of the Law). Such power also extends to communal police officers, over whom the *Bourgmestre* has sole authority, except in exceptional circumstances (Article 104 of the Law). Article 109 of the Law defines the functions of communal police officers placed under the authority of the *Bourgmestre* and, in particular, the duty imposed on the *Bourgmestre* to contribute to maintaining or restoring law and order, to order the arrest of troublemakers or offenders and to bring them before the competent authorities.

15. The decision by the Accused to set up the roadblock, on the one hand, and to have it manned by civilians, on the other hand, entails, to my mind, various types of criminal responsibility. Besides the responsibility incurred for setting up the roadblock itself, the Accused should have known that, under such circumstances as recounted by the witnesses, continuing that activity would entail risks, especially considering the conduct of the untrained civilians who were posted there. Hence, the culpable negligence connected with the setting up of the roadblock becomes continued and aggravated if the Accused knows or has reason to know that crimes were committed after it was set up. In that case, the phrase "he knew or has reason to know" used as a condition for assigning superior responsibility under Article 6(3) of the Statute, could be useful in assessing the continuous nature of that crime. Such knowledge can be ascertained from direct evidence or by inference. In *Aleksovski*, the Trial Chamber of ICTY laid down certain indicia:

"This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them. Conversely, the commission of a crime in the immediate proximity of the place where the superior ordinarily carried out his duties would suffice to establish a significant indicium that he had knowledge of the crime, *a fortiori*, if the crimes were repeatedly committed" (Emphasis added). [12]

16. Within the context of the operation of the Trafipro roadblock, the Prosecution alleged that the Accused incurred responsibility by reason of his position as the hierarchical superior of the persons manning the roadblock. However, I note that in the *Kordic and Cerkez* Judgement, the ICTY Chamber pointed out that the distinction between liability under Article 7(1), on the one hand, and under Article 7(3) on the other hand, (equivalent to Articles 6(1) and 6(3) of the Statute of ICTR), depends on the evidence presented. In the instant case, if the superior was not simply informed that his subordinates had committed crimes, but, in the exercise of his powers, he had otherwise aided or abetted in any manner whatsoever the preparation or execution of those crimes, "(…) the type of criminal responsibility incurred may be better characterised by Article 7(1). Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by

a subordinate, the conduct of the superior may constitute a basis for liability under Article 7 (1)."[13] It is my opinion, in light of the evidence produced in the instant case, that the type of criminal responsibility incurred by the Accused is better defined under Article 6(1) of the Statute because the ingredients for accomplice liability have, to my mind, been established.

B. Presence of a respected authority at the scene of the crime - form of complicity by encouragement.

17. This form of indirect participation in the crimes alleged in the Indictment raises some questions as to the assessment of the requisite link between the presence of the Accused and the crimes, which assessment, to date, has hardly been considered by the courts, but which, in my opinion, must be applied to the events that occurred at Gatwaro stadium.

18. In Common Law, the laid down principle is that mere presence of a person at the scene of the crime is not sufficient to entail his criminal responsibility. However, in *Regina v. Coney*, the High Court (Divisional Court of the Queen's Bench) [14] found that the presence of a spectator at an unlawful prize-fight constituted a sign of encouragement by the accused persons who were among the crowd of spectators, even though they did not directly participate in the crime, or verbally encourage it. The Court, accordingly, held that, even if presence in itself was not sufficient, it was evidence of aiding and abetting because, without these spectators, there would have been no incitement to fight. In that case, Judge Hawkins [15] made the following statement, which became a leading opinion in Common Law jurisdictions :

"In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expression, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposefully present witnessing the commission of a crime, and offered no opposition to it, although he might reasonably be expected to prevent it and had the power so to do, or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not."

19. In guiding the jury, Judge Hawkins underscored the requirements for accomplice liability: a person voluntarily present at the scene of the crime and, with full knowledge of the facts, witnessed the commission of a crime and offered no opposition to it, although he might reasonably be expected to prevent it, because he had the power to do so, or at least the possibility to express his disapproval in the face of the prevailing events.

20. In the *Blaskic* Judgement, the Trial Chamber stated as follows:

"The *actus reus* of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*. In this respect, the mere presence at the crime scene of a person with superior authority, such as a military commander, is a probative indication for determining whether that person encouraged or supported the perpetrators of the crime." [16]

21. In the *Aleksovski* Judgement, the Trial Chamber stated that participation need not be manifested through physical assistance, but could be moral support or encouragement expressed in words, "or even by mere presence at the site of the crime" if such presence had a significant effect on the commission of the crime and that the person present had the required *mens rea*. [17] Moreover, the *mens rea* may be deduced from the circumstances, and "the position of authority constitutes one of the circumstances which can be considered when establishing that the person against whom the claim is directed knew that his presence would be interpreted by the perpetrators of the wrongful act as a sign of support or encouragement." [18]

22. In the *Synagogue* case [19] (mentioned in the *Furundzija* Judgement, [20]) the German Supreme Court found one of the accused guilty of a crime against humanity for providing moral support to those who perpetrated the criminal acts. The Court pointed out that although the Accused had not physically taken part in the devastation of the synagogue with the others, nor planned or ordered it, his occasional presence at the crime scene, his status as a long-time respected militant of the Nazi party and his knowledge of the criminal enterprise, were deemed sufficient by the Court to convict him. The Court held, in respect of the *actus reus*, that his entire conduct constituted support and encouragement in the commission of the crimes even if it was not shown that such support covered each of the crimes committed by others. Regarding the occasional presence of the Accused, the Court held that such presence could not be considered as a form of curiosity shown by a person unconcerned about the events taking place. With respect to the *mens rea*, the Court held that the Accused had in fact wished that the acts be committed "as though they were his own" (*als eigene gewollt hat*). Finally, the Court found that the Accused knew of the plan at least two hours before the commission of the crime.

23. In the *Furundzija* case, the Trial Chamber of ICTY took into account the above decision and found that an "approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity." [21] As regards the nature of assistance provided by the accomplice, it held that it is not necessary for the assistance to be tangible or to be directly linked to the crime by a causal relationship. [22] As to the effect of such assistance, the Chamber tried to summarize the case-law on the subject by stating that "the assistance should have a substantial effect on the commission of the crime", but that it could be in the form of moral support. [23] When the *actus reus* of an omission consists effectively in moral support having a substantial effect on the commission of the crime, the requisite and sufficient *mens rea* is knowledge of the fact that the "acts" assist the commission of the offence, and therefore render the accused an accomplice. [24] In the *Blaskic* Judgement, the Trial Chamber held that the accomplice must have, "as a

minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct." [25]

24. In the *Akayesu* Judgement, the Trial Chamber found the Accused guilty of crimes against humanity for aiding and encouraging others to commit acts of sexual violence by, *inter alia*, allowing that the said acts be committed within the *bureau communal* while he was present, and because he knew or had reason to know that acts of sexual violence were being committed. The Chamber found, on these two points, that the Accused had facilitated the commission of the crimes through words of encouragement in other acts of sexual violence which, by virtue of his authority, "sent a clear signal of official tolerance, without which these acts would not have taken place." [26]

25. I had to review the above case-law, which I consider relevant for the assessment of the criminal responsibility of the Accused, who was present at Gatwaro stadium during the period the refugees were held and massacred there.

C. Standards for the assessment of evidence

26. Issues regarding the assessment of testimonial evidence in the specific context of the cases brought before this Tribunal have been the subject of progressive development since the *Akayesu* Judgement, for the Tribunal is not bound by any approach modeled on national rules of evidence (Rule 89 of the Rules of Procedure and Evidence).

27. Regarding testimonial evidence with respect to the events which occurred at Gatwaro stadium, I hold the view that the majority applied strict assessment standards which were not related to the nature or reliability, but to the quantity and accuracy, of the information provided by witnesses whose credibility is not being questioned (cf. The testimonies of Witness A, Witness AC and Witness G in Chapter V.3 of the Judgement). In fact, in assessing these testimonies, the majority applied standards that have to do more with precision required for issues of identification of a person hitherto unknown, rather than for recognition of a person already known to the witness. In this case, given that no evidence was adduced tending to show that the witnesses present at the stadium may have been faced with a problem of mistaken identity, I hold the opinion that the standard of proof applied by the majority is erroneous. It seems to me that said standard is artificial and far-fetched in the sense that, although it is mainly up to the parties to examine the witnesses during the trial in adversarial proceedings, the Chamber is also allowed to put any additional questions to the witnesses at any stage in the course of the trial, in order to clarify or specify the issues raised, as provided for in Article 85(B) of the Rules on the presentation of evidence. [27] In my opinion, the majority did not draw the appropriate conclusions from the oral evidence presented to establish the presence of the Accused at Gatwaro stadium between 13 and 18 April 1994.

28. Regarding the difficulty of most of the witnesses to provide specific information, I would like to recall precisely the requisite standard in taking oral evidence, as expounded in the *Akayesu* Judgement:

"[…] Similar cultural constraints were evident in their difficulty to be specific as to dates, times, distances and locations […] The Chamber did not draw any adverse conclusions regarding the credibility of witnesses based only on their reticence and their circuitous responses to questions." [28]

29. As to the assessment of the discrepancies between prior witness statements and their testimonies before the Chamber, once again, I concur with the stand taken in the *Akayesu* Judgement :

"The Chamber noted that during the trial, for a number of these witnesses, there appeared to be contradictions or inaccuracies between, on the one hand, the content of their testimonies under solemn declaration to the Chamber, and on the other, their earlier statements to the Prosecutor and the Defense. This alone is not a ground for believing that the witnesses gave false testimony. Indeed, an often levied criticism of testimony is its fallibility. Since testimony is based mainly on memory and sight, two human characteristics which often deceive the individual, this criticism is to be expected [...] Moreover, inaccuracies and contradictions between the said statements and the testimony given before the Court are also the result of the time lapse between the two. Memory over time naturally degenerates, hence it would be wrong and unjust for the Chamber to treat forgetfulness as being synonymous with giving false testimony."[29] (Emphasis added)

30. I therefore totally agree with the following assessment, made in that same Judgement, of the impact of the peculiar circumstances and the widening time difference on the testimonies :

"The Chamber is unable to exclude the possibility that some or all of these witnesses did actually suffer from post traumatic or extreme stress disorders, and has therefore carefully perused the testimonies of these witnesses, those of the Prosecutor as well as those of the Defence, on the assumption that this might possibly have been the case. Inconsistencies or imprecision in the testimonies, accordingly, have been assessed in the light of this assumption, personal background and the atrocities they have experienced or have been subjected to."[30]

31. Lastly, regarding the *unus testis, nullus testis* principle, the Chamber, in the *Akayesu* Judgement, deliberately refused to apply it, stating that "it can rule on the basis of a single testimony provided such testimony is, in its opinion, relevant and credible". [31] The Appeals Chamber endorsed this stand in the *Aleksovski* case when it affirmed that "Similarly, the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration." [32]

32. In light of the various standards for assessing evidence discussed above, I have drawn conclusions, different from those of the majority, regarding the individual criminal responsibility of the Accused with respect to the two events referred to above.

II. Defence Arguments

33. Throughout the trial, the Defence argued that the powers and duties of the Accused, as *Bourgmestre*, were to be viewed *in concreto*, in light of the circumstances that prevailed at the time of the acts with which he is charged. On the one hand, the Defence submitted that the Accused, given his personality and character as a moderate man who had a great love of justice, set up a security shield for the people under threat, by organising pacification meetings, issuing fake identity cards to the Tutsi and by even meeting with the *Abakiga* to dissuade them from pursuing the massacres and looting. On

the other hand, the Defence asserted that the *de facto* authority of the Accused over Mabanza *commune* had deteriorated following the breakdown of law and order and had become extremely limited in the wake of the events, and that consequently he could not be held responsible for the atrocities and crimes committed in Mabanza *commune*. Therefore, the Accused could not be considered an accomplice for failing to carry out his administrative and legal duties under Rwandan national law, for, in the opinion of the Defence, the affirmative acts of the Accused for the people of Mabanza do not allow for establishing evidence of any criminal intent that would make him an accomplice who aided and abetted the perpetration of any of the crimes provided for in the Statute.

34. The Defence contends that the Accused was overly powerless to stop or punish criminal acts committed by a swarm of "invaders" (including those who shared their criminal intent), and that the only power he had left was the authority and control he could exercise over the communal police. However, the Defence alleges that the Accused had limited *de jure* control over the communal police, and sufficient *de facto* control at certain moments. The Defence further contends that to have dealt with such murderous intents shows the Accused's genuine courage and unfailing determination to continue defending his people.

35. The Defence underscored the "Accused's good character" to show that he lacked the specific criminal intent to commit genocide. Yet, it is important to note in this regard that the concept of "good character" borrowed from Common Law only applies to proof of the requisite criminal intent regarding the Accused's criminal responsibility as a principal or co-perpetrator and is not applicable, in the same manner, to the assessment of accomplice criminal responsibility, which has different *mens rea* requirements.

36. It is worth noting that the Defence does not contest that, as a civilian authority of Mabanza *commune*, the Accused had legal duties, as well as the power to ensure respect for the law by all the citizens of his *commune*, and the obligation to punish and prevent crime in his *commune*, to the extent possible. Many of the Prosecution and Defence witnesses alike describe the Accused as a well-known figure, for he had been in office for fourteen years as head of the *commune* and, in the discharge of his duties, enjoyed undoubted respect throughout the *commune*. Moreover, in his official capacity as *Bourgmestre*, the Accused had the obligation to take measures for the protection of the entire population of Mabanza *commune*.

