

## Commentary

### 1. Introduction

During those unforgettable weeks back in October and December 1994 when I was investigating massacre sites in various parts of Rwanda for the UN Security Council's Commission of Experts on Rwanda, I took some small comfort in the hope that justice might eventually come to Rwanda, even if the international community had failed completely to prevent the violations in the first place. The picture that was rapidly emerging in the weeks following Paul Kagame's takeover of Kigali and his Rwandan Patriotic Front's assertion of effective control over the country by the end of June 1994, was one of a meticulously planned and executed genocide. It had been carried out with an astonishing level of organization, political resolve and determination on the part of thousands to try to wipe out the Tutsi minority as well as all moderate Hutu elements in Rwanda. I dared imagine that individuals responsible for torturing and killing some of the people whose corpses lay strewn in the various sites we were investigating, eventually would be prosecuted fairly and effectively. Great Power politics swirling about the Security Council and the UN's first High Commissioner for Human Rights, Mr. José Ayala Lasso, made it far from certain in September 1994 that an international criminal tribunal for Rwanda would ever be brought into being. Yet basic human conscience, and the example of the Security Council's establishment of the International Criminal Tribunal for the former Yugoslavia in May 1993, demanded that similar action be taken for Rwanda.

Justice is not an easy result to attain, particularly in cases involving the most malignant of criminal intent and the most abhorrent of acts. The extreme cruelty and sheer magnitude displayed in the attempted elimination of every Tutsi child, woman and man in Rwanda perhaps become all the more frightening when we realize that the suspect in the dock seems to have led an educated and exemplary family life, exuding the banality of everyday existence. Is this what the crime of crimes is all about – monstrous crimes perpetrated not by monsters, but by ordinary people who behave like monsters? It took thousands of ordinary people to kill hundreds of thousands of ordinary people in Rwanda in 1994, and it has taken hundreds of millions of dollars and large numbers of personnel to prosecute less than a hundred.<sup>1</sup> This is why the prosecutor's responsibility to ensure airtight prosecution remains a heavy one. Each case requires careful legal analysis, unfailing attention to drafting the indictment (with due diligence to cure defects wherever necessary) as well as clear and compelling proof to convince the chamber's Judges beyond a reasonable doubt that the person before them indeed is guilty of the most heinous crimes known to humanity. Achieving justice is most difficult not least because the enormity of the crime cannot be allowed to overshadow the accused's presumption of innocence. Nor can the prosecution's burden to prove criminal guilt beyond a reasonable doubt ever be slipped off to saddle the accused to prove his innocence.

The alleged status and connection of the accused to President Habyarimana, the prosecution's apparent lack of diligence in adducing evidence and arguing its case, the Trial Chamber's consideration of the *alibi* evidence and its conviction of the accused for genocide and extermination relating to two events that were vigorously contested by the defence, and the Appeals Chamber's ultimate acquittal, make the Zigiranyirazo a rather strange case. The case demonstrates how not to prosecute a génocidaire suspect and how not to rule on it. Above all, it shows the critical role that criminal procedure should play in safeguarding the presumption of innocence and the right to fair trial.

### 2. Procedural Overview of the Case

The accused was charged with committing in April and May 1994 the crime against humanity of extermination, or in the alternative, murder, in an indictment confirmed on 20 July 2001 – seven years after

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<sup>1</sup> As of 24 February 2011, the ICTR website indicated that there were 52 completed cases (36 completed cases plus 8 pending appeal and 8 acquittals), 1 case awaiting trial, 21 cases in progress, 10 cases on appeal, 8 detainees acquitted, 2 detainees who died before trial, 2 cases transferred to national jurisdiction, 2 persons released on grounds of withdrawn indictment, and 10 accused at large. Thus, at the time of writing, it appeared that a total of 84 cases would likely reach completion and if all suspects at large were transferred to the ICTR and tried, the total number of individuals tried by the ICTR would reach 94. The ICTR website reports that: "For biennium 2010-2011, the General Assembly of the United Nations approved initial appropriations for ICTR of \$245,295,800 gross (\$227,246,500 net) and authorized 693 posts for 2010 and 628 posts for 2011. 77 nationalities are represented at the Tribunal (Arusha, Kigali, the Hague and New York)." See <http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last accessed on 24 February 2011).

the crimes had been allegedly committed. Six days later, he was arrested in Belgium and transferred to the ICTR's Detention Facility in Arusha, Tanzania. During his first appearance before Judge Navanethem Pillay on 10 October 2001, he pleaded not guilty to both charges. It was not until late February 2003 that Trial Chamber I ordered measures to protect prosecution witnesses and on 15 October 2003 that the prosecution was granted leave to amend its indictment based on newly available information. On 5 November 2003, the prosecution added the charges of conspiracy to commit genocide, acts of genocide or, in the alternative, complicity in genocide. On 17 December 2003, Trial Chamber III granted an extension of time to file preliminary motions and on 27 January 2004, the defence filed a motion which objected to the amended indictment. On 15 July 2004, Trial Chamber III ordered the prosecution to introduce greater specificity to the charges and to the modes of liability. It also ordered the prosecution to link more precisely factual allegations to the type of responsibility alleged, in particular, to distinguish properly individual from command responsibility, and either to support its pleading on command responsibility with sufficient factual precision, or to omit it entirely, as well as to clear up vague references to alleged facts and circumstances. In response, the prosecution filed a second amended indictment on 31 August 2004 which on 9 September 2004 met with the defence's objections, again as to form. The prosecution was granted leave to amend the indictment yet again on 2 March 2005 and to introduce a new allegation against the accused. Trial Chamber III ordered the prosecution to remove references to command responsibility, because the indictment as amended, still failed to contain sufficiently precise factual allegations to support this ground. Six days later, the prosecution returned with a third and final amended indictment which removed any references to command responsibility and instead charged the accused with individual criminal responsibility as part of a joint criminal enterprise. The accused pleaded not guilty to each of the five charges on 4 May 2005, and on 22 September 2005, Trial Chamber III denied defence motions objecting yet again to the form of the indictment. On 30 September 2005, the Trial Chamber denied the prosecutor's motion to further amend the indictment by introducing new facts and allegations on grounds that these did not relate to existing charges in the indictment.<sup>2</sup>

The trial itself before Trial Chamber III, presided over by Judge Ines Monica Weinberg de Roca, with Judges Khalida Rachid Khan and Lee Gacuga Muthoga, involved 88 trial days and the admission into evidence of the testimony of 92 witnesses, 25 of which were called by the prosecution including one expert witness, and 227 exhibits, 115 of which were tendered by the prosecution. The defence made its case over 40 trial days during which it called 41 witnesses including one expert witness and an investigator, and it tendered 112 exhibits.

On 20 July 2006, the prosecution concluded the presentation of its case and significantly, on 17 October 2006, the Trial Chamber "found that the Accused had no case to answer in respect of the allegations" contained in seven paragraphs of the indictment "since the prosecution had presented no evidence in connection with the allegations".<sup>3</sup> Interestingly, the Appeals Chamber ruled that the right of the accused to be present at his own trial was violated in respect of his appearing only by video-link during prosecution witness Michel Bagaragaza's testimony in The Hague. Bagaragaza said he was afraid to travel to Arusha but the accused was not permitted to enter The Netherlands, so the video-link was employed to allow the participation of the accused in a hearing that featured testimony against him. Thus, the Appeals Chamber considered that an accused's 'presence' by video-link was not sufficient to meet the requirements of Article 20, paragraph 4, sub d of the ICTR Statute which guarantees the right of the accused to be tried in his or her presence and to defend himself or herself in person. The testimony of this witness was accordingly struck from the record.<sup>4</sup> On 16 November 2006, the prosecution however secured the transfer of Bagaragaza from The Hague to Arusha where he repeated his testimony into the record in the prosecution's reopened case.

The Trial Chamber took judicial notice that during all material times Rwanda was a State Party to the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, the four Geneva Conventions of 12 August 1949 and to Additional Protocol II of 8 June 1977, and that: "Between 6 April 1994 and 17 July 1994, there was an armed conflict in Rwanda that was not of an international character. The conflict was a

<sup>2</sup> See ICTR, Judgement, *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T, T. Ch. III, 18 December 2008, in this volume, p. 137, Annex 1: Procedural History at par. 1-13.

<sup>3</sup> *Ibid.*, par. 24.

<sup>4</sup> *Ibid.*, par. 25.

genocide in which the Tutsi ethnic group, identified severally from the Hutu and Twa, were targeted for widespread and systematic attack, which caused serious bodily or mental harm and resulted in the death of a large number of Tutsi”.<sup>5</sup>

Responding to a prosecution motion, the chamber requested the authorization of the Tribunal’s President to undertake a visit to the site of the alleged crime. This visit took place from 12-16 November 2007. Prosecution and defence made their closing arguments on 28 and 29 May 2008.

