International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Liu Daqun
Judge Andresia Vaz
Judge Carmel Agius

Registrar: Mr. Adama Dieng

Date: 18 January 2012

THE PROSECUTOR
v.

Augustin NDINDILIYIMANA et al.

Case No. ICTR-00-56-A

BRIEF FOR IBUKA and SURVIVORS FUND (SURF) AS *AMICI CURIAE*

Office of the Prosecutor

Hassan B. Jallow
James J. Arguin

Counsel for Bizimungu

Gilles St-Laurent

Counsel for Ndindiliyimana

Christopher Black

Counsel for Nzuwonemeye

Charles Taku

Counsel for Sagahutu

Fabien Segatwa

Amici Curiae

IBUKA
Survivors Fund (SURF)

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I. Introduction

1. The crimes committed by Major General Augustin Bizimungu, Major General Augustin Ndindiliyimana, Major François-Xavier Nzuwonemeye, and Captain Innocent Sagahutu shock the conscience. But, the sentences the Trial Chamber imposed – time served to 30-years imprisonment – are grossly inadequate to redress the horrors these military leaders unleashed against thousands of innocent victims.

2. As the leading victims' rights organizations in Rwanda, IBUKA and Survivors Fund (SURF) (collectively, "the Victims' *Amici*") are uniquely positioned to assist the Appeals Chamber in understanding why the sentences imposed in this case should be set aside. The sentences do not further the primary sentencing goals of deterrence and retribution, tolerate impunity among those responsible for committing the gravest crimes, and demean the dignity of victims and survivors. The sentences, in short, are a stain on the Tribunal's legacy and the victims' memory.

3. The Victims' *Amici* do not submit this amicus brief out of a blind desire for vengeance or "eye-for-an-eye" justice. No sentence available to the Tribunal could erase the loss and pain inflicted by these offenders. As representatives of the victims of the Rwandan genocide, the Victims' *Amici* seek only to have the victims' collective voice heard so that the Tribunal can fashion sentences that better reflect its mission of preventing impunity and its commitment to doing justice to the victims' memory.

4. No victims were heard during the sentencing phase of this case. Had the victims been heard, they could have assisted the Chamber in better evaluating the gravity of the offenders' conduct. Had the victims been heard, they could have contributed to the offenders' rehabilitation by increasing their awareness of their crimes. At the same time, had the victims been heard, they could have helped restore dignity and power to those still struggling to overcome the traumas inflicted upon them.

5. In preserving the rights of the guilty at sentencing, the Tribunal must not continue to be deaf to the voices of their victims. The Tribunal, of course, must continue to give appropriate consideration to the individual circumstances of each case. But, those individual circumstances also should include the impact of the convicted offender's criminal conduct on their victims. The Appeals Chamber should accordingly use this opportunity to not only correct the sentences imposed in this case but also to clarify the role that victims can and should play in the sentencing phase of trial.

6. Allowing victims to be heard at sentencing is consistent with the Tribunal's Statute and fundamental principles of national and international justice. Indeed, as shown below, most national courts and other international bodies have recognized similar opportunities for victims to be heard at sentencing.

II. Statements of Interest

7. IBUKA is the umbrella organization for 13 different survivor organizations, representing all facets of Rwandan society affected by the 1994 genocide and, more particularly, by the types of crimes committed by the convicted in this case. IBUKA literally means "Remember." It was created in December 1995 after it was noticed that different associations of survivors were often working inconsistently and uncoordinated. They therefore decided to join their efforts and created a coordination structure and named it "IBUKA." Currently included within the IBUKA umbrella are the following associations:

- AVEGA- AGAHOZO — Association of the widow survivors of the genocide.
- ARG- IMPUHWE — Association of genocide survivors of the former Butare Province (in the Southern Province).
- AERG — Association of students/pupils who are genocide survivors.
- ASRG- MPORE — Association for the support of genocide survivors.
- BARAKABAHO — Association for the defense of genocide orphans' rights and interests.
- BENIMPUHWE — Association of women for self and mutual promotion.
- BENISHYAKA -— Association of war affected widows and orphans.
- AOCM- TWIBESHEHO — Association of genocide orphans' heads of households.

- UYISENGA N'IMANZI — Association of orphans.
- DUHARANIREKUBAHO — Association for youth survivors of genocide of Huye District in the Southern province.
- Association Des Familles Témoins de Solidarité (AFTS) — Association to support families who adopted children orphaned by the genocide.
- ASSOCIATION DES RESCAPES DE GENOCIDE DE RUKUMBERI — Monitors and protects the interests of genocide survivors in Rukumberi.
- ASSOCIATION DUHOZANYE — Promotes the rights and interests of widows in Southern Province.

8. All of the IBUKA affiliates are committed to making progress in the following areas:

- Poverty reduction among the survivors of the genocide.
- Health care for genocide survivors (physical and psychosocial).
- Assistance to the vulnerable groups of the genocide survivors.
- Education and care for orphans and child headed households.
- Legal and judicial assistance.
- Preservation of the memory and documentation.
- Promotion of the culture of peace.

9. Association Duhozanye, for instance, was formed by a group of widows in the ex-prefecture of Butare who came together for emotional support, especially for those who had been raped and infected with HIV/AIDS. Today, the association has approximately 3,000 members who assist widows, orphans, and child-headed households cope with trauma and rebuild their lives.

10. AERG is an association of over 43,000 student survivors, representing 26 universities and institutes of higher learning and 272 secondary schools located throughout Rwanda. AERG's main mission is to connect and represent all student survivors, and those whose parents and relatives were killed during the genocide. It provides moral support to help these survivors cope with the loss of their family members. Additionally, it provides survivors with financial support to obtain basic necessities like food, shelter, and healthcare.

11. Uyisenga N'imanzi is another organization under IBUKA's umbrella. It is dedicated to helping children orphaned by the genocide and AIDS (the spread of which was exacerbated by rapes perpetrated during the genocide) rebuild their

lives. It provides counseling, home construction, educational support, and medical care to members struggling to overcome trauma, isolation, and poverty.

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12. Survivors Fund (SURF) Survivors Fund (SURF) was founded by Mary Kayitesi Blewitt OBE, a British citizen of Rwandan origin. Mary lost over 50 members of her family in the genocide and helped establish the first survivors' organisations in Rwanda working for the Rwandan Ministry of Rehabilitation from July 1994. On her return to the UK in 1995, she began to support survivors through establishing SURF, registering the organisation in the UK as a charity (No. 1065705) and a company limited by guarantee (No. 03411565).

13. Survivors Fund (SURF) continues today to rebuild the lives of survivors of the Rwandan genocide. All of its work is informed and underpinned by four guiding principles. SURF is:

- committed over the long term to survivors and partners in Rwanda and the UK;
- independent and flexible in its response to the priorities of survivors;
- identifying activities to fund that are high impact and sustainable; and
- building the capacity of its partners to deliver programmes.

14. Holistic programmes are developed and delivered by survivor-led organizations, including organizations like AERG and AVEGA (Association of Widows of the Genocide), with technical support from SURF. Any one angle of assistance – be it medical, economic, legal, or social – would be an incomplete answer. Thus, the programmes range from healthcare to house building, education to entrepreneurship. Advancing rehabilitation through fair sentencing is another primary objective of SURF.

III. Statement of Facts

15. The starting point in the evaluation of the Trial Chamber's sentences must be the conduct of the accused and the crimes for which they were convicted. Although no written summary can fully capture the horrors that these former leaders unleashed on their victims, the Trial Chamber's scattered recitation of

the facts throughout its nearly 600-page decision does not do justice to the victims.