37. I would like to add that the disciplinary measures provided for in case of failure by the communal employees to comply with their obligations are laid down in Chapter VIII of the Presidential Order on the Status of Communal Officials of 25 November 1975, [33] which is pertinent in assessing the relationship between the Accused and Célestin Semanza, Assistant *Bourgmestre*, as presented by the majority opinion in Chapter VII of the Judgement. Article 38 of the Order stipulates that the *"agents qui, d'après des indices graves, sont présumés avoir commis une faute pouvant être sanctionnée par la disponibilité disciplinaire ou la révocation, peuvent, par mesure d'ordre prise par le bourgmestre, être suspendus de leurs fonctions jusqu'à la clôture de l'instruction. Cette mesure entraîne, pour l'agent, l'interdiction d'exercer toute fonction*

et le place dans une position d'attente pour une période maximum de 3 mois"[employees who, in light of strong evidence, are alleged to have committed an offence punishable by disciplinary suspension or dismissal may, by order of the *bourgmestre*, be suspended from their duties pending completion of the investigation. Under this measure, the employee shall be barred from performing any duties and shall be kept in such a state for a maximum period of three months]." With respect to the performance evaluation of communal staff, which was the responsibility of the *Bourgmestre*, Chapter VI of the

Order also provides that *"tout agent qui a obtenu deux fois consécutives la note synthétique "Médiocre" est démis de ses fonctions* [an employee who receives an overall "Poor" *[Médiocre]* rating two consecutive times shall automatically be dismissed from his duties," (Article 24 of the Order). Yet, the Accused never gave such rating to the *assistant bourgmestre* Semanza, whom he accused before this Chamber of insubordination and even fraud. I am of the opinion that, under the law, the Accused had the necessary means to take disciplinary action against Semanza, but deliberately failed to use them (see Chapter II, Section 6 of the Judgement). I am of the view that the Accused deliberately described his working relationship with Semanza as deplorable in a bid to dissociate himself from the latter's actions and show that he did not enjoy sufficient support in the discharge of his duties.

38. As regards the activities at Trafipro roadblock, the Accused had the duty to take action, by virtue of his powers to maintain law and order in the *commune*, with a view to ensuring control of the activities being carried out there and, as an administrative authority, the duty and power to supervise the civilians who were running a high-risk system, considering the specific circumstances prevailing in Rwanda during that period.

39. With respect to the meeting of 25 April 1994 that followed the massacres in Gitesi commune, particularly in Gatwaro stadium and at the Home St. Jean Complex, I specifically asked the Accused whether he took any steps to seek explanations from his superiors concerning the maintenance, or rather the lack thereof, of law and order in Kibuye. I even asked the Accused whether, in light of the circumstances, he did not consider tendering his resignation, expressing his outrage or even making a report to the *Prefet's* superior on the behaviour of the *gendarmes* who participated in the massacres at the stadium. The Accused answered :

"Your Honour, I share the opinion. But I thought it was up to the superior, my superiors to take the initiative to follow-up on what happened in the prefecture. That was not the first time that such atrocities had occurred, but not on that scale. On each occasion, there were consents, and there were decisions to investigate and follow-up.[34]

40. Nevertheless, the Accused failed to mention any measures said superiors may have taken in that respect.

41. Regarding security in the *commune*, I would like to note that the Accused frequently made reference to attacks by the *Abakiga* on the *commune* in order to support his claim that he was overwhelmed by hordes of uncontrollable attackers and that he felt personally threatened. However, in the Accused's official correspondence with the

prefecture or even in the entries in his personal [35] diary with respect to the dates of the attacks, there is no mention of these "infamous", though ill-defined, *Abakiga*. On the other hand, I note that the *Interahamwe* are mentioned in the diary, although their presence in Mabanza was contested by the Accused, who stated: "I told you that in Mabanza there was no wing of the *Interahamwe*….. *Interahamwe* militia." [36] Such is also the case with the letter to the *Préfet* dated 25 June 1994, in which the Accused mentioned that he felt personally threatened by the assailants from Rutsiro and Kavoye but did not indicate that they were *Abakiga* [37]. Regarding the actual authority and control that the Accused exercised over the *Abakiga*, I deem it worth recalling that although the Accused did not state it, he in fact made it possible to prevent *Abakiga* attacks on a religious institution on several occasions between 16 and 18 April, as was clearly testified to by Defence Witness RA. Witness RA testified that when the assailants arrived on 16 April 1994, a communal policeman intervened and shot in the air, causing the attackers, to disperse. Witness RA testified that in the early hours of 17 April 1994, she and others went to see the Accused at his residence for advice on how best to protect several Tutsi members of the institution who had subsequently decided to leave Mabanza.

42. It should be underscored, with respect to the Accused's awareness of the inherent risks involved in the activities at the roadblocks at the time, that this same Witness RA testified that the Accused advised them against sending their colleagues to Kibuye due to the danger on the road, and provided them with a room in the IGA building, in order to hide them. Witness RA further testified that the Accused and others met with the attackers on 18 April 1994 and pleaded with them to stop the attacks. Witness RA testified that he did not attend the said meeting but had been informed later that the assailants had agreed to suspend attacks on their institution, and that they never ever returned there. I would like to compare this testimony to that of the Accused to the effect that he was overwhelmed when he had to ensure the protection of the refugees at the *commune* office, and that he felt personally threatened by the same attackers whom he had decided to confront, although they were many more on 18 April 1994. Witness RA further testified that the Accused assigned a reservist and a communal policeman to watch over them at Kabilizi: one to watch over Rubengera College and the other to watch over witness RA's location. [38]

43. In my opinion, this testimony proves that the Accused was in a position to exercise his powers relating to the maintenance of law and order, and specifically to prevent the *Abakiga* from committing their atrocities, but chose, on many occasions, to exercise his authority and control selectively, whereas such were part of his duties and obligations.

III. Factual and legal findings relating to allegations in paragraph 4.14 of the Indictment

A. Trafipro roadblock : Setting up, Staffing and Purpose,

44. As regards the erection and running of the Trafipro roadblock, I am of the opinion that the Accused failed in his duty to act and thus incurred liability as an accomplice for the crimes committed in the context of the operations at this roadblock.

1. Setting up of roadblocks

45. The Accused testified that he had first given oral instructions concerning the erection of roadblocks, which were confirmed in writing on 3 June 1994, within a context he described as one of "resumption of the war", in order to check infiltration by members of the Rwandan Patriotic Front (RPF). In his view, said oral instructions were given at the end of April or beginning of May, after the communal council met pursuant to the Prime Minister's instructions of 27 April 1994 [39]. The Accused further testified: "I was implementing what instructions I had been issued by the prime minister through the préfet." [40] In fact, the Accused stated as follows:

"I spoke with the communal council during - - because we had talked about this during the meeting of the communal council we determined the criteria for recruitment, and furthermore, I relayed the directives to all the conseillers, and it was during that meeting that we invited people who were supposed to man the roadblock and we were telling them what their functions would be."[41]

46. However, the Accused also testified that the instructions had been given after 13 April, "during the second half of the month of April." [42] I note that, the exact date on which the roadblock was erected remained vague throughout the testimony of the Accused, despite the fact that questions were repeatedly asked on this point.

47. Witness Z testified that on the evening of 13 April, he had gone to the *Bourgmestre's* home to receive instructions relating to the erection of the roadblock the next day, in the company of a certain Rushimba. Witness Y, for his part, does not specify the date on which the roadblock was set up. Rather, he testified that the roadblock was set up in the month of April, and that he himself, was not among the first people posted to man the roadblock.

48. Explaining why the Trafipro roadblock was erected at that particular location, the Accused stated : "This was why the roadblock was set up close to the *bureau communal*, so that if need be we could call upon the police at the *bureau communal*. So, it was the official roadblock I had referred to, and this is why it was set up there. It was a strategic location" [43]. Hence, it should be noted that the location of the Trafipro roadblock was chosen by the Accused on the basis of the intervention facilities it offered, particularly, assistance from the communal police posted at the *bureau communal*.

2. Instructions

49. The Accused was questioned on several occasions on the nature and scope of the instructions he had allegedly given prior to the "attestation" and "certification" of 3 June 1994, by which he specified measures for the proper manning of the roadblocks and for averting the ill-treatment or even killing of passers-by. I note that the Accused responded to questions put to him by the Chamber by referring to the directives contained in the Prime Minister's circular letter dated 27 April 1994, which was transmitted to the Accused by the *Préfet* on 30 April 1994.[44] In this correspondence, the *Préfet* also referred to the security meeting held in Kibuye on 25 April 1994 which was attended by the Accused. Yet, it is essential to note that the Prime Minister's circular letter contains

no specific information as to the functions and conduct expected of those manning the roadblock other than that “officially” recognized roadblocks could be set up to ensure “that the enemies find no passageway to infiltrate”, that where it was possible, the communal authorities could, in particular, be assisted by the National Army, and finally, that at the said roadblocks, “the citizens must guard against taking it out on innocent people”. [45]

50. In a second letter from the *Préfet* dated 30 April 1994 still to the Accused, the *Préfet* addressed the specific issue of the organization and control of roadblocks by civilians who were to be trained by reservists selected by the *Bourgmestre*, and of the need to organize information meetings for the population after the said recruitment. [46] Yet, the Accused never mentioned the above recommendations concerning the training of people posted to the roadblock, precisely to organize their functions, nor the information meetings to ensure the safety of the population. When questioned on this specific issue, the Accused stated that there were "no reservists in Mabanza who were used to train in the civil defence programme." [47] But then, the erection of the roadblock could not be considered as a purely administrative task, particularly, within the context of the time, where the official purpose was to check infiltration by the RPF-*Inkotanyi*, identified as the enemy, but sometimes generally considered to be Tutsis.

51. I would like to recall that by virtue of his duties as the official in charge of maintaining law and order and of ensuring security in the *commune*, the Accused had the primary responsibility for the operation of the Trafipro roadblock, before and after it became "official". At the time the Trafipro roadblock was set up, the Accused assumed responsibility for the initiative, as well as for the instructions, which he may or may not have given in the month of April, concerning the co-ordination of efforts. I hold the view that it is irrelevant and certainly insufficient for the Accused to rely on vague instructions transmitted to him by the *Préfet* only at a later date to show the practical measures he allegedly took at that time.

52. I note that the evidence adduced supports a finding that killings occurred at the very location of the roadblocks or in connection with the activities at the three roadblocks erected in Mabanza *commune* (Trafipro, Gitikinini and Gacaca roadblocks). Consequently, even if the Trafipro roadblock was set up for *a priori* legitimate security reasons, its *modus operandi* was, through the willful negligence of the Accused and in full awareness of the foreseeable risks, left at the mercy of individuals, whether or not selected by him, who had jointly participated in criminal acts against the Tutsi.

53. Furthermore, I would like to state that at the time the circular letters of 3 June 1994 were published, by which those manning the roadblock were officially appointed and the supervisory committee set up, massive attacks against the Tutsi population had, in the main, already occurred, and the risk of maltreating fleeing Tutsi civilians seeking refuge had, in fact, reduced, either because most of them had already been killed or because those who had not escaped were in hiding.

54. It should also be noted that as regards the “unofficial” roadblocks in the *commune*, cited by many witnesses (Witnesses AA, AB, B, RA, Z and ZD), the Accused merely produced, as evidence of measures he took against the “recalcitrant” persons who allegedly erected the said roadblocks, a letter dated 12 July 1994, requesting two people to “dismantle” the roadblock set up “on their own initiative”. [48] I would like to emphasize that this letter was written barely two days before the Accused escaped, and that as the official in charge of maintaining law and order, as well as security, he could or ought to have taken different measures that were more positive and immediate, if he had wanted to take prompt action to dismantle an "official" roadblock, instead of writing a letter to individuals who deliberately violated communal security rules and regulations, and who were known to him.

3. Individuals assigned to man the roadblocks

55. With regard to the persons actually manning the Trafipro roadblock and in reference to the letter of 3 June 1994, the Accused testified that the "attestation" concerned the same people as those who manned the roadblock right from the time it was set up. He stated as follows :

"The TRAFIPRO roadblock was always manned by these people. What we did was, to give them the attestation because those who were passing at the roadblock would ask them who they were; you are asking me for my identification, in what capacity. So it’s at that point in time that we had been obliged to give them specific assignments and so that if there is any passer-by asking them who they were, they could show this official attestation. But it was always these people who were at the roadblock, at this roadblock. And referring to what happened in the past, I told you that when we started setting up the roadblocks we were expecting what was happening in other communes, and I was telling them that they should not behave in the same manner." [49]

56. Since this "attestation" dates back to early June, that is nearly two months after the Trafipro roadblock was set up, it cannot, in itself, be used as evidence to show the persons who at one time or another manned or supervised the roadblock from the time it was set up, or to show that it was always the same persons. Moreover, the Accused’s claim is contradicted by the testimonies of several witnesses, including Witness Z and Witness Y.

57. The majority found that the presence of Witness Y from April until around 3 June 1994 (para. 914 of the Judgement) was uncontested, and further found that the testimonies of Witnesses O, AA, Z and Y, supported by prior witness statements, suggest (para. 919 of the Judgement) that Witness Z and Rushimba were regularly present at the Trafipro roadblock. The majority concluded that even though it was not possible to establish the exact dates when Z and Rushimba were present at the Trafipro roadblock, the Chamber found that they were at the roadblock with considerable regularity. The majority also took into account the close proximity of the roadblock to the *bureau communal* in assessing the Accused's awareness of the situation (para. 925 of the Judgement). Hence, the majority does not hesitate to conclude that it cannot accept the Accused's contention that the "attestation" of 3 June 1994 gives a complete picture of the persons who were regularly present at the roadblock while it was operational (para. 924 of the Judgement). However, I note that the majority drew no other conclusion other than

stating that it could not accept that the Accused was unaware of the fact that other persons, besides the five who were appointed, were present at the Trafipro roadblock on a regular basis (para. 925 of the Judgement).

