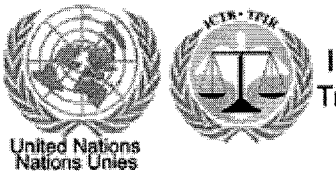

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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

Registrar:
Mr. Agwu U. Okali

Decision of: 21 May 1999

THE PROSECUTOR
versus
CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-T

SEPARATE AND DISSENTING OPINION OF JUDGE TAFAZZAL HOSSAIN KHAN REGARDING THE VERDICTS UNDER THE CHARGES OF CRIMES AGAINST HUMANITY/MURDER AND CRIMES AGAINST HUMANITY/EXTERMINATION

The Office of the Prosecutor:
Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton
Ms. Holo Makwaia

Counsel for Clément Kayishema:
Mr. André Ferran
Mr. Philippe Moriceau

Counsel for Obed Ruzindana:
Mr. Pascal Besnier
Mr. Willem Van der Griend

1. I fully agree with and share in the Judgment with the exception of the Majority's view that the charges of crimes against humanity/murder (hereinafter murder) and of crimes against humanity/extermination (hereinafter extermination) are improper and untenable. The Majority finds that there is no reason to enter a conviction under these counts. I respectfully disagree.

2. The Majority's determination stems from the finding that *concur d'infractions* par

excellence (hereinafter also referred to as concurrence) exists with regard to the three crimes of **genocide, murder and extermination, within each of the four crime sites. The Majority thus determines that the three crimes amount to the same offence and pronounce verdicts of Not Guilty for all the counts of murder and of extermination, in relation to both accused persons. That is, Not Guilty under Counts 2, 3, 8, 9, 14, 15, 20 and 21 for Clement Kayishema and Counts 20 and 21 for Obed Ruzindana.**

3. I find that, notwithstanding the concurrence of crimes, the charges were proper and deserve full consideration. Having fully examined the criminal responsibility of the accused under the said charges, I find Kayishema and Ruzindana Guilty for all the counts of murder and of extermination preferred against them.

Background

4. In effect, the issue on which I dissent is the legal consequence of finding that concurrence exists between charges within the same indictment. That is, the effect of concurrence on the assessment of the guilt or innocence, the verdict pronounced (conviction) and the penalty imposed (sentence) in relation to those charges. In this case, concurrence is found on the basis that the same culpable conduct of the accused supports all three crimes, and that the three crimes, as proved, contain the same elements and protect the same social interest. I do not disagree with the finding that the charges, *as proved*, rely on the same evidence and the same culpable conduct.

5. However, I do not agree with the approach taken by the Majority with regard to the consequence of this concurrence. The Majority determines that the murder and extermination charges are 'improper and untenable' and, consequently, do not fully address the criminal responsibility of the accused persons under those charges. The Majority opines,

Therefore, the counts of extermination and murder are subsumed fully by the counts of genocide. That is to say they are the same offence in this instance.

The Trial Chamber is therefore of the view that the circumstances in this case, as discussed above, do not give rise to the commission of more than one offence. The scenario only allows for a finding of either genocide or extermination and/or murder. Therefore because the crime of genocide is established against the accused persons, then they cannot simultaneously be convicted for murder and/or extermination, in this case. This would be improper as it would amount to convicting the accused persons twice for the same offence. This, the Trial Chamber deems to be highly prejudicial and untenable in law in the circumstances of this case. If the Prosecution intended to rely on the same elements and evidence to prove all three types of crimes, it should have charged in the alternative. As such, *these* cumulative charges are improper and untenable.[1]

6. Ultimately, the Majority pronounces both the accused **Guilty** for the counts of genocide only but **Not Guilty** for the counts of murder and extermination under each crime site. I respectfully **disagree** with this approach. In my opinion, the consequence of concurrence should be dealt with at the penalty stage – by sentencing the accused concurrently for the cumulative charges – rather than at the *verdict*.

7. In Part 1 of this Dissent I shall examine the submissions of the Parties, the relevant jurisprudence and its applicability to the case at Bench. In Part II, I shall address the criminal responsibility of the accused persons under the counts of murder and of extermination.

