PART SIX: THE COUNTS

COUNT 1: CONSPIRACY TO COMMIT GENOCIDE

a. The Essential Elements of the Charge

2502. The crime of Conspiracy, being conceptually borrowed from Common Law, but not defined in the Statute, may be defined as follows, by recourse to British jurisprudence:

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties [...] punishable if for a criminal object. [2565]

2503. The *mens rea* required for the crime of Conspiracy is the intention to be a party to the actions intended to flow from the agreement. As explained by Lord Bridge:

> But, beyond the mere fact of agreement, the necessary mens rea of the crime is, in my opinion, established if, and only if, it is shown that the Accused, when he entered into the agreement, intended to play some part in the agreed course of action in furtherance of the criminal purpose which agreed course of conduct was intended to achieve. Nothing less suffices; nothing more is required. [2566]

2504. The Trial Chamber in *Musema* held that "it is indeed the act of conspiracy itself … which is punishable and not its result,"[2567] which means that the agreement, itself, to commit genocide is punishable, "even where no preparatory act has taken place"[2568] The same judgement defined conspiracy, according to the Common Law definition as being constituted "when two or more persons agree to a common objective, the objective being criminal"[2569] and thus defined the crime of 'conspiracy to commit genocide' as "an agreement between two or more persons to commit the crime of genocide".[2570]

[2565] *Mulcahy* c. *The Queen*, (1868) L.R. 3 H.L. 306, 317.
[2566] *R*. c. *Anderson*, [1986] A.C. 27, 39E (H.L.).
[2567] *The Prosecutor v. Musema*, Judgement of 27 January 2000, at para. 193.
[2568] *Ibid.* at para. 185; *See also* Summary Records of the meeting of the Sixth committee of the General Assembly, 21 Sept. – 10 Dec. 1948, Official Records of the General Assembly (travaux préparatoires of the Genocide Convention).
[2569] *Ibid.* at para. 190.
[2570] *Ibid.* at para. 191.

2505. Thus, it is submitted that the essential elements which must be proved to sustain a charge of "Conspiracy to Commit Genocide" are:

(1) There must be an agreement between two or more persons to a common criminal objective;

(2) The common criminal objective must be to commit genocide, that is, with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; or (b) Causing serious bodily or mental harm to members of the group; or (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; or (d) Imposing measures intended to prevent births within the group; or (e) Forcibly transferring children of the group to another group.

(3) Such person or persons belonged to a particular

(a) national

(b) ethnical

(c) racial, or

(d) religious group.

(4) The Accused was one of the persons who participated in the agreement, in one or more of the following ways:

(i) when charged pursuant to Article 6(1) of the Statute, the Accused either

(a) planned, (b) instigated, (c) ordered, (d) committed, (e) aided, or (f) abetted the crime charged;

(ii) When charged pursuant Article 6(3) of the Statute,

(A) the Accused either

(a) knew, OR

(b) had reason to know

that his subordinate either

(I) was about to commit the crime charged, OR

(II) had committed the crime charged,

AND

(B) the Accused failed to take the necessary and reasonable measures either

(a) to prevent such acts, OR

(b) to punish the perpetrators thereof.

b. The Essential Elements of the Count Have Not Been Proven Beyond a Reasonable Doubt

2506. It is submitted that the first and second essential elements of this Count have not been proved at all, let alone beyond all reasonable doubt. There was no specific evidence presented of any agreement between Major Ntabakuze and anyone else to do anything at all. The Prosecution relied entirely on circumstantial evidence, mainly that there appeared to be cooperation between diverse elements of Rwandan society in carrying out the alleged genocide such as to suggest some form of coordinated action and pre-planning.

2507. Whether or not this perception of events corresponds to reality, it is submitted that none of the evidence would lead to an inevitable conclusion that Major Ntabakuze was a party to *any* of the alleged planning for a genocide, or was responsible for *any* of the coordination of the actions of others participating in that alleged genocide. Bearing in mind that Major Ntabakuze was an army officer, engaged, since 1990, in defending his country from an enemy army of ex-patriot Rwandans, primarily, if not exclusively Tutsi, who were invading Rwanda from Uganda, and were bent on conquering the country, it is not surprising that he may have participated in meetings and planning sessions related to the war. This is certainly not the same thing as participating in the planning and coordination of the massacres of massive numbers of civilians on the basis of their ethnicity.

2508. A concrete piece of circumstantial evidence, which the Prosecution attempts to make much of, is the so-called 'Definition of the Enemy' document, in the creation of which Major Ntabakuze briefly participated. A careful reading of the document itself, exhibited as P-13.1 a and b, rather than the distorted truncated phrase that the Prosecutor has extracted from it, which appears throughout the Prosecutor's brief, will reveal that it plainly and clearly characterises the actual enemy that was attacking Rwanda at that time, with the aim of conquest, which aim eventually succeeded. There is nothing criminal about characterising your enemy as 'extremist Tutsi … who wish to regain power in Rwanda' when, in fact, that is exactly who your enemy is. The invading ex-patriots *were* Tutsi seeking to conquer the country, as their eventual success in that endeavour shows.

2509. It is with more than passing interest that we note that the English version of the "Definition of the Enemy" that appears in the Indictment is significantly different from that which appears in the translation of the document provided by the Prosecutor as exhibit P-13.1(b).

2510. In the version that appears in the Indictment, the word order has been altered and commas, which do not appear in the original, have been interposed, all of which subtly changes the meaning of the sentence.

2511. Here is the definition of the enemy that appears in P-13.1(b), which is a direct translation of P-13.1(a), the original definition of the enemy document which is in French:

> The enemy can be subdivided into two categories:
> - the primary enemy
> - enemy supporters
>
> 1. The primary enemy are the extremist Tutsi within the country and abroad who are nostalgic for power and who have NEVER acknowledged and STILL DO NOT acknowledge the realities of the Social Revolution of 1959, and who wish to regain power in RWANDA by all possible means, including the use of weapons.
>
> 2. Enemy supporters are all who lend support to the primary enemy.

2512. In marked contrast is the excerpt from the Definition that appears in the Indictment, as follows:

> *"The Tutsis from inside or outside the country, who are extremists and nostalgic for power, who do not recognize and have never recognized the realities of the Social Revolution of 1959, and are seeking to regain power in Rwanda by any means, including taking up arms."* The secondary enemy was defined as: *"Anyone providing any kind of assistance to the main enemy"*.

2513. It is submitted that the differences between these two versions are not minor or cosmetic, but are matters of substance. It is clear that the version in the exhibit, - the official translation – defines the enemy as "extremist Tutsi within the country and abroad" etc., not *all* Tutsi by any means, but only *extremist* Tutsi "who wish to regain power in RWANDA by all possible means, including the use of weapons".

2514. It is submitted, and the evidence shows, that the Definition of the Enemy document was a legitimate military tool that sought to accurately characterize the enemy that was invading Rwanda, and it was not a precursor to genocide, or a manifestation of planning or conspiracy to carry out genocide.

2515. As discussed elsewhere in this brief, circumstantial evidence can only achieve the status of proof of guilt beyond a reasonable doubt, if the theory advanced by the Prosecutor that is

derived from that evidence is the *only* reasonable inference that can be drawn from the evidence. This is far from the case with regard to the circumstantial evidence that may suggest that Major Ntabakuze participated in a conspiracy to commit genocide. As has been discussed elsewhere in this Brief, especially in the sections on the *ALTERNATIVE EXPLANATION FOR THE TRAGIC EVENTS IN RWANDA*, and on the *DEFINITION OF THE ENEMY*, there is ample evidence to suggest other explanations for the appearance of planning and coordination.

2516. In the absence of concrete evidence to substantiate the theoretical case of the Prosecution based on the Prosecutor's interpretation of the circumstantial evidence, that there are other reasonable explanations of what that circumstantial evidence means, even if the Chamber might consider them to be less likely explanations than the Prosecution's theory, they are sufficient to raise a reasonable doubt as to Major Ntabakuze's participation in any agreement between two or more persons to the common criminal objective of committing genocide. The *actus reus* of conspiracy, that makes up the first two essential elements of the crime that must be *proved beyond a reasonable doubt* in order to prove conspiracy, having not been proven, the count of conspiracy has not been proved beyond a reasonable doubt regarding Major Ntabakuze. He must be acquitted of the charge of "Conspiracy to Commit Genocide".