58. In his testimony, the Accused stated that the people stationed at the roadblock enjoyed the trust of the communal council, because they had been selected by the said council and that the commission appointed on 3 June 1994 verified that the persons posted at the roadblock discharged their duties properly and that no one was ill-treated. [50] The letter further states, for the information of members of the supervisory commission, that no one was to appear at the roadblock without the "certification", which suggests that there was a likelihood of that happening or that it did happen, thus confirming the testimonies of Y and Z, which made no reference to the "attestations". The Accused testified as follows :

"You see, I gave them assignments, and in those assignments there was no mention made of how Tutsis should be sought. My instructions were clear. Amongst the people with whom I was working, there were those who would go beyond what they were supposed to do and we wanted to bring them back to order […] I do not think, that is not surprising if there is one person amongst this team who made mistakes. But, they knew that they could be punished. This is why I set up this verification commission so that they could direct and supervise these people." [51]

59. The Accused testified that the persons appointed were people who conducted themselves properly and had his confidence. [52] As regards the level of training and background of said persons, the Accused answered, "No, these were exemplary farmers". [53] The Accused stated that he listened to the *conseillers*' views and that the level of training required for persons manning the roadblock was "that they had completed at least primary school or post-primary education and so on".[54] The Accused admitted that he had confidence in them, and that he had selected people of good moral standing in the village for the job.[55]

60. Incidentally, he testified that he did not authorise Witness Z and Rushimba to man the roadblock, although it was established that they were regularly present at the Trafipro roadblock. The presence of a number of people unofficially manning this roadblock during that period would suggest that the Accused did not exercise sufficient control over the people manning the roadblock from at least 3 June 1994, despite the fact that the roadblock was close to both his office and his residence. Reacting to Witness Z's testimony that he received instructions to man the roadblock, the Accused testified that Witness Z's name was in the register of arrest warrants and summonses issued by the courts [56] because he was a wanted person on 17 June 1994. [57] I note, however, that the Accused gave no explanation for the arrest of this witness and that this information sheds no light on what Witness Z's status and duties might have been.

61. The "attestation" of 3 June 1994 sent to Witness Y and four other persons contained the following instruction : "During the checks your are required to conduct, you are kindly requested not to ill-treat passers-by, as some have already done" [58] (emphasis added). The Accused stated in that regard that, "This was why there was a

five-man commission set up, responsible to verify whether or not passers-by had been maltreated and whether the enemy has infiltrated through this passageway." [59]

62. It is my opinion that, in the specific context of April 1994, the Accused should have ensured that all the necessary measures were taken, like the ones he formally took in June 1994, for the proper and effective operation of the Trafipro roadblock even before it was made "official". Specifically, the Accused had the obligation to ensure that measures were taken to limit, as far as possible, any maltreatment of the civilian population. It appears, moreover, that a number of "unofficial" roadblocks, besides the one at Trafipro, were allowed to operate during the month of April. Considering that the Accused had authority over the persons assigned to man the roadblock, even though they were selected in consultation with the communal council, he incurred full responsibility for the setting up and operation of the said roadblock by virtue of his duties as the official responsible for maintaining law, order and security.

63. When I reminded the Accused that Witness Y had spoken in detail about the key role played by Rushimba in the killing of Judith and that Rushimba was apparently the leader of those manning the Trafipro roadblock, he answered: "The names that I have are the five whom I asked to appoint their leader themselves. I don't see the name of Rushimba because you recall that during this period there were people who were at the roadblock like the Witness "Z" whom we referred to and who was on this list." [60] *[NB. French transcript states that witness Z was not on the list*: *"…**n'est pas** sur cette liste…"]* When asked whether Rushimba had been authorised to act as a leader, the Accused answered, "If it was Cyakubwirwa, that maybe is the one who was known as Rushimba, maybe. Otherwise, I wouldn't know very well. […] Fidele Cyakubwirwa, Fidèle Cyakubwirwa, but here we have Fidèle Kubwimana. I don't know whether we are dealing with the same person." [61] In conclusion, whether or not Rushimba was the nickname of one Kubwimana or one Kyakubwira, the testimonies are consistent with the fact that Rushimba held, at least *de facto*, a position of authority or leadership over the persons who manned the Trafipro roadblock from the time it was set up in April 1994. Hence, considering the proximity of the roadblock to the communal office and the fact that the *Bourgmestre* was responsible for its erection, the Accused could not have been unaware of the presence and role of Rushimba and Witness Z, and failed to provide adequate supervision over a system that inherently presented obvious risks.

64. Accordingly, I hold the opinion that by allowing these individuals to man and run the roadblock for the entire period that it was operational, the Accused incurred liability as an accomplice in the arrest and murder of the only two Tutsis who came to the roadblock, or were taken there while it was operational.

B. Purpose of the Trafipro roadblock

65. The majority has noted that neither the *Prefet's* letter of 30 April 1994, nor even the "attestation" or "certification" of 3 June 1994 support a finding that the roadblock was established for criminal purposes, but that precisely, the "certification" warned against the ill-treatment of passers-by (para. 935 of the Judgement). Yet, it had already been

established earlier that this letter that was sent at the end of April only came "to make official" a roadblock which had already been erected earlier on the verbal instructions of the Accused, which instructions the Accused was unable to explain in detail, despite the questions put to him by the Chamber to that effect. Moreover, the letters of June 1994 cannot serve as documentary evidence of due diligence on the part of the Accused for the period prior thereto, because they cover only part of the period during which the roadblock was operational. Furthermore, as the majority noted, the actual conduct of operations at the roadblock during this period is the revealing factor of its objective, which is not necessarily reflected by the documentary evidence (para. 938 of the Judgement).

66. Questioned on the meaning of the word "enemy", appearing in paragraph two of the English version of the "attestation" dated 3 June 1994, [62] the Accused answered : "Enemy is mwanzi, mwanzi […] Mwanzi is what we used to define the enemy and it means member of the RPF." [63] With respect to the ethnic group of those who could pass through the Trafipro roadblock, without encumbrance, the Accused testified that they were passers-by who were in vehicles. […] any ethnic group." The Accused further testified : "Why not say that there were Tutsis that passed by this roadblock? I can give you an example, the example of convoys that I was aware of by Deputy Musafiri. His wife was Tutsi. There was also another Tutsi woman. […] They were in a vehicle which was filled with Tutsis and they passed by this roadblock. They arrived in Kibuye. I remember meeting them there. And later on, they went to Zaire, via Lake Kivu." [64] However, I note that this fact is not corroborated by witnesses Y and Z who were regularly present at the Trafipro roadblock.

67. Witness Z testified that during his recruitment, he went to the home of the *Bourgmestre*, which was guarded by a policeman, to ask about the details of the assignment. The Accused specifically asked him to meet one Rushimba to set up the roadblock very early the next morning, "because the enemies are escaping." [65] Witness Z explained that the *Bourgmestre* used the word *Inyenzi* which, at that time, according to the Witness, meant a Tutsi, or a member or a sympathizer of the RPF. The instructions given by the *Bourgmestre* were that he should check the identification papers of anyone passing through the roadblock, as well as vehicles, in the objective of seeking out the enemy. When passing, the *Bourgmestre* would greet them and would ask about the work and he would urge them on. [66] The Witness testified that about one thousand people passed by everyday, but as regards the ethnic origin of these people, he stated that "at that time, they were Hutus because Tutsis could not pass by the roadblock, they were in hiding." [67] Apart from Judith and Bigirimana, he did not see any other Tutsis. [68] He testified that policemen would pass by because the *bureau communal* was not far from the roadblock and that the *gendarmes* would also come there; in fact, at one point in time, the *gendarmes* came into the region and occupied the building belonging to the Chinese and "they would always come by the roadblock".[69]

68. Witness Y testified to having committed an act of genocide in 1994 by killing three people, two of whom he knew were Tutsis. He explained that it was Rushimba Fidèle and Saidi Rucanos who asked him to go and "man" the roadblock, "because they are the ones

who had been there earlier and they asked me to join them there at the roadblock". [70] As regards the instructions, he testified that, "my friends who had come before me in this job told me that we needed to check all the identity cards which had a photograph inside." [71] This statement means that Witness Y was not among the first group of persons posted to man the roadblock. He also stated that his duty was to check all the identity cards which had a photograph inside and also the documents of vehicles. The instruction was to "check whether the identity card contained the photograph and, if there were no photographs, to send the individual to the *bureau communal*." [72] According to this witness, the purpose of the roadblock was "to fight against the enemy". [73] He testified that he saw the *Bourgmestre* every morning and evening when he was returning home [74] because it was the main road. Asked about the presence of Tutsis at the roadblock, the Witness explained that "The Tutsis, at that time, didn't want to be seen because they were the ones who were being sought". [75] Witness Y testified that he did not see any policemen at the Trafipro roadblock, [76] but that there were *gendarmes* who would come there from the Chinese camp and sometimes they would come in shifts, [77] which is consistent with the testimony of Witness Z.

69. I note, furthermore, that Witness AB testified that the reason for mounting the roadblocks was to identify the Tutsis and "when Tutsis were found, they were killed or if you had a face that looked like a Tutsi's face, you were killed". [78] Asked about the killings which took place in Mabanza *commune* in April 1994, Witness Y stated that "what was happening in the commune was seen by everybody. Everybody knew that there were killings and I don't see how the *Bourgmestre* would be unaware of them when he was there present". [79] Witness RA testified that on 17 April, when he asked the *Bourgmestre* to assist some threatened Tutsis, the Accused advised him not to go to Kibuye because there were roadblocks on the road and that they would be killed if they went.[80] Moreover, Witness B testified that he personally saw two people killed at two different roadblocks, including Pastor Muganga at the Trafipro roadblock. Witness RJ testified that at the roadblocks, the Hutus could go through whereas the Tutsi were stopped. Witness AA testified to having seen about thirty bodies near the Trafipro roadblock and the *bureau communal*, before the bodies were buried in mass graves. Witness A testified that he saw people being killed at the roadblock near Bagilishema's residence where he had seen policemen and the *Interahamwe* controlling this roadblock. [81]

70. It appears from the foregoing that the instructions which were given by the Accused when the Trafipro roadblock was being set up were obviously inadequate and came in too late to avert the risks of criminal conduct on the part of armed civilians, who at that time were manning the roadblock, against the Tutsis, sometimes considered as the RPF-*Inkotanyi* enemy, within the context of the war at the time. I am satisfied that such failure to exercise control gave rise to misconduct on the part of those manning the roadblock in question, since the Accused had the responsibility and the means to control the operations at the Trafipro roadblock right from the time it was set up and throughout the period it was operational.

C. The Accused's Complicity in the murders of Judith and Bigirimana

1. The murder of Judith

71. The Accused testified that he heard about Judith's death for the first time before this Chamber and expressed surprise, as follows:

"I thought she died in Kibuye. It's here that I heard she was killed in Mabanza […] during that period there were a lot of deaths regrettably so, but regarding Judith I thought she left with the others to Kibuye. It was later that I heard she was killed in Mabanza by the attackers. It so happened that the deliquesce [sic] of Mabanza and the Abakigas who arrived, it's possible that she died around that time but I was not informed."[82]

72. When asked whether Judith was well known in Mabanza on account of the charitable work she performed and whether her death therefore made news, the Accused answered as follows regarding Judith's personality:

"I told you that Judith was a farmer and that her husband was a nurse. He wasn't even an assistant medical, what we call a -- is someone who had finished a primary education and then through experience and practice acquires experience to be able to treat people. So the husband was not very well known. Maybe he was well known in his cellule where they lived and maybe the sector but not throughout the commune not in the whole commune and the medication that people have referred to. Maybe this was medication fraudulently acquired by the husband from the centre at which he worked. And maybe she was helping her neighbours with this medicine. It wasn't something which was recognised and official." [83]

73. In my opinion, by this assertion, the Accused, who claimed that he did not know Judith in person, tried to justify his not being aware of her death by using disparaging terms and denigrating her role as a benefactor, as testified to by one of her killers himself, while at the same time alleging that she engaged in quasi fraudulent activities.

74. Witness Y testified that Judith had been taken from Gitikinini to the Trafipro roadblock by Rushimba and that she was not asked for her identification papers because even her neighbour knew her quite well and was aware that she was Tutsi.[84] Describing where they had passed with Judith, the witness explained that they had passed three paces away from the *bureau communal*. He added : "I didn't observe who was in the Secretary's office but I did indeed see the *Bourgemestre* in his office." [85]. In his prior written statement, Witness Y stated:

"When I mentioned in my admission that Bagilishema was a witness, I was responding to a question as to whether anyone had seen us leading her to her death and stating that Bagilishema saw us go by. […] The fact that the murder happened so close to Bagilishema's office leads me to believe that he definitely knew about it. I can state that no inquiry was conducted in the case, at least neither of us, who committed the murder, was brought to book."[86]

75. That Witness Y testified that those who were manning the roadblock did not even take the trouble to ask Judith for her papers because they knew she was Tutsi suggests conclusively that the decision to kill her was based on ethnic grounds, without the duty to check papers in order to identify "the enemy" being even complied with. This tempers the testimony by the same witness to the effect that, in principle, anyone whose papers were in order, regardless of their ethnicity, could pass without incident. I note that the

conduct of the people manning the roadblock at the time, including Witness Y, shows on the contrary, discrimination on ethnic grounds against passers-by identified as Tutsis.

