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International Criminal Tribunal for Rwanda

Tribunal Pénal International pour le Rwanda

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Before Judges: Yakov Ostrovsky, Presiding
Lloyd G. Williams, QC
Pavel Dolenc

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THE PROSECUTOR

v.

LAURENT SEMANZA

Case No. ICTR-97-20-T

Separate Opinion of Judge Yakov Ostrovsky Concerning Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II

Counsel for the Prosecution:

Chile Eboe-Osuji

Counsel for the Defence:

Charles Acheleke Taku
Sadikou Ayo Alao

1. I fully agree with and share in the Judgement with the exception of the Majority's view that Article 4(a) of the Tribunal's Statute was violated. This article coincides with Article 4(2)(a) of Additional Protocol II which reproduces without substantial changes Article 3 common to the Geneva Conventions ("Common Article 3").

2. Thus, from the point of view of the Majority, there was a serious violation of Common Article 3 and Additional Protocol II. These two international instruments enumerate the violations of the laws or customs of war, which were determined to be war crimes in Article 6 of the Nuremberg Charter.

3. In my opinion, the Majority position on this issue is not grounded in law and is, furthermore, not supported by the Chamber's factual findings.

A. Background

4. Counts 7, 9, and 13 charge the Accused with serious violations of Common Article 3 and Additional Protocol II under Article 4 of the Statute of the Tribunal.

5. In light of the Chamber's factual and legal findings, I agree to assess Counts 7, 9, and 13 in the context of the events occurring at Musha church (paragraph 3.11), Mwulire Hill (paragraph 3.12), and Mabare mosque (paragraph 3.13) ["three sites"]. I also agree to assess the alleged violations committed against Rusanganwa (paragraph 3.18) and Victims A and B (paragraph 3.17).

6. The Chamber established that the victims at the three sites and the other above-mentioned crimes were Tutsi refugees, who were not taking part in the non-international armed conflict, which existed on the territory of Rwanda during the relevant period covered by the Indictment.

7. The Chamber also established that these Tutsi refugees were victims of the policy of genocide that was unleashed in the country after the death of the President on 6 April 1994.

8. The fundamental question that must be answered is whether these civilians became the victims, not only of genocide and of certain crimes against humanity, but also of the armed conflict.

9. Pursuant to Common Article 3, each party to a conflict is bound to apply certain provisions for the protection of war victims. In accordance with Article 1 of Additional Protocol II, the parties in the armed conflict on the territory of Rwanda, during the relevant period covered by the Indictment, were the Rwandan governmental armed forces, the FAR, and the dissident armed forces, the RPF. Violation by one of the parties of the laws or customs of war inevitably means a breach of Common Article 3 and Additional Protocol II, which comprise these laws and customs.

B. Protection of the Civilian Population

10. The preamble of Additional Protocol II emphasises the need to ensure a better protection for the victims of internal armed conflict. In practice, it means that the parties in the conflict should conduct military operations so as not to affect the civilian population. Therefore, Common Article 3 and Additional Protocol II intend to protect the victims of an internal conflict, and not simply to protect all individuals from crimes unrelated to the conflict. This principle is confirmed by Additional Protocol II, which states that "[t]he civilian population and individual civilians shall enjoy general protection *against the dangers arising from military operations*."[1]

11. Therefore, the purpose of Additional Protocol II is to ensure better protection for victims of internal armed conflict. The protection of the civilian population against its own authorities is a different matter which is not covered by Common Article 3 and Additional Protocol II. This protection does fall within the scope of numerous related international human rights instruments.

12. During wartime different crimes may be committed, but not all of them relate to international humanitarian law. The Trial Chamber in *Aleksovski* noted: "not all unlawful acts occurring during an armed conflict are subject to international humanitarian law. Only those acts sufficiently connected with the waging of hostilities are subject to the application of this law."[2]

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[1] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13 (emphasis added).
[2] *Aleksovski,* Judgement, TC, para. 45.