COUNT 2: GENOCIDE

a. The Essential Elements of the Charge

2517. The essential elements of the crime of genocide include proof of <u>both</u> (1) the *actus reus* and of (2) the specific *mens rea* regarding the crime of genocide, which definitions of these are to be found in Article 2(2) of the Statute, reproduced above. Specifically, the *actus reus* consists of one or more of the acts listed under Article 2(2) (a) - (e), that is, with intent to destroy, in whole or in part, a national, ethnical, racial or religious group: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

2518. The Trial Chamber in *Akayesu* determined that, in order to hold an Accused liable under Article 2(2)(a), it must be established that "the conduct of the Accused was a substantial cause of the death of the victim."[2571] The Trial Chamber in *Akayesu* also construed the phrase "causing serious bodily or mental harm to members of the group" under Article 2(2)(b) as meaning "acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution."[2572] The phrase "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" under Article 2(2)(c) was held by the same Trial Chamber to be in reference to "the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction".[2573]

2519. The *mens rea* required to prove the crime of genocide is the very specific intent (*dolus specialis*) to "destroy, in whole or in part, a national, ethnical, racial or religious group", as specified in Article 2(2). Absent proof of this precise, specific intent beyond reasonable doubt, no conviction for genocide can result.

2520. While, proof of motive is not required,[2574] it must be shown that the Accused either knew, or was willfully blind to the fact, that his actions constituted participation in genocide. In *Jelisic*, it was held that this specific intention requires

> "the clear knowledge that he was participating in genocide, that is the destruction, at least in part, of a national, ethnic, racial or religious group"[2575] [Emphasis added],

while *Akayesu* determined that

> "the offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Statute with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group"[2576] [Emphasis added].

2521. This clear intention and knowledge can be inferred from a perpetrator's actions or, in the absence of a confession or other admission, from other factors such as the scale of the atrocities committed, their general nature, in a region or a country, or the deliberate and systematic targeting of victims on account of their membership in a particular group, while excluding the members of other groups.[2577]

[2571] *The Prosecutor v. Akayesu*, Judgement of 2 September 1998, at para. 589. *See also The Prosecutor v. Kupreskic et al.*, Judgment of 14 January 2000, at para. 560
[2572] *Akayesu* Judgement, at para. 504.
[2573] *Akayesu* Judgement, at para. 505.
[2574] *Jelisic*; *Cyangugu*, para. 662; *Sikirica et al*, Judgement on Defence Motions to Acquit, 3 September 2001, para. 60.
[2575] *The Prosecutor v. Goran Jelisic*, Judgement, Case No. IT-95-10, 19 October 1999.
[2576] *Akayesu* Judgement, para. 520.
[2577] *Cyangugu*, para. 663.

2522. The Trial Chamber in *Jelisic* held that the requisite intent to commit genocide may be established by proof of the intention to destroy "a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such".[2578] However, "[t]he evidence must establish that it is the group that has been targeted, and not merely specific individuals within that group."[2579]

2523. While proof of premeditation is not required,[2580] nor is the existence of a plan or policy "a legal ingredient of the crime",[2581] "in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases".[2582]

2524. It might be noted that the *Musema* Trial Chamber concluded that an Accused can not be convicted of both conspiracy to commit genocide and genocide on the basis of the same acts.[2583]

2525. Thus, it is submitted that the essential elements which must be proved to sustain a charge of "Genocide" are:

(1) The Accused either

(a) killed one or more persons

(b) Caused serious bodily or mental harm to one or more persons

(c) Deliberately inflicted on one or more persons conditions of life calculated to bring about the physical destruction in whole or in part of the group to which those persons belonged;

(d) Imposed measures on one or more persons intended to prevent births within the group to which those persons belonged;

(e) Forcibly transferred one or more persons who were below the age of majority from the group to which they belonged to another group.

(2) Such person or persons belonged to a particular

(a) national

(b) ethnical

[2578] *Jelisic* Judgement, para. 82, as adhered to by the Trial Chamber in *Sikirica et al*, Judgement on Defence Motions to Acquit, 3 September 2001, para. 77.
[2579] *Sikirica et al*, Judgement on Defence Motions to Acquit, 3 September 2001, para. 89.
[2580] *Cyangugu*, para. 664.
[2581] *Jelisic*, Appeals Chamber Judgement.
[2582] *Jelisic* Appeals Chamber Judgement, para. 48.
[2583] *Prosecutor v. Musema*, Trial Chamber Judgement, 27 January 2000, at para. 198.

(c) racial, or

(d) religious group.

(3) The Accused intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.

(4) The Accused knew, or was wilfully blind to the fact that his act would destroy, in whole or in part, that national, ethnical, racial or religious group, as such

(5) The Accused was one of the people who participated in the crime, in one or more of the following ways:

(i) when charged pursuant to Article 6(1) of the Statute, the Accused either

(a) planned, (b) instigated, (c) ordered, (d) committed, (e) aided, or (f) abetted the crime charged;

(ii) When charged pursuant Article 6(3) of the Statute,

(A) the Accused either

(a) knew, OR

(b) had reason to know

that his subordinate either

(I) was about to commit the crime charged, OR

(II) had committed the crime charged,

AND

(B) the Accused failed to take the necessary and reasonable measures either

(a) to prevent such acts, OR

(b) to punish the perpetrators thereof.

2526. The question is whether or not the *dolus specialis* is a required element of a charge of genocide by command responsibility, that is, under Article 6(3). It is submitted that, notwithstanding some Decisions to the contrary, according to a strict reading of the Articles of the Statute defining genocide, as the scheme of essential elements above demonstrates, the *dolus specialis* is a defining characteristic of genocide, whether charged with direct or command responsibility, and is thus, a necessary essential element. The requirement that this specific intent be proved beyond a reasonable doubt, not inferred from the occurrence of certain acts that may have had some role in the supporting offense was confirmed by the Appeals Chamber in Prosecutor v. *Blagojevich*.[2584]

[2584] See, Appeals Chamber Decision of May 7, 2007, Prosecutor v. *Blagojevich* et al. para. 123.

2527. Furthermore, with regards to the intent required for the responsibility of superiors to attach, in the context of a genocide charge, the Trial Chamber held in *Akayesu* that:

> "criminal intent is the moral element *required for any crime* and that, where the objective is to ascertain the individual criminal responsibility of a person Accused of crimes falling within the jurisdiction of the Chamber, such as genocide, (…), it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that *negligence was so serious as to be tantamount to acquiescence or even malicious intent*."[2585] [Emphasis added]

2528. On the other hand, it could be argued that use of the word "committed" in the chapeau of Article 2(2) of the Statute might imply that only the actual perpetrator need have the *dolus specialis* (as the jurisprudence suggests is the case with "Complicity to Commit Genocide" discussed below). We would submit that since planning, instigating, ordering, committing, aiding, and abetting are all forms of participation under Article 6(1), all of these forms of participation are subsumed by the term "committed" in the chapeau of Article 2.

2529. In any event, when more than one interpretation of the Statute is possible, on the principle that the benefit of the doubt should accrue to the Accused, the interpretation most favourable to the Accused should prevail. The *in dubio pro reo* principle is accepted as a general principle of law and operates in criminal matters so that where a statute or rule may be fairly interpreted in two or more ways, the version most favourable to the accused should be selected. (*Prosecutor v. Akayesu*, Judgement, September 2, 1998, para. 319. See also, *Prosecutor v. Tadic*, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, October 15, 1998, para. 73.)[2586] Thus, we submit, it should be required that it be proved that the Accused shared in the genocidal intent even when charged under command responsibility.

b. The Essential Elements of the Count Have Not Been Proven Beyond a Reasonable Doubt

2530. As an initial point, the Defence raises the issue of whether or not the events in Rwanda in 1994, should be properly characterized as 'genocide' at all, in terms of the *legal* definition of the crime. The Prosecution relies, in the Final Brief, on the fact that judicial notice of the existence of "a genocide" in Rwanda has been taken in another case, as so instructed by the

[2585] *Akayesu* Judgment, at para. 489
[2586] Rodney Dixon, Karim A.A. Kahn, Judge Richard May, editors, Archbold International Criminal Courts: Practice, Procedure & Evidence, Sweet & Maxwell, London, 2003, at para.5-39.