Trial Chamber III handed down its judgement on 18 December 2008, sentencing the accused to serve (with credit for time served as of 26 July 2001) concurrently:

- 20 years of imprisonment for committing genocide and extermination as a crime against humanity for his participation in a joint criminal enterprise to kill Tutsis at Kesho Hill in Gisenyi Prefecture on 8 April 1994 where up to 1,500 Tutsis were killed; and
- 15 years for aiding and abetting genocide in relation to acts committed at a roadblock close to the accused’s residence in Kiyovu that involved the killing of some 10 to 20 persons.

Both sides launched appeals.

In a judgment of 16 November 2009, the Appeals Chamber, consisting of Judge Theodor Meron presiding, and Judges Mehmet Guney, Fausto Pocar, Liu Daqun and Carmel Agius, reversed all convictions, acquitting the accused of responsibility in relation to the Kesho Hill massacre and Kiyovu roadblock killings, and dismissing the other allegations as moot. By the time the Appeals Chamber set the accused free, he had already spent more than 8 years in ICTR detention in respect of crimes the prosecution alleged but could never prove he committed 15 years before and which he claimed he could not possibly have committed because he was not present at the time the crimes were committed.

### **3. General allegations**

Protais Zigiranyirazo’s younger sister, Agathe Kanziga, was married to Rwandan President Juvenal Habyarimana who lost his life, together with Cyprien Ntyamira and their entourages when the airplane they were in was shot out of the sky as it approached the landing strip at Kigali Airport on 6 April 1994. The Trial judgment notes that Zigiranyirazo, born on 2 February 1938 entered politics in 1969 as a Member of Parliament and was appointed prefect of Kibuye in 1973 and later, Governor of Ruhengeri from 1974 until 1989. He left Rwandan politics to study at the University of Quebec at Montreal. On 21 February 1993 – more than a year before the genocide began in Rwanda – the Canadian Broadcasting Corporation reported in a television news broadcast that Canadian authorities had charged Zigiranyirazo for making death threats against two Tutsi refugees in Montreal and that he was suspected of travelling back and forth between Canada and Rwanda to organize death squads to kill opponents of the Habyarimana regime.<sup>6</sup> Zigiranyirazo has also been suspected to have ordered the murder of Dian Fossey – perhaps the world’s leading gorilla conservationist – in Rwanda’s Volcanoes National Park on 26 December 1985, in order to protect the highly lucrative trade in gorillas and gold he allegedly controlled when he was Governor of Ruhengeri (1974-1989).<sup>7</sup> Zigiranyirazo was expelled from Canada in late 1993.

The prosecution alleged that Zigiranyirazo conspired with his sister Agathe, known in Rwanda as the head of the *akazu* (meaning ‘little house’ in Kinyaranda) and also as *Le Clan de Madame* – the most powerful Hutu extremist clique in Rwanda – to assassinate her own husband, President Habyarimana, to trigger the execution of a pre-meditated and systematic plan to commit genocide.<sup>8</sup> The Amended

<sup>5</sup> *Ibid.*, par. 27.

<sup>6</sup> See Alleged Rwandan death squad member living in Montreal, Canadian Broadcast Corporation Archives, broadcasted on 21 February 1993, and available at [http://archives.cbc.ca/war\\_conflict/peacekeeping/clips/11630/](http://archives.cbc.ca/war_conflict/peacekeeping/clips/11630/) last accessed on 23 February 2011.

<sup>7</sup> See N. Gordon, *Murders in the Mist: Who Killed Dian Fossey?*, Hodder & Stoughton Ltd, London 1993, and L. Melvern, *Conspiracy to Murder: the Rwanda Genocide and the International Community*, Verso, London 2004, p. 358.

<sup>8</sup> French police arrested Agathe Habyarimana on 2 March 2010 at her home near Paris on an international arrest warrant issued by Rwandan authorities for genocide, complicity to commit genocide, conspiracy to commit genocide, and related charges. She was then released on bail and was to be extradited to Rwanda which had no extradition treaty with France. See K. Thompson, *Rwandan leader’s widow bailed in genocide case*, France 24, 5 March 2010 at <http://www.france24.com/en/20100302-rwanda-president-habyarimana-widow-arrest-genocide-france>. Subsequently, her application for renewal of residence permit to stay in

Indictment<sup>9</sup> of 8 March 2005 contends that Zigiranyirazo was a prominent member of this tightly knit, powerful group under his brother-in-law President Habyarimana and that he exercised “*de facto* control and authority, in the sense of having the material ability to prevent or to punish criminal conduct, over the actions of soldiers, gendarmes, the Interahamwe, administrative officials, and members of the civilian population in Rwanda.”

The prosecution thus set out to prove a relatively high level of *de facto* authority and criminal responsibility commensurate with that influence. Zigiranyirazo was prosecuted not as a ‘small fry’ but as one of the ‘big fish’. The prosecution alleged that Zigiranyirazo held meetings with various Government, military and ‘family authorities’ in Gisenyi and Kigali-ville préfectures both prior to and following the assassination of his brother-in-law President Habyarimana. These meetings were held allegedly to plan, prepare and facilitate attacks with an intent to destroy, in whole or in part, the Tutsi ethnic group. In particular, in April 1994, roadblocks were set up close to each of Zigiranyirazo’s three homes. It was alleged that he supported the establishment and organization of the *Interahamwe* militia in connection with massacres of some 2,000 Tutsi individuals at Kesho and Rurunga Hills on 8 April 1994. The prosecution also alleged that Zigiranyirazo was responsible for murdering three gendarmes and one Stanislas Sinibagiwe.

The defence argued that Zigiranyirazo could not possibly have been involved in any of these events because he had been elsewhere at the time they transpired. The defence produced an *alibi*, backed up by witnesses, to raise a reasonable doubt about the accused’s guilt. The defence also countered that the evidence was insufficient to prove that Zigiranyirazo was involved with the *Interahamwe*, and it denied that he murdered three gendarmes and Stanislas Sinibagiwe. Furthermore, it urged the chamber to mistrust the prosecution’s evidence altogether which was uncovered only in 2001. The defence contended that in fact the accused was well-known to have had good relationships with Tutsi people and that he was instrumental in helping many Tutsis to survive the genocide.<sup>10</sup>

Following a discussion of serious defects in the indictment and the prosecution’s case, the Trial Chamber’s consideration of the *alibis* will be explored in more depth.

#### 4. Serious defects in the indictment and the prosecution’s case

The prosecution’s case suffered from several weaknesses which are highlighted next, namely that the prosecution: founded its case on unreliable witnesses; failed to present any evidence at all on a number of its key allegations; seemed to make up the case as it went along, adding vague and unsubstantiated allegations; introduced materially inconsistent testimony on key facts; failed to provide adequate notice to the defence; and at the last moment, alleged that the accused committed a crime that did not even come within the Tribunal’s jurisdiction.

##### 4.1 Unreliable prosecution witnesses and unreliable use of a reliable prosecution witness

The chamber noted straightaway<sup>11</sup> that a confidential defence motion to reopen the case in order to show the unreliability of the testimony of Michael Bagaragaza – a key prosecution witness – had become moot because the chamber itself had ‘strong reservations’ about his credibility and was unwilling to rely on his testimony – a major blow to the prosecution.

The prosecution tried to establish another argument key to the accused’s alleged involvement in the planning of the genocide, relying on a sole witness which the Trial Chamber found to be unreliable. The prosecution produced one Isaie Murashi Sagahutu to testify that the accused, together with the Chairman of the Mouvement républicain national pour la démocratie et le développement (MRND) – one of the main organizing forces behind the planning and execution of the genocide – and President Habyarimana, met at the President’s official residence near the end of 1992 and discussed the establishment of the *Interahamwe* which was one of the main militia that carried out the genocide in 1994. Sagahutu indicated that he was not

France was denied. On 2 November 2010, however, a court overruled this decision and requested the prefectural authorities to reconsider her application for permission to continue residing in France. At the time of writing, the issue was still pending.

<sup>9</sup> ICTR, Amended Indictment, *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-I, 8 March 2005.

<sup>10</sup> Judgement, *Prosecutor v. Zigiranyirazo*, T. Ch. III, *supra* note 2, par. 8 and 9.

<sup>11</sup> *Ibid.*, par. 11.

actually at the meeting itself and that he had heard of the meeting from his cousin Sam Mudenge who was killed during the genocide. However, the Trial Chamber noted that: “Sagahutu was inconsistent on whether he personally heard the accused tell his cousin Mudenge of the meeting, or whether Mudenge told him of the meeting”.<sup>12</sup> Moreover, Sagahutu never mentioned such a meeting in his testimony before the Tribunal in another case (Bagosora *et al.*). The Trial Chamber found that Sagahutu could not clear up these inconsistencies to its satisfaction and that it was “highly implausible that the accused would repeatedly visit the home of Mudenge, a Tutsi, to tell Mudenge and the Witness (another Tutsi) about a conversation he had with Wellars Banzi and President Habyarimana regarding the formation of a youth group to kill Tutsi”<sup>13</sup> and that “[...] the Chamber does not consider such uncorroborated hearsay evidence to be sufficient to prove that the meeting took place”.<sup>14</sup> The chamber ruled that the prosecution failed to prove beyond a reasonable doubt that the accused was involved in a meeting with the MRND leader and President Habyarimana to create the *Interahamwe* militia.