13. In this respect, it is important to recall a statement of the International Committee of the Red Cross, that in wartime international humanitarian law coexists with human rights law, and a state at war cannot use the armed conflict as a pretext for ignoring the provisions of human rights law.[3]

C. Nexus as a Main Requirement

14. In view of the foregoing, the jurisprudence of the ICTR and ICTY use the term "nexus" as a main requirement in order to determine whether crimes committed during an armed conflict constitute war crimes. It has been the position of this Tribunal and the ICTY that the nexus requirement is met if the alleged offence is "closely related to the hostilities", or is "committed in conjunction with armed conflict", or is "a part of it." The wording could be different, but the main criterion is to establish that the offence is committed as a result of a violation of the laws or customs of war during an internal armed conflict. This is the real meaning of the term "nexus".

15. As the Judgment in *Kayishema and Ruzindana* makes clear:

> the term "nexus" should not be understood as something vague and indefinite. A direct connection between the alleged crimes, referred to in the Indictment, and the armed conflict should be factually established. No test therefore can be defined *in abstracto.*[4]

16. For example, in *Rutaganda*, it was not sufficient for the Prosecutor to simply allege in a general manner that the *Interahamwe* orchestrated massacres as part of their support for the Rwandan Armed Forces and that, *ipso facto*, the acts of the Accused, who held a leadership position in that organization, also formed part of this support.[5] Indeed, even though the Chamber accepted that there was a link between the genocide and the armed conflict, the Chamber still demanded proof beyond a

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[3] *Report by ICRC, Meeting of Experts, Geneva 27-29 October 1998*, p. 2.
[4] *Kayishema and Ruzindana*, Judgement, TC, para. 188.
[5] *Rutaganda*, Judgement, TC, paras. 442-444.

reasonable doubt that the Accused's specific acts were committed in conjunction with the armed conflict.[6]

17. The Trial Chamber, in *Akayesu*, did not find that the accused's acts were committed in conjunction with the armed conflict even though he provided "limited assistance" to the military on their arrival in Taba commune by allowing them to use his office, setting up radio communications, and providing reconnaissance.[7]

18. These examples in the Tribunal's jurisprudence clearly demonstrate that even in the cases when an accused had a minor connection to the military or one of the warring parties, a nexus is not established automatically.

19. In the Judgment, the Majority enumerates the Accused's criminal acts. Such an approach is not justified without showing the nexus between each criminal act and the armed conflict. The Trial Chamber in *Tadic* stated that: "For an offence to be a violation of international humanitarian law, [the] Trial Chamber needs to be satisfied that *each* of the alleged acts was in fact closely related to the hostilities."[8]

20. The same idea is reflected by the Appeals Chamber in *Akayesu*, when it was recognized that the main requirement is the existence of a "close nexus" between a violation and the armed conflict.[9]

21. Therefore, at the threshold, it must first be established whether the genocidal massacres at the three sites and the alleged crimes committed against Rusanganwa and Victims A and B constitute war crimes or, in other words, whether there is a nexus between these crimes and the armed conflict.

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[6] *Rutaganda*, Judgement, TC, paras. 442-444; *see also Musema*, Judgement, TC, para 974; *Kayishema and Ruzindana*, Judgement, TC, para. 619.
[7] *Akayesu*, Judgement, TC, paras. 641-643. While the Appeals Chamber in *Akayesu* disagreed with the Trial Chamber's holding that an accused must have link with one of the warring parties, it did not however overturn the Trial Chamber's finding that the Prosecutor did not prove beyond a reasonable doubt that the Accused's acts were committed in conjunction with the armed conflict.
[8] *Tadic* Judgement, TC, para. 573.
[9] *Akayesu*, Judgement, AC, para. 444.

D. Nature of the Internal Armed Conflict

22. In determining whether the requisite nexus exists, the Majority agrees in paragraph 518 with the following observation of the Appeals Chamber in *Kunarac*:

> [T]he existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit [the offence], his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established . . . that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.[10]

23. I also agree with this observation of the Appeals Chamber. However, in my view, there is nothing in this observation which relates to our case and supports a finding that a nexus exists between the crimes under our consideration and the armed conflict.