16. In reviewing the facts relevant to sentencing, the Trial Chamber looked at them from the perspective of the prosecution and defence, and made its own impartial evaluation as judges. The Trial Chamber never considered the facts relevant to sentencing from the victims' perspectives. By removing the victims from the sentencing equation, the Trial Chamber dehumanized them. Their pain and suffering was considered only in the abstract and, to be blunt, almost as an afterthought.

17. The following factual summary, drawn primarily from the Trial Chamber's own findings based on proof beyond a reasonable doubt and supplemented by credible witness testimony, is intended to bring the impact of these former leaders' criminal conduct on their victims to the forefront where it properly belongs. Only in this way can the Appeals Chamber fully appreciate the inadequacy of the sentences the Trial Chamber imposed.

A. General Bizimungu

18. Major General Bizimungu had a long and distinguished career in the Rwandan army, culminating in his 16 April 1994 appointment as Chief of Staff – the highest ranking officer in the army.[1] The Trial Chamber found General Bizimungu guilty of genocide (Count 2); murder, extermination, and rape as crimes against humanity (Counts 4-6); and murder and rape as violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Counts 7-8).[2] His convictions related to his direct and superior responsibility, pursuant to Articles 6(1) and (3) of the Statute,[3] for the rapes and murders perpetrated by his subordinates at multiple sites against thousands of innocent victims.

19. The Trial Chamber found that General Bizimungu knew, from multiple sources, that his soldiers were regularly and systematically killing and raping

[1] Judgement, paras. 90, 2183.
[2] Judgement, para. 2163.
[3] Judgement, paras. 924-31, 2177.

innocent civilians, but he did nothing to prevent or punish their crimes.[4] Among the specific crimes that he knew about but did nothing to prevent or punish were the crimes committed at the Josephite Brothers compound, *École des sciences infirmières* de Kabgayi (ESI), Musambira *commune* office and dispensary, TRAFIPRO complex, Butare prefecture office and the Episcopal Church of Rwanda (ERR), and Cyangugu Stadium.

1. Josephite Brothers compound

20. On 7 June 1994, soldiers under General Bizimungu's command removed approximately 100 Tutsi refugees from the Josephite Brothers compound and killed them, along with some members of the religious order who attempted to shelter them.[5] The victims' bodies were dumped into a mass grave, and the compound was subsequently commandeered by the soldiers to serve as a military base.[6]

2. ESI

21. During April and May 1994, soldiers under General Bizimungu's command regularly and repeatedly came to ESI, where Tutsi had sought shelter, to select certain refugees to be killed and, in some cases, raped in the nearby woods.[7] When the soldiers arrived, they would select certain persons to be removed from the compound.[8] Once removed, the soldiers either killed the refugees or handed them over to the *Interahamwe* to be killed.[9] During the same period, soldiers raped numerous other women and girls, some victims were raped repeatedly.[10] The crimes perpetrated by the soldiers were "not random or isolated incidents but were in fact organized and systematic crimes."[11]

22. One female victim who testified at trial, EZ, described the horrific events as follows:

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[4] Judgement, para. 1210-20.
[5] Judgement, paras. 1143-47.
[6] Judgement, paras. 1206-08.
[7] Judgement, paras. 1180-84.
[8] Judgement, para. 1180.
[9] Judgement, para. 1182.
[10] Judgement, paras. 1182, 1184.
[11] Judgement, para. 1202.

I was not safe because the soldiers would come and take away women and young girls to rape them in the forest, and I was one of those who were raped. They came at one point. They wanted to take away a woman to rape her, but this woman refused to follow them, told them that she could not subject herself to that exercise, but she was raped right there in front of everybody, and after the rape, she was killed. They told us that they had all the powers to do whatever they wanted. And then they came, took a group of women and young girls, about 40 altogether and took them to a wood that was between the Red Cross buildings and the nursing school buildings and they raped us there the whole night. They, first of all, asked us to take off all our clothing so as to avoid – or, to prevent the lice we had in our clothes – so that these lice would not bite them. And then they started raping us, and it lasted the whole night. This went on throughout this period. . . .

And throughout this period not one night went by that they would not come to take us. And each time they would tell us not to scream as they raped us. They told us that we were like sheep because when a sheep is shorn, it does not make a sound. And they said that whoever screamed would be killed, and they were so sadistic, after the rape they would pour pepper into our genital parts. And this went on, every day they would come, take away women and young girls that they would rape. . . .

But the soldiers who were 30 in number took their turns. They took turns, but I cannot tell you the number of people who raped me on that occasion. They were taking turns, and that lasted the whole night till dawn, because we went back to the school around 5 a.m.

Not a single night went by without we being raped. At one point in time we even asked them to allow us time to go and eat because, at that time, at noon, we had to queue up for food. In fact, we were living in a building which was opposite where the soldiers were living, so when we queued for food, these soldiers would come out and select the women and young girls that they wanted. So when we even asked them to leave us time to go get some food, they put us in front of bricks and asked us to eat that. So they asked us to eat the bricks and the mud. And we had no choice: We ate the mud. They therefore forced us to eat the mud so as to save our lives.[12]

3. Musambira *commune* office and dispensary

23. Soldiers under General Bizimungu's command also raped and killed a large number of Tutsi civilians at the Musambira *commune* office and dispensary

[12] T. 5 October 2005, p. 16 lines 8-37; p 17, lines 8-19.

in Gitarama *prefecture* during April and May 1994.[13] A "large number" of male Tutsi were killed by the soldiers.[14] The survivors of this massacre, mostly women and children, were then forced to bury the dead bodies in a mass grave, consisting of three large pits.[15]

24. Subsequently, the soldiers raped a number of female survivors.[16] DBH testified that she was among those victims and that she was raped on two separate occasions.[17] She was six-months pregnant at the time.[18]

4. TRAFIPRO complex

25. During this same period, April and May 1994, soldiers under General Bizimungu's command abducted and killed Tutsi refugees at the TRAFIPRO complex on a "regular basis."[19] Soldiers would arrive at the complex daily to select and remove Tutsi refugees.[20] The male refugees never returned but "were shot dead on the spot."[21] Some of the women refugees were allowed to return, but their pain was no less.[22] Many women and girls were raped, some multiple times.[23] One female survivor, DBE, testified that she was raped several times and forced to watch as soldiers killed her 15-year old son.[24] DBB, who was a schoolchild in 1994, also was raped twice by soldiers. On the first occasion, she was raped by three soldiers. Two of the soldiers held her legs open while the third raped her. On the second occasion, she was raped by two solders, who bound her hands and legs before raping her.[25] DBD likewise testified as follows:

> One grabbed one leg, the other grabbed another leg, whilst yet another soldier climbed on top of me, opened his fly, held his gun in his hand. He was beating me. I was very scared. I thought this was the end for me.

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[13] Judgement, paras. 1191, 1203.
[14] Judgement, para. 1188.
[15] Judgement, paras. 1188, 1203.
[16] Judgement, para. 1188.
[17] Judgement, para. 1188.
[18] T. 23 June 2005, p. 23, lines 9-13.
[19] Judgement, paras. 1194-96, 1204.
[20] Judgement, para. 1194.
[21] Judgement, para. 1194.
[22] Judgement, para. 1194.
[23] Judgement, paras. 1194, 1204.
[24] Judgement, para. 1194.
[25] T. 26 January 2006, p. 41-42.