76. To the question as to whether the Accused saw them pass by with Judith, Witness Y answered, "Indeed, he saw us, he saw us."[87] Under cross-examination, Witness Y asserted they had seen the Accused :

"The office had glass windows, I cannot therefore not state whether he saw us or not but we could see him. […] Since we passed in front of him without speaking to him I cannot tell you that he knew what we were going to do."[88]

77. Discussing the three crimes he committed in 1994 and the fact that the Accused had been informed of such crimes, Witness Y testified, "I believe he must have known this because we did this while he was still there."[89] Witness Y stated lastly, "We were there, we were all there. These things happened within this *commune*. He was present in the *commune* and my reasoning or my understanding is that he was aware."[90]

78. Witness Z testified that one Mutiganda came to see him one morning and said to him that he had found an *Inyenzi* in a banana plantation. Witness Z immediately led Judith to the roadblock and, along the way, he met Rushimba who took Judith by the hand. [91] They passed by the communal office, with Rushimba and Witness Y holding Judith and Witness Z behind them, 5 or 10 metres behind them. [92] As they passed by the communal office, after the other three people had gone by, the *Bourgmestre* came out and allegedly asked him "where he had found her", to which Witness Z answered that he had found her "somewhere there in a banana plantation" and had told her that they were going to "work on her", to which the Accused allegedly answered: "…that's fine, go ahead."[93] Witness Z testified that when he reached Judith's home, Rushimba and Witness Y had already killed Judith. He further testified that he thought that the Accused came out of his office because "…he saw them pass by because they -- it is just -- we passed by just the window of the *Bourgmestre* and the curtains were drawn open. So I think he came out to find out what was happening and that was when we met".[94]

79. The majority found that the only evidence concerning the Accused's possible involvement in the murder of Judith was given by Witness Z, who testified to having discussed it with him in front of the communal office immediately after Judith and the people who were escorting her had passed by[95] (para. 959 of the Judgement). The majority found further that if the allegation that the Accused had seen the two roadblock attendants pass in front of his office with Judith had been proved, even if Judith was not being held, that should have alerted the Accused to imminent danger, given the specific circumstances of the time (para. 962 of the Judgement). However, relying on the "contradictions" between Witness Z's written statements and his testimony, coupled with its assessment of the witness's allegations of the arrest and murder of Bigirimana, the majority found that those statements reinforce the Chamber's doubts as to the credibility of the witness. The majority held, based on the findings made in light of its assessment of the circumstances surrounding the killing of Bigirimana, as described by Witness Z, that apart from the statements of the said witness regarding his involvement in the murder

of Judith, it cannot rely on other aspects of the witness's testimony (para. 960 of the Judgement).

80. The apparent contradiction noted by the majority in the account of the meeting between Witness Z and the *Bourgmestre* prior to the murder of Judith is minor in my estimation, and relates at most to the sequence of the words exchanged between the Accused and Witness Z in front of the communal office, but does not raise doubts as to whether a meeting might have taken place. The majority stated that no other witness could corroborate such a meeting although, as it found, the accounts of the events by Witnesses Y and Z are not inconsistent *per se*, but that the majority ruled out the possibility that such a meeting ever happened based on the evidence of a witness that it had already found unreliable in light of his testimony on the murder of Bigirimana (para. 961 of the Judgement). Now, unlike the majority, I am satisfied that Witness Z's testimony regarding his meeting with the *Bourgmestre* is consistent with the evidence of Witness Y who explained that he saw that the *Bourgmestre* was in his office when they passed by with Judith right in front of the *bureau communal* prior to killing her.

81. It is also my opinion, that the mere fact that Witnesses Y and Z knowingly passed in front of the communal office and did not bother to use an alternate route whereas they had the intent to kill Judith conclusively shows that there prevailed at the time a culture of impunity where the activities at the Trafipro roadblock were concerned. Witnesses Y and Z likely did not have the sense that they were acting in violation of any rule or directives from the communal authorities, otherwise they would certainly have chosen to hide, and not taken the obvious and patent risk of meeting the *Bourgmestre*. Plainly, they did not expect to be questioned, reprimanded or even punished for the criminal conduct they were about to engage in, whereas clearly the Accused knew that such individuals manned the Trafipro roadblock as he had met them there on a regular basis.

82. Moreover, Judith, a resident of Mabanza, knowing that she certainly faced death at the hands of the persons who were leading her to her home, elected not to ask the *Bourgmestre* to intervene although the latter was in his office when they passed by. The Accused himself admitted that, given Witness Y's murderous intent, it would have been inconceivable for him to dare pass in front of the communal office with Witness Z, whom he knew to be a delinquent [96]. He further testified that, if that had happened, Judith would certainly have sought his assistance and that it seemed to him odd for someone going past the *bureau communal* under the escort of killers not to ask him or the security forces who were present at the *bureau communal* for assistance [97].

83. I find, unlike the Majority, that there is sufficient reliable and credible evidence that the Accused knew about Judith and the people flanking her passing by, that he may have spoken to Witness Z about it and that he failed to act to prevent the crime and punish its perpetrators at that particular time (para. 965 of the Judgement).

84. Lastly, the fact that the murder was likely committed in April [98], or in any event prior to the June written instructions on which neither of the two witnesses at the roadblock testified, coupled with the fact that such persons, of whom at least one was

formally appointed by the Accused, failed to comply with "directives" relating to the operation of the roadblock, leads me to further question whether there ever was such a thing as "directives" regarding the safety of civilians crossing the roadblock. In my opinion, this is a confirmation of the Accused's wilful negligence in erecting the Trafipro roadblock, negligence which became criminal as he continued to operate the roadblock prior to the directives of early June 1994.

2. The murder of Bigirimana

85. Regarding Bigirimana, Witness Y testified that "he was in a vehicle, we made him come down because he did not have any identity papers."[99] One Semugeshi had said he knew him and that he was an enemy of the country and speaking to Witness Z "he asked him to go and kill him."[100] Witness Y further testified "he asked us to go and deal with him and that he was going to buy us tea, obviously, speaking figuratively." [101] They then left, armed with machetes and a club, to kill him in a small forest about 150 metres from the *bureau communal*. Witness Z landed the first blow and Witness Y struck with the club.[102] It should be noted that Witness Y testified that he did not see the Accused[103] at the time of Bigirimana's arrest, but not that the Accused was not at the roadblock as held by the majority (para. 944 of the Judgement). Moreover, during the examination of Witness Y, no questions were put to him as to whether Bigirimana's wife had been present and what role she might have played during the arrest of her husband.

86. Witness Z testified that Bigirimana was stopped in his vehicle "as they usually did", that they searched "his clothing" for weapons and that he himself allegedly "discovered that he had two identity cards: one indicating that he was a Hutu and the other that he was a Tutsi";[104] which he characterized as a serious offence.[105] One Semugeshi arrived claiming to know Bigirimana very well as a Tutsi who worked with the *Inyenzi*.[106] Witness Z testified that there were a lot of people at the roadblock.[107] As to whether Witness Y had engaged in control operations alongside him, Witness Z testified that he was at the roadblock and that they allegedly "encircled the gentleman's vehicle, the vehicle aboard which François Birgirimana was."[108] Bigirimana's wife, a Hutu woman, allegedly went to plead with the *Bourgmestre*, who was walking towards the roadblock to intervene but the *Bourgmestre* allegedly told her it was none of his business and that she should go and talk to the people manning the roadblock. The Accused then allegedly went past, pretending not to see them,[109] as he headed towards his residence.[110] Under cross-examination, Witness Z testified that Bigirimana's wife and the *Bourgmestre* met on the road to the *bureau communal* and not at the Trafipro roadblock and that he approached the *Bourgmestre* to show him Bigirimana's identity cards and give him some explanations.[111] They allegedly detained Bigirimana until the evening when Witness Y, Rushimba and himself, allegedly took Bigirimana to a bush and killed him with machetes because he was an accomplice, a Tutsi, and also because Semugeshi had given him some money.[112]

87. The majority noted inconsistencies in the testimonies of Witness Y and Witness Z who confessed to killing Bigirimana following his arrest at Trafipro roadblock and drew

some conclusions therefrom as to the credibility of Witness Z (para. 961 of the Judgement).

88. After reviewing the details of this event as recounted by two people manning the roadblock, who both confessed to committing genocide on François Bigirimana, I am unpersuaded that both accounts are irreconcilable and give rise to doubts as to the credibility of Witness Z. Indeed, Witness Y testified that Bigirimana had to climb out of his vehicle because he had no identity papers while Witness Z testified that he personally found the two identity cards. Witness Z physically had them since he explained that he went to show them to the *Bourgmestre* while the latter was discussing with Bigirimana's wife. Therefore, it is not unlikely, given the fact that there were many of them at the roadblock, that Witness Y thought that Bigirimana did not have any identity papers, since they were in the possession of Witness Z. On the other hand, the meeting between Bigirimana's wife and the Accused may not have happened at the specific time of arrest nor at the exact location of the Trafipro roadblock but a few yards from there, on the road between the *bureau communal* and the roadblock and it is not unlikely that Witness Z was the only person who witnessed the meeting since he had in his possession Bigirmana's identity cards and had approached the *Bourgmestre* of his own accord to show them to him. I wish to add that, Witness Y did not testify that the Accused was not at the roadblock at the time of Bigirimana's arrest; he only testified that he had not seen him there.[113]

D. Findings

89. After carefully reviewing the testimonial evidence, I must respectfully disagree with the majority finding that the Accused incurs no criminal responsibility for erecting and controlling activities at the Trafipro roadblock, where Tutsis were arrested or taken to and then killed, in pursuance of a policy of discrimination on ethnic grounds that the Accused allowed to prevail through willful failure to act, whatever the motives of the perpetrators of the crimes might otherwise have been.

90. The majority holds that only the killings of Judith and Bigirimana can be ascribed with certainty to activities at a roadblock in Mabanza (para. 1014 of the Judgement). Consequently, the majority goes on to find that there cannot be the slightest causal link between the fate suffered by civilian victims under such a system and the reckless operation of the roadblock by the Accused (para. 1021 of the Judgement). I wish to observe on this point that the number of victims at the roadblock is irrelevant to the issue of assessing the gravity of the Accused's negligence in erecting and operating such a roadblock, because Witnesses Z and Y, who were themselves regularly present at the roadblock, testified that Tutsis did not use to pass through the roadblock at that time (Witness Z explained that Tutsis who had passed through the Trafipro roadblock and had been arrested were Judith and Birigmana).[114] Such a limited number of Tutsis who passed through the roadblock appears to me to be more indicative of the fact that there was not a large number of Tutsi civilian victims at the Trafipro roadblock, rather than suggesting that the Accused operated the said roadblock in a reasonable fashion.

91. Lastly, the majority addressed the conditions that may be relied on to show criminal negligence on the part of the Accused by holding that four elements must necessarily be proved cumulatively (para. 1011 of the Judgement) : (1) the murders of Judith and Bigirimana were committed in the context of activities at the Trafipro roadblock; (2) the Accused was responsible for the operation of the roadblock in his capacity as the authority in charge of maintaining law and order in the *commune* (the majority also finds that the first two elements were proved); (3) the measures that the Accused took to prevent any potential crimes at the roadblock were woefully inadequate in the circumstances at the time, such measures having been taken over a month after the re-establishment of the Trafipro roadblock; (4) the crimes in question could have been prevented or punished had the Accused exercised due diligence in his duty to control the persons manning the roadblock, by ensuring, *inter alia*, that they were trained by reservists, as suggested in the *Préfet's* letter and by initiating investigations into the incidents mentioned in the Attestation of 3 June 1994.

92. The majority finds, in spite of there not being proffered any such documentary evidence prior to 3 June 1994 and in spite of the vague responses given by the Accused when questioned as to the nature of directives given during the erection of the roadblock, that it cannot be found that the Accused had shown negligence in operating the roadblock because the Accused somewhat exercised *de facto* control over the roadblock (para. 1018 of the Judgement). Now, such a suggestion of a *de facto* role by the Accused in the daily supervision of activities at the Trafipro roadblock is not supported by the testimony of the Accused himself who never suggested that he exercised any such regular control over the said roadblock. Indeed, had the Accused so admitted, such an admission would have given rise to other forms of liability arising from negligence, while suggesting that he willfully ignored what was going on at the roadblock.

93. The majority finds that in the absence of dates on which Judith and Bigirmana were killed, it cannot rule out that the killings were committed at a time when the Accused was not fully in control of the administration of his *commune*, particularly during the attacks by the *Abakiga*. However, it appears reasonable to me to find on the basis of the testimonies of both Witnesses Z and Y that the Accused was in his office while the witnesses were taking Judith away, and at the time when Judith and Bigirimana were killed. Moreover, neither witness testified that the *commune* was attacked by the *Abakiga* during those days (para. 1019 of the Judgement).

94. The majority finds further that it is doubtful that Judith and Bigirimana would have been spared if the Accused had not been negligent, suggesting thereby that the Accused's failure to comply with his duty to act was inconsequential (para. 1020 of the Judgement). I wish to note that this finding is at variance with the majority's holding that the Accused regularly passed by the roadblock, and that should have allowed him to exercise reasonable control over the activities there, including over the people manning the roadblock. However, the majority appears to justify this finding by alleging that one cannot rule out the possibility that the Accused did not have sufficient means of control during those days.

95. Consequently, I am satisfied beyond any reasonable doubt that the evidence outlined and discussed *supra* shows willful negligence on the part of the Accused.

96. With respect to the Accused's criminal intent, it is my opinion that the evidence adduced at trial which shows the negligence evinced by the Accused in deliberately turning a blind eye to the inherent risks in erecting and operating the Trafipro roadblock, is akin to a consistent pattern of conduct.[115] I am persuaded that, over and beyond his duty, the Accused, in his capacity as *Bourgmestre,* had the resources to control on a daily basis the activities and organization of the persons manning the only "official" roadblock in the *commune,* erected close to the *bureau communal,* a location the Accused had to pass as he went to and from home to the office. Furthermore, the Accused was aware that the situation posed a danger for Tutsis, as he admitted to being so aware during his interview with Witness RA, especially where the Mabanza-Kibuye road was concerned. It was proved at trial, and this is not disputed by the parties, that Mabanza *commune* was subjected to certain attacks and that the Accused knew that the Tutsis in Mabanza were the primary targets of such attacks. Consequently, the erection of a roadblock, manned by armed Hutu civilians, who were sometimes generally likened to the *Interahamwe,* to prevent infiltration by members of RPF, obviously posed a special risk for Tutsi civilians.