PART 1

The Submissions of the Parties

8. The Defence submitted that the Trial Chamber should not *convict* for both genocide and crimes against humanity because there is a *concur d'infractions*. The Defence for Ruzindana submitted that "Crimes Against Humanity have been largely absorbed by the Genocide Convention"[2] and that there was a *partial* overlap in the protected social interest of the two Articles of the Statute.[3]

9. The Prosecution, on the other hand, contended that it is permissible to convict the accused for all the established counts for which the accused persons were responsible and to impose multiple sentences. By issuing multiple sentences, the Prosecution submitted, the Chamber would adequately address the gravity of each crime, the role of the accused, and the totality of their culpable conduct. The Prosecution further submitted that "multiple sentencing will not prejudice the convicted person. The Chamber may remedy any prejudicial effect by imposing concurrent sentences for offences which arise from the same factual circumstances."[4]

10. I find that the substance of the Prosecution's submission is in line with the applicable jurisprudence from the International Criminal Tribunals.

The Jurisprudence

11. The jurisprudence from national courts and the views of legal commentators on the issue of concurrence is mixed. Some argue that it is wrong to *convict* for two or more crimes that suffer from concurrence while others argue that an accused can be convicted for all the established crimes but, in order to avoid prejudice, *punished* for the established crimes concurrently (generally by imposing the sentence for the gravest crime).

12. Notwithstanding this general lack of uniformity, the international criminal jurisprudence most relevant to this Tribunal has been consistent in its approach from the very first case at the ICTY - *Prosecutor v. Dusko Tadic.* The ICTY and ICTR have consistently opined that the issue of cumulative charges should be addressed at the stage of penalty - by sentencing the accused concurrently for the established crimes that are supported by the same culpable conduct.

13. In dealing with the issue of concurrence, it appears that the ICTY Chambers have limited their analysis to the overlap of the accused's *culpable conduct.* They have placed less emphasis on the overlapping *elements* of the cumulative crimes. I agree with this approach. What must be punished is culpable conduct; this principle applies to situations where the conduct offends two or more crimes, whether or not the factual situation also satisfies the distinct elements of the two or more crimes, as proven.

In *Prosecutor v. Dusko Tadic,* the Defence submitted that,

In the system of the amended indictment each event is composed of a general description of a vague behaviour of the accused and of a number of Counts, being multiple qualifications of the crimes arising from that behaviour.

Whereas the vague description of behaviour does not individualize specific behaviour per qualification, and where the multiple qualifications of each prosecuted behaviour in the sequential Counts are not individualized per victim nor indicted as alternatives or subsidiars to each other if resulting from the same behaviour, each charged event may result in a cumulation of Counts, being different qualified crimes, but resulting from the same alleged behaviour.

The present indictment is contrary to a fair administration of justice since it exposes the accused to the effect of a double jeopardy.[5]

14. In its response to the above submission the Trial Chamber, in its Decision of 14 November

1995, ruled,

In any event, since this is a matter that will only be at all relevant in so far as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty can not be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. *What is to be punished by penalty is proven criminal conduct* and that will not depend upon technicalities of pleading.[6] [Emphasis added]

The said Chamber fully addressed all the cumulative counts and, in July 1997, sentenced Tadic on findings of guilt for numerous counts which relied upon the same culpable conduct, stating that "[e]ach of the sentences is to be served concurrently."[7]

15. Meanwhile, on 6 December 1996, the ICTY Appeals Chamber addressed the said issue in *Prosecutor v. Zejnil Delalic, et al.* (hereinafter *Celebici*), where it held,

The accused also complains of being charged on multiple occasions throughout the Indictment with two differing crimes arising from one act or omission . . . . On this matter, the Trial Chamber endorsed its reasoning on an identical issue in the *Tadic* case: [Quoting the text of the *Tadic* Decision as stated in paragraph 14 above]

The Bench does not consider that the reasoning reveals an error, much less a grave one, justifying the granting of leave to appeal.[8]