Appeals Chamber. Citing the Appeal Chamber's Decision, the Prosecutor concludes "That a genocide occurred in Rwanda in 1994 is not in doubt".[2587]

2531. It is submitted that the Prosecutor is not entitled to rely on judicial notice in another case to declare that a fact is "not in doubt". The Appeals Chamber was clear and explicit that the judicial notice in the *Karemera* case does not apply in the present case. When Major Ntabakuze sought reconsideration of the Appeals Decision in *Karemera*, the Appeals Chamber found that he had no standing to raise the matter before them *because* the decision did not apply to him, and said:

> The Appeals Chamber observes that the Applicant is in no way prejudiced. If the Trial Chamber in his own case takes judicial notice of the same or similar facts, he may challenge the matter there in accordance with his right to be heard[2588].

It must be remembered that Trial Chamber III, when this case was before them, *rejected* the Prosecutor's request that they take judicial notice of the fact that a genocide occurred in Rwanda in 1994[2589], finding such to be fact at issue in this trial that the Prosecutor had to prove to make its case.

2532. Furthermore, in the Appeal Chamber's Decision on the Ntabakuze Motion for Reconsideration, the Appeals Chamber declined to answer our questions of clarification as to what the precise ambit of a decision to take judicial notice of the existence of a genocide means. Thus we do not know whether the judicial notice was of a 'genocide', as used in the popular vernacular "generic" sense of the word, or of a 'genocide' applying the legal definition of the crime as found in the statute of this Tribunal. That there is such a difference in the uses of this word was explicitly recognized by Trial Chamber III, when this case was before that Chamber.

> MR. PRESIDENT: Any witness can come, and, you know, use the word "genocide" in a generic sort of a way, but it is a legal issue.[2590]

2533. The Prosecutor has suggested repeatedly that the Defence have engaged in 'genocide denial'. Let us be very explicit and clear. The Defence for Ntabakuze has never denied the existence of a genocide in Rwanda. Nor has the Defence for Ntabakuze ever admitted the existence of a genocide in Rwanda. It has been our consistent position that the burden of proof falls on

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[2587] Prosecutor'sFinal Trial Brief, at paragraph 28.
[2588] *Aloys Ntabakuze v. The Prosecutor*, ICTR-98-41-AR73, Decision on Motion for Reconsideration; 4 October 2006, at paragraph 16.
[2589] *Bagosora et al.* Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94; 11 April 2003.
[2590] T. 05/09/02 at p. 32 ,lines 13-15..

the Prosecution to prove beyond all reasonable doubt that genocide did occur in Rwanda in 1994. That means, that the Prosecution has the burden of showing that the events in Rwanda must necessarily be characterized as genocide according to the definition in the Statute of the Tribunal. It is submitted that the Prosecution has not attempted to meet that burden in the Final Trial Brief, relying instead on the proposition that the genocide 'is not in doubt".

2534. With regard to whether or not the count of genocide has been specifically proved regarding Ntabakuze, as has been demonstrated at great length in the sections of this Brief that discuss the factual allegations in the case, and the specific paragraphs of the Indictment underpinning the charges, not a single allegation of any act of genocide has been proved beyond a reasonable doubt concerning Major Ntabakuze. Nor have the vast majority of the specific paragraphs of the Indictment that the Prosecutor has listed in the Count of Genocide the Indictment as providing the material facts of that charge been proven beyond a reasonable doubt.

2535. As is discussed more fully in the sections of this Brief entitled Allegations About: *'PHYSICAL PRESENCE AT A GENERAL ASSEMBLY ON 6 OR 7 APRIL 1994 AND PHYSICALLY COMMITTING CRIMINAL ACTS, BY UTTERING ORDERS TO HARM CIVILIANS', 'THE AKAJAGALI INCIDENT', 'KIMIHURURA INCIDENTS', THE 'NZABONARIBA INCIDENT', THE 'NYABYENDA INCIDENT', 'KILLING AT CENTRE CHRISTUS', 'INCIDENTS IN REMERA AND ENVIRONS', 'KABEZA', 'KABEZA I', THE 'SONATUBE 'INCIDENTS'', 'KILLINGS IN KICUKIRO AND SAHARA', 'ROADBLOCKS', THE 'IAMSEA INCIDENT', 'SUPPLYING WEAPONS AND AMMUNITION TO THE INTERAHAMWE', 'KILLINGS IN KABUGA BETWEEN 8 AND 12 APRIL 1994', 'KILLINGS AT RUHANGA CHURCH, 14 - 17 APRIL 1994', 'KILLINGS AT MASAKA', 'KILLINGS IN KABUSUNZU SECTOR', 'KILLINGS IN NYAKABANDA SECTOR', 'RWAMPARA INCIDENT', 'KABGAYI HOSPITAL',* and *'REINFORCING INTERAHAMWE IN GITARAMA, KIBUYE AND NGORORERO'* are all largely based upon the testimony of unreliable or non credible Prosecution witnesses, whose versions of events were challenged and contradicted by reliable Defence witnesses, often disinterested foreign nationals who have no stake in distorting the truth.

2536. We have demonstrated clearly *supra* that a reasonable doubt persists for each and every one of the allegations that would go to prove the crime of Genocide. It is submitted that none of the essential elements of this count have been proved beyond a reasonable doubt with regard to the acts and conduct of Major Ntabakuze.

2537. In particular it has not been shown, beyond a reasonable doubt, that Major Ntabakuze: (a) killed one or more persons; (b) caused serious bodily or mental harm to one or more persons; (c) deliberately inflicted on one or more persons conditions of life calculated to bring about the physical destruction in whole or in part of the group to which those persons belonged; (d) imposed measures on one or more persons intended to prevent births within the group to which those persons belonged; (e) forcibly transferred one or more persons who were below the age of majority from the group to which they belonged to another group.

2538. Furthermore, the mental element, the *dolus specialis* of Genocide, has not been shown, beyond a reasonable doubt, to have been present in Major Ntabakuze. On the contrary, the evidence has shown that Major Ntabakuze was an honourable man, defending his country from an invading army, who showed no discrimination toward Tutsi, as demonstrated by the fact that discrimination was singularly lacking within his own Para Commando battalion.

2539. Thus, no elements of the Count of genocide have been proved beyond a reasonable doubt regarding Major Ntabakuze, and he must be acquitted of the charge of Genocide that he faces.

COUNT 3: COMPLICITY IN GENOCIDE

a. The Essential Elements of the Charge

2540. The forms of criminal responsibility for which an individual will be held responsible are enumerated in Article 6(1) of the Statute of the Tribunal, as reproduced above. From the text, it flows that, setting aside the actual commission of the predicate offence, the forms of complicity that would appear to be envisaged by the Statute for any of the enumerated crimes punishable by the Tribunal are (i) planning, (ii) instigation, (iii) ordering, (iv) aiding, and (v) abetting, regarding the (i) planning, (ii) preparation, or (iii) execution of the crime[2591].

[2591] … which formulation creates the bizarre situation that one can be accused of "planning the planning of the offence", but presumably it would be possible, though unlikely, to make a plan to plan a crime at a future time.