With regard to prosecution witness Michel Bagaragaza (who was subsequently convicted by the ICTR and given a sentence of 8 years’ imprisonment for complicity to commit genocide),<sup>15</sup> the Trial Chamber noted that almost all of his sources were dead and therefore could not be cross-examined. The chamber considered that the “indictment against Bagaragaza implicates him in some of the same crimes as the accused, and it is conceivable that by testifying against the accused, Bagaragaza seeks to shift blame from himself”.<sup>16</sup> Not only that, but the chamber took note that the prosecution had provided the accused with certain perquisites including direct payments prior to his being arrested, payments to relocate and support his family as well as promises concerning the venue of his own trial.<sup>17</sup> These aspects led the chamber to consider that it was “unsafe to accept Bagaragaza’s uncorroborated hearsay testimony regarding the Accused’s alleged support for the *Interahamwe*”<sup>18</sup> and it therefore dismissed this part of the prosecution’s case without even hearing from the defence.<sup>19</sup>

Interestingly, the prosecution appears to have mishandled the adduction even of reliable witness testimony in introducing Alison Des Forges as an expert witness, whom the Trial Chamber considered offered credible testimony, rather than as a witness to establish the prosecution’s factual allegation, thus confusing her role in the proceedings. The chamber observed that “her testimony on the 6 April 1994 meeting was more like that of a factual witness, than that of an expert witness, and therefore, the chamber would not accept her testimony even if it were offered as proof of the meeting”.<sup>20</sup> This failed prosecution strategy led the chamber to dismiss this part of the prosecution’s case as unproved and rendered it unnecessary to hear from the defence on this point. The chamber also commented that the testimony of Des Forges was in any case based on uncorroborated hearsay evidence from three persons.<sup>21</sup>

The Trial Chamber also rejected the prosecution charges relating to the accused’s alleged role in the Umuganda Stadium meeting on grounds that it was supported by a sole witness who was currently in the process of seeking pardon and appeal against a death sentence against him issued by the Gisenyi Court of first instance in 2001.<sup>22</sup> This raised a reasonable presumption that the witness possibly had an ulterior motive to testify against the accused. The testimony of another prosecution witness, who was appealing his sentence of life imprisonment for crimes committed during the genocide, was also dismissed on grounds of possible ulterior motives over and above his stated willingness to lie in order to escape punishment<sup>23</sup> in relation to meetings allegedly held at a Nyundo football field.

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<sup>12</sup> *Ibid.*, par. 116.

<sup>13</sup> *Ibid.*, par. 117.

<sup>14</sup> *Ibid.*, par. 118.

<sup>15</sup> See <http://www.haguejusticeportal.net/eCache/DEF/9/092.html> last accessed on 4 February 2011.

<sup>16</sup> Judgement, *Prosecutor v. Zigiranyirazo*, T. Ch. III, *supra* note 2, par. 138.

<sup>17</sup> *Ibid.*, par. 139.

<sup>18</sup> *Ibid.*, par. 140.

<sup>19</sup> *Ibid.*, par. 141.

<sup>20</sup> *Ibid.*, par. 149.

<sup>21</sup> *Ibid.*, par. 196.

<sup>22</sup> *Ibid.*, par. 154.

<sup>23</sup> *Ibid.*, par. 164.

The testimony of yet other prosecution witnesses relating to the accused's alleged participation in regular meetings in Gisenyi Prefecture involving plans to kill Tutsis was considered to be uncorroborated hearsay. It was also vague, lacking dates, times, locations or other specific details<sup>24</sup> such that the chamber felt it unnecessary to hear from the defence before it dismissed the allegations. Regarding La Corniche roadblock which the prosecution alleged the accused set up in Gisenyi town in April 1994 to single out Tutsis and murder them, the chamber noted that the prosecution produced only one witness whose testimony did not actually support the allegation and whose credibility and reliability in any case was considered weak.<sup>25</sup>

The credibility and reliability also of defence witnesses arose as a key element in the trial with respect to the accused's *alibi* as discussed in part V below.

#### 4.2 No evidence presented on a number of key allegations

The prosecution failed even to present evidence concerning the accused's alleged role in funding the *Interahamwe* to bury bodies in his backyard, exhume them later and dump them into the Basera River, or that the accused was involved in the killings of Jean-Sapeur Sekimonyo's entire family plus 18 Tutsis. The prosecution also failed to present evidence to prove: that messages were sent between the accused, Colonel Bagosora and Jean-Bosco Barayagwiza to plan the genocide; that a key meeting with Barayagwiza at the Palm Beach Hotel actually took place; that an alleged meeting among the accused, Agathe Kanziga and Colonel Anatole Nsengiyumva took place; or that any of the alleged daily meetings between the accused and military leaders in Gisenyi and Ruhengeri to organize the targeting and killing of Tutsis and moderate Hutus actually happened. The chambers further indicated that the prosecution did not adduce any evidence to prove the existence of an agreement between the accused and Colonels Bagosora, Nsengiyumva and Setako to instigate and encourage the murder of Tutsi civilians at a roadblock near his home or to prove allegations in connection with a roadblock at Kiyovu at which it was alleged some 50 individuals were killed. The chambers therefore considered that it could not address any allegations based on these assertions, in essence, disqualifying these parts of the prosecution's case.<sup>26</sup>

#### 4.3 Making it up as you go with vague and unsubstantiated allegations

The ICTR Statute and Rules provide that the charges against the accused have to be formulated in a sufficiently precise manner as to allow the accused to answer. As the chamber commented: "The Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused in the course of the trial depending on how the evidence unfolds".<sup>27</sup> An indictment which lacks clear detail on the victim's identity or times, places and the way in which the crime was committed, must therefore be considered defective. The prosecution always has an opportunity to cure such defects, as confirmed by a line of ICTY and ICTR cases, to provide 'timely, clear and consistent information' so as to give the accused fair notice of the specific charges against him. As long as the initial defects have not precluded the possibility of a fair trial, or the new information radically transforms the prosecution's case,<sup>28</sup> this curing of defects in an indictment can again place the prosecution on solid ground.

The minimum requirements for prosecution-related fact-finding are well known and such defects in indictments and motions to cure them are not rare. During the months leading up to the opening of a criminal trial, new, more specific information can often emerge from ongoing criminal investigations that could and should be used to strengthen the prosecution's case as long as the prosecution provides sufficient notice to the accused to allow the preparation of an adequate defence.

In the present case however, the prosecution added allegations as it went along, and even sought to convict the accused of conspiracy to commit genocide by attributing to the accused certain statements the prosecution had earlier said it would not use. The judgment discloses a palpable sense of frustration on the part of the Trial Chamber at the prosecution's vague allegations that the accused had participated in a number of meetings where the assassination of certain Hutu and Tutsi political opponents was supposedly planned, and

<sup>24</sup> *Ibid.*, par. 177, 180 and 204.

<sup>25</sup> *Ibid.*, par. 12.

<sup>26</sup> *Ibid.*, par. 14 and 15.

<sup>27</sup> *Ibid.*, par. 17.

<sup>28</sup> *Ibid.*, par. 18.

its failure to cure these defects in the indictment. The prosecution failed to lead evidence as to whether the accused attended a meeting in Kanombe on 6 April 1994, the names of other participants including Agathe Kanziga in the meeting, and the accused's participation in listing persons to be killed. Furthermore, while the prosecution first acknowledged that the accused could not be convicted of conspiracy to commit genocide on account of this meeting, during closing arguments, it nevertheless then sought conviction on this very same ground which impelled the chamber to point out that: "Having stated that it was not seeking conviction on this event, the prosecution cannot now seek conviction at the end of trial" because 'clear and consistent notice' was not given to the defence to be able to rebut the charge.<sup>29</sup>

Moreover, the chamber had warned the prosecution not to lead evidence on allegations not included in the indictment: "The Chamber recalls that during trial, it ordered the prosecution not to lead evidence of the November 1992 meeting at Kabaya presided over by Leon Mugesera, as this meeting was not pleaded in the Indictment".<sup>30</sup>

#### 4.4 Introduction of materially inconsistent testimony on key facts and failure to provide adequate notice to the defence

Similarly, a prosecution witness, who served as a security guard, gave testimony that the accused spoke to a crowd and encouraged killings at a meeting at Umuganda Stadium during the 'last week of April' 1994, as mentioned above, but the prosecution did not include this in the indictment, springing it on the defence only during its closing brief. At trial, the defence therefore argued that the chamber should not consider the Umuganda Stadium allegations. The prosecution replied that it had indeed referred to the meeting in paragraph 5 of the indictment which says that the accused: "agreed with government and military authorities in Kigali-ville prefectures and in Gisenyi" ... "with the intention to destroy, in whole or in part, the Tutsi ethnic group" and indicates the specific persons that the accused had 'agreed with'. Here, the indictment language is remarkably vague. To say, 'agreed with' seems to imply more a subjective feeling of agreement rather than any concrete, objective manifestation of having reached an actual joint plan to be executed. The chamber would have required a concrete meeting of minds actually to develop and carry out a plan, not just some kind of mental state of agreement to find the accused guilty on the conspiracy charge. Not surprisingly, the chamber found the charge defective.