24. Furthermore, both sentences of the Appeals Chamber are not quoted in their entirety. As to the first sentence, its full text is the following:

> The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.[11]

25. Thus, the Appeals Chamber underlines the impact of the armed conflict on the perpetrators of crimes. In *Kunarac*, the crime was committed in specific circumstances when "the three accused, in their capacity as soldiers, took an active part in carrying out military tasks during the conflict, fighting on behalf of one of the parties to the armed conflict, namely the Serb side and that they therefore knew that an armed conflict was taking place."[12]

26. Consequently, the armed conflict was not causal to the commission of this crime, but played a substantial part in these soldiers' ability to commit a crime, in their decision to do it, in the manner in which it was committed, or the purpose for which it was committed.

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[10] *Kunarac*, Judgement, AC, para. 58.
[11] *Kunarac*, Judgement, AC, para. 58.
[12] *Kunarac*, Judgement, TC, para. 569.

27. As to the second sentence of the Appeals Chamber, a very important part of this sentence is omitted, namely that this statement is related to the specific crimes in *Kunarac*. In that case, the existence of a nexus was not questioned because during this armed conflict, "Muslim civilians were killed, raped, or otherwise abused *as a direct result* of the armed conflict, and because the armed conflict apparently offered blanket impunity to the perpetrators."[13]

28. Therefore, according to the Majority, because the Appeals Chamber acknowledged the existence of the nexus in *Kunarac*, the requisite nexus also exists in our case despite the fact that our Accused was not a combatant like the three Serb soldiers, and the circumstances in which he committed the crimes are completely different.

29. The existence of a nexus should not be proved in such a way. It is obvious that the statement of the Appeals Chamber with regard to a particular case must not be automatically applied to another case without any analysis showing that there is a ground for such an application.

30. Hence, it is clear that in *Kunarac* the crimes were committed by three soldiers in conjunction with the armed conflict and that the victims were Muslim civilians. In *Krnojelac*, the Trial Chamber took notice of the widespread and systematic attacks by the Serb forces against non-Serb civilian population.[14] Moreover, in *Tadic*, the Trial Chamber used even more clear language, considering the nature of such armed conflicts as an ethnic war.[15]

31. The character of the armed conflict in Rwanda was different. Having started the war in 1990, the RPF did not target any ethnicity. It was a war for power in the country. There is no evidence that there was a genocide in 1990, 1991, 1992, and 1993. The policy of genocide was unleashed only after 6 April 1994, and not by the RPF, and not against the RPF and its members.

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[13] *Kunarac*, Judgement, TC, para. 568. (emphasis added).
[14] *Krnojelac*, Judgement, TC, para. 61.
[15] *Tadic,* Judgement, TC, para. 574.

32. The evidence shows that this policy of genocide was unleashed by the Rwandan authorities against their own civilian population of a particular ethnicity. This crime was parallel to the armed conflict, but never intersected with it. This is why such a criminal policy is beyond the scope of Common Article 3 and Additional Protocol II, which aim to protect the victims of the armed conflict.[16] As the Trial Chamber in *Akayesu* stated: "it should be stressed that although the genocide against the Tutsi occurred concomitantly with the . . . conflict, it was, evidently, fundamentally different from the conflict."[17]

E. Policy of Genocide

33. As a result of this policy of genocide, the Tutsi civilians were attacked everywhere, including their traditional refuges where they sought sanctuary.

34. In accordance with the evidence, the main driving force of these attacks were young members of the MRND, the so-called "*Interahamwe*". The overwhelming majority of the attackers were Hutu civilians armed with traditional weapons. Very often, all the assailants were called *Interahamwe.*

35. In addition, as the human rights organization African Rights explains: "the *Interahamwe* were sent to rural areas not just to kill, but to force the local people to kill."[18] By one estimate, nearly half of the Hutu population of Rwanda participated in the genocide.[19]

36. This genocidal campaign was supported in different forms and to a different extent by governmental and local officials. In certain cases, these officials also involved gendarmes and soldiers in this genocidal campaign, which was approved by the mass media, some ministers, prefets, bourgmestres, and other influential persons.