2541. However, since the Statute at Article 2(3)e), specifically criminalizes Complicity in Genocide as a distinct crime, but does not define the concept, in order to interpret Article 2(3)e), the Trial Chamber in *Akayesu* was

> of the opinion that it is necessary to define complicity as per the Rwandan Penal Code, and to consider the first three forms of criminal participation referred to in Article 91 of the Rwandan Penal Code as being the elements of complicity in genocide, thus:
>
> complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose;
>
> complicity by knowingly aiding or abetting a perpetrator of a genocide in the planning or enabling acts thereof;
>
> complicity by instigation, for which a person is liable who, though not directly participating in the crime of genocide crime, gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited to commit genocide. [2592]

2542. The Trial Chamber in *Akayesu* further specified that

> [t]he intent or mental element of complicity implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.[2593]

But a distinction was drawn between the mental element required under the forms of accomplice liability under Article 6(1) and that under Article 2(3)e). Consequently, where a person is accused of aiding and abetting, planning, preparing or executing genocide, it must be proven that such a person acted with specific genocidal intent, i.e. the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, whereas, as stated above, there is no such requirement to establish accomplice liability in genocide. [2594]

2543. Thus, the *Akayesu* Chamber considered that those charged specifically with any of planning, instigating, ordering, aiding or abetting in genocide under 6(1) must be proven to have acted with the specific genocidal intent (*dolus specialis*), while those charged specifically with Complicity in Genocide under Article 2(3)e) need only to be proven to have

> knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the Accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[2595]

2544. However, the Trial Chamber in *Semanza* held, with regards to the intent required to establish complicity in genocide under Article 2(3)(e), that:

[2592] *Akayesu* (TC) at para. 537.
[2593] *Akayesu* (TC), at para. 538.
[2594] *Akayesu* (TC), at para. 547.
[2595] *Akayesu* (TC), at para. 545.

> "In the view of the Chamber, there is no material distinction between complicity in Article 2(3)(e) of the Statute and the broad definition accorded to aiding and abetting in Article 6(1). The Chamber further notes that the *mens rea* requirement for complicity to commit genocide in Article 2(3)(e) *mirrors that for aiding and abetting and the other forms of accomplice liability in Article 6(1)*."[2596] [Emphasis added; Footnotes omitted]

2545. Whether or not there is a distinction between the required intent if one is charged under 6(1) or 6(3) would appear, at the moment, to be an unresolved question:

> There is authority for the view that complicity in genocide requires that the Accused share the genocidal intent when it "strikes broader than the prohibition of aiding and abetting". The Appeals Chamber cited national legislation and the *travaux préparatoires* of the 1948 Genocide Convention to support that view, but took no position on that question since it was not an issue before the Chamber, thereby rendering their comments *obiter dicta*.
> There is, therefore, no authoritative decision within the Tribunal as to whether there is a difference in the *mens rea* for aiding and abetting genocide and complicity in genocide, either when the latter is broader than aiding and abetting, or indeed, when it is of the same scope as aiding and abetting.[2597] [Footnotes omitted]

However, the Appeals Chamber in the *Blagojevich* Decision on May 9, 2007 helped to clarify this matter by making clear that an Accused cannot be held liable as an "aider and abetter" of a specific intent crime, such as "genocide," without proof of "knowledge of the mass killings at issue." Genocidal intent cannot be inferred from the commission of acts alone, such as mass transport of possible victims or the commission of "opportunistic killings."[2598]

2546. We would reiterate our arguments made in relation to command responsibility for genocide, and submit that *all* forms of charging genocide should require the specific *mens rea*, since it is the defining characteristic of genocide, and that any ambiguity be resolved in favour of the Accused. Nevertheless, through an abundance of caution, for the purposes of this present discussion, we will not make the specific *mens rea* a required essential element, below, although we believe it should be.

2547. Of course, in order to be found guilty of complicity in any predicate offence, there must be proven to have been

> a punishable, principal act, in the commission of which the accomplice has associated himself. Complicity, therefore, implies a predicate offence committed by someone other than the accomplice. [2599]

Consequently

[2596] *Protsecutor v. Laurent Semanza*, Trial Chamber III Judgment, 15 May 2003, at para. 394.
[2597] *Prosecutor v. Slobodan Milosevic*, IT-02-54-T, "Decision on Motion for Judgement of Acquittal", 16 June 2004, at paras.295-296.
[2598] Appeals Chamber *Blagojevich* Decision, para 1223, May 7, 2007.
[2599] *Akayesu* (TC), at para. 539.

> in order for an Accused to be found guilty of complicity in genocide, it must, first of all, be proven beyond a reasonable doubt that the crime of genocide has, indeed, been committed.[2600]

2548. It should also be noted that the *Akayesu* Trial Chamber concluded that:

> it is not justifiable to convict an Accused of two offences in relation to the same set of facts … where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide.[2601]

2549. We submit that the essential elements which must be proven to sustain a conviction for Complicity in Genocide may be defined as follows:

(1) There must have been a genocide, that is, with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; or (b) Causing serious bodily or mental harm to members of the group; or (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; or (d) Imposing measures intended to prevent births within the group; or (e) Forcibly transferring children of the group to another group.

(2) The Accused was complicit with another person or other persons in that genocide in one or more of the following ways:

(a) by procuring means for the genocide for the other person or persons (b) by aiding or abetting the other person or persons in planning or in acts of genocide (c) by instigating the other person or persons to commit genocide.

(3) The Accused knew that such a person or persons were committing genocide, even though the Accused himself may not have had the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such

(4) The Accused was one of the people who participated in the crime, in one or more of the following ways:

(i) when charged pursuant to Article 6(1) of the Statute, the Accused either

(a) planned, (b) instigated, (c) ordered, (d) committed, (e) aided, or (f) abetted the crime charged;

(ii) When charged pursuant Article 6(3) of the Statute,

(A) the Accused either

(a) knew, OR

(b) had reason to know

that his subordinate either

[2600] *Akayesu* (TC), at para. 540.
[2601] *Akayesu* (TC), at para. 468.

(I) was about to commit the crime charged, OR

(II) had committed the crime charged,

AND

(B) the Accused failed to take the necessary and reasonable measures either

(a) to prevent such acts, OR

(b) to punish the perpetrators thereof.

b. The Essential Elements of the Count Have Not Been Proven Beyond a Reasonable Doubt

2550. The first essential element that must be proved regarding Complicity in Genocide is, of course, that there was genocide, according to the definition in the Statute of the Tribunal, in which to be complicit. We have argued in our discussion *supra* in relation to the Count of Genocide, itself, that the Prosecutor inappropriately relies, in the Final Brief, on the fact that judicial notice of the existence of "a genocide" in Rwanda has been taken in another case, concluding "That a genocide occurred in Rwanda in 1994 is not in doubt".[2602]

2551. We reiterate our submission that the Prosecutor is not entitled to rely on judicial notice in another case to declare that a fact is "not in doubt". Whether or not the events that occurred in Rwanda in 1994 should be properly characterised as genocide is a matter for the Chamber to decide based upon the evidence before it, and not based on judicial decisions taken by another Chamber.

2552. With regard to the other elements of this Count as applied to Major Ntabakuze, nowhere has the Prosecutor specified which type of complicity is alleged against Major Ntabakuze, such as (a) by procuring means for the genocide for the other person or persons (b) by aiding or abetting the other person or persons in planning or in acts of genocide (c) by instigating the other person or persons to commit genocide, nor is it specified who specifically the other person or persons are.

2553. Nevertheless, as is discussed more fully in the sections of this Brief entitled Allegations About: *'PHYSICAL PRESENCE AT A GENERAL ASSEMBLY ON 6 OR 7 APRIL 1994 AND PHYSICALLY COMMITTING CRIMINAL ACTS, BY UTTERING ORDERS TO HARM CIVILIANS', 'THE AKAJAGALI INCIDENT', 'KIMIHURURA INCIDENTS', THE 'NZABONARIBA INCIDENT', THE 'NYABYENDA INCIDENT', 'KILLING AT CENTRE CHRISTUS', 'INCIDENTS IN REMERA AND ENVIRONS',*

[2602] Prosecutor'sFinal Trial Brief, at paragraph 28.