> That is how he opened his fly, took out his penis, and penetrated me. After he finished, his friends let go of my legs, and the second climbed on top of me. There were three of them. All of them were busy telling me, "What did you come here for?"
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> . . . The first one raped me, took out his penis, and penetrated me. But his two colleagues were holding my – holding down my legs, holding my legs to the ground. Meanwhile, they were beating me with the butts of his gun, on the chest, on the back, all over. They'd already undressed me, removed my skirt, my kitenge, and all I had on me was my petticoat.[26]

5. Butare prefecture office and ERR

26. Soldiers under General Bizimungu's command also abducted, raped, and killed large numbers of civilians who had sought refuge at the Butare prefecture office and ERR from late April to May 1994.[27] As at the other sites, male refugees were taken away and executed.[28] Female refugees were raped in the nearby woods or, in some cases, in public spaces with other soldiers looking on.[29] The rapes and murders were committed in a systematic manner, often in broad daylight, and on property owned by the government and religious organizations.[30]

27. LN testified that a man, possibly a member of the *Interahamwe*, raped a young refugee girl of less than 13-years old, in broad daylight and "in full view of everybody," in the open space in front of the Butare *préfecture* office sometime between 27 April and 15 May 1994.[31]

28. XY similarly testified that, while she was a refugee at the Butare *préfecture* office, she saw soldiers and *Interahamwe* come to the *préfecture* office every day and night to abduct male and female refugees. On one occasion, two soldiers and three *Interahamwe* took her friend Marie and other refugees. When Marie returned the following morning, her clothes were dirty and she was wounded on her head. Marie told XY that she had been raped in the woods in

[26] T. 4 April 2005, p. 73, lines 5-15.
[27] Judgement, para. 1457.
[28] Judgement, para. 1449.
[29] Judgement, para. 1450.
[30] Judgement, para. 1457.
[31] T. 12 September 2005, pp. 82-83.

Rwabayanga, "near the pit where bodies were being thrown," and that the people who were taken away at the same time as Marie were killed in the woods.[32] XY was herself raped by a soldier when they were moved to ERR. She was sitting with a group of young girls when a soldier approached them and asked if her name was XY. The soldier subsequently took her into the woods about 300 metres from the group and raped her, all the while hitting her and calling her a "wicked *Inyenzi*".[33]

29. As for the male refugees, QBP testified that the soldiers and *Interahamwe* would come during daytime and "grab" the men.[34] On one occasion, the soldiers and *Interahamwe* isolated the men from the other refugees and then beat the men with clubs until they died.[35] On another occasion, the soldiers killed seven male refugees in front of the classrooms, without even bothering to hide their actions.[36]

30. General Bizimungu admitted that he knew about these crimes when he assumed command on 19 April 1994, but he did nothing.[37] He attempted to explain away his inaction by saying that the reports he received about the attacks did not indicate "whether such and such a soldier was implicated."[38] But, he undertook no efforts to obtain this information; instead, he turned a blind eye to the atrocities committed by his soldiers.[39]

6. Cyangugu Stadium

31. General Bizimungu likewise took no action to prevent or punish the rapes and murders perpetrated by his soldiers at Cyangugu Stadium during April and May 1994.[40] Following President Habyarimana's death, approximately 4,000 to

[32] T. 15 March 2006, pp. 6-9, 11; T. 13 March 2006, pp. 11-13.
[33] T. 13 March 2006, pp. 15-17; T. 14 March 2006, pp. 46-47.
[34] T. 5 September 2005, p. 42 lines 28-30.
[35] T. 5 September 2005, p. 42 lines 28-30.
[36] T. 5 September 2005, p. 44, lines 24-34.
[37] Judgement, para. 1455.
[38] Judgement, para. 1455.
[39] Judgement, para. 1458.
[40] Judgement, para. 1528.

5,000 Tutsi civilians sought refuge at the stadium.[41] On "numerous occasions," soldiers came to the stadium with lists of names.[42] The lists contained the names of Tutsi men who the soldiers removed from the stadium.[43] As the soldiers marched the Tutsi men to Gatandara, they kicked and beat the Tutsi with the butts of their guns.[44] When they arrived in Gatandara, the soldiers turned the Tutsi men over to the *Interahamwe*, who started hacking at the refugees with sharp weapons.[45] None of these men was ever seen again.[46]

32. Soldiers also selected female refugees, removed them from the stadium, and raped them.[47] Once again, many women were raped multiple times.[48]

33. On or about 10 May 1994, *Interahamwe* intercepted a group of refugees who were trying to escape the stadium and flee to Congo.[49] They hacked the refugees to death. LBC watched as her mother was killed right in front of the stadium.[50]

7. Other relevant conduct

34. In addition to the crimes for which General Bizimungu stands convicted, the Trial Chamber found by proof beyond a reasonable doubt that Rwandan soldiers perpetrated other criminal acts in the days before General Bizimungu's appointment as Chief of Staff.[51] Although the Trial Chamber found that it could not hold General Bizimungu criminally responsible for these crimes because they were committed prior to his assumption of command, the fact remains that, upon assuming command a few days later, he took no steps to investigate or punish the perpetrators of the following atrocities.

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[41] Judgement, para. 1509.
[42] Judgement, para. 1510, 1516.
[43] Judgement, para. 1510, 1516.
[44] T. 28 September 2005, p. 8.
[45] T. 28 September 2005, p. 8.
[46] Judgement, para. 1516.
[47] Judgement, para. 1518.
[48] Judgement, para. 1518.
[49] Judgement, para. 1517.
[50] Judgement, para. 1517.
[51] Judgement, para. 90 (finding that General Bizimungu was appointed Chief of Staff on 16 April 1994 and took up his post on 19 April 1994).

35. The tone for General Bizimungu's inaction in the days, weeks, and months following his appointment as Chief of Staff was set in the hours after President Habyarimana's plane crashed on 6 April 1994. General Bizimungu's response to this news was to call for the Tutsi to be killed and for roadblocks to be established to ensure that no Tutsi would escape.[52] The Trial Chamber found that these anti-Tutsi remarks were "directly linked" to the killings of Tutsi civilians in Rwankeri *secteur* on 7 April and, thus, convicted him for aiding and abetting those killings.[53]

36. The attacks in Rwankeri *secteur* unleashed by General Bizimungu's comments were particularly brutal. During one attack, "a woman called Joyce was taken out of her parents' house . . . . And after she was taken out, she was raped and killed by inserting sticks into her vagina. . . .[54] In another attack, a female victim's breast was cut off.[55]

37. General Bizimungu's anti-Tutsi sentiments also helped foster a culture of impunity among his subordinates that festered and eventually erupted when he formally assumed command. Indeed, on 8 April 1994 – only two days after General Bizimungu's anti-Tutsi remarks and a little more than a week before his appointment as Chief of Staff – Rwandan soldiers attacked approximately 200 to 250 mainly Tutsi civilians who had sought refuge at the Josephite Brothers compound.[56] In the course of this attack, the soldiers killed or injured a "large number" of Tutsi civilians, and raped one young girl.[57] No action was taken to punish the perpetrators of these crimes.

38. No doubt emboldened by this seeming acquiescence from the army's command, two months later Rwandan soldiers – now officially under General

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[52] Judgement, para. 911.
[53] Judgement, paras. 924-31, 2177.
[54] T. 3 March 2005, p. 20 lines 3-8.
[55] T. 2 February 2006, p. 4 lines 17-32.
[56] Judgement, para. 1131.
[57] Judgement, para. 1140.

Bizimungu's command – launched a second attack on the same compound, with equally tragic consequences.[58] Again, the soldiers were not punished.