16. Following the above Appeals Chamber Decision, in the *Celebici* Judgment of 16 November 1998, the Trial Chamber held,

The Trial Chamber . . . thus declined to evaluate this argument on the basis that the matter is only relevant to penalty considerations if the accused *is ultimately found guilty* of the charges in question. . . . It is in this context that the Trial Chamber here orders that each of the sentences is to be served concurrently. The sentence imposed shall not be consecutive.[9] [Emphasis added]

17. Hence, the Appeals Chamber has clearly endorsed the view initially stated by the *Tadic* Trial Chamber and followed in several Tribunal cases; to wit, it is at the stage of penalty (sentencing) where the issue of concurrence - and the contingent prejudice to the accused - should be addressed, rather than at the verdict.

18. Notably, the Trial Chambers of the ICTR have dismissed defence preliminary motions where the defence argued that cumulative charging based upon the same culpable conduct is impermissible. For example, in *Prosecutor v. Nahimana,* dismissing the defence contentions, Trial Chamber I of the ICTR held,

In any case and as far as the cumulation of charges is concerned, it is the highest penalty that should be imposed. However, it is evident that we are not at this stage yet.

Finally, it should be pointed out in this regard that in the *Delalic* case, Trial Chamber I of the ICTY dismissed the objection raised by the Defence regarding the cumulation of charges on the grounds that the question was only relevant to the penalty if the accused is ultimately found guilty.[10]

19. The said issue was also raised in *Prosecutor v. Ntagerura*. On 28 November 1997, only four days later, Trial Chamber II of the ICTR fully endorsed the aforesaid view of Trial Chamber I, thus dismissing the defence contention.[11]

20. In *Prosecutor v. Akayesu,* Chamber I of the ICTR again endorsed the principle pronounced in

Tadic case and held,

In that case, when the matter reached the sentencing stage, the Trial Chamber dealt with the matter of cumulative criminal charges by imposing concurrent sentences for each cumulative charge. Thus, for example, in relation to one particular beating, the accused received 7 years' imprisonment for the beating as a crime against humanity, and a 6 year concurrent sentence for the same beating as a violation of the laws or customs of war.

The Chamber takes due note of the practice of the ICTY. This practice was also followed in the *Barbie* case, where the French *Cour de Cassation* held that a single event could be qualified both as a crime against humanity and as a war crime.[12]

21. More recently, on 24 February 1999, in the *Prosecutor v. Milorad Krnojelac,* Trial Chamber II of the ICTY held,

This pleading issue has already been determined by the International Tribunal in favour of the prosecution: previous complaints that there has been an impermissible accumulation where the prosecution has charged such different offences based upon the same facts – as it is here – have been consistently dismissed by the Trial Chambers, upon the basis that the significance of that fact is relevant only to the question of penalty. More importantly, the **Appeals Chamber** has similarly dismissed such a complaint.

22. In the same Decision, the Chamber further held,

The Prosecution must be allowed to frame charges within the one indictment on the basis that the Tribunal of fact may not accept a particular element of one charge which does not have to be established for the other charges, and in any event in order to reflect the totality of the accused criminal conduct, so that the *punishment* imposed will do the same. Of course, great care must be taken in *sentencing* so that an offender *convicted* of different charges arising out of the same or substantially the same facts is not *punished* more than once for his commission of the individual act (or omissions) which are common to two or more of those charges. But there is no breach of the double jeopardy principle by the inclusion in the one indictment of the different charges arising out of the same or substantially the same facts.[13] (Emphasis added)

23. Thus, the line of international jurisprudence has evolved to hold that where the prosecution has charged such different crimes based upon the same facts, the matter falls for consideration *once* an accused is ultimately found guilty. And, the consequence of cumulative charges can be suitably dealt with at the stage of sentencing, rather than at verdict. In my view, this approach applies equally well to matters where the elements of the crimes, as proved, also overlap.