Paragraph 7 of the indictment also refers vaguely to 'various meetings with regional and local administrative officials' 'to plan, organize and facilitate attacks on Tutsi in Gisenyi prefecture' and that the accused 'agreed to take action against local Tutsis' and 'instigated the elimination of all Tutsis at a public meeting' without referring to anything specific the accused was supposed to have said.<sup>31</sup>

Not only were the indictment references to various planning, organizing and facilitating meetings too vague, but the chambers found that the prosecution witness' testimony did not match key details of the facts alleged. The prosecution seems to have mixed up and confused various meetings, who was present and what was supposed to have transpired at each.<sup>32</sup>

As for curing these defects, the chamber underlined that the prosecution knew about the Umuganda Stadium meeting and its witness's statement before it filed the indictment and that in a Preliminary Motion Decision of 15 July 2004, the prosecution was ordered to amend the indictment. At the same time, the prosecution filed a motion to amend the indictment to add a further allegation relating to an attack at Rurunga Hill which was granted. However, the prosecution failed to amend the indictment with regard to its Umuganda Stadium allegations, wasting the opportunity to give fair notice to the defence. In rejecting the Umuganda evidence, the chamber noted that: "Such an amendment would have provided the Defence with clear notice of the Prosecution's case regarding the Accused's participation in conspiracy to commit genocide".<sup>33</sup> Yet another opportunity was lost when the prosecution attempted to provide timely, clear and consistent information to

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<sup>29</sup> *Ibid.*, par. 28.

<sup>30</sup> *Ibid.*, par. 19.

<sup>31</sup> *Ibid.*, par. 34.

<sup>32</sup> *Ibid.*, par. 35.

<sup>33</sup> *Ibid.*, par. 38.

the defence regarding Umuganda Stadium such as to put the defence on full notice of the substance of the allegation, because the newly included information remained at the same level of generality.

Other material inconsistencies in witness testimony bedevilled the prosecution. The prosecution's Umuganda Stadium security guard witness at times dated the Umuganda meeting to have taken place four or five days after the death of President Habyarimana – around 11 April 1994 – but at other times he referred to the same meeting as having transpired in the last week of April – implying that the meeting took place at some time between 23 and 30 April – producing a serious discrepancy of between 12 and 26 days on a basic, critical fact.<sup>34</sup>

Allegations concerning meetings held at a football field in Nyundo in April 1994 were similarly not detailed sufficiently in the indictment to put the accused on proper notice and here, another prosecution witness seems to have confused various meetings and times:

“The Chamber is of the view that the meeting referred to in the Indictment is clearly a different meeting than that referred to by Witness ATN. The Chamber therefore considers that paragraph 7 [of the indictment] did not provide sufficient notice of the totality of the Prosecution's case as it concerns alleged events in Nyundo.”<sup>35</sup>

The Nyundo meeting allegation was intended to establish that the accused spoke at a public gathering and promised to deliver weapons to kill the ‘enemy’ (Tutsis) and ‘their accomplices’ (moderate Hutus) and it therefore formed a key element of the prosecution's case. In fact, the chamber then concluded that “the only similarity between paragraph 10 [of the indictment] and the allegations that Witness ATN testified about is that the witness alleges that Colonel Bagosora and Colonel Setako attended the second meeting in Nyundo, and paragraph 10 names them as co-conspirators of the accused”.<sup>36</sup> Similar to its response to the chamber with regard to defects in the indictment relating to the alleged Umuganda Stadium meeting, the prosecution pleaded that the defect was cured by its provision of timely, clear and consistent information to the accused through a pre-trial brief<sup>37</sup> on the alleged meetings in Nyundo.

There are several interesting facets to the Nyundo meeting allegation. First, the prosecution produced only one witness to establish that such a meeting took place despite the fact that there were supposed to have been a large number of persons in attendance. Second, the prosecution's provision of detail is as low as that evident in the Umuganda Stadium meeting allegation. Third, the fact that both the prosecution and its witness confused several meetings seems to indicate that the prosecution did not undertake the basic task of charting out the sequence of events upon which it intended to rely or to compartmentalize the facts correctly. The chamber noted that: “The summary of Witness ATN's proposed testimony ... confuses matters further by referring to a single meeting at which the Accused said and did nothing” and that none of the details recounted in the pre-trial brief gave the defence sufficiently accurate notice as to rebut the charge. Fourth, the extract from the pre-trial brief which the prosecution claimed to have provided timely, clear and consistent information to the defence on the details of the Nyundo allegation obviously had never been proofread: several words seem to be missing which render the brief ungrammatical and which must have tested the chamber's patience with the prosecution.

Another source of confused testimony concerned meetings supposed to have taken place in Kiyovu in mid-April 1994 which, according to Prosecution Witness ATO, implicated the accused in preparing for the killing of Tutsis with the collection and storage of firearms. This testimony might have been important had the prosecution not omitted to mention any related allegation in its indictment, pre-trial brief or in opening statement.<sup>38</sup> In any case, the prosecution had indicated that it did not seek conviction on the basis of this testimony.

Similarly, a defence objection to the admissibility of Prosecution Witness PA's testimony about meetings he was told had transpired during the genocide during which participants resolved to kill Tutsis was overruled.

<sup>34</sup> *Ibid.*, par. 43.

<sup>35</sup> *Ibid.*, par. 50.

<sup>36</sup> *Ibid.*, par. 52.

<sup>37</sup> Pre-Trial Brief, Annex I, Summary of Witness ATN's Proposed Testimony, p. 10.

<sup>38</sup> Judgement, *Prosecutor v. Zigiranyirazo*, T. Ch. III, *supra* note 2, par. 61.



However, the chamber then invalidated this testimony anyway on grounds that the “Prosecution failed to discharge its burden to properly inform Zigiranyirazo that it intended to rely on these meetings as facts underpinning the charge of conspiracy to commit genocide, and that this failure materially impaired the Accused’s ability to prepare his defence”.<sup>39</sup>

The chamber pointed out other defects in the indictment which precluded adequate notice to the defence. First, in its closing brief, the prosecution averred that the methodical and systematic manner of the attacks in which the accused was involved ‘conclusively demonstrated’ the existence of a conspiracy to commit genocide<sup>40</sup> but nothing along these lines was included in the indictment and neither was evidence as to any attacks pleaded in support of an allegation of conspiracy in the indictment. In short, the prosecution sprang this allegation on the defence at the last stage of the proceedings. It repeated this error with regard to another alleged attack at Kesho Hill on 8 April 1994, seeking to support a count of conspiracy to commit genocide,<sup>41</sup> leading the chamber to state that it was “of the view that to the extent the prosecution sought to include these allegations as part of the count of conspiracy to commit genocide, it should have pleaded the allegations unambiguously in the concise statement of facts supporting that count” and that the prosecution’s failure to do so meant that the indictment remained defective.<sup>42</sup>

#### 4.5 Charging crimes that do not come within the tribunal’s jurisdiction

The serious defects in the indictment, pre-trial brief and closing brief, together with some unusual prosecution argumentation as described above, left the prosecution wide open to defence counter-attack for failure to provide adequate notice. The prosecution may have sensed its ship was sinking and panicked near the end of the trial proceedings. Startlingly, in footnote 83 of the judgment, the Trial Chamber conjectured that:

“The Prosecution itself seems to have been somewhat confused regarding the nature of the crime, describing it as a ‘conspiracy to commit a crime against – a crime against humanity’. Closing Arguments, T. 29 May 2008 p. 32. Conspiracy to commit a crime against humanity is not a crime within the jurisdiction of this Tribunal.”

### 5. The Trial Chamber’s consideration of the *alibis*

One difficulty for the prosecution was that the accused was domiciled in Canada from 1989 to 1993. The prosecution failed to discharge its burden to show that he returned to Rwanda for sufficient time and frequency to enable him to create the *Interahamwe* militia that was instrumental in planning and committing the genocide in Rwanda.<sup>43</sup>

In addition to this general *alibi*, the defence produced two separate *alibis* to raise a reasonable doubt as to the accused’s alleged participation and support in relation to two serious criminal events: the singling out and murder of Tutsis at a roadblock set up directly in front of the accused’s home in Kiyovu; and a major massacre that carried out at Kesho Hill where between 1000 and 2000 Tutsis were killed.

Crucially, the Trial Chamber’s convictions of the accused in relation to the Kiyovu roadblock and the Kesho Hill massacres, were predicated on its rejection of the testimonies of numerous defence witnesses that the accused could not possibly have committed the crimes because he was not at either place when the crimes were committed. The entire case thus turned on the Trial Chamber’s consideration and assessment of the credibility of the *alibi* evidence and the weight to be accorded to it in relation to the prosecution’s account of the events. To understand the crux of the chamber’s consideration and ultimate rejection of the *alibi* evidence relating to the Kiyovu roadblock and Kesho Hill massacre, it is necessary to recount next in some detail the witness testimony itself.