39. Similarly, on 11 April 1994 at Nyanza Hill, Rwandan soldiers killed thousands of refugees who had sought refuge at the ETO complex in Kigali.[59] Initially, a small group of Belgian UNAMIR peacekeepers was present to protect the approximately 4,000 refugees.[60] When the peacekeepers withdrew, the *Interahamwe* and soldiers of the Rwandan Army attacked, forcing approximately 2,000 to 3,000 refugees to flee the ETO complex and seek protection at another location guarded by the UNAMIR soldiers.[61]

40. Driven from one refuge and seeking shelter at another potential refuge, the refugees were intercepted by the *Interahamwe* and Rwandan soldiers, who marched them to Nyanza Hill.[62] Once there, Rwandan soldiers opened fire on the unarmed civilians.[63] As one victim recounted:

> [W]hen the attackers started firing at us, I was still with my wife and my four children. . . . My wife, my four children and myself, that is, the members of my family, we were there, and as I said, I was wounded. . . . My wife and three of my children fell at that place. They died and I was left with one child.
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> . . . The following morning, I was thinking that all members of my family had died and that I was the only survivor, but I overhead my surviving child talking to another child that he was lying in water. Immediately I recognised my child's voice, and I called him, and the child also recognised my voice, and the child told me that, "Father, I am lying in a pool of water." I immediately understood that the child was, in fact, lying in a pool of blood.[64]

41. Approximately 2,400 civilians were massacred in the prolonged slaughter at Nyanza Hill.[65] The Trial Chamber found that the organized and sustained

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[58] Judgement, paras. 1143-47.
[59] Judgement, paras. 1149, 1151
[60] Judgement, para. 1149.
[61] Judgement, para. 1150.
[62] Judgement, para. 1150.
[63] Judgement, para. 1155.
[64] T 21 September 2005, p. 54 lines 6-24.
[65] Judgement, para. 1155.

nature of the attack belied any contention that this massacre was the responsibility of a band of "miscreant soldiers acting independently of the orders and knowledge of the army's command."[66] Nevertheless, despite the orders and knowledge of the army's command, nothing was done to investigate or punish the soldiers responsible for this massacre.

42. The victims' blood likely was not even dry when – five days later – General Bizimungu became Chief of Staff. Yet, he did nothing, allowing the perpetrators of this massacre to proceed with impunity to commit still more atrocities against innocent civilians, including those crimes for which he now stands convicted.

43. The Trial Chamber found no mitigating circumstances to negate the gravity of General Bizimungu's crimes.[67] To the contrary, it found that he "not only failed to halt the killings of Tutsi, but in fact endorsed and actively encouraged the genocide in 1994."[68] For all this, the Trial Chamber sentenced General Bizimungu to 30 years imprisonment – mere seconds of imprisonment for each of his thousands of victims.

B. General Ndindiliyimana

44. General Ndindiliyimana was a prominent member of Rwandan society. In addition to his military rank, he served on the Crisis Committee that was composed of senior leaders of the Rwandan Armed Forces.[69] At various points in his career, he served as Chief of Staff of the *Gendarmerie* and as Minister of Defence, Minister of the President's Office for Defence and Security Issues, Minister of Transport and Communication, and Minister of Youth and Sports.[70] He also was President of the Rwandan Olympic Committee and an active member of that committee until March 1994.[71]

45. The Trial Chamber found General Ndindiliyimana guilty of genocide (Count 2), murder and extermination as crimes against humanity (Counts 4-5),

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[66] Judgement, para. 1155.
[67] Judgement, para. 2183.
[68] Judgement, para. 2183.
[69] Judgement, paras. 83-84.
[70] Judgement, para. 83.
[71] Judgement, para. 83.

and murder as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 7).[72] His convictions related to his superior responsibility, pursuant to Article 6(3), for the crimes committed by his subordinates at Kansi Parish and St. André College.

46. In April 1994, several thousand Tutsi refugees had gathered at Kansi Parish, seeking sanctuary from recent attacks perpetrated in the area.[73] Starting on 21 April 1994 and continuing into the next day, *Interahamwe*, supported by police and *gendarmes*, attacked the refugees.[74] Prior to the attack on 21 April, six *gendarmes* assigned to guard General Ndindiliyimana's home provided weapons to the *Interahamwe* and other attackers.[75] The same *gendarmes* later actively joined in the attack.[76]

47. During the attack, the *gendarmes* and other attackers opened fire and threw grenades at the defenseless Tutsi refugees.[77] Thousands of Tutsi were killed.[78] Any surviving Tutsi who attempted to flee were cut down with machetes as they ran.[79]

48. General Ndindiliyimana admitted that he "would have known" that *gendarmes* assigned to his home participated in the attack.[80] Given the magnitude of the attack on the parish and the use of grenades and firearms, the Trial Chamber found that he must have known but did nothing to prevent or punish his subordinates for providing weapons to the attackers and actively participating in the crimes.[81]

49. *Gendarmes* under General Ndindiliyimana's command also collaborated with *Interahamwe* in attacking Tutsi civilians at St. André College on 13 April

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[72] Judgement, para. 2163.
[73] Judgement, para. 1281.
[74] Judgement, para. 1285.
[75] Judgement, paras. 1290-92, 1295.
[76] Judgement, paras. 1290-92, 1295.
[77] T. 23 September 2004, p. 34 lines 24-29; T. 27 September 2004, p.23 lines 7-15.
[78] Judgement, para. 2111.
[79] T. 19 September 2005, pp. 58-59.
[80] Judgement, paras. 1294, 2184.
[81] Judgement, paras. 1292, 1295, 2184.

1994.[82] This attack resulted in the killing of at least "a few dozen refugees," although some witnesses estimated that hundreds more were killed.[83] Whatever the precise number, the Trial Chamber found that the attack resulted in the "killing and injury of a significant number of refugees."[84] Most of the victims were killed with machetes; those who attempted to flee the massacre were shot.[85] GCB, who the Trial Chamber found credible in most respects, testified about one incident where the *Gendarmes* selected a group of about 20 male refugees, led them out of the compound, forced them to lie down on the road, and then shot them at close range.[86]

50. General Ndindiliyimana knew or should have known that there was a "strong prospect" that his subordinates perpetrated crimes at St. André College, but he failed to take "any measures" to address these crimes, either by seeking to investigate or punish those who committed them.[87]

51. In considering the gravity of General Ndindiliyimana's offences, the Chamber noted that there was no evidence to show that he knew in advance that his subordinates were about to commit the crimes.[88] Thus, his criminal responsibility was based "solely on a failure to punish killings that his subordinates had already committed."[89] As an aggravating factor, the Trial Chamber noted that "General Ndindiliyimana's role as Chief of Staff of the *Gendarmerie* carried a duty to protect and serve the people of Rwanda."[90] But, despite General Ndindiliyimana's clear breach of this solemn duty, the Chamber sentenced him to "time served" or 11-years imprisonment and ordered his immediate release.[91]

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[82] Judgment, para. 1365.
[83] Judgement, para 1352.
[84] Judgement, para. 1372.
[85] T. 6 June 2005, p. 38 lines 19-28.
[86] Judgement, paras. 1350, 1352; T. 14 September 2005, pp. 65-66.
[87] Judgement, paras. 1373, 1956, 2185.
[88] Judgement, para. 2186.
[89] Judgement, para. 2186.
[90] Judgement, para. 2187.
[91] Judgement, para. 2267.