24. The jurisprudence in this area of international law is no doubt still fresh - the case at Bench is only the second trial wherein the accused have been prosecuted for the international crimes of genocide simultaneously with crimes against humanity. Although different approaches are conceivable, in my view, it is important that the various Chambers ensure that the jurisprudence ripens into a judicious, as well as a consistent, body of law.

25. For the above reasons, and those that follow, I find no justification to depart from the approach employed by the Chambers in the aforementioned cases.

Were the Charges of Murder and of Extermination Improper and Untenable?

26. The answer to this question, in my opinion, is an emphatic no.

27. The Majority holds that if the Prosecution intended to rely on the same elements and

evidence to prove all three types of crimes, it should have charged in the alternative and, that the cumulative charges are "improper and untenable."[14] Accordingly, the Majority does not fully address the accused's criminal responsibility under the charges of murder and extermination. I **disagree** with this approach.

28. At the start of trial it was too early to assess concurrence. Whether the crimes *as proved* suffer from concurrence is a question that is best determined after a trial chamber has accepted or rejected the evidence adduced - only then will a chamber be fully seized of the culpable conduct and the elements applicable to the charges in question.[15] This much is accepted by the Majority in its determination,

Having examined the elements, both mental and physical, and the protected social interests, the Trial Chamber finds that genocide and crimes against humanity may overlap in some factual scenarios, but not in others. This is not surprising. Both international crimes are offences of mass victimisation that may be invoked by a wide array of culpable conduct in connection with many, potentially different, factual situations. Accordingly, whether such overlap exists will depend on the specific facts of the case and the particular evidence relied upon by the Prosecution to prove the crimes.[16]

29. Not surprisingly, in Prosecutor v. Milorad Krnojelac, Trial Chamber II of the ICTY held that the Prosecution must be allowed to frame charges within the one indictment on the basis that the Tribunal may not accept a particular element of one charge and, in order to reflect the totality of the accused's conduct.[17]

30. In the case at Bench, although Ruzindana filed a preliminary motion, pursuant to rule 72 (B) (ii) of the Rules, on defects in the form of the Indictment,[18] the cumulative nature of the charges was not challenged therein. Similarly, Kayishema filed preliminary motions, none of which addressed the cumulative charges. Therefore, it is reasonable to infer that the Defence teams did not raise the issue being mindful that the Tribunals had consistently dismissed such challenges. Nor did the Defence raise it during the presentation of evidence. Consequently, the Trial Chamber had no occasion to direct the Prosecution to amend the cumulative charges and the Prosecution had no reason to believe that they were improper and untenable.

31. It is not fair on the Prosecution, nor does it serve the interests of justice, to find at this stage that the charges should have been in the alternative. Having regard to the jurisprudence referred to above, I hold that the charges are proper and tenable.

The Verdict Should Flow From the Chamber's Factual Findings Based Upon the Consideration of Proven Facts

32. Once the Prosecution has been permitted to proceed throughout trial with charges which, depending upon the Chamber's ultimate findings, may or may not overlap, the Trial Chamber is under the obligation to address the criminal responsibility on each charge. In my opinion, the verdict should be based upon the consideration of proven facts rather than the 'technicalities of pleading.' Here, this is particularly important since the offences of genocide and crimes against humanity are intended to punish different evils and to protect different social interests. Indeed, finding as the Majority did that murder and extermination are subsumed by genocide and that they are the same offence, defeats the very scheme and object of the law.

33. Further, the full assessment of charges and the pronouncement of guilty verdicts are important in order to reflect the totality of the accused's culpable conduct. For crimes against humanity to be established, the Chamber must be satisfied that there was a widespread or systematic attack against a civilian population. These elements are not required for genocide. Genocide requires the specific intent to destroy a certain protected group, in whole or in part, and this destruction need not be part of a widespread or systematic attack, or targeted against a civilian

population. Therefore, as in this case, where the culpable conduct was part of a widespread and systematic attack specifically against civilians, to record a conviction for genocide alone does not reflect the totality of the accused's culpable conduct. Similarly, if the Majority had chosen to convict for extermination alone instead of genocide, the verdict would still fail to adequately capture the totality of the accused's conduct.