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[16] *Kayishema and Ruzindana*, Judgement, TC, para. 621.
[17] *Akayesu*, Judgement, TC, para. 128.
[18] AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR, AND DEFIANCE p. xx (rev. ed. 1995).
[19] Elizabeth Neuffer, *Amid Tribal Struggles, Crimes Go Unpunished*, THE BOSTON GLOBE, 8 December 1996, p. A20.

F. Massacres at the Three Sites

37. It is in light of the foregoing facts that the Chamber must consider what happened at the three sites where Tutsi civilians were attacked. Neither the RPF, the FAR, nor the military operations between them, had any link with the massacres at these sites. It is clear from the evidence that these massacres occurred as a result of the crime of genocide. *Interahamwe*, who attacked Tutsi civilians at all three sites, in certain cases were supported by the guns and grenades of some soldiers, who were not with the army in the field fighting against the RPF. According to the evidence, many of these soldiers "had fled from the battlefield".[20] The participation of these soldiers in the anti-Tutsi genocidal campaign, which appeared to be almost official in the country, does not, however, create a nexus between these crimes and the armed conflict because these soldiers were closely related, not to the armed conflict, but to the genocidal campaign and were part of it.

G. Departure from the Requisite Nexus

38. Instead of proving the existence of a nexus between the Accused's crimes committed at the three sites and the armed conflict, the Prosecutor as well as the Majority oversimplify the matter. They interpret the war and its influence on the criminal situation in the country as the requisite nexus. Thus, they depart from the definition and understanding of this notion in the ICTR and ICTY jurisprudence.

39. In order to prove the existence of a nexus, the Majority states the following: the ongoing armed conflict between the Rwandan government forces and the RPF both created the situation and provided a pretext for the extensive killings and other abuses of Tutsi civilians (paragraph 518); the killing began in Gikoro and Bicumbi shortly after the death of President Habyarimana when the active hostilities resumed between the RPF and government forces (paragraph 518); the armed conflict was exploited for the killing and mistreatment of Tutsi in Bicumbi and Gikoro (paragraph 519); the armed conflict also substantially motivated the attacks perpetrated against the Tutsi civilians in Bicumbi and Gikoro (paragraph 521); as the RPF army advanced toward

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[20] Testimony of Witness VN, T. 9 November 2000 p. 101.

Bicumbi and Gikoro, the killings of Tutsi civilians in these two communes intensified (paragraph 521).

40. Such statements oversimplify the matter. They only illustrate a motive for the commission of crimes and the environment in which these crimes were committed, but this has no impact on the proof necessary to show a violation of the laws or customs of war.

41. Indeed, I agree that there is a tangential relationship between the armed conflict and the crimes under consideration. It could be recognized that the armed conflict was used as a pretext to unleash and intensify the policy of genocide. It could also be said that this crime was committed under the cover and under the guise of the war that created favorable conditions for the implementation of the crime of genocide and encouraged the perpetrators of this crime.

42. However, these circumstances did not create a legal ground for the conclusion of the existence of a nexus between the massacres at the three sites and the armed conflict.

43. The clearest example of this oversimplification is when the Prosecutor states that any offence is a war crime as long as it was committed under the guise or under cover of the armed conflict.[21]

44. Such a superficial approach leads to a situation where it would not be necessary to consider each case on its merits because every crime automatically could be qualified as a war crime.

45. The third oversimplification is when the Prosecutor without any explanation states that the alleged offences constitute war crimes because, as indicated in Counts 7, 9, and 13, they occurred "in the course of a non-international armed conflict."

46. This language fails to properly allege nexus, which is an essential element necessary to establish a violation of Article 4 of the Statue. Apparently, according to this position, a crime merely needs to occur during an armed conflict to constitute a

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[21] T. 17 June 2002 p. 87.

war crime. As such, the Prosecutor has no need to introduce any evidence that these crimes were related to the armed conflict beyond the fact that they occurred during it.