97. I note that the powers to check identification, to search, to confiscate, to an extent, to arrest and detain which were exercised by individuals who, as testified by the Accused, had no special training apart from primary education, are by virtue of delegation of powers, among the basic powers of the *Bourgmestre* relating to his responsibility for maintaining law and order in the *commune*. Notwithstanding the scope of such delegation of powers, the Accused never referred in his testimony to any measures he might have taken to enforce the *Préfet's* directive to the effect, *inter alia,* that the persons manning roadblocks should be trained by reservists.

98. Furthermore, to the extent that the Accused alleges, in his defence, that he knowingly and unlawfully issued a number of false identity cards to Tutsis who came either to the *bureau communal* or to his home, it is my opinion that he could not have been unaware of the consequences of carrying an identity card indicating a Tutsi ethnicity, and more specifically when crossing a roadblock at that particular time.

99. Consequently, there is no denying that the risks posed by such a system were real and could be perceived by an Accused-*Bourgmestre* who had been in office for 14 years, from the moment such a screening system was put in place, and it became known that the persons manning the roadblocks enjoyed considerable power at the time major massacres were being perpetrated in Mabanza *commune* and in Kibuye *préfecture*. Those circumstances alone warranted that the Accused became doubly vigilant and ensured an adequate level of supervision over activities at the roadblock throughout that period. Consequently, even the supervisory and control actions taken by the Accused in June appear inadequate to me, especially as they relate to incidents which allegedly occurred from the time the roadblock had been erected but which were never followed up on. Therefore, it is not impossible that the killings testified to by Witnesses Z and Y would

be part of such "incidents". Yet, no proceedings were instituted by the Accused to identify, to punish or to prosecute the perpetrators of those crimes.

100. There is no evidence prior to June 1994, not even in the Accused's testimony, that he in any way tried to prevent persons not assigned to the roadblock from actually manning it, or that he punished those who inflicted ill-treatment on passersby. It is my view that such information concerning ill-treatment of passersby, coupled with the fact that the Accused knew that "unofficial" roadblocks had been erected in the *commune* and admitted to having been aware of what was happening at other roadblocks in other *communes* or even on the Kibuye road, constitute a body of indicia sufficient to show that the Accused had reason to know the nature of the risks posed by the Trafipro roadblock. In the instant case, I am satisfied that considering the information available to the Accused, he must have been aware of the probability of criminal conduct by the individuals manning the roadblock and that his was so serious a conduct as to amount to criminal negligence as defined in the *Blaskic* Judgement.

101. In light of the foregoing, it is my opinion that the Accused willfully neglected his duty to exercise appropriate control over the *modus operandi* at the only roadblock under his responsibility, and thereby aided substantially the principals of the crimes. The Accused did not fulfil his duties of supervision and maintenance of law and order in Mabanza *commune.* Therefore, I find that through willful negligence, the Accused incurred liability for complicity in crimes against humanity – murder – committed by individuals assigned regularly, or even permanently, to the Trafipro roadblock.

IV. The Accused's complicity in the detention and maltreatment of refugees at Gatwaro stadium (paras. 4.23, 4.24 and 4.31 of the Indictment)

102. I respectfully distance myself from the position of the majority who, in finding evidence of his presence at the stadium insufficient, failed to hold the Accused criminally liable for complicity in the unlawful confinement of the Mabanza refugees at the Gatwaro stadium, in Kibuye, from 13 to 18 April 1994.

103. After carefully weighing the testimonial evidence adduced, I am of the view that the Accused's testimony is not credible since he testified before the Chamber that he never went to Gatwaro stadium, nor even to Kibuye town between 9 and 25 April 1994, despite credible and corroborated testimonial evidence placing him at Gatwaro stadium on 13, 14 and 18 April 1994.

104. For the purposes of my reasoning, I refer to the facts as set out in Chapter V, Section 3.2 of the majority judgement without undertaking an exhaustive review of all the testimonial evidence.

A. Monitoring by the Accused of the situation with respect to the Mabanza refugees in Gitesi

105. With regard to the circumstances surrounding the departure of the refugees, the Accused testified as follows:

"Given the circumstances in which I received the message, there was no way of checking. It is when I received this message, and that I was sensing what was going to happen, especially given what was being said elsewhere, rumours, I didn't check on what was happening in Kibuye, whether they would be able to receive these people. I was simply thinking that they should flee and run away."[116]

106. The Accused testified that after the refugees left for Kibuye, he had thought that their safety would be ensured by *Préfecture* and *commune* authorities in Kibuye.[117] In response to questions from the Chamber on the nature and content of actions he allegedly took to check on the plight of the refugees at the stadium, the Accused explained that he did not go to Kibuye because he had to face attacks occurring in the Mabanza c*ommune* on that day. He further testified that the *gendarmerie* Commander, Jabo, had told him in the afternoon of 13 April 1994 that the refugees had arrived safely in Kibuye. Now, it is worth noting that, as the Accused testified to himself, his meeting with Commander Jabo was a chance encounter and that the Accused had failed to take action, on his own initiative, to ensure that the refugees would arrive in Kibuye safe and sound, even if no crime under Statute of the Tribunal's had been committed during the transfer. Questioned on the monitoring of the Mabanza refugees' safety in Kibuye, the Accused added that he went to Kibuye only when he was invited.[118] Coming from a Government- appointed *Bourgmestre* in office for 14 years, and with a well-established reputation in Government, such an explanation does not appear to me credible, in light of the events unfolding at the time and the movement of a substantial part of the *commune's* Tutsi population. Therefore, I am unpersuaded by the Accused's assertion that he had taken practical and concrete action to check on the plight of the refugees and I would add that this point is important to assessing the role of the Accused in the events that occurred at Gatwaro stadium as from the transfer of refugees.

107. With respect to his schedule, the Accused testified that from 13 April 1994 "the *Abakiga* came [everyday], and this time they did not remain at Mabanza they continued up to Gitesi, towards Gitesi and they would go back in the evenings."[119] Now, during that period, the majority of Tutsis from Mabanza were refugees in Kibuye, Gitesi *commune,* upon the Accused's advice as given in the morning of 12 April 1994. I am of the view that the Accused cannot therefore claim that he was unaware of the possible attacks on the Tutsi refugee population in Gitesi by the same *Abakiga* who were attacking Mabanza during that same period. Furthermore, I note that there is no independent or specific factual evidence adduced by the Accused that on 15, 16 and 17 April 1994 other *Abakiga* attacks occurred in Mabanza requiring that the Accused remain in the *commune* to ensure the safety of the population.

108. With regard to the actual security conditions prevailing in Mabanza from 13 April 1994, the Accused, when questioned on how he kept the *Préfet* informed through a report on the events of 13 April 1994, testified that he had spoken to the *Préfet* in the morning of 13 April, following the departure of the refugees, but not subsequently because the telephone lines had been cut. As to whether he could not have possibly sent a message to the *Préfet* through the *gendarmerie* Commander, Jabo, since the telephone

was no longer working, the Accused replied: "I didn't have a specific message for him, he himself, would have been aware of what happened in Mabanza."[120] And this, despite the fact that that day was described by the Accused as "total chaos in Mabanza"[121] and would have certainly prompted a commensurate reaction, including, notifying higher authorities with a view to their possible intervention. I note that this attitude stands in stark contrast to the Accused's zealous promptitude in informing the *Préfet* in the night of 12 to 13 April of imminent danger he had had to face before the refugees fled the *bureau communal*. For instance, after midnight in the night of 12 to 13 April 1994, upon realizing that the *préfecture* had brought in other refugees from Rutsiro, the Accused testified that he had telephoned the *Préfet* and even offered to resign:

"At that point in time, at that very time at midnight, I telephoned the *Préfet*, it was very late but I took the liberty to call him at night. I asked him what they were trying to do […] So I asked why the *Préfet* was bringing people before consulting me, we should have looked at the ways and means of finding a solution to my problems. That is what I believe we should have done. Moreover, I said to the *Préfet*, I had invited him on several occasions to come and see with his own eyes the conditions under which I was working and the problems with which I was faced and he never came. […]I told him, by telephone, that I would bring - - that I was going to give him the keys to the office on the morning of the 13th."[122]

109. Concerning the Accused's alleged offer to resign presented to the *Préfet* that morning, it seems to me that in light of the events which followed the departure of the Tutsi refugees, such as the widespread attacks described by the Accused, or the withdrawal of the *gendarmerie* forces and, especially, the massacre of the majority of the Mabanza Tutsi population in Kibuye on 17 and 18 April, the Accused would have had several serious opportunities to tender his resignation to the *Préfet*, but elected to remain in office, in spite of such events.

110. During his testimony, the Accused insisted on the number of times he contacted the *Préfet* during the night of 12 to 13 April 1994. In my opinion, such insistence served as a justification for the fact that the Accused had no other recourse than "to advise" the refugees to leave for Kibuye and to ask them to vacate the *bureau communal* in the morning of 13 April, in order to get rid of the "burden" brought, in his view, by the *Préfet*. Now, it should be noted that from 9 April 1994, the Accused had five *gendarmes* following the Kibuye security meeting held on that day, and that instead of stationing them close to the *bureau communal* where the Tutsi population, who were the primary targets of the attackers, had sought refuge as of that same date, the Accused had elected to post the *gendarmes* to Mushubati, although the latter had no means of transport.[123] Nevertheless, the *gendarmes* had a telephone line and it appears quite strange that the Accused elected not to call the *gendarmes* at least in the evening of 12 April 1994 so that they might come and ensure the security of the *bureau communal* considering the fresh influx of refugees that evening.

111. Furthermore, I note that despite the Accused being presumably aware of an imminent danger as identified in the morning of 13 April 1994, none of the witnesses who at the time were refugees at the *bureau communal* testified to the Accused explaining to them the specific nature of such a danger. However, the Accused testified at length to an imminent attack by attackers composed of *Abakiga* from Rutsiro.

112. Lastly, in light of the unique circumstances in which the Accused decided to dispatch, as a matter of urgency, thousands of refugees from the *bureau communal* to Kibuye in the morning of 13 April 1994, it appears to me doubtful that the Accused could have proceeded without seeking prior authorization from *Préfet* Kayishema, given the well-established chain of command which required the Accused, in his capacity as *Bourgmestre*, to first seek such an authorization. If true, then such unorthodox conduct seems to me to stand in stark contrast to the Accused's reluctance, in light of the opportunities he presumably had, to go to the *Préfecture*, even without invitation, following the departure of the refugees, to ensure that they would actually be safe there. By extension, this observation applies to the Accused's reluctance to address the 25 April 1994 security meeting in Kibuye, which in particular followed the massacres at Gatwaro Stadium and which will be discussed in detail below.

113. Consequently, I am of the opinion that the totality of the Accused's contradictory attitude in the face of the unfolding events casts doubt on the veracity of his testimony. I find therefrom that the explanations provided by the Accused as to the magnitude of the attacks on Mabanza *commune* served to conceal his willful negligence in checking on the plight of the Tutsi refugees, with the Accused relying on "the alibi" offered by the *Abakiga* attacks on the *commune* to show that, he had been blocked in Mabanza on the one hand, and that he had to attend to the population of the *commune*, on the other hand.

B. Regarding the presence of the Accused at Gatwaro stadium on 13 and 14 April 1994.

1. 13 April 1994

114. Witness A and Witness AC testified to seeing the Accused at Gatwaro stadium on 13 April 1994 though there is about a one-hour discrepancy in the time they both testified to seeing him. (According to Witness AC, the Accused was with Semanza).[124] However, the Accused testified that he had remained in Mabanza where the *bureau communal* had allegedly been *inter alia* attacked by *Abakiga* in the morning.[125]

115. Witness A testified that the Accused arrived at the stadium gates around 2 p.m. but as he did not have a watch, the time he had given was a rough estimate.[126] Witness A testified that the Accused followed the refugees when they left Mabanza for Kibuye but that the Accused had stopped to speak to some *gendarmes* and joined them in Kibuye as the gates of Gatwaro stadium were being opened.[127] Now, since Witness A failed to mention in his prior statements the Accused following the refugees as they left the *bureau communal*, the majority finds that such failure casts doubt on the evidence of Witness A who testified before the Chamber to seeing the Accused on that day (para. 536 of the Judgement).

116. Witness AC testified to the Accused arriving unarmed and in civilian clothing, around 3 p.m. that same day. The witness explained that the Accused spoke to the *gendarmes* at the stadium gates and that after his departure, the *gendarmes* allegedly stated that nobody would be allowed out of the stadium and even beat back the refugees

who attempted to follow the Accused. The majority found that there were inconsistencies between the testimony of the witness and his prior statement as to the specific conduct of the Accused when he arrived that day. The majority noted discrepancies between the prior statements of Witness AC and his testimony: either the Accused entered the stadium or he tried to enter the stadium, or he took a few steps into the stadium. The majority finds, that in the face of such discrepancies and consistencies with the account of the visit of the Accused the day before, coupled with the fact that the witness only gave a sketchy account of the visit, it cannot be ruled out that the witness actually remembered a single visit which he was now recounting as two separate visits (para. 538 of the Judgement).

117. For my part, I hold the opinion that since these questions were not clearly put to Witness AC during his testimony, the majority's finding which is based specifically on a prior statement is speculative. At any rate, according to the majority decision itself, it should have been found that the witness remembered at least one visit of the Accused to the stadium, although this fact is not even accepted by the majority. Regarding the absence of details, I note that the majority acknowledges with respect to the evidence of the other witnesses who had been at the stadium at that time, but who had not seen the Accused, that it is not unlikely that the Accused made "short visits" which went unnoticed. But the majority nonetheless required comprehensive and specific details about the visits of the Accused as testified to by the witnesses who saw the Accused "briefly."