'KABEZA', 'KABEZA I', THE 'SONATUBE 'INCIDENTS'', 'KILLINGS IN KICUKIRO AND SAHARA', 'ROADBLOCKS', THE 'IAMSEA INCIDENT', 'SUPPLYING WEAPONS AND AMMUNITION TO THE INTERAHAMWE', 'KILLINGS IN KABUGA BETWEEN 8 AND 12 APRIL 1994', 'KILLINGS AT RUHANGA CHURCH, 14 - 17 APRIL 1994', 'KILLINGS AT MASAKA', 'KILLINGS IN KABUSUNZU SECTOR', 'KILLINGS IN NYAKABANDA SECTOR', 'RWAMPARA INCIDENT', 'KABGAYI HOSPITAL', and *'REINFORCING INTERAHAMWE IN GITARAMA, KIBUYE AND NGORORERO'*, are all largely based upon the testimony of unreliable or non credible Prosecution witnesses, whose versions of events were challenged and contradicted by reliable Defence witnesses, often disinterested foreign nationals who have no stake in distorting the truth.

2554. These are the specific allegations that appear to have some possible connection to the three modes of participation that are outlined in the second essential element of this crime. It is submitted that we have amply demonstrated that none of these allegations, or any of the other allegations by the Prosecutor against Major Ntabakuze, have been proved beyond a reasonable doubt. Since none of the allegations that might support the count of Complicity have been proven, none of the examples of possible forms of *actus reas* found in the second essential element of this charge have been proven beyond a reasonable doubt.

2555. There being no proof beyond a reasonable doubt of the essential element of the count consisting of the *actus reas*, that is, either procuring means, aiding, abetting or instigating, the Count has not been proved beyond a reasonable doubt and major Ntabakuze must be acquitted of the charge.

COUNT 4: CRIME AGAINST HUMANITY: MURDER

a. The Essential Elements of the Charge

2556. Crimes against humanity are defined as crimes committed as part of a widespread or systematic attack on a civilian population. Thus, as part of the *actus reus* it must be proven that the crime alleged was, in fact, part of such a widespread or systematic attack. The *mens rea* that must be proven is that of the specific crime along with the specific *mens rea* for crimes against humanity, which is actual knowledge of the fact that the perpetrator's act is part of the widespread or systematic attack on a civilian population, pursuant to a policy or

plan.[2603] No (personal) motive needs to be proved. In *Blaskic* it was considered to be sufficient for the Accused to knowingly take the risk of "participation in the implementation of the ideology, policy or plan"[2604].

2557. In the *Semanza* Judgement, it was found that to make a case for crimes against humanity, the Prosecutor must prove: (1) that there was an attack; (2) that the attack was widespread or systematic; (3) that the attack was directed against any civilian population; (4) that the attack was committed on national, political, ethnical, racial or religious grounds; and (5) that the Accused acted with knowledge of the broader context of the attack and with knowledge that his act(s) formed part of the attack.[2605]

2558. The Chamber in *Semanza* found that premeditated murder can constitute a crime against humanity under Article 3(a) of the Statute,[2606] explaining that premeditation requires that the Accused held the intention to murder prior to committing the act causing death. However, the Accused need not have premeditated the murder of a particular individual; it is sufficient that the Accused had a premeditated intention to murder civilians as part of the widespread or systematic attack on discriminatory grounds.[2607]

2559. Following the *Semanza* reasoning, but simplifying slightly, and incorporating the *Blaskic* formulation (which adds the precision that the term "systematic' refers to an attack as being "pursuant to a policy or plan"), we submit that the essential elements that must be proved to convict for Crime Against Humanity Murder are as follows:

(1) The Accused or his subordinates deliberately caused the death of another person or persons.

(2) The conduct causing the death was part of a widespread attack or a systematic attack pursuant to a policy or plan.

(3) The attack was against any civilian population.

(4) The attack was perpetrated on national, political, ethnic, racial or religious grounds.

[2603] E. van Sliedregt, p. 49; *The Prosecutor v. Kayishema and Ruzindana*, ICTR-95-IT, Judgement, 21 May 1999, paras. 133 – 134; *The Prosecutor v. Tadic*, IT-94-1-A, Appeals Chamber Judgement; *The Prosecutor v. Rutaganda*, ICTR-96-3-T, 6 December 1999, para. 69; *The Prosecutor v. Musema*, ICTR-96-13-T, 27 January 2000, para. 206.
[2604] *The Prosecutor v. Blaskic*, IT-95-14-T, 3 March 2000, para. 257.
[2605] *Semanza,* Judgement (TC), paras. 327-332.
[2606] *Semanza,* Judgement (TC), para. 339.
[2607] *Semanza*, Judgement (TC), paras. 334 - 340.

(5) The Accused acted with actual knowledge of the broader context of the attack and with knowledge that his act(s) formed part of the attack.

(6) The Accused was one of the people who participated in the crime, in one or more of the following ways:

(i) when charged pursuant to Article 6(1) of the Statute, the Accused either

(a) planned, (b) instigated, (c) ordered, (d) committed, (e) aided, or (f) abetted the crime charged;

(ii) When charged pursuant Article 6(3) of the Statute,

(A) the Accused either

(a) knew, OR

(b) had reason to know

that his subordinate either

(I) was about to commit the crime charged, OR

(II) had committed the crime charged,

AND

(B) the Accused failed to take the necessary and reasonable measures either

(a) to prevent such acts, OR

(b) to punish the perpetrators thereof.

b. The Essential Elements of the Count Have Not Been Proven Beyond a Reasonable Doubt

2560. As with the other Counts already discussed, it is submitted that none of the allegations made by the Prosecutor against Major Ntabakuze have been proved beyond a reasonable doubt. In the absence of proof beyond a reasonable doubt of any of the criminal acts alleged Major Ntabakuze cannot be convicted of the counts that the allegations underpin.

2561. It is submitted as well, that it has not been proved beyond a reasonable doubt that the various crimes committed in Rwanda in 1994 were committed "pursuant to a policy or plan", which, it is submitted, is part of the second essential element of this crime, as a crime against humanity. Thus, Major Ntabakuze cannot be convicted of this crime as a crime against humanity.

2562. As is discussed more fully in the sections of this Brief most directly related to this Count, entitled Allegations About: *'PHYSICAL PRESENCE AT A GENERAL ASSEMBLY ON 6 OR 7 APRIL*

1994 AND PHYSICALLY COMMITTING CRIMINAL ACTS, BY UTTERING ORDERS TO HARM CIVILIANS', 'THE AKAJAGALI INCIDENT', 'KIMIHURURA INCIDENTS', THE 'NZABONARIBA INCIDENT', 'KILLING AT CENTRE CHRISTUS', 'INCIDENTS IN REMERA AND ENVIRONS', 'KABEZA', 'KABEZA I', THE 'SONATUBE 'INCIDENTS'', 'KILLINGS IN KICUKIRO AND SAHARA', THE 'IAMSEA INCIDENT', 'KILLINGS IN KABUGA BETWEEN 8 AND 12 APRIL 1994', 'KILLINGS AT RUHANGA CHURCH, 14 - 17 APRIL 1994', 'KILLINGS AT MASAKA', 'KILLINGS IN KABUSUNZU SECTOR', 'KILLINGS IN NYAKABANDA SECTOR', 'RWAMPARA INCIDENT', , and *'KABGAYI HOSPITAL'* are all largely based upon the testimony of unreliable or non credible Prosecution witnesses, whose versions of events were challenged and contradicted by reliable Defence witnesses, often disinterested foreign nationals who have no stake in distorting the truth.

2563. As none of the allegations against Major Ntabakuze have been proved beyond a reasonable doubt, the first essential element of this Count, the *actus reas*, being that Major Ntabakuze or his subordinates deliberately caused the death of another person or persons, has not been proved beyond a reasonable doubt. Nor has the second essential element, that the conduct causing the death was part of a widespread attack or a systematic attack pursuant to a policy or plan, been proved beyond a reasonable doubt. Therefore, Major Ntabakuze must be acquitted of this charge.