47. Nonetheless, the Majority overlooks this deficiency in the Indictment by stating that: "[t]he Chamber understands this phrase as meaning that the alleged crimes had a nexus to the armed conflict" (paragraph 516). The Majority's observation and the Prosecutor's approach reveal that they are not accurately applying the requisite legal standard.

48. The fourth oversimplification of the matter is when the Prosecutor argues that the crimes of genocide and crimes against humanity as "'extremely serious crimes' ought to be sufficient to engage the application of the war crimes instruments in question, since these instruments forbid in the most extreme cases 'violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment' of victims of armed conflict."[22]

49. The Prosecutor on the one hand recognizes in her closing argument that the "law requires a connection or nexus between violation and conflict."[23] On the other hand, the Prosecutor contradicts it in her Closing Brief believing that the nexus is not necessary and Common Article 3 and Additional Protocol II must be applicable because we are dealing with extremely serious crimes.

50. In this respect, it will be proper to recall the position of the Chamber, which recognized in paragraph 368, that the purpose of Common Article 3 and Additional Protocol II is the protection of people as victims of internal armed conflict, "not the protection of people against crimes unrelated to the conflict *however reprehensible such crimes may be.*" (emphasis added).

H. Applicability of Common Article 3 and Additional Protocol II

51. There is a complete confusion in the position of the Prosecutor and the Majority with regard to the applicability of Common Article 3 and Additional Protocol II. In

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[22] Prosecution Closing Brief para. 103.

Counts 7, 9, and 13, the Prosecutor refers to certain provisions of these international instruments which provide criminal responsibility for crimes such as murder, cruel treatment, rape, and torture. I agree that at least some of these crimes were committed during the massacres of Tutsi civilians, as discussed in the Chamber's legal findings concerning genocide and crimes against humanity.

52. However, the Prosecutor and the Majority disregard that the provisions of these international instruments are applicable only where the crimes are committed as a result of the violations of the laws or customs of war, thus constituting a violation of the provisions of Common Article 3 and Additional Protocol II.

53. In paragraph 3.17 of the Indictment, the Prosecutor states that the Accused told a small group of men in Gikoro commune that before killing Tutsi women they must rape them. As a result, the inhabitants of Gikoro raped Victim A and killed Victim B. The Judgement's discussion on this matter explains everything about the rape and murder as well as the role of the Accused with regard to these particular crimes. What cannot be found, however, in this discussion is any attempt to show the existence of a nexus between these crimes and the armed conflict.

54. On the contrary, there is an acknowledgment that the rape of these Tutsi women by the three perpetrators is part of their broader work of killing Tutsi (paragraph 547). This admission shows that these Tutsi women have been tortured, raped, and murdered as a result of a widespread genocidal attack and that there is no nexus to the armed conflict.

55. A similar situation occurs with respect to Rusanganwa. During the massacre at Musha church, the Accused asked him when the RPF was going to arrive. He replied: "I am not God. I know neither the day nor the time." (paragraph 170). Every refugee could have been asked about it, and likely would have given the same answer. There is no evidence that Rusanganwa knew or could have known anything about the arrival of the RPF. There is also no evidence that he had any ties with the RPF allowing him to possess this kind of information. However, there is evidence that during the massacre the Accused and Bourgmestre Bisengimana killed Rusanganwa after

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[23] T. 17 June 2002 p. 65.

inflicting severe injuries on him as a prominent Tutsi. In my opinion, this crime happened because of a genocidal intention, and not because Rusanganwa knew something about the RPF or some other subject. In this Judgement, there is also no attempt to show that there is a nexus between this particular crime and the armed conflict.

56. The Prosecutor, however, attempts to fill in this lacuna with respect to Rusanganwa and Victims A and B by stating in paragraphs 3.17 and 3.18 of the Indictment that the Accused intended the acts described in these two paragraphs to be part of a non-international armed conflict against the RPF. However, there is no evidence to confirm that this was the Accused's belief. Furthermore, it is necessary to have factual confirmation of the existence of the requisite nexus. The beliefs of the Accused or somebody else cannot be taken as proof of this requirement.