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<sup>39</sup> *Ibid.*, par. 67.

<sup>40</sup> *Ibid.*, par. 70.

<sup>41</sup> *Ibid.*, par. 73.

<sup>42</sup> “The Chamber recalls that the first time the Prosecution gave notice of its intention to hold Zigiranyirazo accountable for conspiracy on the basis of the allegations with respect to Kesho Hill was in its Closing Brief. The Chamber considers that this was not timely or clear enough to cure the defect, and that this materially impaired the Accused’s ability to prepare his defence.” Judgement, *Prosecutor v. Zigiranyirazo*, T. Ch. III, *supra* note 2 at par. 78.

<sup>43</sup> *Ibid.*, par. 126.

## 5.1 Kiyovu roadblock

Paragraph 10 of Count 1 of the indictment alleges that around 12 or 13 April 1994, the accused instigated and encouraged the killing of Tutsis and moderate Hutus at a roadblock set up in front of his house at Kiyovu. The prosecution alleged that the accused passed by the roadblock and upon seeing some 50 corpses on the ground, congratulated the guards manning the roadblock and remarked ‘Now you are working’.<sup>44</sup> The prosecution further alleged that the accused “ordered and instigated soldiers, Interahamwe and armed civilians at the roadblock near his Kiyovu residence to search the homes in the neighbourhood and kill any Tutsis that [sic] were found” and that soldiers and *Interahamwe* in fact did kill persons from the neighbourhood as well as those who were passing through the roadblock and who were identified as Tutsis.<sup>45</sup>

Unlike the witnesses it had brought forward to support its other allegations, and whose testimony the Trial Chamber rejected with regard to the Kiyovu roadblock, the prosecution was able to produce Witness BCW whose testimony was very clear and precise. The witness exhibited a high degree of consistency as regards the time of day, events surrounding the singling out of Tutsis and their killing at the roadblock, and other circumstantial details. This testimony seemed to be coherent and non self-contradictory.<sup>46</sup>

The defence however brought forward a witness of very high credibility and status and whose testimony the chamber was likely to respect, to contradict the prosecution’s account as to the location of the roadblock. This witness, Stanislas Harelimana, the Solicitor General of the Kigali Court of Appeal in 1994, testified that he never saw a roadblock at the intersection in front of the accused’s house where the prosecution claimed it was. He indicated on a map for the court where he remembered the roadblocks had actually been set up. Harelimana conceded however that he had seen a group of five or six men standing around a tree trunk close to the accused’s house which could have been used as a roadblock. The defence backed up this testimony with a number of other witnesses who were also familiar with the accused and the neighbourhood in which he lived, that in fact no roadblock was set up in front of the accused’s residence. One witness testified that she had personally been staying at the accused’s home and did not see any roadblock or related activity outside the house.

The defence went further and brought forward nine witnesses who testified that the accused was not even present in Kiyovu, but in Rubaya from 11 April 1994 for about a week, during the times the prosecution alleged the accused had instigated and encouraged the killing of Tutsis at the roadblock that was supposed to be in front of his house.

Deliberating on this matter, the chamber noted first “that the prosecution led no evidence on any of the allegations [...] relating to the Kiyovu roadblock”.<sup>47</sup> Nevertheless, the chamber found in favour of the prosecution’s assertion that the roadblock did indeed exist in front of the accused’s house because prosecution witness BCW’s testimony was clear, precise and coherent and not inconsistent with defence witness testimony that the gathering of men at the intersection in front of the accused’s residence could itself have constituted a roadblock.<sup>48</sup>

While the Trial Chamber indicated that it found Prosecution Witness BCW’s testimony to have been credible and reliable, it did not provide convincing reasons why it chose to attach greater weight to this one prosecution witness over the testimony of nine defence witnesses which contradicted the prosecution’s claim on the precise location of the roadblock:

“The Chamber recalls that the testimonies [of the defence witnesses] only support the assertion that there was no roadblock in front of the Accused’s house up until the morning of 9 April 1994. Their testimonies do not exclude the possibility that a roadblock was erected some time after the morning of 9 April 1994. Nor does their evidence refute the possibility that men were assembled at the Intersection prior to 9 April 1994, as maintained by Witness BCW, because neither [defence] Witness BBL, nor Domitilla, left the house between 7 and 9 April 1994”.<sup>49</sup>

<sup>44</sup> *Ibid.*, par. 214.

<sup>45</sup> *Ibid.*, par. 215.

<sup>46</sup> *Ibid.*, par. 218-224.

<sup>47</sup> *Ibid.*, par. 230.

<sup>48</sup> *Ibid.*, par. 239-240.

<sup>49</sup> *Ibid.*, par. 240.

Here, the chamber seems to have abandoned its requirement for the prosecution to prove its case, including the factual details, beyond a reasonable doubt, by placing greater weight on the testimony of one prosecution witness who testified that the roadblock was in front of the accused's house, over that of nine defence witnesses who testified they saw no such roadblock at the material times. By noting that defence witness testimony did not exclude the *possibility* that there was a roadblock at such place, the chamber seems to have shown a predisposed inclination to discount the defence testimony without proper warrant.

To consider whether the Trial Chamber shifted the burden of proof away from the prosecution to the defence to prove the accused's innocence, it is necessary to examine relevant passages from the chamber's judgment. In particular, the chamber had to reach a finding as to whether the accused was in Kiyovu where he was alleged to have participated in the killings at a roadblock there, or instead at Rubaya, an entirely different location:

"The Chamber recalls that the Defence relies on nine witnesses to show that the Accused was in Rubaya from 11 April 1994, for approximately one week, and therefore could not have been in Kiyovu during this time. However, the Chamber recalls that the evidence of some of these witnesses was not sufficiently detailed on the activities of the Accused while in Rubaya, and included discrepancies. In this respect, Agnès Kampundu's recollection was vague and she stated "I don't remember well, and it is a long time." Although she testified that the Accused remained in Rubaya for one week, she could not provide details on the Accused's activities. Rather, she testified that he "did not do anything in particular".<sup>50</sup>

The question arises straightaway as to what test should the chamber have applied to assess the credibility of the *alibi* witness. Should *alibi* testimony be discounted solely on grounds that the deponent remembers only that the accused was elsewhere than the scene of the crime and is unable to recall details about what precisely he was doing?

Similarly, another defence witness, Marie Chantel Kamugisha, could not testify as to what the accused did in Rubaya but only that: "I know he was there".<sup>51</sup> Witness BNZ120 provided a similarly vague account about the accused's activities while at the same time affirming that the accused spent a week in Rubaya starting from 11 April as did defence witnesses Gloria Mukampungu and Aimé Marie Ntuye.<sup>52</sup> The Trial Chamber noted that:

"The testimony of Bernadette Niyonizeye also lacked detail. Although she attested that the Accused travelled in the convoy to Rubaya on 11 April 1994, she provided no details of his activities while in Rubaya. Furthermore, the Chamber recalls that her evidence was inconsistent with her will-say statement according to which the Accused was waiting at the Rubaya Tea Factory when the convoy arrived."

The chamber appears to have thought that any inconsistencies in the defence witness' testimony considerably undermined the credibility of the *alibi*.

The next passage seems to confirm the chamber's requirement on the accused to produce an airtight *alibi* rather than one which merely raised a reasonable doubt as to whether he actually committed the alleged crimes:

"Although other Defence Witnesses provided more detailed testimonies, none testified that the Accused remained in Rubaya for the entire period of 11 April to 17 April 1994. In this respect, the Chamber recalls the testimony of Domitilla, that the Accused did leave Rubaya during that time. Similarly, Marguérite Maria Mukobwajana testified that the Accused left Rubaya to run errands. Although Dr. Séraphin Bararengana attested that the Accused left Rubaya only once without him to make some purchases, the Chamber notes that his testimony is inconsistent with that of Mukobwajana, as she suggested that the Accused left Rubaya more than once. Agnès Kampundu also testified that the Accused did leave Rubaya during that period.<sup>53</sup>

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<sup>50</sup> *Ibid.*, par. 245.

<sup>51</sup> *Ibid.*, par. 246.

<sup>52</sup> *Ibid.*, par. 247-248.

<sup>53</sup> *Ibid.*, par. 249.

Thus, it seems that unless the defence was able to prove that the accused did not once leave Rubaya, the chamber would not accept the *alibi*. Moreover, the testimony among the nine *alibi* witnesses had to be highly consistent, and in this respect, the chamber concluded that:

“Accordingly, although the Chamber does not discount the Defence evidence suggesting that the Accused was at Rubaya for approximately one week from 11 April 1994, the Chamber finds that none of the Defence Witnesses’ testimonies exclude the possibility that the Accused left Rubaya for periods between 12 and 17 April 1994. The Chamber, therefore, finds that the Accused does not have an alibi for 12 to 17 April 1994”.<sup>54</sup>

The clear implication of this statement is that the chamber would not accept any *alibi* that did not exclude *even the possibility* that the accused was not in Rubaya during all material times, thus requiring the defence to meet a very high standard.