52. The only explanation the Trial Chamber provided for its unusual sentence was its determination that General Ndindiliyimana's breach of duty was somehow mitigated by four facts. First, the prosecution's violation of its disclosure obligations during trial.[92] Second, General Ndindiliyimana may not have had adequate resources to control or communicate with all of the gendarmerie units under his command.[93] Third, General Ndindiliyimana's support for the Arusha Accords suggested that he was a political moderate inclined toward peace.[94] Fourth, because he was allegedly politically sidelined and threatened by Hutu extremists, General Ndindiliyimana's ability to effectively punish his subordinates was hindered. As shown below, none of these factors absolves his guilt or justifies the Trial Chamber's light sentence.

C. Major Nzuwonemeye and Captain Sagahutu

53. The Trial Chamber found Nzuwonemeye and Sagahutu guilty of murder as a crime against humanity (Count 4) and murder as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 7) in connection with the killing of Prime Minister Agathe Uwilingiyimana and 10 Belgian peacekeepers.[95]

54. On the morning of 7 April 1994, Major Nzuwonemeye ordered Captain Sagahutu to deploy armored vehicles and RECCE Battalion soldiers to the residence of Prime Minister Uwilingiyimana.[96] The soldiers were intended to reinforce soldiers from the Presidential Guard who were already at the Prime Minister's residence.[97]

55. This deployment was significant because Prime Minister Uwilingiyimana was a "prominent opposition member of the government.[98] Later that day, she was scheduled to give a radio address to calm the public and help put an end to

[92] Judgement, para. 2191-95
[93] Judgement, paras. 291-96.
[94] Judgement, paras. 2199-222.
[95] Judgement, para. 2163.
[96] Judgement, para. 1715.
[97] Judgement, paras. 1715-16
[98] Judgement, para. 2137.

the violence.[99] The radio address was so important that UNAMIR sent the Belgian peacekeepers to the Prime Minister's residence to ensure her safety and escort her to the radio station so she could make the address.[100] Unfortunately, UNAMIR's attempt to safeguard the Prime Minister and the hope she represented were thwarted by Major Nzuwonemeye's and Captain Sagahutu's deployment of the RECCE Battalion.[101]

56. Acting on instructions from their commanders (and in collaboration with other elements of the Rwandan army), the RECCE Battalion attacked the Prime Minister's residence, disarmed the UNAMIR soldiers, and killed the Prime Minister, her husband, brother, and several associates.[102] The Prime Minister's death not only prevented her from making the anticipated radio address, but it carried heavy symbolic weight as well. Her murder dealt a severe blow to moderate elements striving to quell further bloodshed. As the Trial Chamber explained, had the Prime Minister been able to make her address "on national radio at such a crucial time," it "could have substantially calmed the situation in the country."[103]

57. The brutal manner in which the Prime Minister was killed and her body desecrated show that her murderers intended to send a drastically different message to the public: moderation would be brutally punished. As a consequence, the murderers riddled the Prime Minister's body with bullets, including gunshots to her mouth, abdomen, and forehead.[104] In addition, after killing her, the killers shoved an empty soda bottle into her genitals.[105]

58. One of Major Nzuwonemeye's and Captain Sagahutu's subordinates described the horrific scene in these terms:

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[99] Judgement, paras. 513, 1718, 2137.
[100] Judgement, para. 1718.
[101] Judgement, para. 1718.
[102] Judgement, paras. 1718, 1740, 1844; T. 22 September 2005, p. 73; T. 18 January 2006, pp. 31-32.
[103] See Judgement, para. 2137.
[104] Judgement, para. 1737; T. 22 September 2005, p. 73; T. 9 May 2005, pp. 22-23; T. 12 January 2005, pp. 23-24.
[105] T. 12 January 2005, pp. 23-24.

> The corpse was laying by the gate, at the back entrance on the tarred road. . . . The back gate leading to the tarred road. In fact, it is the front gate, not the back gate of the building. . . . The body had been dragged by the arms and it had been put outside of the house. It was naked, and it was lying on its back. The body was riddled with bullets. You could see bullet wounds on the head and on the back, particularly on the stomach. . . . Apart from the bullet wounds an empty Fanta bottle had been thrust into her genitals.[106]

59. Shortly after killing the Prime Minister and members of her family and associates, soldiers under Major Nzuwonemeye's and Captain Sagahutu's command killed 10 Belgian peacekeepers.[107] Like the Prime Minister's assassination, these killings likewise carried great symbolic weight and were a direct affront to the international community and international justice.

60. The Trial Chamber found that the killing of the Belgian peacekeepers took place in two stages.[108] In reality, it was three stages. First, as noted above, the Belgian peacekeepers were disarmed when they were intercepted at the Prime Minister's residence and then transported to Camp Kigali.[109] Second, upon arrival at Camp Kigali, the unarmed peacekeepers were forced to remove their shoes, and attacked with a variety of "crude instruments, including canes, rifle butts and rocks."[110] The Belgian soldiers were screaming, but none of the Rwandan soldiers came to their aid, even though the beatings lasted four hours.[111] At least six unarmed peacekeepers were killed in this initial attack.[112] Third, after the two-to-four remaining peacekeepers managed to escape and seek shelter in a nearby building, soldiers under Nzuwonemeye and Sagahutu's command "began lobbing grenades and firing small arms" into the building, killing the remaining peacekeepers.[113]

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[106] T. 12 January 2005, p. 23.
[107] Judgement, para. 1853.
[108] Judgement, paras. 510, 1865.
[109] Judgement, paras. 1718, 2138.
[110] Judgement, para. 510, 1855; Tr. 29 September 2004, p. 47; T. 30 September 2004, pp. 22-23; T. 5 October 2004, pp. 27-28.
[111] T. 11 January 2005, p. 66.
[112] Judgement, para. 510.
[113] Judgement, paras. 510, 1856.

61. Major Nzuwonemeye and Captain Sagahutu knew about these killings; indeed, they implemented the orders to carry them out.[114] In fact, when told that some of the Belgian peacekeepers were resisting the initial attack perpetrated by soldiers at Camp Kigali, Captain Sagahutu ordered his subordinates to put down the resistance.[115] In response to this order, two of his subordinates took a MGL grenade launcher from his office and used it to kill the two-to-four surviving Belgians who managed to escape the initial slaughter.[116]

62. During the day, UNAMIR's commander, General Dallaire, made repeated inquires regarding the missing UN troops.[117] Late that evening, he was informed that the troops were at the Kigali hospital. When he arrived, General Dallaire was directed to the morgue where he found the "bodies of the dead Belgian soldiers, many of them half-naked, piled together in a gruesome fashion" on the ground outside the morgue.[118] General Dallaire promptly ordered a board of enquiry into the Belgian peacekeepers' murders; Major Nzuwonemeye and Captain Sagahutu, on the other hand, did nothing.[119]

63. In determining the appropriate sentence, the Trial Chamber noted that the "killing of the Prime Minister, a figurehead of the Rwandan government, carried particular symbolic weight and removed opposition to the ensuing genocide and other crimes that ultimately occurred."[120] Similarly, with regard to the murders of the Belgian peacekeepers, the Trial Chamber noted that their deaths likewise "carried particular symbolic weight and removed impediments to the genocide and other crimes that ultimately occurred."[121]

64. The Trial Chamber viewed the "calculated and premeditated nature" of the Prime Minister's assassination and the Belgian peacekeepers' role as representatives of the UN Security Council's peacekeeping authority as

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[114] Judgement, paras. 1906, 2098-99.
[115] Judgement, paras. 1886, 1907, 2034.
[116] Judgement, paras. 1870, 1872, 1886, 2034, 2099, 2255.
[117] Judgement, para. 1771.
[118] Judgment, para. 1771.
[119] Judgment, paras. 1772, 1889.
[120] Judgement, para. 2247.
[121] Judgement, para. 2258.

aggravating factors.[122] None of the factors offered in mitigation by Major Nzuwonemeye or Captain Sagahutu detracted from the gravity of their offenses.[123] Nevertheless, the Trial Chamber sentenced them to only 20-years imprisonment.[124] As detailed below, these sentences do not adequately reflect the leading roles these military commanders played in assassinating the Prime Minister and UN peacekeepers – killings that the Trial Chamber itself found cleared the path for the genocide and multiple other atrocities that followed.