57. Therefore, in accordance with the evidence, these crimes were committed as a result of genocide. There is no evidence that these crimes were committed because of a violation of the laws or customs of war.

58. In such circumstances, Common Article 3 and Additional Protocol II are not applicable, and this is an error of law when the Prosecutor and the Majority apply the provisions of these international instruments to offences which are not war crimes.

59. This indisputable principle of law is disregarded in the Indictment when in paragraph 3.4.2, the Prosecutor asserts that Common Article 3 and Additional Protocol II protect civilians without recognising that civilians are protected by these international instruments only against war crimes, and not against all crimes that could be committed during war. Unfortunately, the Majority agrees with the Prosecutor's erroneous position by applying the provisions of Common Article 3 and Additional Protocol II to crimes that have no nexus to the armed conflict.

I. Defects in the Majority Position

60. There are some additional defects in the Majority's position that deserve to be addressed.

61. The Majority's reference to the Accused's participation in military operations conducted against civilian refugees (paragraph 522) is not correct. The genocidal attacks against Tutsi civilians cannot be qualified as a military operation. It is obvious that the Accused did not participate in any military operations between the RPF and the FAR. In any case, there is no such evidence.

62. The Majority states that civilians were displaced by the armed conflict and because of fears of the increasing violence in their localities (paragraph 518). This general assertion does not properly reflect the real situation. The Tutsi civilians, who became victims, were not displaced by the armed conflict. They were displaced because genocidal killers were seeking them.

63. The Majority also states that Rwandan government soldiers played an active role in the attacks against the concentrated refugee populations at Musha church, Mabare mosque, and Mwulire Hill (paragraph 518). Such an assertion is not supported by the Chamber's factual findings.

64. According to the Chamber's factual findings, soldiers were not among the assailants at Mabare mosque. The attacks against Tutsi civilians at Mwulire Hill started on 8 April 1994. The evidence shows that Tutsi refugees were attacked daily until 18 April 1994. During these ten days, the Tutsis were attacked without the participation of the soldiers. Only on 18 April 1994, when there were about 10,000 refugees, the Accused pursuant to the evidence brought *Interahamwe*, soldiers, and their equipment in a red Toyota pickup truck to participate in final attack. From the evidence, the role of the soldiers appears to be overstated.

65. As to the massacre at Musha church, the role of the soldiers is also exaggerated. As it was indicated above, many people joined the anti-Tutsi genocidal campaign, which appeared to be based on official policy, and some soldiers who were not with army in the field fighting against the RPF also were involved. However, this is not a reason to overemphasise their role.

66. The attempt of the Majority to show the existence of a nexus by using exaggerated military references is not appropriate. Such terms as "military authorities", "military officials", "high ranking military", and "military operations," are not based as a rule

on the factual findings and cannot substitute for the necessary analysis required to prove the existence of a nexus between the war and the Accused's specific crimes.

67. In paragraph 522, the Majority refers to the attempt of the Accused "to elicit information concerning the advance of the enemy." Such a general assertion is not supported by the Chamber's factual finding. There is only one fact in the evidence: during the massacre at Musha church, the Accused asked Rusanganwa, a Tutsi teacher, when the RPF was going to arrive. Rusanganwa replied, "I am not God. I know neither the day nor the time." (paragraph 170). After that he was killed by the Accused and Bisengimana who showed by this act to all Tutsi inhabitants of Gikoro what could happen to those who were waiting for the arrival of the RPF. The Majority's interpretation of this fact goes too far because there is no evidence that Rusanganwa possessed any military information. In my view, he was tortured and killed simply as an eminent Tutsi.

68. In paragraph 522, at the end of the section discussing the nexus element, the Majority makes the following conclusion: "the Chamber therefore has no doubt that a nexus existed between the Accused's alleged offences and the armed conflict in Rwanda."