COUNT 5: CRIME AGAINST HUMANITY: EXTERMINATION

a. The Essential Elements of the Charge

2564. Extermination may be differentiated from murder in that it is directed against a population rather than against individuals and "it requires an element of mass destruction which is not required for murder"[2608]. Responsibility for a limited number of killings is insufficient to form the material element of extermination. Extermination was defined in *The Prosecutor v. Krstic* as being different from murder in that

> there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population.[2609]

[2608] *Akayesu* Judgement, at para. 591.
[2609] *The Prosecutor v. Krstic,* Judgement, 2 August 2001, at para. 503.

2565. The *Akayesu* Judgement adds that it must be shown that the accused or his subordinate participated in the killing of certain named or described persons and defines the essential elements thus:

1. the accused or his subordinate participated in the killing of certain named or described persons;
2. the act or omission was unlawful and intentional.
3. the unlawful act or omission must be part of a widespread or systematic attack;
4. the attack must be against the civilian population;
5. the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.[2610]

2566. The *mens rea* for extermination is the intent to perpetrate or to participate in mass killing.[2611]

2567. Combining the elements above, it is submitted that the essential elements that must be proven for Crime Against Humanity Extermination are as follows:

(1) The Accused or his subordinates participated in the killing of certain named or described persons.

(2) The killings were part of a mass destruction calculated to bring about the destruction of a numerically significant part of a targeted population.

(3) The act(s) or omission(s) causing the deaths and the participation in the mass destruction were unlawful and intentional.

(4) The conduct causing the deaths was part of a widespread attack or a systematic attack pursuant to a policy or plan.

(5) The attack was against any civilian population.

(6) The attack was perpetrated on national, political, ethnic, racial or religious grounds.

(7) The Accused acted with actual knowledge of the broader context of the attack and with knowledge that his act(s) formed part of the attack.

(8) The Accused was one of the people who participated in the crime, in one or more of the following ways:

(i) when charged pursuant to Article 6(1) of the Statute, the Accused either

(a) planned, (b) instigated, (c) ordered, (d) committed, (e) aided, or (f) abetted the crime charged;

[2610] *Akayesu* Judgement, at para.592.
[2611] *Semanza,* Trial Judgement; *Cyangugu*, Trial Judgement.

(ii) When charged pursuant Article 6(3) of the Statute,

(A) the Accused either

(a) knew, OR

(b) had reason to know

that his subordinate either

(I) was about to commit the crime charged, OR

(II) had committed the crime charged,

AND

(B) the Accused failed to take the necessary and reasonable measures either

(a) to prevent such acts, OR

(b) to punish the perpetrators thereof.

b. The Essential Elements of the Count Have Not Been Proven Beyond a Reasonable Doubt

2568. As with the other Counts already discussed, it is submitted that none of the allegations made by the Prosecutor against Major Ntabakuze have been proved beyond a reasonable doubt. In the absence of proof beyond a reasonable doubt of any of the criminal acts alleged Major Ntabakuze cannot be convicted of the counts that the allegations underpin.

2569. It is submitted as well, that it has not been proved beyond a reasonable doubt that the various crimes committed in Rwanda in 1994 were committed "pursuant to a policy or plan", which, it is submitted, is part of the second essential element of this crime, as a crime against humanity. Thus, Major Ntabakuze cannot be convicted of this crime as a crime against humanity.

2570. As is discussed more fully in the sections of this Brief most directly related to this Count, entitled Allegations About: *'PHYSICAL PRESENCE AT A GENERAL ASSEMBLY ON 6 OR 7 APRIL 1994 AND PHYSICALLY COMMITTING CRIMINAL ACTS, BY UTTERING ORDERS TO HARM CIVILIANS', 'THE AKAJAGALI INCIDENT', 'KIMIHURURA INCIDENTS', THE 'NZABONARIBA INCIDENT', 'KILLING AT CENTRE CHRISTUS', 'INCIDENTS IN REMERA AND ENVIRONS', 'KABEZA', 'KABEZA 1', THE 'SONATUBE 'INCIDENTS'', 'KILLINGS IN KICUKIRO AND SAHARA', THE 'IAMSEA INCIDENT', 'KILLINGS IN KABUGA BETWEEN 8 AND 12 APRIL 1994', 'KILLINGS AT RUHANGA CHURCH, 14 - 17 APRIL 1994', 'KILLINGS AT MASAKA', 'KILLINGS IN KABUSUNZU SECTOR', 'KILLINGS IN NYAKABANDA SECTOR', 'RWAMPARA INCIDENT',* and *'KABGAYI HOSPITAL'* are all largely based upon the testimony of unreliable or non credible Prosecution

witnesses, whose versions of events were challenged and contradicted by reliable Defence witnesses, often disinterested foreign nationals who have no stake in distorting the truth.

2571. As none of the allegations against Major Ntabakuze have been proved beyond a reasonable doubt, the first three essential elements of this Count, which define the *actus reas*, being that Major Ntabakuze or his subordinates participated in the killing of certain named or described persons; that the killings were part of a mass destruction calculated to bring about the destruction of a numerically significant part of a targeted population; and that the act(s) or omission(s) causing the deaths and the participation in the mass destruction were unlawful and intentional; have not been proved beyond a reasonable doubt. Nor has the fourth essential element, and that conduct causing the deaths was part of a widespread attack or a systematic attack pursuant to a policy or plan, been proved beyond a reasonable doubt. Therefore, Major Ntabakuze must be acquitted of this charge.

COUNT 6: CRIME AGAINST HUMANITY: RAPE

a. The Essential Elements of the Charge

2572. The *Kunarac* Judgement, confirmed on Appeal, established the definition of rape in international law, as follows:

> [T]he *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily; as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect the penetration, and the knowledge that it occurs without the consent of the victim.[2612]

The Appeal Chamber added that coercive circumstances without the use of threat or force may be sufficient to show absence of consent, hence threats and use of force are not essential elements of the crime.[2613]

2573. Thus, the essential elements which must be proven to sustain a conviction for Crime Against Humanity Rape charged under Article 6(3) are as follows:

[2612] *The Prosecutor v. Kunarac* Judgement, 22 February, 2001 at para. 460.
[2613] *The Prosecutor v. Kunarac* Judgement in Appeal, at paras. 59-61.

(1) The subordinate or subordinates of the Accused sexually penetrated the victim, however slightly, in one or more of the following ways

(a) in the vagina or anus of the victim by the perpetrator's penis or any other object,

(b) in the mouth of the victim by the penis of the perpetrator.

(2) This sexual penetration was without the consent of the victim.

(3)This sexual penetration was intentional, and the perpetrator knew that the victim did not consent.

(4) The sexual penetration was part of a widespread attack or a systematic attack pursuant to a policy or plan.

(5) The attack was against any civilian population.

(6) The attack was perpetrated on national, political, ethnic, racial or religious grounds.

(7) The perpetrator acted with actual knowledge of the broader context of the attack and with knowledge that his act(s) formed part of the attack.

(8) (A) the Accused either

(a) knew, OR

(b) had reason to know

that his subordinate either

(I) was about to commit the crime charged, OR

(II) had committed the crime charged,

AND

(B) the Accused failed to take the necessary and reasonable measures either

(a) to prevent such acts, OR

(b) to punish the perpetrators thereof.

b. The Essential Elements of the Count Have Not Been Proven Beyond a Reasonable Doubt

2574. As has been amply demonstrated in the section of this Brief entitled *ALLEGATIONS ABOUT RAPE*, the evidence concerning rape came from completely unreliable witnesses, and was contradicted by various reliable witnesses. Among the witnesses contradiction these allegation, were even Prosecution witnesses. The discussion about this allegation has clearly demonstrated that there is reasonable doubt that the events ever occurred. Thus, none of the

essential elements of this crime have been proved beyond a reasonable doubt, and Major Ntabakuze must be acquitted of this Count.

COUNT 7: CRIME AGAINST HUMANITY: PERSECUTION

a. The Essential Elements of the Charge

2575. The jurisprudence of the ICTY and ICTR indicates particular and unique grounds that must underlie the crime of persecution.