118. In my opinion the other testimonies regarding the Accused being present at Mabanza in the morning of 13 April 1994 are not inconsistent with the Accused possibly visiting Gatwaro stadium in the early afternoon since he had a vehicle and the roads would have been free by then as the refugees had already arrived at their destination. For his part, the Accused testified that Mabanza was 20 kilometres away from Kibuye *préfecture* and "moreover, that it was not a tarmac road, it took me one hour to get to Kibuye." [128] I am unpersuaded by the majority's finding that in light of the evidence of Witness A and Witness C, it would have been impossible for the Accused to have gone to the stadium on two separate occasions on 13 April 1994 (para. 539 of the Judgement). This, although the majority noted that the witnesses give an approximate time and that the only factual difference lies in the fact that one of the witnesses testified that the Accused was at the stadium before the gates were opened (Witness A) while the other witness was already inside the stadium (AC). It is quite possible for the Accused to have remained for a while in the vicinity of the stadium or in Gitesi *commune*; therefore, I fail to see how such two witnesses could be said to be describing an unlikely situation all the more since the time given were estimates.

2. 14 April 1994

119. The Accused testified that on that very day of 14 April in the morning, the *Abakiga* returned to the *commune* in greater numbers and attacked a group of peasants near the *bureau communal* and that once again, they attacked Karungu like they had done the day before."[129]

120. Witnesses A and AC[130] testified to seeing the Accused again in a vehicle with Semanza on 14 April 1994 (according to Witness A, in the company of Dr. Léonard and according to Witness AC, at 9 a.m. in the company of two communal police officers and the communal driver)[131] head towards the entrance and speak to the *gendarmes.* Witness AC testified that the Accused was in civilian clothing and unarmed while the policemen were armed. Witness A who was high on the larger stand further testified that when they arrived, the refugees shouted: "that they", referring to the visitors, were coming to kill them. In my opinion, if there was a mix-up as to the day of the visit (Thursday or Friday) between Witness A's testimony and his prior statement, such a discrepancy has little impact on the reliability of the evidence of a witness who was recounting the same incident on both occasions, an incident which involved the Accused being present at the stadium that day. I do not share the view of the majority that it was prompted by "the absence of details" from Witness A on such a visit to consider the prior statements of the said witness (para. 549 of the Judgement). I am puzzled by such an approach to assessing evidence that I cannot endorse.

121. Regarding the visit of the Accused to the stadium on 14 April 1994, the majority finds that the evidence of Witness A is not conclusively corroborated by the testimony of Witness AC and notes specifically the fact that Witness AC did not testify to a "striking and relevant detail" as mentioned by Witness A who testified that when the Accused arrived, the refugees screamed "that they," referring to the visitors, had come to kill them (para. 551 of the Judgement). Thus, though the majority finds that Witness A had not provided sufficient detail to erase the subsisting doubt with respect to the visit of the Accused, it seems incongruous for the majority to rely on a "striking and relevant detail" given by this same witness to find that the testimonies of A and AC are not conclusively corroborative of one another, in spite of the fact that Witness AC was at another location in the stadium and that this may account for his failing to mention such a detail. (para. 551 of the Judgement.)

3. Findings on the presence of the Accused at the Stadium on 13 and 14 April 1994 and on the assessment of the testimonial evidence

122. I note that, even though the Accused renounced his defence of alibi in the course of the trial, and whereas he claimed in his testimony that he did not go to Kibuye between 9 and 25 April 1994, the Accused was only able to provide little information on his schedule and activities in Mabanza during this period. Even though several witnesses place the Accused in Mabanza on 13 and 14 April, at various times during the day on 13 April, their testimonies, in the main, only point to the mornings. It therefore seems to me that the Accused could very possibly have travelled between Mabanza and Kibuye during the day, considering that, as suggested by the Accused himself, one hour by road was sufficient to cover such a distance. I would like to note, moreover, that the evidence used to "corroborate" the presence of the Accused on 13 and 14 April 1994 in Mabanza, is testimonies which had not been accepted by the Trial Chamber when they suggested the Accused's involvement in other crimes committed in Mabanza (particularly, Witnesses AB, Z and H).

123. Moreover, it being established that the Accused was present at the stadium during this period, in the absence of evidence to show that he objected to the crimes which were committed there at that time, and taking into account his status as an authority, I am of the opinion that the probability that the Accused was, at that time, associated with the perpetrators of the crimes is, to my mind, established, even in the absence of evidence to show that the Accused was privy to a preconceived plan. Such probability, in my opinion, is supported by the statement of Witness A, as to the incident which occurred upon the arrival of the Accused on 14 April 1994, during which incident the refugees inside the stadium cried out "that they" – including the Accused who was among the visitors – had come to kill us [refugees], a detail described by the majority as “striking and pertinent.”

124. Consequently, I differ with the majority which, in assessing the evidence in support of the presence of the Accused at the stadium, and in light of the factual findings which could be made on the basis of evidence of the presence of an authority at the scene of the crime, applied a double standard regarding the assessment of evidence and, in several cases, the test applied proved to be inappropriate. Thus, the majority stated that an allegation of the presence of the Accused must be treated with caution if such allegation is not supported by other evidence (para. 532 of the Judgement). In other words, where lack of detail raised doubt, the majority would apply the following test : examine other testimonies or take into account witness statements to clarify or test the veracity of allegation made by a witness, whereupon if there is no corroboration, the doubt would persist and presence would not have been proven (para. 532 of the Judgement).

125. As I stated *supra* in the introductory remarks, I hold, on the contrary, that testimonial evidence has an intrinsic value, and that evidence must be tested when the witness is giving testimony and not *a posteriori*, by relying, particularly, on the witness' prior statements, without such statements being necessarily put to him during his testimony. I insist on the fact that prior statements must be used with caution, by taking into account the lack of information on the conduct of the examination of the witness, and by ensuring that apparent inconsistencies are brought to the knowledge of the witness, thus giving him the opportunity to provide an explanation during his testimony.

126. In this instance, the majority holds that Witness A only gave superficial information regarding his observation of the Accused; it points out, in particular, that there is no precision as to what the Accused was doing, whether or not he was accompanied, whether he was standing or sitting in a vehicle or whether he was armed (para. 537 of the Judgement). I note that Witness A provided several details, but that the majority did not make factual findings therefrom, because it considered them as being insufficient to remove doubt as to the presence of the Accused. I deem it appropriate to recall that, in the opinion of the majority, depending on the location of an individual at the stadium and taking into account the fact that there was a crowd inside the stadium, it is not to be ruled out that a brief visit could go unnoticed (para. 542 of the Judgement). *A fortiori,* to require that witnesses provide such details and accurate information is, in my opinion, unjustified and unfair, considering that the witnesses recognized, and not identified, the Accused under such circumstances as have been described.

127. Lastly, when the majority states that it does not give any weight to the fact that Witnesses A and AC allegedly saw the Accused at the stadium on 13 April within an interval of about one hour, it nevertheless draws the inference that if the Accused had been present when the refugees were entering the stadium (as testified by Witness A), the Accused would not have had to return at a later stage to ask whether the refugees he had sent had arrived, (as testified by Witness AC) (para. 539 of the Judgement). I hold the opinion that such a finding is irrelevant and smacks more of speculation. I would like to add that the assessment of Witness AC's testimony by the majority with regard to the visit of the Accused on 13 April 1994 and the finding that the said superficial and sketchy description of the visit of the Accused could very well apply to the visit of the next day is, in my opinion, unfounded (para. 541 of the Judgement). Regarding the visit of 14 April 1994, I disagree with the finding of the majority that the testimonies of A and AC are insufficiently corroborative of one another. In light of these testimonies, I am of the opinion that the majority failed to consider the fact that the witnesses were at two different locations in the stadium at the time they saw the Accused on 14 April 1994.

128. When the majority holds that it is not satisfied beyond reasonable doubt that the presence of the Accused on 13 and 14 April 1994 is established, it adds that, assuming that the Accused was there, the witnesses did not provide sufficient details concerning the purpose of his visit, and that, therefore, there was insufficient evidence of his criminal intent (para. 543 of the Judgement). I note that by such reasoning, the majority rejects its own logic regarding the hypothetical significance of the presence of an authority, who does not intervene for the refugees, whereas he has, at least the means to express his disapproval, if only to take positive action to protect the said refugees.

129. Moreover, even though the Chamber finds that the ill-treatment inflicted upon the refugees at the stadium during the period from 13 April to the day of the attack, on 18 April 1994, amounted to inhumane acts committed during said period (crimes against humanity), the majority went ahead to find that, in any case, even if the Accused were present at the stadium on 13 April, no crime under the Statute had been committed at that time which could give rise to any liability (para. 543 of the Judgement). I must point out here that the reasoning of the majority on this point does not at all take into account its own factual findings that crimes against humanity were committed during the period commencing from 13 April 1994.

130. In light of the foregoing, and considering the testimonies of Witnesses A and AC that I find credible and reliable, I respectfully disagree with the factual findings of the majority as regards the lack of sufficient evidence of the presence of the Accused at the stadium on 13 and 14 April 1994. I am convinced that having visited the stadium on these various occasions, the Accused was aware of the inhumane detention conditions under which the refugees found themselves, most of whom came from Mabanza, and that being so aware, he did not intervene in their favour. Accordingly, I find that by his presence, even transient, at the time the refugees were undergoing inhumane treatment, the Accused provided some form of moral support, some legitimacy to the criminal activities being carried out, and thereby incurred liability as an accomplice. Furthermore, by his silence and failure to intervene in favour of the refugees, notably those from Mabanza,

the Accused facilitated the perpetration of said crimes. Lastly, I am convinced that by going to the stadium on two occasions at the time the refugees were in forced confinement, the Accused could not have been unaware of the fact that presence would be interpreted as encouragement, or even as acquiescence by those who were responsible for the refugees' living conditions, in particular, the *gendarmes* posted at the stadium gates on 13 and 14 April 1994. I am convinced that in his capacity as a respected administrative authority, the Accused's presence at the scene of the crimes helped to legitimize the said crimes in a significant manner because, in the absence of effective denunciation, such conduct provided moral or psychological support to the perpetrators of the crimes. The tacit acquiescence of the Accused is shown through his behaviour and attitude as described by the witnesses, in particular, his conversations with the *gendarmes,* whose role and intention he must have been aware of, between 13 and 14 April 1994. Considering the entire circumstancial evidence, I am satisfied that the Accused, failing his objection to the perpetration of the crimes in question, knew that his presence would very likely contribute to the perpetration of criminal acts by other persons, whose role and intention he had been able to verify.

131. I am therefore satisfied beyond reasonable doubt that the Accused is liable as an accomplice, pursuant to Article 6 (1) of the Statute and, of other inhumane acts under Article 3 (1) of the Statute, committed from 13 to 14 April at Gatwaro stadium, as alleged in Count 5 of the Indictment.

V. Complicity of the Accused in the attack on Gatwaro Stadium on 18 April 1994 (paras. 4.13, 4.26 and 4.27 of the Indictment)

132. The fact that there was a widespread and systematic attack on 18 April 1994 against the civilian population that was compelled to take refuge in the stadium has been proved beyond reasonable doubt, and is uncontested by the Accused.

1. Evidence of the Accused's presence in the Stadium on 18 April 1994

133. First of all, I want to state that I concur with one of the findings of the majority relating to the lack of credibility on the part of Witness AA concerning the Accused's involvement in the events at the stadium. In fact, I hold the opinion that the doubts and questions raised during Witness AA's testimony, considering his prior statement and guilty plea before the Rwandan authorities, were not erased even after he was cross-examined thereon during the trial (paras. 607-637 of the Judgement).

134. Witness Z testified that on the day of the attack on the Home St. Jean complex or on the stadium (17 or 18 April 1994), the Accused, who was armed, stopped by at the Trafipro roadblock with Semanza and armed *Abakiga* and allegedly told the witness that he was going to Kibuye, as he always did whenever he was going there.[132]

135. Prior to the attack, Witness AC saw Semanza in the communal vehicle that was carrying the *Interahamwe*[133] stop near the stadium gate.

136. Witness A testified that on the morning of 18 April 1994 prior to the attack on the stadium, he saw the Accused, together with Semanza and policemen in a vehicle, but that the Accused left in the same vehicle after he heard the refugees shouting.[134] The witness, who happened to be at the grandstand located in the uppermost part of the stadium, described it as a brief stopover. His description is obviously limited, but it does not call into question the fact that this event occurred. I cannot subscribe to the finding of the majority regarding the credibility of this witness' testimony, when they state that "…the evidence provided by Witness A about the presence of the Accused at the Stadium is unclear." (para. 641 of the Judgement).