The Approach Herein Does Not Prejudice the Accused

34. The concept of *concur d'infractions* is to protect an accused from prejudice where the same facts and conduct support a conviction for two or more crimes which rely upon the same elements. I fully endorse this principle. Indeed, it is unfair that an accused is punished more than once for one culpable conduct where the facts and victims are the same. However, any real prejudice in the instant case would arise from the *sentence* imposed rather than the *pronouncement of conviction.*

35. It is said that multiple convictions may unnecessarily tarnish the criminal record and image of the accused. I do not find this position convincing in the instant case. Here the realities that have emerged are so vast and complicated that they attract both the laws of genocide and crimes against humanity. Once the accused has been found guilty of the abominable crime of genocide, it is difficult to appreciate how the pronouncement of additional guilty verdicts under the two crimes of murder and extermination would tarnish his image further or lead to other prejudice, when the sentences are ordered to run concurrently.

36. Further, as the Majority acknowledges, the Prosecution used the same elements to show the existence of the three crimes and, "relied upon the same evidence to prove these elements . . . [t]he evidence produced to prove one charge necessarily involved proof of the other." Accordingly, during trial the accused persons were not prejudiced by having to refute any extra evidence due to the cumulative charges. On the other hand, had this been a case of double jeopardy (that is, where a person is prosecuted in *successive* trials for an offence for which he has already been acquitted or convicted), then the potential for prejudice would be obvious. Here, we are not concerned with successive trials.

37. Both Kayishema and Ruzindana will be sentenced according to their culpable conduct which, in this case, is the leadership role they played in massacring thousands of Tutsi men, women and children, due purely to their ethnicity. Whether this conduct offends one or three crimes, the sentence imposed must be the same. In my opinion, a verdict that the accused persons are guilty for the counts of murder and of extermination, as well as genocide, will in no way prejudice the accused. Thus, concurrent sentencing based upon the proven criminal conduct is a satisfactory way of ensuring that the accused do not suffer prejudice.

PART II

The Criminal Responsibility Under the Counts of Murder and Extermination

38. The Majority correctly determines that,

The Prosecution uses the same elements to show genocide, extermination and murder, and relies upon the same evidence to prove these elements. The evidence produced to prove one charge necessarily involved proof of the other. The culpable conduct that is, premeditated killing, relied upon to prove genocide, also satisfied the *actus reus* for extermination and murder. Additionally, all the murders were part of the extermination (the mass killing event) and were proved by relying on the same evidence. Indeed, extermination could only be established by proving killing on a massive scale.

The widespread or systematic nature of the attacks in Kibuye satisfied the required elements of

crimes against humanity, and also served as evidence of the requisite acts and genocidal intent. The *mens rea* element in relation to all three crimes was also the same that is, to destroy or exterminate the Tutsi population. Therefore, the special intent required for genocide also satisfied the *mens rea* for extermination and murder. Finally, the protected social interest in the present case surely is the same. The class of protected persons, i.e., the victims of the attacks, for which Kayishema and Ruzindana were found responsible were Tutsi civilians. They were victims of a genocidal plan and a policy of extermination that involved mass murder. Finally, the Prosecutor failed to show that any of the murders alleged was outside the mass killing event, within each crime site. These collective murders all formed a part of the greater events occurring in Kibyue *Prefecture* during the time in question.[19]

39. Thus, as is evident from the above, the Majority accepts the criminal responsibility of Kayishema and Ruzindana under the charges of murder and of extermination. The Trial Chamber's findings in relation to the evidence and the accused person's criminal responsibility pursuant to the charges of genocide will apply equally to murder and extermination under each crime site, respectively. However, for the sake of completeness, I am obliged to briefly address certain aspects of these counts.