IV. Submissions

A. The Trial Chamber's sentences do not fulfil the primary goals of sentencing and are grossly inadequate.

65. The crimes prosecuted by the Tribunal are the gravest known to man, and the persons prosecuted by the Tribunal are among those most responsible for perpetrating those atrocities. Once guilt has been adjudicated, the sentence imposed by the Tribunal should make plain the international community's condemnation of the conduct in question and demonstrate to all that the international community will not "tolerate serious violations of international humanitarian law and human rights."[125] Only in this way can the Tribunal fulfill its mandate of ensuring that "such violations are halted and effectively redressed."[126]

66. In keeping with this mandate, the Appeals Chamber has identified deterrence and retribution as the primary factors to consider in imposing sentence.[127] Deterrence is meant to prevent or dissuade others from committing similar crimes in the future. Retribution is "not to be understood as fulfilling a

[122] Judgement, paras. 2247, 2258.
[123] Judgement, paras. 2252, 2263.
[124] Judgement, para. 2268-69.
[125] Aleksovski Appeal Judgement, para. 185.
[126] Resolution 955 (1994), adopted by the Security Council at its 3454th meeting on 8 November 1994.
[127] Aleksovski Appeal Judgement, para. 185.

desire for revenge but as duly expressing the outrage of the international community at these crimes."[128]

67. The sentences imposed in this case fail to satisfy either of these aims. The relatively light sentences imposed against these senior military leaders are not likely to deter future violations of international humanitarian law. They also do not adequately convey the international community's outrage at these crimes. To the contrary, the sentences imposed here are less severe than those available under most national laws for ordinary crimes, like assault, rape, or murder, committed against a single victim. They do not reflect the extraordinary nature of the crimes committed by these senior military leaders against thousands of innocent victims.

68. The inadequacy of the Trial Chamber's sentences cannot be explained away by reliance on catch phrases like "judicial discretion" or the "individual circumstances" of the convicted. To be sure, Trial Chambers have broad discretion in fashioning sentences and in so doing must consider the individual circumstances of the person to be sentenced. But, the "starting point for consideration of an appropriate sentence" is the "gravity of the conduct of the accused."[129] Where a Trial Chamber fails to give "sufficient regard to the gravity of the conduct" on which a conviction is based, the Appeals Chamber should remedy the error.[130]

69. Here, the Trial Chamber duly noted that the crimes committed by these former military leaders were exceedingly grave. It also found substantial aggravating factors based on their breaches of their solemn duty to protect the members of the civilian population and abuse of the public trust placed in them by virtue of their military ranks and standing in the community. Except for General Ndindiliyimana, whose individual circumstances are discussed below, it also found no mitigating factors to detract from the gravity of their offences. Nevertheless, it fashioned sentences far below the life sentences that this

[128] Aleksovski Appeal Judgement, para. 185.
[129] Aleksovski Appeal Judgement, para. 182.
[130] Aleksovski Appeal Judgement, para. 183.

Tribunal has imposed against other military and civilian leaders convicted of similarly grave offences.[131]

70. The Trial Chamber also failed to adequately explain how these light sentences could be reconciled with its own assessment of the gravity of the crimes and its assessment of the various aggravating factors relevant to each offender. As a result, the victims of these crimes are left with lingering doubt about whether justice was in fact done.

71. This doubt would have been alleviated had the Trial Chamber's sentencing analysis started with the premise that, given the gravity of the offences and aggravating circumstances, a life sentence was appropriate here – as it has been in other genocide cases before the Tribunal. The Chamber then should have considered the individual circumstances or mitigating factors that it believed justified or explained why, in the exercise of discretion, it chose to impose a substantially reduced sentence.

72. The Trial Chamber never provided this explanation. It found that the crimes were grave, there were substantial aggravating factors, and identified a few individual circumstances or mitigating factors. Then, it jumped right to imposing sentences from 11-to-30 years for each convict. This gap in the Chamber's explanation of its sentencing decision should not be swept aside as an exercise of discretion, thereby insulating its decision from meaningful appellate review. The victims deserve more.

1. General Bizimungu

73. With regard to General Bizimungu, in particular, the Trial Chamber failed to take into account highly pertinent information relevant to his character.[132] It failed to give any consideration to his responsibility for failing to punish soldiers under his command who committed crimes before he was appointed Chief of

[131] Semanza Appeal Judgment, para. 389 ("convictions for perpetrating genocide, at least those not reached after a guilty plea, have generally resulted in life sentences").
[132] Mucic Appeal Judgement, para. 787 (observing that "all information relevant to an accused's character should be considered in sentencing").

Staff.[133] Although the Trial Chamber held that, under existing jurisprudence, General Bizimungu could not be held *legally* responsible for these crimes, he remains *morally* responsible for his failure to take any action at all to investigate or punish these crimes.[134]

74. General Bizimungu's failure to investigate or punish these earlier crimes set the stage for the crimes that occurred after he formally assumed command. By doing nothing to investigate or punish these earlier crimes, General Bizimungu implicitly licensed his subordinates to murder, rape, and torture innocent civilians without fear of consequence. Thus, the Trial Chamber erred by not taking General Bizimungu's "ongoing failure to exercise the duties to prevent or punish, with its implicit effect of encouraging subordinates to believe that they [could] commit further crimes with impunity," into account in determining his sentence.[135]

2. General Ndindiliyimana

75. Similarly, with regard to General Ndindiliyimana, the Trial Chamber acknowledged that he was "aware of the scale and scope of the killings that were taking place in Rwanda" throughout April 1994.[136] He received daily SITREPs from his troops on the situation.[137] By virtue of his rank and prominence in the community, General Ndindiliyimana could have prevented or punished the crimes committed by his subordinates at Kansi Parish and St. André College; he did nothing. The Trial Chamber found that the gravity of his crimes was mitigated by four factors. But, none of them alone or in combination truly mitigated anything.

76. First, the Trial Chamber cited alleged prosecutorial misconduct as a factor in mitigation. This factor, however, is not a personal circumstance of General

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[133] Judgement, para. 90.
[134] The Prosecutor has appealed the Chamber's legal finding. If the Prosecutor's appeal on this basis succeeds, it will serve only to further highlight the gross inadequacy in the Trial Chamber's sentence of 30-years imprisonment.
[135] See Mucic Appeal Judgement, para. 739.
[136] Judgement, para. 783.
[137] Judgement, para. 783.

Ndindiliyimana; it does not explain in any way his failure to prevent or punish the crimes for which he stands convicted. Thus, it should not have been a factor in mitigating his sentence. Its consideration here resulted in unjustified leniency.

77. Other full and adequate remedies exist to redress or punish any alleged misconduct that may have occurred during the prosecution of this case. The Trial Chamber here, for instance, allowed the defence to recall certain prosecution witnesses and call additional defence witnesses. It also admitted 12 of the statements belatedly disclosed by the prosecution into evidence.[138]

78. Other alternatives existed as well. The Chamber, for instance, could have allowed a continuance of proceedings, struck testimony from the record, ordered supplemental disclosures, or directed the prosecution to confirm the validity and comprehensiveness of its disclosures. In more extreme cases, the Trial Chamber could sanction counsel or even initiate contempt proceedings.[139] Any one or a combination of these measures would redress the particular misconduct at issue (*e.g.*, a disclosure violation), and it would do so without unfairly lightening the punishment for a convicted *génodcidaire* responsible for thousands of rapes and murders.