In other words, the chamber would not accept the *alibi* unless the accused *could not possibly* have been at the Kiyovu roadblock (assuming that such roadblock even existed) – a very high evidentiary threshold for an accused to meet. The chamber went on to find that the accused compelled Witness BCW to man the roadblock in close proximity to the accused’s Kiyovu house, that the accused passed by this roadblock on 12 April 1994 and ordered the men at the roadblock to check identity papers to ensure persons of Tutsi ethnicity would not escape, and that he instructed food to be brought to the men manning the roadblock.<sup>55</sup> The chamber also found “that Tutsi were taken aside and killed at the roadblock and that at least between 10 and 20 people were killed there” but that it was not prepared to “find beyond reasonable doubt, on the basis of Witness BCW’s uncorroborated hearsay testimony, that some time between 12 and 23 April 1994, guns were brought from the accused’s house to the roadblock at the Intersection.”

The chamber found that there was insufficient evidence to prove that the accused actually ordered<sup>56</sup> or instigated anyone<sup>57</sup> or participated in a joint criminal enterprise<sup>58</sup> to kill Tutsi individuals at the Kiyovu roadblock, but that it had been proven beyond a reasonable doubt that he had aided and abetted these killings.<sup>59</sup>

## 5.2 Kesho Hill massacre

The alleged responsibility of the accused in a massacre at Kesho Hill in Gisenyi prefecture formed another major part of the prosecution’s case. The indictment alleged that on or about 8 April 1994, around 2000 Tutsi individuals tried to escape the killings being perpetrated in Rwanda, by grouping at Kesho Hill near the Rubaya Tea Factory. The prosecution alleged that the accused led a convoy, ordered and instigated armed Presidential Guard soldiers, gendarmes, and *Interahamwe* militia to attack and kill Tutsis at this location, and that in fact between one and two thousand Tutsis were killed there.<sup>60</sup>

Prosecution Witness AKK explained at trial that, on the morning of 7 April 1994 after hearing radio broadcasts about President Habyarimana’s death, he fled with his family to Kesho Hill on that evening and that they spent the night there. In the morning of 8 April, Witness AKK joined with other Tutsis to repel *Interahamwe* attacks, two hours after which he saw a convoy of civilian and military vehicles which arrived at Kesho Hill and that he personally recognized a number of local politicians and saw the Rubaya Tea Factory manager arrive at the hill in this convoy.<sup>61</sup> Later on that morning, recounted the witness, the accused arrived and after the Bourgmestre made a speech, he made a speech of his own to the gathering of assailants that had grown in number throughout the morning hours. The witness stated that he could not hear directly what the accused had said but that he was told later by others that the accused had called upon the assailants

<sup>54</sup> *Ibid.*, par. 250.

<sup>55</sup> *Ibid.*, par. 251.

<sup>56</sup> *Ibid.*, par. 416.

<sup>57</sup> *Ibid.*, par. 417.

<sup>58</sup> *Ibid.*, par. 418.

<sup>59</sup> *Ibid.*, par. 424.

<sup>60</sup> *Ibid.*, par. 252.

<sup>61</sup> *Ibid.*, par. 254.

'to start work' and that immediately thereafter, a full-scale attack began.<sup>62</sup> In the course of his testimony, Witness AKK laid out the alleged sequence of events in considerable detail.

Another prosecution witness, Witness AKP, indicated that he had been situated around 100 metres up a hill whence he could see and hear the accused clearly say to the crowd: "Now you have what's required and what you didn't have before, so I wish you will do good work".<sup>63</sup> Following this speech, the crowd of attackers opened fire on the Tutsis at Kesho Hill and then used small hoes to kill the wounded. In 1995, when the dead were exhumed in order to be given a proper burial, it was estimated that the total death toll from the Kesho Hill Massacre had reached 1,400.

The testimonies of Witnesses AKK and AKP were well corroborated by prosecution Witnesses AKL, AKR, AKO, ATM, APJ, SGP and Michel Bagaragaza who all gave similar accounts of what they saw from their respective vantage points at Kesho Hill. Importantly, the witnesses swore that they were close enough to have recognized clearly the accused at the site, to have seen him incite the crowd of attackers, and to have witnessed the massacre itself.<sup>64</sup>

In contrast, defence Witness RDP109 testified that he had been at Kesho Hill at the material times and that no speeches had been given and moreover, that he had not seen the accused there at all. Similarly, Defence Witness RDP46 testified that there had been no speeches prior to the attacks and that the accused had not been at Kesho Hill. Defence Witness César Busuro testified that he and his mother visited the accused during the time of the Kesho Hill massacre and that: "the Accused did not arrive in the area with the Presidential family until mid-April, and therefore, could not have been involved in the Kesho Hill killings on 8 April 1994".<sup>65</sup> A number of other defence witnesses testified that the accused had been elsewhere at the time of the Kesho Hill massacres and that he therefore could not possibly have committed the alleged crimes.

Before discussing its deliberations on this conflicting evidence, the Trial Chamber noted that: "The Defence also relies on the evidence of nine witnesses who testified that the Accused was at the Presidential residence in Kanombe on 8 April 1994".<sup>66</sup> The defence objected that all of the prosecution witnesses probably had colluded in developing their testimony since all were members of a survivors group called Ibuka. The Trial Chamber rejected that claim however on grounds that colluded testimony would have shown a much higher level of uniformity among the various accounts as to what had transpired at Kesho Hill.<sup>67</sup> The chamber also noted certain discrepancies in the prosecution witness testimony as to the kind of vehicle the accused was alleged to have arrived in at Kesho Hill and the time that the attacks actually occurred, whether at 08:00 or later in the day (around 14:00), the number of attackers and the number of victims. The chamber therefore decided to accept the testimonies of Witnesses AKR and AKO insofar as they were corroborated by other evidence but without accepting uncorroborated hearsay<sup>68</sup> and it considered that overall, there was a relatively high degree of consistency in prosecution witness testimony on the salient facts.<sup>69</sup>

Defence witnesses Agnès Kampundu and Jeanne Marie Habyarimana told the chamber that they saw the accused on the morning of 8 April 1994 at Kanombe, which directly contradicts the prosecution's allegation that he personally gave a speech at that time in Kesho Hill instigating the attack which resulted in the killing of hundreds of Tutsis there. The chamber noted that:

"Agnès Kampundu acknowledged that she did not "remember well", and Jeanne Marie Habyarimana testified that she spent most of the time in the sitting room, or attending to her children. Further, neither witness detailed specific times that they saw the Accused on 8 April 1994".<sup>70</sup>

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<sup>62</sup> *Ibid.*, par. 257.

<sup>63</sup> *Ibid.*, par. 262.

<sup>64</sup> *Ibid.*, par. 263-287.

<sup>65</sup> *Ibid.*, par. 298.

<sup>66</sup> *Ibid.*, par. 301.

<sup>67</sup> *Ibid.*, par. 303.

<sup>68</sup> *Ibid.*, par. 305.

<sup>69</sup> *Ibid.*, par. 309-310.

<sup>70</sup> *Ibid.*, par. 323.

The chamber also considered that the testimonies of three other defence Witnesses – Marie Chantel Kamushiga, Bernadette Niyonizeye and Aimé Marie Ntuye – were insufficiently detailed as to the precise times that they claimed to have seen Zigiranyirazo in Kanombe, or what he had been doing there, as to prove the *alibi*.<sup>71</sup> Another defence witness told the chamber that he spoke to the accused around 15:30 or 16:00 in Kanombe, but the chamber concluded that this testimony did not support the accused’s *alibi* since he was alleged to have instigated the attacks at Kesho Hill at 8:00 in the morning. The chamber’s presumption seem to be that the accused might have been at Kesho Hill in the morning and that he then could have travelled back to Kanombe in time to have spoken with the defence witness.