The Attack

40. The Trial Chamber has analysed the essential elements of the attack under crimes against humanity.[20] The analysis reveals that Kayishema's criminal conduct at the massacres at Mubuga Church, the Stadium, the Complex and Bisesero area was part of a widespread or systematic attack against a civilian population on ethnic grounds, and that Kayishema was aware that his acts formed part thereof. And, that Ruzindana's criminal conduct at Bisesero area was part of a widespread or systematic attack against a civilian population on ethnic grounds, and that Ruzindana was aware that his acts formed part thereof. The conduct of both accused was instigated or directed by a government or another organization or group. I concur with this analysis and shall not repeat it here.

The Crimes

41. The Majority did not specifically determine whether the evidence satisfies the distinct elements of the individual crimes of murder and extermination, at the four crime sites; an analysis that the Majority deems unnecessary due to the concurrence with genocide. Of course, a finding of guilt may only be entered if the Prosecution has proved the requisite elements beyond all reasonable doubt. Therefore, below I shall apply the evidence to the distinct elements of murder and extermination bearing in mind that much of the evidence has already been discussed in detail pertaining to the genocide counts. The criminal responsibility of the accused persons under each said count will be the same as that stated under the count of genocide, within the same crime site.

The massacres at the Catholic Church and Home St. John Complex

Count 2

42. Count 2 charges Kayishema with crimes against humanity in violation of Article 3(a) (murder) of the Tribunal Statute. All the killings on 17 April 1994 at the Complex were murders, that is, premeditated and intentional killings. Further, Kayishema caused the death of Tutsis at the Complex massacre by premeditated acts or omissions, intending to do so. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at the Complex has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 1 (genocide) is equally attracted and applicable to this Count 2 (murder).

Count 3

43. Count 3 charges Kayishema with crimes against humanity in violation of Article 3(b) (extermination) of the Tribunal Statute. On 17 April 1994 at the Complex there was extermination, that is a mass killing event. Kayishema participated in the extermination, having intended the killings. The mass killing resulted in the death of thousands of Tutsis. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at the Complex has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 1 (genocide) is equally attracted and applicable to this Count 3 (extermination).

The massacres at the Stadium in Kibuye Town

Count 8

44. Count 8 charges Kayishema with crimes against humanity in violation of Article 3(a) (murder) of the Tribunal Statute. All the killings on 18 April 1994 at the Stadium were murders, that is, premeditated and intentional killings. Kayishema caused the death of Tutsis in the Stadium massacre by premeditated acts or omissions, intending to do so. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at the Stadium has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 7 (genocide) is equally attracted and applicable to this Count 8 (murder).

Count 9

45. Count 9 charges Kayishema with crimes against humanity in violation of Article 3(b) (extermination) of the Tribunal Statute. On 18 April 1994 at the Stadium there was extermination, that is a mass killing event. Kayishema participated in the extermination, having intended the killings. The mass killing resulted in the death of thousands of Tutsis. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at the Stadium has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 7 (genocide) is equally attracted and applicable to this Count 9 (extermination).

The massacres at the Church in Mubuga

Count 14

46. Count 14 charges Kayishema with crimes against humanity in violation of Article 3(a) (murder) of the Tribunal Statute. All the killings on 15 and 16 April 1994 at the Mubuga Church were murders, that is, premeditated and intentional killings. Further, Kayishema caused the death of Tutsis at the Mubuga Church massacre by premeditated acts or omissions, intending to do so. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at Mubuga Church has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 13 (genocide) is equally attracted and applicable to this Count 14 (murder).

Count 15

47. Count 15 charges Kayishema with crimes against humanity in violation of Article 3(b) (extermination) of the Tribunal Statute. On 15 and 16 April 1994 at Mubuga Church there was extermination, that is a mass killing event. Further Kayishema participated in the extermination,

having intended the killings to take place. The mass killing resulted in the death of thousands of Tutsis. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at Mubuga Church has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 13 (genocide) is equally attracted and applicable to this Count 15 (extermination).