69. This conclusion is based on:

(a) Exaggerated military references which, as previously explained, are not appropriate and, in any case, do not prove the existence of nexus;

(b) Declarations of a general character which are not substantiated by proof and, moreover, are not supported by the Chamber's factual findings and arguments;

(c) The observation of the Appeals Chamber in *Kunarac* mentioned in paragraph 517 which, as previously explained, was interpreted by the Majority erroneously; and

(d) The phrases describing the influence of the armed conflict on the situation in the country which, as previously explained, do not satisfy the elements necessary to constitute war crimes, but may only illustrate a motive for the commission of genocidal crimes and the environment in which these crimes were committed.

70. When the Majority later considers the specific violations of Common Article 3 and Additional Protocol II, the abundant artificial military phraseology disappears, but a new problem arises.

71. The Majority enumerates the criminal acts committed by the Accused at the three sites as well as against Rusanganwa and Victims A and B.

72. These criminal acts were already enumerated in previous chapters of the Judgement. The difference is that in the previous chapters, the Chamber established why certain of these acts constitute crimes against humanity and complicity in genocide.

73. When considering Common Article 3 and Additional Protocol II, the Majority does not seek to explain why these criminal acts also violate the provisions of these international instruments. The simple enumeration of these criminal acts without establishing a requisite nexus does not prove anything, even when these acts are enumerated many times.

74. In paragraph 535, the Majority makes the following conclusion: "The Chamber finds beyond a reasonable doubt that the Accused aided and abetted in the intentional murders committed at Musha church and Mwulire Hill." I agree with this conclusion, which was already made in the genocide and crimes against humanity legal findings. However, it is not shown why these criminal acts constituted also violations of Article 4(a) of the Statute, and, in my view, there is not even an attempt to prove that there is a nexus between these crimes and the armed conflict.

75. A similar situation exists in paragraph 551, where the Chamber finds beyond a reasonable doubt that the Accused instigated the rape and the torture of Victim A and the murder of Victim B and that the Accused committed torture and intentional murder against Rusanganwa. I agree that these crimes were committed, but again it is never shown why these crimes against humanity also constitute violations of Article 4(a) of the Statute dealing with war crimes. In particular, there is not even an attempt to prove that there is a nexus between these crimes and the armed conflict.

76. In such circumstances, when the nexus is not established between the criminal acts committed by the Accused and the armed conflict, there is no ground for the

applicability to these criminal acts of Article 4(a) of the Statute, which covers Common Article 3 and Article 4(2)(a) of Additional Protocol II.

77. The problem is that the Majority's position is not grounded in law and is not based on the facts and an analysis of the specific circumstances in which the Accused's criminal acts were committed. In this respect, the Appeals Chamber in *Kunarac* pointed out the following:

> In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as a part of or in the context of the perpetrator's official duties.[24]

78. The Majority did not address these and many other factors, which are of extreme importance in order to determine whether there was a nexus between the Accused's criminal acts and the armed conflict. The Majority's general and superficial approach towards this matter does not result in a conclusion that is grounded in law and in the factual findings.

J. Conclusion

79. Considering the above, and based on all the evidence presented in this case, I came to the conclusion that it was not proved beyond a reasonable doubt that the criminal acts of the Accused were committed in direct conjunction with the armed conflict. These criminal acts had no direct connection with the military operations or with the victims of the armed conflict.

80. It was not proved that these criminal acts constitute, not only crimes against humanity and complicity in genocide, but also war crimes. Instead, the evidence clearly shows that Tutsi civilians became victims of these criminal acts as a result of a policy of genocide unleashed against them by the authorities of their own country.

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[24] *Kunarac*, Judgement, AC, para. 59.

81. Therefore, it cannot be concluded that the material provisions of Common Article 3, Additional Protocol II, and Article 4(a) of the Statute have been violated in this particular case.

82. Thus, the question of the Accused's criminal responsibility for violations of these international instruments does not arise. As such, the Accused, in my opinion, does not incur liability under Counts 7, 9, and 13.

83. For all the above reasons, I respectfully submit this separate opinion.

Done in English and French, the English text being authoritative.

Arusha, 15 May 2003.

Yakov Ostrovsky

Presiding Judge

(*Seal of the Tribunal*)