137. Contrary to the majority opinion, Witness G recognised, and not identified, the Accused who was with *Préfet* Kayishema and the attackers on Gatwaro hill before the *Préfet* gave the signal to launch the attack (para. 649 of the Judgement). It should be noted that although the credibility of Witness G was not at issue, the majority nevertheless went ahead to apply improper standards for the assessment of evidence as to whether Witness G identified, and not recognised the Accused. Although the majority relied on the testimony of said witness for its finding that the Accused, who was with the attackers, was a person known to the witness, it states, with regard to *Préfet* Kayishema, that it is not satisfied with the evidence relied on by the Prosecution to show that this witness knew the *Préfet* prior to the events at the stadium. The fact remains that, the majority accepted that Witness G knew the Accused, based on Witness G's testimony given in camera to the effect that he and the Accused lived in close proximity to each other,[135] without considering particularly relevant facts (para. 650 of the Judgement) In my view, the majority unjustifiably adopted a double standard in assessing the evidence. On the other hand, during the in camera hearing, the witness provided pertinent information as to what he was able to see, the exact position where he was, that is on the first step in the stands[136] and as to the fact that the Accused was on Gatwaro hill together with *Préfet* Kayishema.[137] The witness duly indicated all these locations in a photograph of Gatwaro stadium.[138] During the attack, the witness could see the Accused who was standing, but not carrying a weapon that day.[139] However, the majority emphasised that the Prosecution had failed to discharge its duty to provide sufficient evidence regarding the conditions in which Witness G viewed the events, in order to dispel any doubt (para. 652 of the Judgement); yet the witness testified that he was only a short distance away from the Accused.[140] In the opinion of the majority, the fact that Witness G testified that the Accused was in a standing position on the hill cannot be accepted as a distinctive factor of conduct that could help distinguish the Accused from the other attackers (para. 652 of the Judgement). The majority further stated that Witness G's view "presumably" included a porch filled with people, which suggests that their opinion is based on speculation (para. 649 of the Judgement). It should be noted that Witness G was in a location different from that of the other two witnesses who were at the stadium during the attack (A and AC). Thus, since Witness G was relatively closer to Gatwaro hill, he was able to recognise the Accused on the said hill while Witnesses A and AC may not have seen him from their location in the stadium. Nonetheless, since the majority held that no other witness had corroborated the fact that the Accused was on the hill before and during the attack, it concluded that on account of the distance and given

that Witness G was unable to provide further details, the presence of the Accused had not been proven, for there was still doubt (para. 653 of the Judgement).

138. On the contrary, I am of the view that the testimonial evidence given by Witnesses A and G regarding the presence of the Accused before and during the attack on the stadium is not contradictory. I take the view that in light of the surrounding circumstances, Witness A, who was right at the top of one of the stands when the attack began, before he subsequently came down to the field[141], that is in a stand opposite the one where Witness G was, saw the Accused in the morning of 18 April 1994 when he arrived in a vehicle and not during the attack. On the contrary, Witness G who was in a stand opposite that of Witness A did not see the Accused in the morning of 18 April 1994, but rather around 2 p.m., just before the attack and when it began, at which time the Accused was on Gatwaro hill.

139. I find that since both witnesses saw the Accused at two different times of the day on 18 April 1994 from different locations inside the stadium, it is both well-founded and justified to consider them credible, and I dismiss as immaterial the contention of the majority that the witness' observation of the Accused was inadequate. Consequently, I am of the opinion that the testimonies of Witnesses A and G prove beyond reasonable doubt that the Accused was present in Gatwaro stadium on 18 April 1994 before and during the attack on the refugees who were being detained there.

2. The Accused's testimony

140. The Accused testified that on the morning of 18 April 1994, he went, together with policemen and Pastor Eliphaze, to Rubengeri Parish to request the *Abakiga* to withdraw from the *commune*. The *Abakiga* allegedly did not listen to him and went towards Gitesi town in Kibuye.[142] Thus, while the *Abakiga* returned to Mabanza in much larger numbers than in the previous days, the Accused was informed of their intentions and the direction they were heading for on the morning of 18 April 1994, after having met with them.[143] The Accused further testified that following the failed attempt, he stayed in the *bureau communal* until midday, helping people whose identity cards had been torn, by getting them new ones, so that if the *Abakiga* returned they would not be killed.[144] I must point out that I was not satisfied with the Accused's explanation in support of his testimony that he decided suddenly to face the *Abakiga* on 18 April 1994, whereas the attacks on Mabanza *commune* had begun since 13 April 1994, at which date he claimed he was not in a position to stop them because he was personally threatened, whereas the number of attackers increased daily, as per his testimony. When asked where the *Abakiga* were heading for on 18 April 1994, the Accused reiterated that they "were going towards Gitesi.[145]" The Accused further testified that it was on that day that the *Abakiga* committed their criminal acts in Kibuye and added : "but in Mabanza, I was faced with other problems. It was the people who were coming to me. Coming to tell me about how they had problems".[146] As the majority noted, the Accused later testified that he had stayed at home on the afternoon of 18 April 1994, that he had received people; but then this has not been corroborated by any other testimony or documentary evidence. I hold the view that the evidence adduced supports a finding that the Accused

was informed on the morning of 18 April 1994 that the refugees in Mabanza who were at Gatwara stadium in Gitesi *commune* faced possible attacks and, it also shows that by going to the stadium on the morning of 18 April 1994, as testified by Witness A, the Accused knew or had reason to know that an attack was imminent.

141. The Accused testified subsequently that at midday he returned home to receive people requesting him to help obtain identity cards for them, and that he allegedly wrote letters to the c*onseillers* and members of the *cellule*, whereas there is no evidence of such official correspondence in the *commune's* outgoing mail register.[147] And for good reason, the Accused asserted as follows :

"Between the 12 and 27 April 1994 that indicates the chaos which was prevailing in the commune. The commune was totally paralysed. The secretariat was not functioning. All the communal departments were paralysed. That is why between the 12 and 27 there is no letter, there is no other letter which went out of the commune".[148]

142. This testimony raises doubts as to the Accused's contention that on the afternoon of 18 April 1994, while the attack was being launched on the Gatwara stadium, he stayed at home to write "official letters" of which no trace exists, whereas one testimony situates him at the said stadium at the same moment, at the beginning of the afternoon when the attack was launched.

143. When questioned on the tragic fate of the Mabanza refugees in Kibuye and the identity of the attackers, the Accused testified that he thought that the higher authorities had been informed of the situation in Kibuye. Thus, he thought it was up to them [authorities] to take the initiative to follow up on what happened in the *Préfecture* and conduct the necessary investigations, for that was not the first time that such atrocities had occurred[149]. Yet, after the massacres in Gitesi *commune*, which he admitted he was aware of since 19 April 1994, the Accused remained quiet and took no measures, at least, until 25 April 1994. His failure to request the identity of persons killed or to order an investigation following the massacre of thousands of members of the Mabanza population appears, to say the least, incomprehensible, and indeed, incompatible with the Accused's ostensible concern for the security of the Mabanza population, whose most vulnerable section, composed of the Tutsis, had just been annihilated.

144. I hold the view that had the Accused's intention not been criminal when he went to the stadium on the day of the attack, he would have intervened, at least, by trying to stop the attacks, in order to protect the Tutsi population of Mabanza who had sought refuge there and over whom he had responsibility. If he did not have the means to stand up to the attackers, and having understood that the higher administrative authorities would not intervene or might have been involved in the massacres, and if the Accused had not acquiesced in the massacres, he would at least have taken measures *a posteriori* to identify or repatriate the bodies of Mabanza natives killed. It is therefore not credible, as the Defence indicated hypothetically, that even if the Accused had been at the stadium on the day of the attack, he would have been there only passively, whereas as he himself admitted, the Accused knew that the attackers were moving towards Gitesi town in Kibuye and that when he went there he did not object to the crimes committed.

145. In his capacity as the official responsible for the security of the inhabitants of Mabanza, the Accused testified that he went to Kibuye on 25 April 1994 to attend a security meeting at the *Préfecture* with, among others, *Préfet* Kayishema and some other *bourgmestres.* In that regard, the Accused testified that the authorities deplored what had happened and made recommendations to the higher authorities aimed at averting a recurrence of such situations in the future.[150] The Accused testified that, at the meeting, the *Préfet* mentioned that *gendarmes*, delinquents and the *Abakiga* had taken part in the killings and that nobody, not even him [the Accused], had inquired about the number of victims in spite of the fact that thousands of Tutsis from Mabanza were among the victims.[151] The Accused further testified that they [the *Préfet* and *Bourgmestre* of Gitesi] were overwhelmed and that they decided that each *Bourgmestre* was to ensure that what had happened in Kibuye did not occur elsewhere.[152] When I asked the Accused if he had sought an explanation about the apparent participation of *gendarmes* in the massacres at Gatwaro stadium, he gave the following answer:

"This meeting did not last long, because there were problems between the Prefect and the Bourgmestre of Gitesi commune, the urban commune of Gitesi, regarding what happened in the town. Then we had to give the security status report of the various communes. But the meeting did not last long. It was one hour, it lasted an hour."[153]

146. When I insisted on knowing if the massacres had not been carried out with the knowledge and under the supervision of the administrative authorities of Kibuye, the Accused responded: "The *Préfet* explained to us that the local commander "went to the battlefield … and that he himself was threatened. That is how he explained the situation to us, … that he was unable to do anything during that period."[154] The Accused never testified that the issue of the *Préfet's* use of his power to call in the armed forces as provided for in the Legislative Decree of 11 March 1975 on the organization and functioning of the *prefecture* was raised by the participants at the security meeting.[155] The Accused then added :

"… then he had problems explaining what happened. So on that point, the Prefect asked us it we needed fuel. We told him that we needed fuel for our communes."[156]

147. It seems surprising to me, to say the least, that the type of problem raised by the Accused during that meeting, in his capacity as an administrative authority, and particularly at a time when, according to him, the town was stinking and strewn with bodies,[157] was a problem of petrol and fuel supply, whereas a large part of the Tutsi population of Mabanza had just been exterminated.

148. As to the majority's question whether the Accused could not have done more (paras. 665 - 683 of the Judgement), I hold the view that, the evidence confirming his presence at the stadium on 18 April 1994, and the fact that he had failed in his duty as a local government representative during and after the massacres indisputably establish the extent of liability and negligence of the Accused in connection with the massacres at Gatwaro stadium. Moreover, I am convinced that the difficulty with which the Accused answered questions about his failure to order an investigation into the massacres in order to denounce them or punish the perpetrators thereof could be logically explained by the

fact that the Accused, who was present at the time of the massacres, acquiesced in their commission.

149. Besides, given the fact that during that meeting, the Accused realized that the authorities of Gitesi, who were administratively in charge of Gatwaro stadium, did not take a clear stand when recounting the horrendous massacres which had just taken place there, and the fact that *gendarmes* were involved in the killings, I fail to see the relevance of the letter that the *Bourgmestre* sent to that same *Préfet* on 24 June 1994, which even contrasts with the timidity displayed by the Accused at the meeting of 25 April 1994 following the massacres. In that letter written in June, when a large part of the Tutsi population had already been massacred at Kibuye, the Accused, with full knowledge of the facts, vehemently denied being an accomplice "who supports Hutus married to Tutsis and the Tutsi in general", and requests that the *Préfet* counter the attack by the Hutus from Rutsiro and Kavoye: "otherwise the population of Mabanza commune would defend itself, which can result in a confrontation between the Hutus, whereas what we presently needed the most is their unity to face the *Inyenzi-Inkotanyi*." [158] For all these reasons, the Accused urgently requested assistance from the *Préfet.* This documentary evidence brings to light the ambiguous nature of the relationship between the Accused and the *Préfet*, a relationship the Accused sometimes described as distant, when explaining why he dared not ask him about the massacres at Gitesi, and sometimes as very frank, when trying to show that he could count on the *Préfet* to, among other things, intervene to ensure his own protection, and inform him if the people of Mabanza could take care of "accomplices." I hold the opinion that this last point proves that the Accused was not powerless in the face of the events he has recounted.

150. In light of the explanations given by the Accused, it is apparent that after the large-scale massacre in Kibuye, he failed in his duties and responsibilities as a *Bourgmestre*. He did not attempt to clarify the situation about the officials nor to identify the victims of Mabanza, and was evasive on the questions he could have asked as to how the events unfolded, even though he was present at the "security" meeting of 25 April 1994, which was attended by all the authorities concerned by the massacres.

VI. Findings

151. Testimonial evidence of the presence of the Accused at Gatwaro stadium on 18 April 1994 appears to me to irreparably impair the credibility of the Accused's testimony and impugn his vague and even sometimes surreal accounts of his activities in Mabanza *commune* on that day aimed at rebutting the allegations that he was present at the stadium. On this specific point, I concur with Judge Pillay's finding in her separate opinion in the Musema Judgement that "once the credibility of a witness has been impaired, the testimony of that witness is inherently unreliable in all its parts, unless it is independently corroborated."[159] In the said case, Judge Pillay dissented with the majority's finding that the sole testimony of a witness, who had otherwise been found to be a credible witness, while the Accused was not, was insufficient to prove that the Accused was present at the crime site. Judge Pillay went on to hold that "the testimony

of Witness [..] cannot be rejected in one instance on the basis of testimony from the Accused and accepted in another instance despite testimony from the Accused."[160]

152. In the instant case, I am satisfied that the testimonies of Witnesses A and G prove beyond reasonable doubt that the Accused was present before and during the attack on the stadium on 18 April 1994, and that the Accused knew or had reason to know that the attack was being planned or was indeed imminent.

153. It is my opinion that by being willfully present during the said attack the Accused incurs criminal responsibility as an observer who acquiesced in the commission of crimes by others and thereby encouraged such crimes. I am satisfied that the testimonial evidence adduced shows the Accused's acquiescence in the crimes committed, since it does not evince any reprobation whatsoever of the crimes by the Accused, despite the duties and obligations incumbent upon him in his capacity as *Bourgmestre*, even if he were outside his respective administrative district. Though not explicit, it is my opinion that, in the instant case, the criminal intent of the Accused can be inferred from the body of facts presented above. I am satisfied that by being present at the stadium in the morning and afternoon of 18 April 1994, even in the absence of evidence of a pre-conceived plan, the Accused could not have been unaware that an attack was going to be launched against the refugees at the stadium and that, he therefore incurs accomplice liability under Article 6(1). In the case at bar, the subjective element of the crime does not arise from co-perpetration because in my view it has not been shown that Accused in any way shared as such the same criminal intent with the perpetrators of the crimes. However, as held in the *Tadic* Judgement, [161] in respect of complicity, *mens rea* can, *inter alia*, comprise knowledge of the common design to inflict ill-treatment. Such an intent may be proved either directly or as a matter of inference from the nature of the Accused's authority within an organizational hierarchy.[162] In the said case, the Chamber further held that what is required, beyond the negligence, is a specific intent to the extent that even if the person had no intention of bringing about certain results, that person was aware that the actions of the group were most likely to lead to that result (*dolus eventualis*).