The massacres in the Area of Bisesero - Kayishema

Count 20

48. Count 20 charges Kayishema with crimes against humanity in violation of Article 3(a) (murder) of the Tribunal Statute. The killings that took place in Bisesero area during April, May and June 1994 that involved Kayishema were murders, that is, premeditated and intentional killings. Kayishema caused the death of Tutsis at numerous places in the Bisesero area including, Karonge Hill at the end of April, Bisesero Hill on 11 May, Muyira Hill on 13 and 14 May, the Cave, Gitwa Cellule in May and Kucyapa in June. Kayishema caused these deaths by premeditated acts or omissions, intending to do so. The criminal responsibility of Kayishema under Articles 6(1) and 6 (3) for the massacres at Bisesero area has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 19 (genocide) is equally attracted and applicable to this Count 20 (murder).

Count 21

49. Count 21 charges Kayishema with crimes against humanity in violation of Article 3(b) (extermination) of the Tribunal Statute. The killings in the Bisesero area during April, May and June 1994 amounted to an extermination, that is a mass killing event. Further, Kayishema participated in the extermination, having intended the killings. The mass killing resulted in the death of thousands of Tutsis. The criminal responsibility of Kayishema under Articles 6(1) and 6(3) for the massacres at Bisesero area has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Kayishema's criminal responsibility under Count 19 (genocide) is equally attracted and applicable to this Count 21 (extermination).

The massacres in the area of Bisesero - Ruzindana

Count 20

50. Count 20 charges Ruzindana with crimes against humanity in violation of Article 3(a) (murder) of the Tribunal Statute. The killings that took place in Bisesero area during April, May and June 1994 that involved Ruzindana were murders, that is, premeditated and intentional killings. Further, Ruzindana caused the death of Tutsis at numerous places in the Bisesero area including, the Mine on 15 April, Gitwa Cellule in early May, Bisesero Hill on 11 May, Muyira Hill on 13 and 14 May, the Cave, Kucyapa in June, the Hole near Muyira in early June. Ruzindana caused these deaths by premeditated acts or omissions, intending to do so. The criminal responsibility of Ruzindana under Articles 6(1) and 6(3) for the massacres at Bisesero area has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Ruzindana's criminal responsibility under Count 19 (genocide) is equally attracted and applicable to this Count 20 (murder).

Count 21

51. Count 21 charges Ruzindana with crimes against humanity in violation of Article 3(b) (extermination) of the Tribunal Statute. The killings in the Bisesero area during April, May and June 1994 amounted to an extermination, that is a mass killing event. Further, Ruzindana participated in the extermination, having intended the killings. The mass killing resulted in the death of thousands

of Tutsis. The criminal responsibility of Ruzindana under Articles 6(1) and 6(3) for the massacres at Bisesero area has been established by the evidence, beyond all reasonable doubt, and accepted by this Chamber. Ruzindana's criminal responsibility under Count 19 (genocide) is equally attracted and applicable to this Count 21 (extermination).

Conclusion

52. The relevant jurisprudence of the International Tribunals is well founded and applicable to this case. The approach employed therein properly avoids entering into the legal quagmire of overlapping acts, elements and social interests at the stage of conviction. Rather, it concentrates upon the criminal conduct at the stage of sentencing. In doing so, it ensures that the accused's culpable conduct is reflected in its totality and avoids prejudice through concurrent sentencing.

53. In the case at Bench, the Trial Chamber finds that the same culpable conduct of the accused persons offends the crimes of genocide, murder and of extermination, within each crime site, on the facts and evidence of the case. In my opinion therefore, both accused persons should be found Guilty under each count of genocide, murder, and of extermination preferred against them, notwithstanding the finding that the crimes, *as proved*, suffer from *concur d'infractions.*

Dissenting Verdict

Genocide

54. Accordingly, I completely **agree** with and share in the verdict that Clement Kayishema is **Guilty** under Counts 1, 7, 13 and 19 for genocide. And, that Obed Ruzindana is **Guilty** under Count 19 for genocide.

Crimes against humanity/other inhumane acts

55. Further, I completely **agree** with and share in the verdict that Clement Kayishema is **Not Guilty** under Counts 4, 10, 16 and 22 for crimes against humanity/other inhumane acts. And, that Obed Ruzindana is **Not Guilty** under Count 22 for crimes against humanity/other inhumane acts.