> [T]he crime of persecution must be committed on discriminatory grounds, specifically race, religion or politics (see *Tadic Judgment*, para. 715). No other crimes against humanity have this requirement (see, *Prosecutor v. Tadic,* Judgment of the Appeals Chamber' July 15, 1999, paras 281-305).[2614]

2576. The Trial Chamber in *Tadic* defined the crime of persecution as follows:

> The elements of the crime of persecution are the occurrence of a persecutory act or omission and a discriminatory basis for that act or omission on one of the listed grounds, specifically race, religion or politics. As discussed above, the persecutory act must be intended to cause, and result in, an infringement on an individual's enjoyment of a basic and fundamental right. The notion of persecutory act or omission provides broad coverage, including acts mentioned elsewhere in the Statute as well as acts which, although not in and of themselves inhumane, are considered inhumane because of the discriminatory grounds on which they are taken.[2615]

2577. Although some persecutory acts are listed in the Statute, the term "persecutory acts" is undefined. To fill this *lacuna*, the Trial Chamber in *Kupreskic* devised a four part test for the *actus reus* of persecution. The acts must be characterized by:

> (1) a gross and blatant denial, (2) on discriminatory grounds, (3) of a fundamental right laid down in international customary or treaty law, (4) reaching the same level of gravity as other crimes against humanity enumerated in … the Statute[2616]

2578. The Trial Chamber in *Kordic* emphasized that the act must reach a similar level of gravity of the offences listed in the Statute,[2617] and defined the *mens rea*, indicating that it is necessary that the Accused share the aim of the discriminatory policy and that mere knowledge of the policy was not sufficient.[2618]

[2614] Rodney Dixon, Karim A.A. Kahn, Judge Richard May, editors, Archbold International Criminal Courts: Practice, Procedure & Evidence, Sweet & Maxwell, London, 2003, at para.12-29.
[2615] *The Prosecutor v. Tadic,* Judgement, at para. 715.
[2616] *The Prosecutor v. Kupreskic*,n Trial Chamber Judgement, 14 January 2000, at para. 621.
[2617] *The Prosecutor v. Kordic*, Trial Chamber Judgement, 26 February 2001, at paras. 194-196.
[2618] *Ibid.*, at paras. 211-220.

2579. From this jurisprudence, it is submitted that the essential elements which must be proven to sustain a conviction for Crime Against Humanity Persecution are as follows:

(1) The perpetrator intentionally severely infringed the enjoyment of a basic and fundamental right of a person or persons.

(2) This infringement amounted to (a) a gross and blatant denial (b) on discriminatory grounds (c) of a fundamental right laid down in international customary or treaty law, (d) reaching the same level of gravity as other crimes against humanity enumerated in Article 3 of the Statute of the ICTR.

(3) The discriminatory ground for the persecutory act or omission was one or more of (a) race, (b) religion or (c) politics.

(4) The perpetrator of the persecutory act shared the aim of the discriminatory policy that led to the persecutory act.

(5) The conduct was part of a widespread attack or a systematic attack pursuant to a policy or plan.

(6) The attack was against any civilian population.

(7) The attack was perpetrated on national, political, ethnic, racial or religious grounds.

(8) The Accused acted with actual knowledge of the broader context of the attack and with knowledge that his act(s) formed part of the attack.

(9) The Accused was one of the people who participated in the crime, in one or more of the following ways:

(i) when charged pursuant to Article 6(1) of the Statute, the Accused either

(a) planned, (b) instigated, (c) ordered, (d) committed, (e) aided, or (f) abetted the crime charged;

(ii) When charged pursuant Article 6(3) of the Statute,

(A) the Accused either

(a) knew, OR

(b) had reason to know

that his subordinate either

(I) was about to commit the crime charged, OR

(II) had committed the crime charged,

AND

(B) the Accused failed to take the necessary and reasonable measures either

(a) to prevent such acts, OR

(b) to punish the perpetrators thereof.

b. The Essential Elements of the Count Have Not Been Proven Beyond a Reasonable Doubt

2580. Inasmuch as the set of paragraphs in the Indictment are listed as outlining the material facts for many different charges, it is difficult to know exactly what acts the Prosecution is alleging constitute acts of persecution that would have been committed by Major Ntabakuze. Nevertheless, as has been amply demonstrated in the sections of this Brief dealing with each of the allegations against Major Ntabakuze that appeared in the evidence of this trial, not a single one of those allegations has been proved beyond a reasonable doubt. The allegations are all largely based upon the testimony of unreliable or non credible Prosecution witnesses, whose versions of events were challenged and contradicted by reliable Defence witnesses, often disinterested foreign nationals who have no stake in distorting the truth.

2581. Thus, since none of the allegations has been proved beyond a reasonable doubt, any acts of persecution that may be found among those allegations have similarly not been proved beyond a reasonable doubt. Thus, none of the essential elements of this crime have been proved beyond a reasonable doubt, and Major Ntabakuze must be acquitted of this Count.

COUNT 8: CRIME AGAINST HUMANITY: INHUMANE ACTS

a. The Essential Elements of the Charge

2582. According to the *Kordic* Judgement, "other inhumane acts" is a residual category covering acts not specifically enumerated in the Statute[2619]. As with "persecution",

> [t]he threshold to be reached by other acts to be incorporated in this category are that the acts must be "similar in gravity to those listed in the preceding sub-paragraphs" (*Tadic*, Judgment, Trial Chamber, May 7, 1997, para. 729); "carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article [3]" (*Kupreskic*, Judgment, Trial Chamber, January 14, 2000, para. 566).

[2619] *The Prosecutor v. Kordic*, Trial Chamber Judgement, 26 February 2001, at para. 269.

The acts "must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity" (*Tadic*, Judgment, para. 729; also see, *Blaskic,* Judgment, Trial Chamber, March 3 2000, para. 243). Acts such as mutilation and other types of bodily harm, beatings and other acts of violence, and serious physical and mental injury have been found to constitute inhumane acts (see, *Tadic*, Judgment, para. 7230; and *Blaskic,* Judgment, para. 239). The *Kupreskic* Judgment has taken a broader view of the acts that may be characterized as "inhumane acts", and included the forcible transfer of groups of civilians, enforced prostitution, and enforced disappearances (see, *Kupreskic,* Judgment, Trial Chamber, January 14, 2000, para. 566).[2620]

2583. Based on this jurisprudence we would define the essential elements that must be proven to sustain a conviction for Crimes Against Humanity Other Inhumane Acts as follows:

(1) The perpetrator intentionally acted in such a way as to cause injury to a person or persons in terms of physical or mental integrity, health or human dignity;

(2) This act reached the same level of gravity as other crimes against humanity enumerated in Article 3 of the Statute of the ICTR.

(3) The act was part of a widespread attack or a systematic attack pursuant to a policy or plan.

(4) The attack was against any civilian population.

(5) The attack was perpetrated on national, political, ethnic, racial or religious grounds.

(6) The Accused acted with actual knowledge of the broader context of the attack and with knowledge that his act(s) formed part of the attack.

(7) The Accused was one of the people who participated in the crime, in one or more of the following ways:

(i) when charged pursuant to Article 6(1) of the Statute, the Accused either

(a) planned, (b) instigated, (c) ordered, (d) committed, (e) aided, or (f) abetted the crime charged;

[2620] Rodney Dixon, Karim A.A. Kahn, Judge Richard May, editors, Archbold International Criminal Courts: Practice, Procedure & Evidence, Sweet & Maxwell, London, 2003, at paras. 12-40 - 12-41.

(ii) When charged pursuant Article 6(3) of the Statute,

(A) the Accused either

(a) knew, OR

(b) had reason to know

that his subordinate either

(I) was about to commit the crime charged, OR

(II) had committed the crime charged,

AND

(B) the Accused failed to take the necessary and reasonable measures either

(a) to prevent such acts, OR

(b) to punish the perpetrators thereof.

b. The Essential Elements of the Count Have Not Been Proven Beyond a Reasonable Doubt

2584. Inasmuch as the set of paragraphs in the Indictment are listed as outlining the material facts for many different charges, it is difficult to know exactly what acts the Prosecution is alleging constitute inhumane acts that would have been committed by Major Ntabakuze. Nevertheless, as has been amply demonstrated in the sections of this Brief dealing with each of the allegations against Major Ntabakuze that appeared in the evidence of this trial, not a single one of those allegations has been proved beyond a reasonable doubt. The allegations are all largely based upon the testimony of unreliable or non credible Prosecution witnesses, whose versions of events were challenged and contradicted by reliable Defence witnesses, often disinterested foreign nationals who have no stake in distorting the truth.