154. It ensues from the foregoing that the Accused could not have been unaware that his presence at the massacre site would encourage, if not, sanction the crimes perpetrated on the refugees by hundreds of attackers. Even if a direct causal relationship with the commission of the crimes has not been shown, his participation came in the form of moral support. I am satisfied that the presence of the Accused at Gatwaro stadium on 18 April 1994 contributed substantially to the perpetration of the crimes testified to by the witnesses during the massacre of the Tutsi refugees. There is no denying that there were residents of his *commune*, who were under his responsibility, among the victims of the said massacre and that his mere presence, as the highest-ranking authority in Mabanza *commune*, in the absence of any opposition on his part to the criminal acts in progress, could only have encouraged the perpetrators of the crimes.

155. The French Code of Criminal Procedure provides under Article 353 with respect to the Assize Court [*Cour d'assises*] that "The law does not ask an accounting from judges

of the grounds by which they became convinced […]. The Law asks them only the single question […]: 'Are you thoroughly convinced?'" I am thoroughly convinced that the Accused is guilty, under Article 6(1) of the Statute, of complicity in genocide and crimes against humanity (murder and extermination), crimes covered under Articles 2(3)(e) and 3(a), 3(b) and 3(i) of the Statute, in respect of counts two, three, and four and five, and that his guilt on such counts warrants a guilty verdict.

Done in Arusha on 7 June 2001 in French and English, the French text being authoritative.

Judge Mehmet Güney

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[1] Transcript of the hearing of 5 June 2000, p. 43.

[2] *The Prosecutor v. Blaskic*, ICTY, Judgement of 3 March 2000, para. 267.

[3] *The Prosecutor v. Blaskic*, Judgement of 3 March 2000, para. 560 to 562.

[4] *Prosecutor v. Tadic*, Judgement of 7 May 1997, para. 689.

[5] *Prosecutor v. Tadic*, ICTY Appeals Chamber Judgement of 15 July 1999, paras. 189 and 190.

[6] *The Prosecutor v. Akayesu*, Judgement of 2 September 1998, paras. 486 to 489.

[7] Thus, it was held that a passive spectator who had an affirmative legal duty to intervene to prevent the offence which he witnessed passively - in silence – committed an offence construed as complicity by giving moral support.

[8] *Tribunal correctionnel Aix*, 14 January 1947, D. 1947. Somm. 19, Rev. science crim. 1947, 5 81.J.C. P. 1947.II 3465

[9] *Cass. Belge*, 23 October 1950 and 24 September 1951, *rev. dr. pén. Et criminologie*, 1951-952.774 [1947.II, 3465.

[10] [1995]1 Appeals Court 71. *171.

[11] Prosecution Exhibit No. 71, footnote 3 of the report by André Guichaoua on "*L'autorité communale et les prérogatives du bourgmestre*." This law is also cited in Article 8 of the Presidential Order of 25 November 1975 on the status of communal personnel, Defence Exhibit No. 97.

[12] *The Prosecutor v. Aleksovski*, ICTY Judgement of 25 June 1999, para. 80.

[13] *The Prosecutor v. Kordic and Cerkez*, ICTY Judgement of 26 February 200, para. 371.

[14] [1882] 8 Queen's Bench Division 534.

[15] Per Hawkins, J. at 557.

[16] *The Prosecutor v. Blaskic*, Judgement of 3 March 2000, para. 284.

[17] *The Prosecutor v. Zlatko Aleksovski*, Judgement of 25 June 1999, para. 63 and following.

[18] *Ibid.*, para. 65.

[19] Strafsenat. Urteil vom 10. August 1948 gegen K und A StS 18/48, Oberste Gerichtshof der Britischen Zone (Entscheidungen, Vol. I, pp. 53 and 56) Judgement of the German Supreme Court in the British Occupied Zone.

[20] *The Prosecutor v. Anto Furundzija*, ICTY Judgement of 10 December 1998 paras. 205 and following

[21] *Ibid*., para. 207.

[22] *Ibid*., para. 232.

[23] *Ibid*., paras. 234 and 235.

[24] *Ibid*., para 249.

[25] *The Prosecutor v. Blaskic*, Judgement of 3 March 200, para. 286.

[26] *The Prosecutor v. Akayesu*, Judgement 2 September 1998, para. 293 and 294.

[27] Rule 85 (B) of the Rules of Procedure and Evidence specifically provides that: "It shall be for the party calling a witness to examine him in chief, but a judge may at any stage put any question to the witness"

[28] *The Prosecutor v. Akayesu*, Judgement 2 September 1998, para. 156.

[29] *Ibid*, para. 140.

[30] *Ibid*, paras. 142 and 143.

[31] *Ibid*, para. 135.

[32] *The Prosecutor v. Zlatko Aleksovski*, ICTY Appeals Chamber Judgement, 24 March 2000, para. 62.

[33] Defence Exhibit No. 97.

[34] Transcript of the hearing of 5 June 2000, p. 62.

[35] Prosecution Exhibit No. 85

[36] Transcript of the hearing of 9 June 2000, p. 89.

[37] Prosecution Exhibit No. 84.

[38] Transcript of the hearing of 2 May 2000, pp. 72 and 73.

[39] Prosecution Exhibit No. 77 A.

[40] Transcript of the hearing of 9 June 2000, p. 42.

[41] Transcript of the hearing of 9 June 2000, p. 43.

[42] Transcript of the hearing of 9 June 2000, p. 76.

[43] Transcript of the hearing of 9 June 2000, pp. 54-55.

[44] Prosecution Exhibit No. 77 B.

[45] Prosecution Exhibit No. 77 A.

[46] Prosecution Exhibit No. 77 A.

[47] Transcript of the hearing of 9 June 2000, p. 96.

[48] Defence Exhibit No. 18.

[49] Transcript of the hearing of 9 June 2000, pp. 39 and 40.

[50] Prosecution Exhibit No. 94.

[51] Transcript of the hearing of 9 June 2000, p. 49.

[52] Transcript of the hearing of 8 June 2000, p. 231.

[53] Transcript of the hearing of 7 June 2000, p. 161.

[54] Transcript of the hearing of 9 May 2000, p. 30.

[55] Transcript of the hearing of 8 June 2000, p. 265 of the French version.

[56] Defence Exhibit No. 100.

[57] Transcript of the hearing of 7 June 2000, p. 169 of the French version.

[58] Defence Exhibit No. 62.

[59] Transcript of the hearing of 9 June 2000, p. 37.

[60] Transcript of the hearing of 9 June 2000, p. 36.

[61] Transcript of the hearing of 9 June 2000, pp. 44 and 45.

[62] Prosecution Exhibit No. 94.

[63] Transcript of the hearing of 9 June 2000, pp. 44-46

[64] Transcript of the hearing of 9 June 2000, p. 33

[65] Transcript of the hearing of 8 February 2000, p. 39.

[66] Transcript of the hearing of 8 February 2000, p. 52.

[67] Transcript of the hearing of 8 February 2000, pp. 55 to 56.

[68] Transcript of the hearing of 8 February 2000, pp. 75 to 76.

[69] Transcript of the hearing of 8 February 2000, p. 74.

[70] Transcript of the hearing of 7 February 2000, p. 28.

[71] Transcript of the hearing of 7 February 2000, p. 34.

[72] Transcript of the haring of 7 February 2000, p. 35.

[73] Transcript of the hearing of 7 February 2000, p. 32.

[74] Transcript of the hearing of 7 February 2000, p. 33.

[75] Transcript of the hearing of 7 February 2000, p. 36.

[76] Transcript of the hearing of 7 February 2000, p. 55.

[77] Transcript of the hearing of 7 February 2000, p. 55.

[78] Transcript of the hearing of 15 November 1999, pp. 109 and 110.

[79] Transcript of the hearing of 7 February 2000, p. 60.

[80] Transcript of the hearing of 2 May 2000 (Closed session) , p. 49.

[81] Transcript of the hearing of 17 November 1999, p. 56.

[82] Transcript of the hearing of 7 June 2000, p. 160.

[83] Transcript of the hearing of 9 June 2000, pp. 160 and 161.

[84] Transcript of the hearing of 7 February 2000, p. 63 (French).

[85] Transcript of the hearing of 7 February 2000, p. 52.

[86] Defence Exhibit No. 64.

[87] Transcript of the (in camera) hearing of 7 February 2000, p. 53 (French).

[88] Transcript of the hearing of 7 February 2000, p. 54.

[89] Transcript of the hearing of 7 February 2000, p. 26.

[90] Transcript of the hearing of 7 February 2000, p. 62.

[91] Transcript of the hearing of 8 February 2000, pp. 62 and 63.

[92] Transcript of the hearing of 8 February 2000, p. 67.

[93] Transcript of the hearing of 8 February 2000, p. 67.

[94] Transcript of the hearing of 8 February 2000, p. 67.

[95] Transcript of the hearing of 8 February 2000, p. 75 (French).

[96] Transcript of the hearing of 9 June 2000, p. 156.

[97] Transcript of the hearing of 9 June 2000, p. 156.

[98] Witness Z talks of “end of April” in his admission to the Rwandan authorities of 22 June 1998, Defence Exhibit No. 112.

[99] Transcript of the hearing of 7 February 2000, p. 38.

[100] Transcript of the hearing of 7 February 2000, p. 38.

[101] Transcript of the hearing of 7 February 2000, p. 37.

[102] Transcript of the hearing of 7 February 2000, p. 38.

[103] Transcript of the hearing of the hearing of 7 February 2000, p. 48 - 49.

[104] Transcript of the hearing of 8 February 2000, p. 57.

[105] Transcript of the hearing of 8 February 2000, p. 57.

[106] Transcript of the hearing of 8 February 2000, p. 56.

[107] Transcript of the hearing of 8 February 2000, p. 58.

[108] Transcript of the hearing of 9 February 2000, p. 77.

[109] Transcript of the hearing of 8 February 2000, p. 79.

[110] Transcript of the hearing of 8 February 2000, p. 70.

[111] Transcript of the hearing of 9 February 2000, p. 79.

[112] Transcript of the hearing of 8 February 2000, p. 59.

[113] Transcriptof the hearing of 7 February 2000, p. 49.

[114] Transcript of the hearing of 8 February 2000, p. 75.

[115] Pursuant to Rule 93 of the Rules of Procedure and Evidence, evidence of a consistent pattern of conduct is admissible in proving the guilt of an accused.

[116] Transcript of the hearing of 5 June 2000, p. 44.

[117] Transcript of the hearing of 5 June 2000, p. 42

[118] Transcript of the hearing of 5 June 2000, p. 51.

[119] Transcript of the hearing of 5 June 2000, pp. 133 - 134.

[120] Transcript of the hearing of 5 June 2000, p. 121.

[121] Transcript of the hearing of 5 June 2000, p. 113.

[122] Transcript of the hearing of 5 June 2000, pp. 29-32.

[123] Transcript of the hearing of 8 June 2000, pp. 142 and 143 (French).

[124] Transcript of the hearings of 17 November 1999, p. 22 and 23 and of 18 November 1999, p. 39.

[125] Transcript of the hearing of 5 June 2000, p. 42.

[126] Transcript of the hearing of 17 November 1999, p. 74.

[127] Transcript of the hearing of 17 November 1999, p. 31.

[128] Transcript of the hearing of 9 June 2000, p. 72.

[129] Transcript of the hearing of 5 June 2000, pp. 42, 113 and 125.

[130] Transcript of the hearing of 17 November 1999, p. 38 and of 18 November 1999, p. 43.

[131] Transcript of the hearing of 18 November 1999, p. 44.

[132] Transcript of the hearing of 8 February 2000, pp. 52 and 53.

[133] Transcript of the hearing of 18 November 1999, p. 50.

[134] Transcript of the hearing of 17 November 1999, p. 36.

[135] Transcript of the hearing of 26 January 2000 (in camera), p. 39 (French).

[136] *Ibid.*, p. 36 (French).

[137] *Ibid.*, pp. 33 - 36 (French).

[138] Prosecution Exhibit No. 65.

[139] Transcript of the hearing of 26 January 2000, pp. 37 and 38 (French).

[140] Transcript of the hearing of 26 January 2000, p. 16.

[141] Transcript of the hearing of 17 November 1999, p. 61 (French).

[142] Transcript of the hearing of 5 June 2000, pp. 141 - 142.

[143] Transcript of the hearing of 5 June 2000, pp. 140 - 141.

[144] Transcript of the hearing of 5 June 2000, p. 142.

[145] Transcript of the hearing of 5 June 2000, p. 141.

[146] Transcript of the hearing of 5 June 2000, p. 142.

[147] Defence Exhibit No.18.

[148] Transcript of the hearing of 6 June 2000, p. 100.

[149] Transcript of the hearing of 5 June 2000, p. 62.

[150] Transcript of the hearing of 5 June 2000, p. 69.

[151] Transcript of the hearing o 8 June 2000, p. 256.

[152] Transcript of the hearing of 6 June 2000, p. 103.

[153] Transcript of the hearing of 6 June 2000, p. 102.

[154] Transcript of the hearing of 6 June 2000, p. 103.

[155] Article 11 of the Legislative Decree sets forth the conditions under which the *Préfet* may use his powers to call in the armed forces to restore public order.

[156] Transcript of the hearing of 6 June 2000, p. 104.

[157] Transcript of the hearing of 6 June 2000, p. 101.

[158] Prosecution Exhibit No. 84.

[159] *The Prosecutor v. Musema*, Judgement rendered by the Trial Chamber on 27 January 2000, Separate Opinion of Judge Navanethem Pillay, para. 4, p. 315.

[160] *Ibid*, p. 317.

[161] *The Prosecutor v. Tadic*, Judgement rendered by the Appeals Chamber on 15 July 1999.

[162] *Ibid.*, para. 220.