Violations of article 3 common to the Geneva Conventions and Additional Protocol II

56. Further, I completely **agree** with and share in the verdict that Clement Kayishema is **Not Guilty** under Counts 5, 6, 11, 12, 17, 18, 23, and 24 for violations of article 3 common to the Geneva Conventions and Additional Protocol II. And, that Obed Ruzindana is **Not Guilty** under Counts 23 and 24 violations of article 3 common to the Geneva Conventions and Additional Protocol II.

*Crimes against humanity/murder and crimes against humanity/extermination - **Kayishema***

57. In light of the foregoing, **in addition** to the unanimous Guilty verdicts rendered by this Chamber for genocide, I would pronounce Clement Kayishema **Guilty** under Counts 2, 8, 14, and 20 for crimes against humanity/murder and **Guilty** under Counts 3, 9, 15 and 21 for crimes against humanity/extermination. In order to ensure that Kayishema would not suffer prejudice due to the concurrence of his culpable conduct, I would order that the sentences imposed in relation to the said counts of murder and extermination be equal to, and served concurrently with, the sentences imposed for the counts of genocide, under each of the four crime sites, respectively. I would not impose consecutive penalties.

*Crimes against humanity/murder and crimes against humanity/extermination - **Ruzindana***

58. In light of the foregoing, **in addition** to the unanimous Guilty verdict rendered by this

Chamber for genocide, I would pronounce Obed Ruzindana **Guilty** under Count 20 for crimes against humanity/murder and **Guilty** under Count 21 for crimes against humanity/extermination. In order to ensure that Ruzindana would not suffer prejudice due to the concurrence of his culpable conduct, I would order that the sentences imposed in relation to the said counts of murder and extermination be equal to, and served concurrently with, the sentence imposed for the count of genocide, for his conduct within the Bisesero area. I would not impose consecutive penalties.

59. For all the above reasons, I respectfully submit this Separate and Dissenting Opinion.

Done in English and French,

the English text being authoritative.

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Judge Tafazzal Hossain Khan

Dated this twenty first day of May 1999

Arusha, Tanzania

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[1] Kayishema and Ruzindana Judgment at Part VII

[2] Defence Closing Brief (Ruzindana), p. 6, 29 Oct. 1998.

[3] *Ibid.*

[4] Prosecutor's Sentencing Brief at para 102.

[5] Prosecutor v. Dusko Tadic, Defence Motion on the Form of the Indictment, (4 September 1995), IT-94-I-T.

[6] Prosecutor v. Dusko Tadic, Decision on the Defence Motion on the Form of the Indictment (14 November 1995) IT-94-I-T at p 6.

[7] Prosecutor v. Dusko Tadic Sentencing Judgment at para 76.

[8] Prosecutor v. Zejnil Delalic, *et al.*, Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment), IT-96-21-AR, Appeal Decision, at para IV.

[9] Celebici Judgment, IT-96-21-T, at para 1286.

[10] Prosecutor v. Nahimana Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, 24 November 1997, at para 37.

[11] Prosecutor v. Ntagerura Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment of 28 November 1997, at para 26.

[12] Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T (2 September 1998) at paras 464, 465.

[13] Prosecutor v. Milorad Krnojelac, Decision on the Defence Preliminary Motion on the Form of the Indictment, at para 10.

[14] Kayishema and Ruzindana Judgment at Part VII

[15] For example, in the present case, if the evidence to prove that the attacks were based on political grounds (one of the alleged discriminatory grounds for the crimes against humanity charges) had been accepted by the Chamber, then the crimes of extermination and murder would contain a different element from genocide. In this example, the elements of the charges would not completely overlap.

[16] Kayishema and Ruzindana Judgment at Part VII

[17] Prosecutor v. Milorad Krnojelac, *ibid.*

[18] Preliminary Motions, filed by Ruzindana, (8 February 1997).

[19] Kayishema and Ruzindana Judgment at Part VII

[20] Kayishema and Ruzindana Judgment Parts VI Chapter 3 and Part VII