The chamber rejected the testimony of each of the other defence witnesses one-by-one. It ruled that the testimony of one Bararengana as to the accused’s arrival in Kanombe around 15:00 or 15:30 left open the possibility that the accused had been at Kesho Hill during the morning of 8 April 1994 and that another witness, Jean Luc Habyarimana, had indicated that he could not be absolutely certain that the accused was in Kanombe for the whole day of 8 April 1994.<sup>72</sup> The chamber also heard Defence Witness Gloria Mukampungwa’s testimony that she had seen the accused in the morning of 8 April 1994 in Kanombe to be unreliable because she was only 12 at the time of the Kesho Hill massacre and that her testimony was too vague in other respects. The chamber stated that it was “not convinced that she saw the Accused at Kanombe on 8 April 1994”.<sup>73</sup> Defence Witness Marguérite Mukobwajana said that she saw the accused in Kanombe at both 08:00 and 15:00 or 16:00 on 8 April 1994, but the chamber said that her testimony:

“was not detailed and she was the only witness to testify that she saw the Accused at a specific time in the morning. Further, her evidence does not provide the Accused with an alibi between approximately 8.00 a.m. and 4.00 p.m. The Chamber therefore does not consider her evidence sufficient to refute the detailed, credible and corroborated evidence of Prosecution Witnesses AKK and AKL”.<sup>74</sup>

In short, the chamber found the key prosecution witness testimony that the accused was at Kesho Hill to have been “corroborated by credible evidence”<sup>75</sup> while the defence witness testimony was “too vague and does not place the Accused at Kanombe at the specific times he was seen at Kesho Hill”.<sup>76</sup> This led the chamber to find beyond a reasonable doubt that the accused was in Kesho Hill on the morning of 8 April 1994 as part of a convoy, that he met with certain officials and that he addressed a group of assailants prior to the attack. The chamber further found that the attackers applauded and then attacked the Tutsis at the hill and that between 800 and 1,500 Tutsi individuals were killed there. It could not however conclude beyond a reasonable doubt “that the Accused gave specific orders to the assailants”.<sup>77</sup>

From its findings of fact that the Kesho Hill massacre did occur on the morning of 8 April 1994,<sup>78</sup> that the accused formed part of the convoy and that he addressed the attackers just before they began killing the Tutsis there, although it was not possible to surmise what the Accused actually said, the chamber concluded that given:

“the ethnicity of the victims, the scale of the killings, and the context within which they took place, the only reasonable conclusion is that the physical perpetrators of the killings possessed the intent to destroy in whole or in part the Tutsi ethnic group”.<sup>79</sup>...

and that acts of genocide were indeed committed at Kesho Hill. The chamber could not conclude beyond a reasonable doubt that the accused ordered the assailants to attack nor that the accused actually instigated the killings. However, it found that the accused participated in the killings of Tutsis at Kesho Hill which constituted a joint criminal enterprise, that the accused shared the genocidal intent of all the participants in

<sup>71</sup> *Ibid.*, par. 323-324.

<sup>72</sup> *Ibid.*, par. 325.

<sup>73</sup> *Ibid.*, par. 326.

<sup>74</sup> *Ibid.*, par. 327.

<sup>75</sup> *Ibid.*, par. 329.

<sup>76</sup> *Ibid.*, par. 328.

<sup>77</sup> *Ibid.*, par. 330.

<sup>78</sup> *Ibid.*, par. 400.

<sup>79</sup> *Ibid.*, par. 402.

this act,<sup>80</sup> and moreover, “that the Accused significantly contributed to the execution of the joint criminal purpose to kill Tutsi at Kesho Hill by encouraging assailants to attack”.<sup>81</sup> The chamber ultimately found the accused guilty also of the crime against humanity of extermination for the Kesho Hill massacre and that he had shared in the intent to kill Tutsis on a mass scale.<sup>82</sup>

The obvious question that arises is ‘what is the distance between Kanombe and Kesho Hill?’ How long would it take to travel that distance? If the distance was insignificant, for example, a few kilometres, the *alibi* would carry less weight in terms of raising a reasonable doubt as to the accused’s presence at the scene of the crime since he could have been more easily in the two places in a single day. If on the other hand the distance were much greater, and travel between the two locations made more difficult by the existence of armed hostilities, poor road conditions and roadblocks or other hindrances, the *alibi* would have to be accorded greater weight. Oddly, the Trial Chamber did not explain this aspect in its judgment beyond indicating that the Trial Chamber president had authorized a visit to the site of the crimes from 12 to 16 November 2007.<sup>83</sup> Even more strange, the Trial Chamber failed to keep a record of its on-site visit and the fact that it had travelled the distance from Kanombe to Rubaya to check the duration this trip would take. In any case, the prosecution and defence agreed that, depending on the conditions prevailing at the time, the driving distance between Kanombe and Rubaya would have taken between 6 and 10 hours each way.

## **6. The Appeals Chamber’s acquittal of Protais Zigiranyirazo**

‘*Alibi*’ comes from the Latin meaning ‘in or at another place’. If the accused was not at the scene of the crime, he or she could not possibly have committed the crime. The radical implications of this defence risks wrong-footing the prosecution and upsetting the trial process, and so the production of an *alibi* has to be regulated by certain procedural safeguards for two main reasons.

First, in terms of trial proceedings, an *alibi* sprung on the prosecution without advance notice does not allow for criminal investigation on the *alibi*’s veracity outside the courtroom or effective cross-examination of *alibi* witnesses in the courtroom. Such kind of ambush risks causing unfair prejudice to the prosecution’s case and hindering larger interests of criminal justice, including the pursuit of truth. Many jurisdictions accordingly require the defence to provide the prosecution with notice that it intends to rely on an *alibi*. This notice has to be provided with sufficient detail as to allow the prosecution to investigate the truthfulness of the *alibi* evidence, and where such *alibi* appears to have been fabricated, to challenge the credibility of *alibi* witnesses.<sup>84</sup>

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<sup>80</sup> *Ibid.*, par. 408.

<sup>81</sup> *Ibid.*, par. 409.

<sup>82</sup> *Ibid.*, par. 454.

<sup>83</sup> *Ibid.*, Annex I, par. 34.

<sup>84</sup> Although domestic criminal law does not bind the ICTR, it is worth considering US alibi case-law because of strong US constitutional protection of the right to fair trial relating to the burden of proof. The Harvard Law Review in 1892 reported that a Florida Court in *Adams v. State*, (10 So. Rep. 106 (Fla.)) required the defence only to produce enough evidence to raise a reasonable doubt as to the accused’s presence at the scene of the crime; see 5 Harvard Law Review 1892, p. 351. In contrast, in Indiana, the court was satisfied with nothing less than the accused’s establishment of his *alibi*, if not beyond a reasonable doubt, at least by a preponderance of evidence, to entitle it to any weight; *State v. Beasley*, 50 N.W. Rep. 570 (Ia.). By the early 1960’s, a number of states in the US had enacted legislation to ensure that false alibis were not suddenly thrown against the prosecution in the course of a trial because of the great difficulty to refute such *alibis* without fair warning. See e.g. Directors of The Columbia Law Review Association, Prosecution Entitled to Know Identity of Defendant’s Witnesses and Discover Documents to Be Introduced in Support of Affirmative Defence, 63 Columbia Law Review 1963, p. 362. In particular, statutory notice requirements on the accused have been upheld as an essential element of fair and effective criminal justice, for example in the 1970 case of *Williams v. Florida* where the United States Supreme Court held that Florida’s notice-of-alibi rules basically mandated “a limited form of pre-trial discovery wherever [the accused] intends to rely at trial on the Defence of alibi.” See *Williams v. Florida*, 90 Supreme Court 1893 (1970) at p. 1895. By 1984, most of the states in the US had enacted similar rules. See L. A. Irish, Alibi Notice Rules: the Preclusion Sanction As Procedural Default, 51 University of Chicago Law Review 1984, p. 254. More than a hundred years after the 1892 case of *Adams v. State*, the controversy as to how to treat alibi evidence had not been settled in US Courts of Appeal, taking the form of continuing ambiguity over the scope of application of the constitution’s due process clause in this regard. For example, some Courts of Appeal required the judge to give juries clear ‘alibi instructions’ to the effect that the prosecution had to prove the elements of its case beyond a reasonable doubt and that a failure to do so would violate the accused’s right to a fair trial as in United States Court of Appeal, *United States v. Hicks*, 7 November 1984, 748 F.2d 854 (4th Circuit 1984), whereas others have held that there is no such requirement at all. See J. P. Friedman, Criminal Procedure – Alibi Instructions and Due Process of Law, 20 Western New England Law Review 1998, p. 343. See also the interesting Supreme Court of Canada case of *R. v. Cleghorn*, [1995] 3 S.C.R. 175.

Second, the attitude of the trier of fact to the introduction of an *alibi* can inadvertently work another kind of injustice in favour of the prosecution and against the defence. The judge and/ or jury might not resist a psychological tendency to attribute greater credibility to prosecution allegations over the accused's *alibi* claims or might require the defence to prove the truthfulness of the *alibi* to a high level of certainty, rather than merely to have to raise a reasonable doubt that he had been in a position to commit the *actus reus*. The erroneous application of such a high threshold to prove the truth of the *alibi* in effect shifts the burden of proof away from the prosecution to prove guilt beyond a reasonable doubt, towards the accused to prove his or her innocence. That violates the presumption of innocence and precludes the right to fair trial.