2585. Thus, since none of the allegations has been proved beyond a reasonable doubt, any acts of persecution that may be found among those allegations have similarly not been proved beyond a reasonable doubt. Thus, none of the essential elements of this crime have been proved beyond a reasonable doubt, and Major Ntabakuze must be acquitted of this Count.

COUNT 9: SERIOUS VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL II: KILLING AND CAUSING VIOLENCE TO HEALTH AND TO PHYSICAL OR MENTAL WELL-BEING OF CIVILIANS AS PART OF AN ARMED INTERNAL CONFLICT

a. The Essential Elements of the Charge

2586. It was found in the *Celebici* case that there is no qualitative distinction between the concept of "willful killing" under the Geneva Conventions, and "murder" as a violation of the customs of war, "they differ only in the jurisdictional requirements. The rationale the Trial Chamber followed was to extend elementary considerations of humanity to internal conflicts."[2621]

2587. The requirement that most of the crimes which may be charged under International Criminal law must have taken place in the context of an armed conflict is fundamental.
For all the offences, except genocide, it is necessary to prove that an armed conflict existed, and establish a relationship between the offence and the conflict.

> … [T]he conflict has to be internal to render certain provisions of Article 4 of the ICTR Statute applicable. In terms of the Appeals Chamber's decision[*], the provisions of common Article 3 of the Geneva Convention apply during all conflicts, irrespective of whether the conflict is international or internal. Additional Protocol II, however, only applies during internal armed conflicts[2622]. [*See *The Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995.]

2588. It is submitted that the essential elements that must be proven to sustain a conviction on this Count are as follows:
(1) The Accused or his subordinates deliberately caused the death of another person or persons, or
(2) The Accused or his subordinates deliberately caused violence to the health and to the physical or mental well being of another person or persons.
(3) The victim or victims were civilians.
(4) The acts took place as part of an internal armed conflict.

[2621] Rodney Dixon, Karim A.A. Kahn, Judge Richard May, editors, Archbold International Criminal Courts: Practice, Procedure & Evidence, Sweet & Maxwell, London, 2003, at para. 11-28.

[2622] *Ibid*, at para. 2-32.

(5) The Accused was one of the people who participated in the crime, in one or more of the following ways:

(i) when charged pursuant to Article 6(1) of the Statute, the Accused either

(a) planned, (b) instigated, (c) ordered, (d) committed, (e) aided, or (f) abetted the crime charged;

(ii) When charged pursuant Article 6(3) of the Statute,

(A) the Accused either

(a) knew, OR

(b) had reason to know

that his subordinate either

(I) was about to commit the crime charged, OR

(II) had committed the crime charged,

AND

(B) the Accused failed to take the necessary and reasonable measures either

(a) to prevent such acts, OR

(b) to punish the perpetrators thereof.

b. The Essential Elements of the Count Have Not Been Proven Beyond a Reasonable Doubt

2589. It is submitted that the fourth essential element of this Count, that is that the acts alleged took place as part of an internal armed conflict has not been proved beyond a reasonable doubt. Indeed, considerable evidence was adduced that the conflict was international in nature, being an invasion from Uganda, by Ugandan nationals who were ex-patriot Rwandans. It is submitted that an invasion from without, even by people who may have been born in Rwanda, or are the offspring of former Rwandans, is still a conflict of an international character, and cannot properly be characterised as "internal".

2590. However, regardless of whether it was an internal or an international armed conflict, as has been amply demonstrated in the sections of this Brief dealing with each of the allegations against Major Ntabakuze that appeared in the evidence of this trial, not a single one of those allegations has been proved beyond a reasonable doubt. The allegations are all largely based upon the testimony of unreliable or non credible Prosecution witnesses, whose versions of events were challenged and contradicted by reliable Defence witnesses, often disinterested foreign nationals who have no stake in distorting the truth.

2591. Thus, since none of the allegations has been proved beyond a reasonable doubt, any acts of persecution that may be found among those allegations have similarly not been proved beyond a reasonable doubt. Thus, none of the essential elements of this crime have been proved beyond a reasonable doubt, and Major Ntabakuze must be acquitted of this Count.

COUNT 10: SERIOUS VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL II: OUTRAGES UPON PERSONAL DIGNITY, IN PARTICULAR HUMILIATING AND DEGRADING TREATMENT, RAPE AND INDECENT ASSAULT, AS PART OF AN ARMED INTERNAL CONFLICT

a. The Essential Elements of the Charge

2592. The essential elements of "outrages upon personal dignity, in particular humiliating and degrading treatment" have been delineated by the Trial Chamber in *Kunarac et al*, thus:

> (i) that the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and
> (ii) that he knew that the act or omission could have that effect.[2623]

2593. Combining this with the definition of rape in international law, and taking into account the provisions of Article 3 common to the Geneva Conventions and additional Protocol II, we submit that the essential elements that must be proven to sustain a conviction on this Count charged under Article 6(3) are as follows:

> (1) The subordinate or subordinates of the Accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, in particular rape or sexual assault, and
>
> (2) The perpetrator knew that the act or omission could have that effect.
>
> (3) In committing the rape or sexual assault, the perpetrator sexually penetrated the victim, however slightly, in one or more of the following ways

[2623] *Prosecutor v. Kunarac, Kovac and Vukovic*, Trial Chamber Judgement, 22 February 2001, at para. 514.

(a) in the vagina or anus of the victim by the perpetrator's penis or any other object,

(b) in the mouth of the victim by the penis of the perpetrator.

(4) This sexual penetration was without the consent of the victim.

(5)This sexual penetration was intentional, and the perpetrator knew that the victim did not consent.

(6) The act or omission took place during an armed internal conflict.

(7) (A) the Accused either

(a) knew, OR

(b) had reason to know

that his subordinate either

(I) was about to commit the crime charged, OR

(II) had committed the crime charged,

AND

(B) the Accused failed to take the necessary and reasonable measures either

(a) to prevent such acts, OR

(b) to punish the perpetrators thereof.

b. The Essential Elements of the Count Have Not Been Proven Beyond a Reasonable Doubt

2594. It is submitted that the seventh essential element of this Count, that is that the acts alleged took place as part of an internal armed conflict has not been proved beyond a reasonable doubt. Indeed, considerable evidence was adduced that the conflict was international in nature, being an invasion from Uganda, by Ugandan nationals who were ex-patriot Rwandans. It is submitted that an invasion from without, even by people who may have been born in Rwanda, or are the offspring of former Rwandans, is still a conflict of an international character, and cannot properly be characterised as "internal".

2595. However, regardless of whether it was an internal or an international armed conflict, as has been amply demonstrated in the sections of this Brief dealing with each of the allegations against Major Ntabakuze that appeared in the evidence of this trial, not a single one of those allegations has been proved beyond a reasonable doubt. In particular, as related to this count, the section of this Brief entitled *ALLEGATIONS ABOUT RAPE*, demonstrates that the evidence

concerning rape came from completely unreliable witnesses, and was contradicted by various reliable witnesses. Among the witnesses contradiction these allegation, were even Prosecution witnesses. The discussion about this allegation has clearly demonstrated that there is reasonable doubt that the events ever occurred.

2596. Thus, since none of the allegations has been proved beyond a reasonable doubt, any acts outrages upon personal dignity, in particular humiliating and degrading treatment, that may be found among those allegations have similarly not been proved beyond a reasonable doubt. Thus, none of the essential elements of this crime have been proved beyond a reasonable doubt, and Major Ntabakuze must be acquitted of this Count.