79. The second mitigating factor invoked by the Trial Chamber was General Ndindiliyimana's alleged lack of resources. No alleged lack of resources, however, prevented the *gendarmerie*s guarding his home from providing weapons to be used in the attack on innocent civilians at Kansi Parish. If his subordinates had resources sufficient to perpetrate this attack and the attack at St. Andre College, it follows that General Ndindiliyimana had sufficient resources to prevent or punish these crimes. But, he did nothing.

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[138] Decision on Defence Motions Alleging Violation of the Prosecutor's Disclosure Obligations Pursuant to Rule 68, 22 September 2008; Decision on Ndindiliyimana's Motion to Recall Identified Prosecution Witnesses and to Call Additional Witnesses.

[139] Karemera v. Prosecutor, Case No. ICTR-98-440AR73.19, Decision on Mattheiu Ngirumpatse's Appeal Against a Sanction Imposed on Counsel, 21 March 2011, para. 17; Rule 77 of the Rules of Procedure and Evidence.

80. Third, the Trial Chamber noted that General Ndindiliyimana's made statements supportive of the Arusha Accords, thereby suggesting that he was a moderate inclined toward peace. The Trial Chamber's supposition in this regard cannot, however, be reconciled with his failure to prevent or punish any of the subordinates who perpetrated the murders and rapes at Kansi Parish and St. Andre College. Those crimes were not the acts of a moderate; whatever moderation he may have expressed on other occasions pales in comparison to the rapes and murders that he allowed to go unpunished.

81. The Chamber's fourth mitigating factor purports to excuse General Ndindiliyimana's failure to punish these crimes by suggesting that he lacked the political clout to do so. This suggestion, however, flies in the face of the Trial Chamber's own determination that General Ndindiliyimana was in a position to punish these crimes committed by his subordinates at Kansi Parish and St. Andre College.[140] He could do so not only because he was Chief of Staff of the *Gendarmerie* but also because of his longstanding political influence in Rwanda.

82. Although it is true that General Ndindiliyimana was subsequently removed as Chief of Staff, he was not politically sidelined. Rather, he was appointed ambassador to a major European country – Germany. Upon assuming his post, however, he still did nothing to speak out against the genocide, including the crimes committed by his subordinates. "The combination of these factors should, therefore, have resulted in a longer sentence and should certainly not have provided grounds for mitigation."[141]

83. A common thread runs through the Trial Chamber's assessment of the gravity of General Ndindiliyimana's crimes and his individual circumstances. It is the Trial Chamber's view that General Ndindiliyimana was somehow less deserving of punishment because his criminal responsibility was based "solely on a failure to punish killings that his subordinates had already committed."[142] This

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[140] See Furundzija Appeals Judgment, para. 253 (once an accused's guilt has been proved beyond a reasonable doubt, the "possibility of innocence can never be a factor in sentencing").
[141] Aleksovski Appeal Judgement, para. 183.
[142] Judgement, para. 2186.

view appears to have distorted the Chamber's assessment and resulted in a discernible error.

84. The Appeals Chamber has consistently held that a commander's responsibility to prevent and punish crimes committed by subordinates is as grave as the crimes the subordinates commit.[143] General Ndindiliyimana, therefore, is at least equally culpable for the rapes and murders that his subordinates committed, even if he was not present when the crimes were committed.[144]

85. Furthermore, the gravity of his crimes is not diminished merely because his convictions rest only on his failure to punish the crimes, as opposed to preventing them from occurring. As Chief of Staff of the *Gendarmerie*, General Ndindiliyimana was under a sworn duty to protect innocent civilians. That duty included taking measures to punish subordinates responsible for committing crimes against innocent civilians. As with General Bizimungu, his failure to do so emboldened his subordinates to commit more crimes without fear of accountability.

3. Major Nzuwonemeye and Captain Sagahutu

86. So too with regard to Major Nzuwonemeye and Captain Sagahutu. The Trial Chamber correctly noted the enormous symbolic weight that the assassination of the Prime Minister and UN peacekeepers carried. But, it failed to take that adequately into account in fashioning its sentences.

87. These deaths extinguished any hopes that the violence would be abated. The killings emboldened extremists to perpetrate more crimes against the Tutsi and those perceived as sympathizing with the Tutsi. After all, if the Prime Minister could be brutally killed in her own home and her body violated with a soda bottle who was safe? Not even the UN peacekeepers, carrying the full

[143] Mucic Appeal Judgement, paras 732, 735-37.

[144] See Bagosora Appeal Judgement, para. 740 (noting that "superior responsibility under Article 6(3) of the Statute is not to be seen as less grave than criminal responsibility under Article 6(1) of the Statute").

imprimatur of the international community, could protect her – or even themselves – from these extremists bent on the annihilation of the Tutsi.

88. The Appeals Chamber has itself recognized that the "desecration of the Prime Minister Uwilingiymana's corpse constituted a profound assault on human dignity meriting unreserved condemnation under international law. Such crimes strike at the core of national and human identity."[145] The sentences imposed here do not adequately reflect the gravity of Major Nzuwonemeye's and Captain Sagahutu's responsibility for this profound assault on human dignity, particularly given the other grave crimes for which they stand convicted.

B. The Trial Chamber failed to give adequate consideration to Rwandan sentencing practice.

89. In addition to its failure to adequately assess the gravity of the offences in light of the individual circumstances of the convicted, the Trial Chamber also failed to adequately take into account the sentencing practice in Rwanda. The Chamber said it did so, but, once again, the sentences it imposed do not reflect that it did so in fact.

90. The Trial Chamber, for instance, did not provide any explanation – reasoned or otherwise – for why these military leaders were any less deserving of the life sentence that Rwandan domestic law provides for high-ranking (Category I) offenders – like them – found guilty of genocide and crimes against humanity.[146] Admittedly, the Trial Chamber was not bound to adhere to this domestic sentencing practice, but its failure to provide any explanation at all for its substantial deviation from Rwandan law casts further doubt on the legitimacy of its sentences.[147]

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[145] Bagosora Appeal Judgement, para. 729.

[146] See Aleksovski Appeal Judgement, para. 188 (finding sentence imposed by ICTY trial chamber decision manifestly inadequate when compared to SFRY Criminal Code).

[147] Mucic Appeal Judgement, para. 821 (observing that Trial Chambers may "draw guidance" from domestic sentencing practices).

C. The Trial Chamber failed to give adequate consideration to the impact of the offenders' conduct on their victims.

91. The doubt cast on the legitimacy of the Trial Chambers' sentences is exacerbated by the absence of any meaningful victim participation in the sentencing process. To promote the interests of justice and the rights of victims, Trial Chambers must give due consideration to impact of the offender's criminal conduct on their victims and survivors.

92. The Tribunal's current practice merges into one the adjudication of guilt and imposition of sentence stages of trial. No doubt efficiencies are gained by this merger in terms of decreased transportation costs and increased witness availability. But, these efficiencies come at a substantial cost to victims, who are essentially deprived of any meaning role in the sentencing process.[148] The Appeals Chamber should remedy this unfairness by directing Trial Chambers to bifurcate (as the Tribunal did in its early years) the adjudication of guilt and sentencing stages of trials.