The Appeals Chamber in *Zigiranyirazo* rightly pointed out that the Trial Chamber, despite making clear that the prosecution had to prove its case beyond a reasonable doubt, in fact ended up shifting the burden of proof to the accused to prove his *alibi*: “the Trial Chamber did not fully appreciate that *Zigiranyirazo* only needed to establish reasonable doubt that he would have been able to travel to and from Kesho Hill on the morning of 8 April 1994, rather than establish his exact location throughout the day in Kanombe”.<sup>85</sup> This amounted to the accused having to prove his innocence in order to rebut the prosecution's allegations. The Trial Chamber applied too demanding a test by requiring that defence witnesses *account completely* for the time the accused claimed he spent in Kanombe on 8 April 1994. Following a line of ICTR and ICTY Appeals Chamber cases,<sup>86</sup> the Appeals Chamber reiterated that:

“An accused does not bear the burden of proving his alibi beyond reasonable doubt. Rather, [h]e must simply produce the evidence tending to show that he was not present at the time of the alleged crime” or, otherwise stated, present evidence “likely to raise a reasonable doubt in the Prosecution case.” If the alibi is reasonably possibly true, it must be accepted.”<sup>87</sup>

Although the Appeals Chamber was no doubt correct that the burden of proof cannot shift from the prosecution to the defence, the test for the *alibi* to have to be ‘reasonably possibly true’ sounds somewhat mysterious. What can ‘reasonably possibly true’ really mean? Applying the test of mere possibility is perhaps too low a test since many things can be *possible* even if they are extremely unlikely. At least the additional qualifying requirement of ‘reasonableness’ raises the threshold from the merest, slightest possibility to something more likely without reaching the level of a balance of probabilities threshold. In order not to depart from settled criminal law principles, and as a matter of strict logic and clarity, it would have been preferable if the Appeals Chamber had not introduced the somewhat intuitively opaque formula of ‘reasonably possibly true’, but instead the simpler requirement that in order for an *alibi* to be accepted it must raise a reasonable doubt as to the accused's presence at the scene of the crime. This approach would have avoided introducing extraneous complications in judicial fact-finding by sticking strictly to the ‘beyond a reasonable doubt’ formula.

As for the accused's *alibi* with respect to the Kiyovu allegations:

“In concluding that *Zigiranyirazo* did not have an alibi between 12 and 17 April 1994, the Trial Chamber did not consider the evidence as a whole as well as the relevant circumstantial evidence of his presence at Rubaya or in its vicinity. It is reasonable to infer that *Zigiranyirazo* was present at Rubaya in Gisenyi Prefecture, or in its vicinity, between 12 and 17 April 1994 based on multiple sightings by several witnesses over the course of several days, especially when the evidence of these witnesses is considered together with evidence regarding the time

<sup>85</sup> ICTR, Judgement, *Zigiranyirazo v. Prosecutor*, Case No. ICTR-01-73-A, A. Ch., 16 November 2009, to be published in volume XXXVI, par. 41.

<sup>86</sup> Namely, the Appeal Judgements in the ICTR and ICTY cases: ICTR, Judgement, *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, A. Ch., 16 January 2007, Klip/ Sluiter, ALC-XXV-620; ICTR, Judgement, *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, A. Ch., 23 May 2005, Klip/ Sluiter, ALC-XXII-625; ICTR, Judgment (Reasons), *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, A. Ch., 1 June 2001, Klip/ Sluiter, ALC-X-495; ICTY, Judgement, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, A. Ch., 20 February 2001, Klip/ Sluiter, ALC-V-369; ICTR, Judgement, *Nahimana, Barayagwiza and Ngeze v. Prosecutor*, Case No. ICTR-99-52-A, A. Ch., 28 November 2007, Klip/ Sluiter, ALC-XXXI-257; ICTR, Judgement, *Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, A. Ch., 9 July 2004, Klip/ Sluiter, ALC-XVIII-563; ICTR, Judgement, *Musema v. Prosecutor*, Case No. ICTR-96-13-A, A. Ch., 16 November 2001, Klip/ Sluiter, ALC-X-863; ICTR, Judgment, *Karera v. Prosecutor*, Case No. ICTR-01-74-A, A. Ch., 2 February 2009; to be published in volume XXXVI; ICTR, Judgement, *Simba v. Prosecutor*, Case No. ICTR-07-76-A, A. Ch., 27 November 2007 Klip/ Sluiter, ALC-XXV-817; ICTR, Judgement, *Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-A, A. Ch., 19 September 2005, Klip/ Sluiter, ALC-XXII-721.

<sup>87</sup> Judgement, *Zigiranyirazo v. Prosecutor*, A. Ch., *supra* note 82, par. 17.



and difficulties involved in travelling between Rubaya and Kiyovu. The Appeals Chamber therefore finds that the Trial Chamber erred in fact by misconstruing key alibi evidence”.<sup>88</sup>

This led the Appeals Chamber to rule that the Trial Chamber had erred in law and in fact, by failing to assess the *alibi* evidence properly, incorrectly applying the appropriate legal principles, and:

“failing to consider or provide a reasoned opinion with respect to relevant evidence, and misconstruing key evidence related to the alibi. The Appeals Chamber considers that these errors constituted a miscarriage of justice and invalidated the verdict, and thus that the Trial Chamber’s findings on Zigiranyirazo’s participation in the crimes committed at the Kiyovu Roadblock must be overturned”.<sup>89</sup>

The Appeals Chamber then reversed the Trial Chamber’s conviction relating to the Kiyovu roadblock and ordered the accused’s immediate release from ICTR custody but not before reiterating its view that the Trial Chamber’s errors constituted a serious miscarriage of justice:

“In reversing Zigiranyirazo’s convictions for genocide and extermination as a crime against humanity, the Appeals Chamber again underscores the seriousness of the Trial Chamber’s errors. The crimes Zigiranyirazo was accused of were very grave, meriting the most careful of analyses. Instead, the Trial Judgement misstated the principles of law governing the distribution of the burden of proof with regards to *alibi* and seriously erred in its handling of the evidence. Zigiranyirazo’s resulting convictions relating to Kesho Hill and the Kiyovu Roadblock violated the most basic and fundamental principles of justice. In these circumstances, the Appeals Chamber had no choice but to reverse Zigiranyirazo’s convictions.”<sup>90</sup>

The Appeals Chamber’s acquittal of the accused on all charges must have severely disappointed anyone who suffered from these or related incidents, and enraged others who felt certain that the accused was heavily implicated in masterminding the genocide in Rwanda in 1994. For anyone who has seen the horrors of the Rwandan genocide up close, it will be difficult to stomach the release of anyone who appears to have been closely involved in crucial elements of planning, encouraging and carrying out the massacres. But this is what justice requires. Unless the prosecution proves the key factual elements of the crime and the accused’s legal responsibility in committing it, beyond a reasonable doubt, the accused must be set free on procedural grounds. Without strict adherence to the requirements of procedural justice, the presumption of innocence can mean nothing and it will be enough that people only appear guilty for us to convict them. The strange case of Protais Zigiranyirazo demonstrates not only that justice is a most difficult result to attain, particularly with regard to crimes of monumental magnitude, but also how not to prosecute a génocidaire suspect and how not to rule on it.

#### **7. How not to prosecute a génocidaire suspect and how not to rule on it**

The prosecution effort seems to have suffered from poor conceptualization, planning and execution throughout the process and this must have complicated the Trial Chamber’s duty to render justice. The Zigiranyirazo Case offers the following lessons on how not to prosecute a génocidaire suspect and how not to rule on it:

*In order NOT TO SUCCEED at prosecuting the accused, the prosecution should:*

1. begin by drafting a vague indictment.
2. not respond or respond inadequately when the Trial Chamber requests it to amend the indictment.
3. mix up factual allegations in order to confuse everyone which witness is supposed to testify as to which fact.
4. include allegations without supporting them with any factual proof.
5. apply to the Trial Chamber to introduce new facts and allegations into the indictment that have little or nothing to do with the charges.
6. build its case upon the testimony of some particularly unreliable witnesses who are currently being prosecuted for genocide-related crimes and who have a demonstrated record of partiality or even

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<sup>88</sup> *Ibid.*, par. 67.

<sup>89</sup> *Ibid.*, par. 73.

<sup>90</sup> *Ibid.*, par. 75.

mendacity plus a strong interest to shift responsibility from themselves to the accused in order to avoid or reduce the prospective punishment staring at them in the face.

7. avoid presenting any evidence at all on some key factual allegations.
8. introduce materially inconsistent facts on key allegations.
9. not provide adequate notice to the defence. This way, the defence can use this argument against the prosecution on appeal.
10. confuse the roles of expert and fact witnesses so that the Trial Chamber has to reject all or most of this testimony.
11. make up some new allegations as it proceeds through the trial, and for good measure, add some totally new charges in Closing Arguments.
12. invent some new crimes that don't even figure in the ICTR Statute and make sure to spring them on both the Trial Chamber and the defence just to see what happens.

*In order to COMMIT A SERIOUS MISCARRIAGE OF JUSTICE, the Trial Chamber should:*

1. announce that it requires the prosecution to prove its case beyond a reasonable doubt, but then apply an entirely different standard during the deliberations.
2. require the defence to prove the accused's *alibi* beyond a reasonable doubt, thereby effectively jettisoning the presumption of innocence.
3. give manifestly greater credit to prosecution witnesses than to defence witnesses.
4. ignore key factual elements relating to the accused's *alibi* such as the distance and time required to travel to and from the location where the accused swore he was at the time the crime was committed, and the crime scene.
5. reject all defence witness testimony relating to the *alibi* on grounds of minor inconsistencies among the defence witnesses on this point.
6. make sure not to make a record of its visit to the crime scene and its having travelled the road connecting the crime scene location to the location where the accused swore he actually was at the time the crime was committed.

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