93. The testimony of victims as witnesses during the adjudication of guilt stage of trial, of course, is essential to the determination of truth. But, the testimony of victims as witnesses is filtered through evidentiary rules and the adversarial process. Victims as witnesses are generally restricted to answering only the questions put to them by prosecution, defence counsel, and, less frequently, the judges.[149] Other matters, including the victim's personal opinion about the accused's conduct and the impact of that conduct on the victim's life, generally are excluded as irrelevant or too prejudicial.

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[148] This merger also comes at a cost to the accused, who are put in the unenviable position of having to respond to matters relating to their sentencing before their guilt has been fully adjudicated.

[149] Open-ended questions sometimes asked at the conclusion of formal questioning to the effect of "does the witness have anything else to add," do not sufficiently address this deficiency. Victims who testify as witnesses rarely feel empowered or confident enough in the wake of often-hostile cross-examination to take this open-ended question as an invitation to express their personal opinions or views on how or why the accused should be sentenced. Nor, in fairness, does it seem appropriate for victims to do so before the guilt of the accused has been adjudicated.

94. Once guilt has been adjudicated, however, the Chamber in determining what sentence should be imposed must assess all of the circumstances surrounding the convicted persons' criminal conduct, including how that conduct impacted or continues to impact any victims or survivors. Statements from victims and survivors, including those who testified at trial as well as others who have been impacted, are highly relevant and beneficial at this stage of trial.

95. Most fundamentally, victim impact statements assist the Trial Chamber in accurately assessing the gravity of the offender's criminal conduct. Crimes have real and tragic consequences for victims and their families; they are not merely abstract statistics to be dismissed – as the Trial Chamber did here – with ambiguous statements like many Tutsi were raped and killed. To humanize the victims of atrocities like those committed in this case, victims and survivors must be heard at sentencing.

96. Allowing victims and survivors to be heard at sentencing also promotes the rehabilitation of the accused. It impresses on persons whose guilt has been adjudicated the seriousness of their conduct and provides them with an opportunity for meaningful reflection and moral education. This type of self-reflection is critical to rehabilitation because it forces the guilty to confront the human costs of their behavior and appreciate the norms that ideally will govern their future conduct.

97. The converse is also true. Convicted persons who remain unmoved by the pain, suffering, and loss they have inflicted demonstrate to the sentencing Chamber that they are not strong candidates for rehabilitation. This lack of remorse is itself a valuable consideration in sentencing.[150]

98. Lastly, allowing victims to be heard at sentencing promotes the healing process and recovery. Victimization often results in feelings of powerlessness, fear, anxiety, and loss of social status. Allowing victims to be heard at sentencing helps restore their personal dignity and respect. It confers official

[150] See Nchamihigo Appeal Judgement, para. 396 (quoting Strugar Appeal Judgement, paras. 365, 366).

recognition from the Tribunal and international community that they have been subjected to grave violations of their human rights. And, the possibility that what they say could influence the sentence that will be imposed shows that their words have force and that the injustices inflicted on them will be punished.

99. In contrast, when sentences are handed down without victims being heard, victims become alienated and disenfranchised. As the former United Nations High Commissioner for Refugees asked: "is it fair and realistic to expect the survivors to forgive and to cooperate if there is no justice?"[151] Allowing victim participation in the sentencing stage of trial promotes a sense of justice for victims irrespective of the sentence ultimately imposed.

100. Allowing victims to be heard at sentencing also is consistent with the Tribunal's Statute, as well as the practice commonly followed in national jurisdictions and other international bodies. The ICTR Statute recognizes the right of victims, at least in so far as they are witnesses, to participate at every stage of the trial proceedings. Additionally, the Statute expressly confers on victims a right to compensation pursuant to Rule 106 of the Rules of Procedure and Evidence. But, these are largely hollow rights if the victims cannot also be heard when the Chamber fashions the convicted offender's sanction.

101. National courts in both common law and civil law systems have long recognized that victims can and should have a role in the sentencing phase of trials.[152] In the United States, for example, consideration of victim impact statements during the sentencing phase of trial is commonplace, especially in capital offence cases.[153] In the United Kingdom, courts likewise have recognized the rights of victims in criminal proceedings and have increasingly allowed victims to be heard at the sentencing stage.[154] In civil law systems, the concept

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[151] Sadako Ogata, Preventing Future Genocide and Protecting Refugees, Lecture at the United States Holocaust Memorial Museum, Washington, D.C. (30 April 1997).

[152] See Professor Julian V. Roberts, Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole, University of Chicago, 2009.

[153] Payne v. Tennessee, 501 U.S. 808 (1991); Booth v. Maryland, 482 U.S. 496 (1987); Gathers v. South Carolina, 490 U.S. 805 (1989).

[154] R v. Black & Gowan (2006) CA Crim. 2306.

of *Partie Civile* ensures victim representation at every stage of the trial proceedings, including sentencing.[155]

102. At the international level too, there has been a growing acceptance that victim participation at every stage of trial, including sentencing, is necessary to ensure fundamental justice. The Rome Statute 1998 reflects this acceptance. Read together, Articles 68(3) and 76(2) of the Rome Statute expressly allow victim participation at every phase of the trial, including at sentencing.[156] More recently, in September 2011, the European Court of Justice re-affirmed the right of victims to be heard at sentencing.[157] Additionally, the United Nations Draft Convention on Justice and Support for Victims of Crime and Abuse of Power explicitly identifies greater victim participation in criminal proceedings as one of its overarching goals.[158] Article 5(2)(b) of the Draft Convention explicitly recognizes a right for victims to be heard and to present their concerns at "appropriate stages of the proceedings where their personal interests are affected."

103. The Tribunal has made great progress in ensuring that victims are protected and respected at the investigative and trial stages. It also has recognized roles for the prosecution, defence, and convicted person at the sentencing stage. The victims seek no greater right to be heard at sentencing than the right already conferred on the accused, his counsel, and the prosecution. Formal recognition of this right is not only consistent with the Tribunal's Statute but also would bring the Tribunal's sentencing practice into line with a growing list of national jurisdictions and international norms.

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[155] Criminal Procedure Systems in the European Community, Christine Van Den Wyngaert, Butterworths, 1993.
[156] See also International Criminal Court Rules of Procedure and Evidence, Rules 89-93.
[157] Gueye & Anor, C-483/09, C-1/10.
[158] Preamble to the Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power, 14 November 2006.

V. Conclusion

104. In sum, the Appeals Chamber should review the sentences imposed in this case to ensure that they better fulfill the dual goals of retribution and deterrence. Based on this review, the Appeals Chamber should set aside the impermissibly lenient sentences imposed by the Trial Chamber and impose the life sentences that better reflect the gravity of the crimes these offenders committed. Alternatively, the Appeals Chamber should remand this case for a new sentencing hearing where the victims' voices may be heard or allow the Victims' *Amici*, as the leading victims organizations in Rwanda, to be heard in the Appeals Chamber on the impact that the crimes committed by these offenders had on their countless victims.

105. Without regard to the particular circumstances of this appeal, the Appeals Chamber should take this opportunity to remedy the lack of victim participation in the sentencing phase of the Tribunal's trials. Victims should no longer be silenced at sentencing. The Tribunal's continued failure to address this deficiency in the sentencing phase of trial creates the appearance of injustice, if not, actual injustice, in the eyes of hundreds of thousands of genocide victims and survivors.

Word count 10,575.

Dated and signed this 18th day of January 2012, Kigali, Rwanda.

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Professor Jean Pierre Dusingizemungu
President, IBUKA

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Dr. David Russell
Director, Survivors Fund (SURF)